UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

IN THE MATTER OF: Bluestone Coke, LLC 3500 35th Avenue North Birmingham, Alabama 35207 Respondent. Proceedings under Section 3008(a) and (h) of the Solid Waste Disposal Act, as amended by, inter alia, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(a) and (h)	Docket No. RCRA-04-2023-2106 **EXHIBITS CX20–CX73 IN SUPPORT OF COMPLAINANT'S PREHEARING EXCHANGE**

Complainant's exhibits in support of its Prehearing Exchange, filed on August 23, 2024, have been divided into two (2) volumes in order to conform to the file-size limitations of the E-Filing system of the Office of Administrative Law Judges for the EPA. What follows is the second of these two volumes, consisting of eight hundred and sixty-three (863) pages, inclusive of this cover sheet, and including the Exhibits numbered CX20–CX73.

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Exhibit CX20

September 7, 2018

United States Environmental Protection Agency
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303-8960

Attention: Mr. Wesley Hardegree

Re: **Corrective Measures Implementation (CMI) Work Plan (Revision 1.0)**
SMA 4 – Former Chemical Plant
Administrative Order on Consent - Docket # RCRA 04-2012-4255
ERP Compliant Coke
3500 35th Avenue North
Birmingham, Jefferson County, Alabama
USEPA ID No. ALD 000 828 848
Terracon Project No. E1187063

Dear Mr. Hardegree:

On behalf of ERP Compliant Coke, LLC (ERP Coke), Terracon Consultants, Inc. (Terracon) is pleased to submit the enclosed revisions to the *Corrective Measures Implementation (CMI) Work Plan (Revision 1.0) for SMA 4 - Former Chemical Plant* for the above-referenced site. These revisions have been prepared in response to Final Comments dated July 27, 2018. The individual comments and responses are provided below, and a CMI Work Plan (Revision 1.0) is enclosed.

USEPA Comment No. 1

SMA 4, Section 3.2: As written, the work plan currently has the draft Environmental Covenant only going to ADEM for review. The work plan needs to indicate that the draft Environmental Covenant will be sent to both EPA and ADEM for review. [Note: SMA 5's work plan does have the draft Environmental Covenant going to both EPA and ADEM, and EPA has already received a preliminary draft of the Environmental Covenant].

ERP Coke Response No. 1

Section 3.2 has been revised to include the draft Environmental Covenant also going to the USEPA for review.

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USEPA Comment No. 2

SMA 4, Section 3.3.3.3: What is the anticipated period of time expected between the two ISCO injections? Is it a set number of days, weeks, months, or is it dependent on parameters monitored in the soil and the two (2) observation wells after the first injection? Based on the statement in Section 3.3 that the subsurface reactions can propagate for up to 30 days, is it safe to assume the 2nd injection will not occur prior to 30 days after the first injection?

ERP Coke Response No. 2

Two paragraphs have been added to the bottom of Section 3.3.3.3 to address the question above. These paragraphs read:

> The pilot test will consist of two injection events spaced between 30 to 45 days apart. The exact time between events will be made based on observation of the nearby monitoring wells; however, the time between injections will not exceed 60 days.
>
> The newly installed observation wells plus monitoring wells MW-55 and MW-56 will be sampled prior to the initial ISCO injection, 30 to 45 days after the initial injection, and 30 to 45 days after the second injection. The groundwater from the wells will be analyzed for volatile organic compounds (VOCs) by EPA Method 8260.

USEPA Comment No. 3

SMA 4, Section 3.3.3.2, Section 3.3.3.4, Section 3.5, Section 3.8: The work plan states in Section 3.3.3.4 that "If it is determined that the ISCO is not effective at remediating the soil area, a second pilot test may be conducted using steam." The work plan seems to be relying mostly on pre- and post-soil sampling results and information from two (2) observation wells to assess the effectiveness of ISCO and whether Steam should be studied. Some further clarification is needed as to how the success/failure of ISCO will be determined and when the transition to study Steam injection might occur. For example,

a) What constituents/parameters will be monitored in the two (2) new observation wells and what will be the monitoring schedule?
b) Has consideration been given to adding to the understanding of ISCO's success (or the decision to study Steam) by also monitoring/sampling of existing nearby groundwater wells (e.g., MW-55, MW-56) during the ISCO pilot?
c) If Steam is to be studied, will the same monitoring/assessment approach used for ISCO be used to assess the effectiveness of the Steam pilot? Are there any unique aspects to steam injection that need to be monitored?
d) How does the proposed quarterly groundwater sampling mesh with the pilot study and the full scale in-situ treatment? In other words, the proposed schedule for groundwater monitoring is quarterly for the first-year and semi-annual thereafter.

When does the first-year start? Does it start with the first ISCO injection, or when the in-situ treatment goes full scale?

e) Will the quarterly groundwater sampling play any role in evaluating the ISCO and/or Steam pilot and which method should go full scale?

ERP Coke Response No. 3

The following has been revised in response to USEPA comment 3:

a) and b) - The following paragraph has been added to the end of Section 3.3.3.2:

> The observation wells plus monitoring wells MW-55 and MW-56 will be sampled prior to the initial ISCO injection, 30 to 45 days after the initial injection, and 30 to 45 days after the second injection. The groundwater from the wells will be analyzed for volatile organic compounds (VOCs) by EPA Method 8260. If a steam injection pilot study is conducted, the observation wells plus the performance wells will be sampled on a quarterly basis for VOCs by EPA Method 8260.

c) The following paragraph has been added to the end of Section 3.3.3.4:

> If a steam injection pilot study is conducted, the observation wells plus the performance wells will be sampled on a quarterly basis for VOCs by EPA Method 8260. Quarterly sampling is more applicable to steam injection since the formation takes time to heat.

d) and e) The following paragraph has been added to the end of Section 3.5:

> We are proposing the following groundwater sampling schedule for the CMI. Current Interim Measures (IM) quarterly sampling will continue until the final treatment remedy is implemented. Once the final remedy is implemented, then the first year we recommend quarterly sampling for the performance wells and annual sampling for the upgradient, performance, and sentinel wells, followed by semi-annual sampling in subsequent years for the performance wells and annual sampling for the upgradient, performance, and sentinel wells. During the corrective action groundwater monitoring, we recommend that groundwater samples be analyzed for volatile organic compounds by EPA Method 8260 and polynuclear aromatic hydrocarbons by EPA Method 8270SIM. The data obtained during the corrective action monitoring will be used in conjunction with other sampling to determine the effectiveness of the corrective action that is taking place.

USEPA Comment No. 4

Section 3.5: Because the picture of the overall success of the remedy (i.e., full scale in-situ treatment and pumping) will build through time as groundwater monitoring results become available, the quarterly sampling must occur over four consecutive quarters after the in-situ treatment goes full scale.

ERP Coke Response No. 4

The last paragraph of Section 3.5 has been modified to read:

We are proposing the following groundwater sampling schedule for the CMI. Current Interim Measures (IM) quarterly sampling will continue until the final treatment remedy is implemented. Once the final remedy is implemented, then the first year we recommend quarterly sampling for the performance wells and annual sampling for the upgradient, performance, and sentinel wells, followed by semi-annual sampling in subsequent years for the performance wells and annual sampling for the upgradient, performance, and sentinel wells. During the corrective action groundwater monitoring, we recommend that groundwater samples be analyzed for volatile organic compounds by EPA Method 8260 and polynuclear aromatic hydrocarbons by EPA Method 8270SIM.

USEPA Comment No. 5

SMA 4, Section 3.7/3.8 and SMA 5, Section 3.4/3.5: The schedule of activities and reporting needs to be better presented/organized. For example:

- SMA 4, Section 3.7, SMA 5, Section 3.4: There is no time period provided for the completion of the survey.
- SMA 4, Section 3.7: There is no overall length of time provided for the pilot study.
- SMA 4, Section 3.7, Section 3.8; SMA 5, Section 3.4: The work plan needs to clarify a little more the transition and reporting to occur as the project transitions from the ISCO pilot phase - including the possible Steam pilot - to full scale. Does the Pilot Study Report, which is mentioned in these sections and due 60 days after completion of field activities, refer to completion of the ISCO test or completion of both the ISCO test and any needed Steam test? In other words, since there is one confirmed pilot study, ISCO, and one alternative pilot study, Steam, will the Pilot Test Report be for the ISCO test alone, or will the Pilot Test Report be held until both ISCO and (if needed) Steam are performed?
- SMA 4, Sections 3.7 and 3.8: The schedule of activities and reporting do not account for review and development of the Environmental Covenant with the regulatory agencies. For example, Section 3.7 just states that an Environmental Covenant will be placed on SMA 4 after the survey, and Section 3.8 simply states that a report documenting the filing of the EC will be submitted within 180 days of CMI work plan approval.

- SMA 4, Section 3.7 and 3.8: There is a conflict in when the UIC permit application is to be submitted. Section 3.7 says the UIC permit will be requested within 30 days of CMI work plan approval; Section 3.8 says the UIC permit application will be submitted within 60 days of CMI work plan approval.

The new EPA administration is very keen on visual presentation of schedules. Therefore, EPA developed a rough Gantt Chart based on its understanding of the proposed schedule and the delay in the cost estimate review (see attached) [Note: This chart did not attempt to include the option for the Steam Pilot.] In order to help clarify many of the questions raised in other comments on the schedule and for future use in project tracking, the work plan needs to include a Gantt Chart covering at least the following main tasks:

Task 1: LUCP
Task 2: Environmental Covenant
Task 3: ISCO Pilot Test
Steam Pilot Test (if needed)
Task 4: Remedy Monitoring
Task 5 - Financial Assurance

ERP Coke Response No. 5

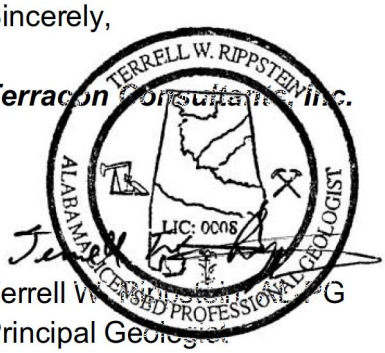
A Gantt chart has been prepared and is included as Appendix D. A paragraph has been added to the end of Section 3.7 that reads:

A Gantt chart has been prepared that indicates the proposed timing on the schedule of activities and is included as Appendix D.

CLOSING

If you should have any questions, please do not hesitate to contact us at (205) 942-1289.

Sincerely,



Terracon Consultants, Inc.

Terrell W. Rippstein, PG
Principal Geologist

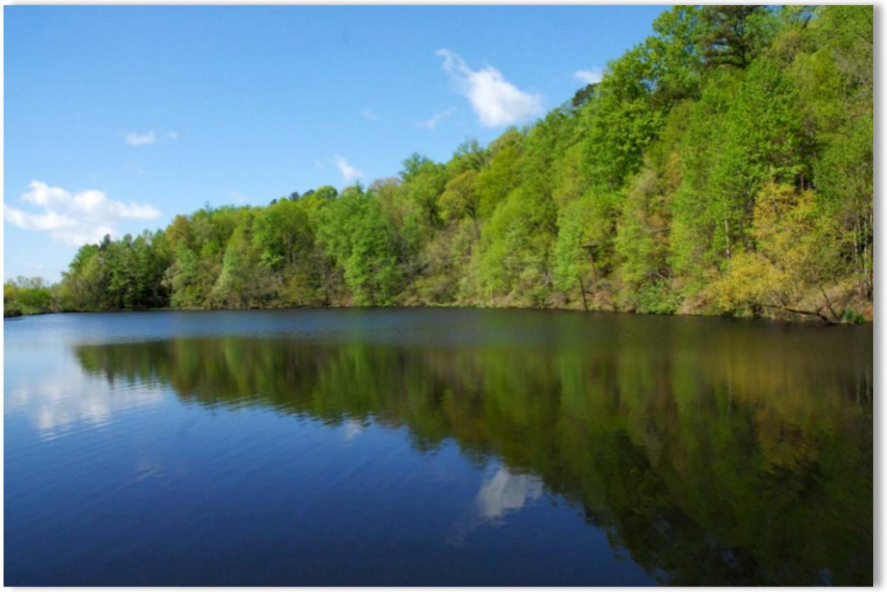
cc: Ms. Meredith Anderson; USEPA Region 4
ADEM

Corrective Measure Implementation Work Plan (Revision 1.0)

SMA 4 – Former Chemical Plant

ERP Coke
3500 35th Avenue North
Birmingham, Alabama
USEPA ID No. ALD 000 828 848

September 7, 2018
Terracon Project No. E1187063



Prepared for:

ERP compliant COKE

Birmingham, Alabama

Prepared by:

Terracon Consultants, Inc.
Birmingham, Alabama

September 7, 2018

ERP Compliant Coke
3500 35th Avenue North
Birmingham, Alabama 35207

Attention: Mr. Don Wiggins

Re: **Corrective Measures Implementation (CMI) Work Plan (Revision 1.0)**
SMA 4 – Former Chemical Plant
Administrative Order on Consent - Docket # RCRA 04-2012-4255
ERP Compliant Coke
3500 35th Avenue North
Birmingham, Jefferson County, Alabama
USEPA ID No. ALD 000 828 848
Terracon Project No. E1187063

Dear Mr. Wiggins:

Terracon Consultants, Inc. (Terracon) is pleased to submit this Corrective Measures Implementation (CMI) Work Plan (Revision 1.0) for activities in conjunction with the site referenced above.

Should you have any questions or require additional information, please do not hesitate to contact our office.

Sincerely,
Terracon Consultants, Inc.

Terrell W. Rippstein, AL-PG #8
Principal Geologist

Dallas Whitmill, AL-PE#33070
Senior Project Engineer

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LIST OF ABREVIATIONS

ADEM	Alabama Department of Environmental Management
AOC	Area of Concern
ANPR	Advanced Notice of Proposed Rulemaking
CAA	Corrective Action Alternative
CAO	Corrective Action Objective
CAP	Corrective Action Plan
CFR	Code of Federal Regulation
cm/sec	centimeter per second
CMI	Corrective Measures Implementation
CMS	Corrective Measure Study
COC	Contaminant of Concern
COPC	Constituent of Potential Concern
DOT	Department of Transportation
EI	Environmental Indicators
ERA	Ecological risk assessment
FCP	Former Chemical Plant
FMC	Five Mile Creek
FWI	Facility Wide Investigation
HHRA	Human Health Risk Assessment
HHRE	Human Health Risk Evaluation
HI	Hazard Index
IM	Interim Measures
IRIS	Integrated Risk Information System
LDA	Land Disposal Area
LDR	Land Disposal Restriction
LUCP	Land Use Control Plan
MCL	Maximum Contaminant Level
NRWQC	National Recommended Water Quality Criteria
Order	Administrative Order on Consent
OSHA	Occupational Safety and Health Administration
PCS	Preliminary Cleanup Standards
PIF	Pig Iron Foundry
PPE	Personal Protective Equipment
PRG	Preliminary Remediation Goal
PVC	Poly Vinyl Chloride
RAGS	Risk Assessment Guidance for Superfund
RCRA	Resource Conservation and Recovery Act
RCRIS	RCRA Information System
PCS	Preliminary Cleanup Standards
RFI	RCRA Facility Investigation

RSL	Regional Screening Levels
SMA	SWMU Management Area
SSL	Soil screening level
SVOC	Semi-Volatile Organic Compound
SWMU	Solid Waste Management Unit
TCL	Target Constituent List
TCLP	Toxicity Characteristic Leaching Procedure
TSD	Treatment, Storage, And Disposal
UCL	Upper Confidence Limit
USEPA	United States Environmental Protection Agency
VOC	Volatile Organic Compounds

Corrective Measures Implementation Work Plan (Revision 1.0)
SMA 4 – Former Chemical Plant
ERP Coke
3500 35th Avenue North
Birmingham, Alabama
USEPA ID No. ALD 000 828 848

Project No. E1187063
September 7, 2018

1.0 INTRODUCTION/PURPOSE

The ERP Compliant Coke, LLC (ERP Coke) facility is located at 3500 35th Avenue North in Birmingham, Jefferson County, Alabama (Figure 1-1). The center of SMA 4 lies at approximately 33.5649 degrees north latitude and 86.7982 degrees west longitude. This Corrective Measures Implementation (CMI) Work Plan for SMA 4 has been prepared in response to the *Final (Remedy) Decision for the Former Chemical Plant* from the United States Environmental Protection Agency (USEPA) dated February 2018. A map of the current facility including the 45 Solid Waste Management Units (SWMUs) and six Areas of Concern (AOCs) consolidated into five SWMU Management Areas (SMAs) is included as Figure 1-2. This CMI Work Plan concerns only SMA 4 – Former Chemical Plant (FCP) and its associated SWMUs and AOC.

Table 1-1 below lists the twelve SWMUs and two AOCs (Figure 1-3) that make up SMA 4.

Table 1-1. List of SWMUs and AOC in SMA 4
SWMU 26 – Main Process Building
SWMU 27 – Floor Drain System
SWMU 28 – Sulfonation Floor Drain
SWMU 29 – Product Tank Containment Area
SWMU 30 – Centrifuge Waste Water Tank
SWMU 31 – Monohydrate Floor Drain and Sump
SWMU 32 – Drum Storage Area
SWMU 33 – Plant Drum Storage Area
SWMU 34 – Wastewater Neutralization System
SWMU 35 – Mineral Wool Piles
SWMU 36 – Used Oil Tank
SWMU 42 – Former Above Ground Storage Tanks (ASTs)
AOC B – Drainage Ditch next to Shuttlesworth Drive and 35th Avenue
AOC D – Former Chemical Plant (FCP) Groundwater Plume

1.1 Background

The roots of the facility can be traced back to 1881 when Sloss-Sheffield Steel and Iron Company first began producing pig iron in Birmingham, Alabama. In 1920, where ERP Coke sits today, Sloss-Sheffield Steel and Iron Company built two modern coke oven batteries to serve its own

needs as well as those of other customers. As Birmingham's steel industry grew, so did the need for furnace coke, which prompted the construction of three more batteries at the site during the 1950s.

As American industry evolved in the ensuing years, so did the operation of the facility. Today, ERP Coke is a highly efficient, technologically advanced operation serving a variety of customers in the furnace and foundry markets.

The operation now consists of three batteries with a total of 120 coke ovens which produce approximately 460,000 tons of coke each year. A highly experienced operating staff provides assurance of adherence to strict operating, environmental, and safety standards.

The original coke manufacturing facility began operation in 1920 as Sloss Sheffield Steel and Iron Company. Beginning in 1952, the company experienced a series of corporate reorganizations and several name changes culminating in a name change to Walter Coke, Inc. in June 2009, and then the purchase of the coke plant assets by ERP Compliant, Coke, LLC occurred in February 2016. The following operations have occurred at the facility:

- The biological treatment facility (BTF), designed to treat wastewater generated at the facility, was constructed in 1973-74, first received wastewater in 1975 and is still in operation today. SMA 1 includes the BTF Process Area.

- Land Disposal Areas (LDAs) have been used at various times over the life of the facility. Biological sludge, blast furnace sludge, and construction and demolition debris have been placed in the land disposal areas. SMA 2 includes the LDA.

- Coke manufacturing has occurred since 1920, and 120 coke ovens continue to operate. SMA 3 includes the Coke Manufacturing Plant.

- Chemical manufacturing began at the facility in 1948, and all chemical manufacturing operations ceased in 2002. In addition, a mineral wool plant, which manufactured mineral fiber used in the production of ceiling tile and insulating products, was built in late 1947 and was decommissioned in 2010. SMA 4 includes the FCP and the mineral wool piles.

- An iron blast furnace that produced pig iron from iron ore began operation in 1958; blast furnace operations ceased in 1981, and the blast furnace was decommissioned in 1984. SMA 5 includes the Former Pig Iron Foundry (FPIF).

The land around the ERP Coke facility is zoned for industrial and residential use, and a significant number of other industrial facilities remain operational in the area. Before 1957, the area was primarily industrial, with a significant number of other facilities, including coke and cement

manufacturing plants, pipe manufacturing plants, and limestone quarry operations. Residential neighborhoods were constructed on properties in the area of ERP Coke only after 1957 (USEPA, 1990). The most likely future land use for the ERP Coke facility is industrial.

A RCRA Section 3008(h) Administrative Order on Consent (the "2012 Order") with the effective date of September 24, 2012, was signed by Walter Coke and the USEPA. In 2016, ERP contractually assumed the RCRA Order obligation of Walter Coke through bankruptcy proceedings and the RCRA Section 3008(h) Administrative Order on Consent (the "2016 Order") was reissued and modified to reflect the name change to ERP Coke and was signed by ERP Coke and the USEPA. The objectives of the 2016 Order remained the same as previously outlined in the 2012 order. The 2012 Order declared that all of the approved investigation tasks of the RFI Work Plans required by the 1989 Order had been completed by Walter Coke and that the 1989 Order was terminated and no longer in effect. In the 2012 Order, there are 45 SWMUs, 6 AOCs, and 5 SMAs at the facility (Figure 2) listed. ERP Coke has assumed responsibility for performing activities under the Order.

1.2 Corrective Measures Study (CMS) Overview

Terracon on behalf of ERP Coke, submitted the *Corrective Measures Study (CMS) SMA-4 – Former Chemical Plant (Revision 1.1)* on April 14, 2017. The purpose of the CMS Report was to summarize the evaluation, analysis, and selection of appropriate corrective measures at SMA 4.

Based on the activities conducted during the CMS for SMA, it was determined that:

- COCs exceeded an ELCR of 10-6 and an HI of 0.1 in soil and groundwater.
- For the construction worker scenario and industrial worker scenario, the cumulative risk across all media is greater than an ELCR of 10-4 and an HI of 1.0.
- For the construction worker scenario and industrial worker scenario, the cumulative risk for subsurface soil exceeds an HI of 1.0, and several constituents exceed an HQ of 0.1 for a construction worker setting.
- A comparison of soil COC concentrations for leachability to soil factors indicate certain exceedances of GWP SSLs in subsurface soils.
- The soil contamination is deemed not to warrant corrective action based on the risk to human health being controlled by a LUCP; however, some areas where soil COCs exceed the GWP SSLs are recommended for remediation.
- Active groundwater remediation is also recommended.

Based on these conclusions and a detailed analysis that was performed individually and collectively with respect to the five alternatives, Alternative 5 - Land Use Controls + In-Situ Soil Source Area Treatment + Groundwater Removal and Treatment + Groundwater Monitoring is recommended as the corrective action alternative for SMA 4.

The *Final (Remedy) Decision for the Former Chemical Plant* from the USEPA dated February 2018 indicated that they concurred with the recommendations from the CMS for SMA 4.

The recommended remedy found in the facility's April 14, 2017, Corrective Measure Study Report and proposed to the public on October 1, 2017, is identified as Alternative 5: Land Use Controls + In-Situ Soil Source Area Treatment + Groundwater Removal and Treatment + Groundwater Monitoring. This alternative can reasonably be concluded to satisfy all of the Facility-Specific Corrective Action Objectives found in Table 3; therefore, it is EPA's Final Decision that Alternative 5, which consists of the following components, be the remedy for the Former Chemical Plant.

- Land Use Controls: Land use controls are administrative means to protect current and future human exposure to unacceptable environmental contamination. This protection will be accomplished through the following techniques/components:
  - Land Use Control Plan (LUCP) developed by the Facility (and overseen by the USEPA)
  - An Environmental Covenant secured under the Alabama Uniform Environmental Covenants Act, Ala. Code §§ 35-19-1 to 35-19-14 (2007 Cum. Supp.).
- In-Situ Soil Source Area Treatment/In-Situ Groundwater Treatment: Chemicals, bacteria (e.g., zero valent iron, yeast extract, micronutrients, potassium permanganate, etc.), or steam will be used with the purpose of helping prevent any further release of contaminants from the soil to the groundwater and aiding in advancing the groundwater remediation. Bench scale studies will need to be conducted to determine the appropriate chemicals or bacteria to be used, the concentrations, locations, etc.
- Groundwater Removal and Treatment: The hydraulic control well network, which was installed under an Interim Measures in 2013 to control the VOC groundwater plume and currently consists of 6 extraction wells, will continue. The recovered groundwater will be used as process water for the coke plant and will eventually cycle to the Facility's Biological Treatment Facility (BTF) for subsequent discharge in compliance with the Facility's NPDES Permit.
- Groundwater Monitoring: Long-term groundwater monitoring will occur to assess the effectiveness of the overall remediation system.

With this remedy, all of the SWMUs and AOCs listed in Table 1-1 (Section 1.0), except AOC D - Former Chemical Plant Groundwater Plume, are no further action. The remedy components concerning soil are not easily associated with any particular unit listed in Table 1-1. The broad concerns with the soil addressed by this remedy are now subsumed by a new AOC G - Former Chemical Plant Dispersed Soil Contamination.

1.3 Interim Measures

Interim Measures (IM) have been ongoing at SMA 4 since 2013. As part of the IM Implementation six containment wells designated CW-1 through CW-6 were installed in SMA 4. In addition, there are 18 monitoring wells located in SMA 4 that have been grouped in to categories (Upgradient, Performance, Sentinel) which will be used to evaluate the effectiveness of the IM and the corrective measures. The categories include:

Upgradient Wells: MW-77, MW-80 and MW-81.

Performance Wells: MW-49S, MW-49D, MW-50, MW-51, MW-52, MW-53, MW-54, MW-55, MW-56, MW-78, and MW-90.

Sentinel Wells : MW-70, MW-71, MW-72, and MW-89.

Figure 1-3 illustrates the location of the monitoring wells and hydraulic control wells.

The hydraulic control system consists of the following:

- Electric-powered, submersible, total fluid pumps in each CW well;
- 1.5-inch diameter, metal pipe;
- Ball check valves;
- 1,500 gallon resin tank,
- Secondary containment vessel;
- Electric-powered transfer pump; and
- Totalizing flow meter.

Electric submersible pumps with flow controllers were placed in hydraulic control wells CW-1 through CW-6. Trenches were excavated from each hydraulic control well location to a central location where a 1,500 gallon above ground resin tank was placed. The tank was placed into a concrete secondary containment dike that is capable of holding at least 110% of the volume of the tank. An electric-powered transfer pump was installed to pump the water from the tank through metal piping to the light oil system for recycling.

Initial start-up of the groundwater containment system was conducted on April 18, 2013. Since the system start-up, the system has been routinely running with minor downtime to make repairs to parts or to add equipment such as the filter that is being used to prevent iron fouling.

The following milestones have been achieved during the IM based on the last annual report submitted in August 2017:

- No VOCs have exceeded the RSL/MCL in off-site monitoring wells since February 2014.

- Monitoring well MW-50 was the only off-site monitoring well prior to the system start-up to have VOC concentrations ever exceed the RSLs/MCLs, but since IM implementation, no VOCs in MW-50 exceed an RSL/MCL.
- The system has been operating full-time with minor adjustments since May 2013.
- ERP Coke checks the system daily and the pumping wells on a weekly basis, and performs preventative maintenance as necessary.
- The groundwater flow direction as determined by the measured water levels has remained generally towards the east and southeast with localized flow towards the hydraulic control wells as illustrated in the potentiometric surface maps.
- A total of 6,383,570 gallons of groundwater and approximately 775.90 pounds of VOCs and SVOCs have been removed by the hydraulic control system from April 2013 to June 2017.
- Eight of the performance monitoring wells are showing a decreasing trend for VOCs, while three are showing a stable to fluctuating trend.

1.4 Supporting Documents

There are several documents which were previously prepared and submitted to the USEPA that will be used in conjunction with this CMI Work Plan and during the implementation of the corrective measures. They are:

- Community Involvement Plan (Revision 4.0) dated June 26, 2018.
- Quality Assurance Project Plan (QAPP) (Revision 1.1) dated June 26, 2018.
- Interim Measures (IM) Groundwater Sampling and Analysis Plan (Revision 1.0) dated October 9, 2012.
- Site Specific Health and Safety Plan (Revision 1.1) dated June 26, 2018.

2.0 CORRECTIVE MEASURES REQUIREMENTS

2.1 Corrective Action Objectives

Corrective Action Objectives were developed during the CMS Report to address both potential risk to human health and regulatory requirements. As stated in the USEPA's *Final Decision,* seven facility-specific corrective action objectives (CAO) were identified to address the risks identified in SMA 4. These facility-specific objectives are developed from the USEPA's General Corrective Action Performance Standards. These CAOs are:

- Soil
  1. Maintain, in perpetuity, land use as industrial, a setting that has been found to be protective for the detected soil concentrations.
  2. Ensure that industrial/commercial workers, construction workers, and trespassers are not exposed to unacceptable levels of soil contaminants.
  3. Minimize the potential for soil contaminants to leach and contaminate groundwater or adversely impact groundwater cleanup.
- Groundwater
  4. Restore groundwater to maximum beneficial use, which in this case is as a drinking water aquifer.
  5. While aquifer restoration is sought, hydraulically control the groundwater plume in order to keep contamination that is above identified cleanup standards from expanding and/or migrating offsite.
  6. Remove significant sources of subsurface mass.
  7. While aquifer restoration is sought, control current land use exposures (e.g., industrial/commercial workers, construction workers, and trespassers) and potential future exposures (residents) to groundwater above the identified cleanup standards.

2.2 Media Cleanup Standards

As discussed in the OSWER Directive 9355.0-30 dated April 22, 1991, acceptable risk levels for cumulative carcinogenic risks to an individual based on exposure assumptions can range from 10^{-4} to 10^{-6} as long as the cumulative excess lifetime carcinogen site risk is less than 10^{-4} and the noncancer hazard quotient (HQ) is less than 1. In order to meet the goal of the cumulative excess lifetime carcinogen site risk being less than 10^{-4} across all media, the analytical samples from each sample media were screened against the calculated PCS at an ELCR of 10^{-5} or a HQ of 1.0. If the risk for a particular constituent did not exceed the ELCR of 10^{-5} or a HQ of 1.0, then the constituent was screened out because it did not exceed the target risk level for corrective action. If a receptor exceeded the 10^{-5} ELCR or HQ of 1.0 for a constituent, then the media in which it exceeded the ELCR or HQ is considered for corrective action. If multiple receptors exceeded the target risk levels for a specific media, then the most conservative PCS value for the 10^{-5} ELCR or 1.0 HQ was used to screen the data.

The ERP Coke facility including all of SMA 4 is industrial, and future land use will continue to be industrial. Therefore, PCSs were calculated for only the Industrial/Commercial Worker scenario and the construction worker scenario for all completed pathways as appropriate.

The success of the selected remedy will be measured against the numeric and non-numeric cleanup standards listed in Tables 2-1 through 2-4 below.

Table 2-1. Numeric Cleanup Standards for Facility-Specific Groundwater Objective 4 (Groundwater Restoration) and Groundwater Objective 5 (Hydraulic Control)

Contaminant	Groundwater Concentration (ug/L)	Point of Compliance
Benzene	5*	Throughout the Plume
Benzo(a)anthracene	0.03**	
Benzo(a)pyrene	0.2*	
Benzo(b)fluoranthene	0.25**	
Chlorobenzene	100*	
Cis-l,2-Dichloroethene	70*	
Dibenz(a,h)anthracene	0.025**	
Indo(l,2,3-cd)pyrene	0.25**	
Methylene Chloride	5*	
Napthalene	0.17**	
Trichloroethene	5*	
Toluene	1,000*	
Pentachlorophenol	1*	
Vinyl Chloride	2*	
1,2,4-Trichlorobenzene	70*	
1,2-Dichloroethane	5*	
1,4-Dichlorobenzene	75*	
1,4-Dioxane	0.46**	

* Maximum Contaminant Level (MCL)
** Carcinogenic Tap Water Regional Screening Level (June 2017)

Table 2-2. Numeric Cleanup Standards* for Facility-Specific Groundwater Objective 6 (Source Removal) and Soil Objective 3 (Leaching)	
Contaminant	**Groundwater Protection Soil Screening Levels (leachability)**
	Concentration (mg/kg)
Arsenic	6
Benzene	0.11
Benzo(a)anthracene	1
Benzo(b)fluoranthene	2
Carbazole	0.1
Chlorobenzene	3.1
Dibenzofuran	0.015
Methylene chloride	0.033
Naphthalene	0.026
Toluene	31
Vinyl chloride	0.017
l-Methylnaphtbalene	0.006
3 & 4 Methylphenol	0.17
4-Methylphenol (p-cresol)	0.15

* These soil leaching standards are site specific soil screening levels from Appendix G of the Phase III RCRA Facility Investigation (RFI) Report (March 2009). They constitute the lowest target values that soil might need to reach in order for groundwater cleanup to be obtained/maintained. Soil levels higher than those listed here may turn out to be acceptable if Facility-Specific Groundwater Objective 4 (aquifer restoration) can reached. In other words, the leachability cleanup standards are not to be strictly interpreted as levels to be met at every soil sample location. Instead, they are to be applied in coordination with the success in meeting the cleanup standards for groundwater restoration listed in Table 2-1.

Table 2-3. Numeric Cleanup Standards*** for Facility-Specific Soil Objectives 1 and 2 and Use Controls				
Contaminant	**Industrial/Commercial Worker**		**Construction Worker**	
	Surface Soil (0-1 ft)	**Groundwater**	**Subsurface Soil (2-15 ft)**	**Groundwater**
	Concentration (mg/kg)	**Concentration (ug/L)**	**Concentration (mg/kg)**	**Concentration (ug/L)**
Arsenic	19*	N/A	N/A	N/A
Benzene	N/A	15*	409**	110*
Benzo(a)anthracne	29*	0.08*	N/A	N/A
Benzo(a)pyrene	2.9*	0.005*	28*	N/A
Benzo(b)fluoranthene	29*	0.09*	N/A	N/A
Chlorobenzene	N/A	261**	1,171**	222**
Chromium	65*	N/A	N/A	N/A
Cis-1,2-Dichloroethene	N/A	202*	N/A	N/A
Dibenz(a,h)anthracene	2.9*	0.003*	N/A	N/A
Indo(l,2,3-cd)pyrene	29*	0.003*	N/A	N/A
Methylene Chloride	N/A	547*	N/A	N/A
Naphthalene	N/A	5.18*	N/A	16**
Trichloroethene	N/A	9.54**	N/A	9.54**
Toluene	N/A	5,278**	21,785**	16,382**
Pentachlorophenol	N/A	0.51*	N/A	N/A
Vinyl Chloride	N/A	3.7*	N/A	317**
1,2,4-Trichlorobenzene	N/A	12*	N/A	12**
1,2-Dichloroethane	N/A	5.4	N/A	31.2**
1,4-Dichlorobenzene	N/A	15*	N/A	327**
1,4-Dioxane	N/A	17*	N/A	N/A

N/A Not Applicable
* April 14, 2017 Risk Assessment, Estimated Lifetime Cancer Risk (ELCR) = lOE-OS
** April 14, 2017 Risk Assessment, Hazardous Quotient = 1
*** These soil cleanup standards constitute the level that is protective of humans in an industrial setting. At this time, the soil concentrations and distribution do not warrant active remediation given the current industrial land use. These industrial cleanup levels serve as the basis for applying institutional controls (see Table 7), and can be used to evaluate any future soil results obtained within SMA-4 in order to help in determining what, if any, active remediation is needed.

Table 2-4. Narrative (Non-Numeric) Cleanup Standards for Facility-Specific Soil Objectives 1 and 2 and Groundwater Objective 7 (Land Use Controls)				
Cleanup "Technology"	**Comment on Cleanup Technology**	**Implementation Technique/ Mechanism**	**Component of Cleanup Standard**	**Point of Compliance**
Institutional Controls	With use of current and reasonable setting of industrial/commercial land use, the need to actively address soil contamination was deemed not to be needed. Groundwater contamination does exist at levels requiring active remediation. In order to satisfy Facility-Specific Soil Corrective Measures Objectives 1 and 2 and to satisfy Facility-Specific Corrective Measure Objective 4, institutional controls are needed to ensure that land use does not inadvertently and/or unknowingly become residential in the future, and to protect workers from unknowingly being exposed to contamination that might be at unacceptable levels.	Environmental Covenant	An Environmental Covenant shall be secured under the Alabama Uniform Covenants Act, Ala. Code §§ 335-19-1 to 35-19-14 (2007 Cum. Supp.). The Environmental Covenant shall be entered with the intent of providing clear and enforceable rules for the perpetual care of the Facility's real estate in light of the selected remedy. The Environmental Covenant shall list the components of the LUCP that best reside long term with the land as opposed to specific operating procedures at the Facility (e.g., deed restriction to limit site to industrial land use only; deed restriction to limit use of groundwater, etc.).	Throughout the SMA
		Corporate Land Use Plan (LUCP)	The LUCP, at a minimum, shall: 1. Acquire a deed restriction on land and groundwater use through securing an Environmental Covenant. 2. Explain the land use controls to be used to protect workers, contractors, public from exposure to contaminated environmental media (e.g., permit to perform any digging activities and the proper personal protective equipment (PPE), fence/signs as necessary to prevent unauthorized access, etc.). 3. Include all necessary information or structure necessary to implement the LUCP (e.g., point-of-contact; monitoring program; notification procedures for LUPC violations, pending sale/lease of property, etc,; and reporting).	Throughout the SMA

2.3 Regulatory Policy

Groundwater is not used for drinking water or other beneficial uses at ERP Coke and is not used for drinking water downgradient in the North Birmingham area. However, unless otherwise designated by the USEPA, all groundwater is considered suitable, or potentially suitable, for municipal or domestic water supply.

3.0 CORRECTIVE MEASURES

The Final (Remedy) Decision for the Former Chemical Plant (FCP) document from USEPA dated February 2018 stated: "The recommended remedy found in the facility's April 14, 2017, Corrective Measure Study Report and proposed to the public on October 1, 2017, is identified as Alternative 5: Land Use Controls +In-Situ Soil Source Area Treatment + Groundwater Removal and Treatment + Groundwater Monitoring. This alternative can reasonably be concluded to satisfy all of the Facility-Specific Corrective Action Objectives; therefore, it is EPA's Final Decision that Alternative 5, which consists of the following components, be the remedy for the Former Chemical Plant.

- Land Use Controls: The Land Use Controls are administrative means to protect current and future human exposure to unacceptable environmental contamination. This protection will be accomplished through the following techniques/components:

  - Õ Land Use Control Plan (LUCP) developed by the Facility (and overseen by the USEPA)
  - Õ An Environmental Covenant secured under the Alabama Uniform Environmental Covenants Act, Ala. Code §§ 35-19-1 to 35-19-14 (2007 Cum. Supp.)

- In-Situ Soil Source Area Treatment/In-Situ Groundwater Treatment: Chemicals, bacteria (e.g., zero valent iron, yeast extract, micronutrients, potassium permanganate, etc.) or steam will be used with the purpose of helping prevent any further release of contaminants from the soil to the groundwater and aiding in advancing the groundwater remediation. Bench scale studies will need to be conducted to determine the appropriate chemicals or bacteria to be used, the concentrations, locations, etc.

- Groundwater Removal and Treatment: The hydraulic control well network, which was installed under an Interim Measures in 2013 to control the VOC groundwater plume and currently consists of 6 extraction wells, will continue. The recovered groundwater will be used as process water for the coke plant and will eventually cycle to the Facility's Biological Treatment Facility (BTF) for subsequent discharge in compliance with the Facility's NPDES Permit.

- Groundwater Monitoring: Long-term groundwater monitoring will occur to assess the effectiveness of the overall remediation system.

3.1 Land Use Control Plan

A Land Use Control Plan (LUCP) will be prepared in accordance with the *Sample Federal Facility Land Use Control ROD Checklist and Selected Language* document found at the website https://www.epa.gov/fedfac/sample-federal-facility-land-use-control-rod-checklist-and-

suggested-language-luc-checklist. This LUCP will be submitted to the USEPA within 120 days of approval of the CMI Work Plan.

The LUCP will at a minimum include:

- A description of the land along with the certified land survey location of the boundary with respect to state plane coordinates,
- Placing a deed restriction on the property to limit the site to Industrial/Commercial Land Use.
- An explanation of the land use control including permits to perform any digging activities and the proper personal protective equipment (PPE) that must be used to protect workers, and the use of a fence and signs as necessary to prevent unauthorized access,
- Identification of the facility program point-of-contact designated responsible for implementing the LUCP,
- An on-site compliance monitoring program,
- Notification procedures to the USEPA and ADEM whenever the facility anticipates a major change in land use,
- An annual field inspection and report submitted to the USEPA and ADEM to document the effectiveness of the land use controls,
- A certification of the annual report by the designated official to continue compliance with the LUCP,
- A procedure to notify the USEPA and ADEM immediately upon discovery of any unauthorized major change in land use or any activity inconsistent with the LUCP and the actions that would be implemented to ensure protectiveness, and
- A procedure to provide notification to the USEPA and ADEM of transfer, by sale or lease, of SMA 4.

3.2 Environmental Covenant

ERP Coke will subcontract a surveying firm to provide a legal description of the boundaries of SMA 4. Following receipt of the legal description from the survey, Terracon will work with ERP Coke to prepare the Environmental Covenant and provide a draft to the USEPA and ADEM for approval. Following USEPA and ADEM's approval of the draft Environmental Covenant, Terracon will file the Covenant with the Jefferson County Court of Probate. The recorded Covenant will be provided to the USEPA and ADEM. We anticipate the process to record the covenant can be completed within 120 days following approval of the CMI Work Plan. A copy of the Alabama Uniform Environmental Covenants Program Division 335-5 is included as Appendix A. In addition, model Environmental Covenant is included as Appendix B.

3.3 In-Situ Soil Source Area Treatment

The subsurface area in SMA 4 with high concentrations of benzene, toluene, and chlorobenzene was determined to be approximately 240 feet in length and 120 feet in width (Figure 3-1). We have evaluated several types of chemical and physical injection alternatives including steam and in-situ chemical oxidation (ISCO). One or both of these in-situ methods will be used in remediation of the soil source area. The plan is to conduct a pilot test to determine which of these methods will be most effective in reducing the contamination levels. If the pilot test for the first method implemented is effective, then a pilot test of the other method may not be performed.

Chemical Oxidiation

In-situ chemical oxidation (ISCO) involves the injection or direct mixing of reactive chemical oxidants into the soil source area for the primary purpose of rapid and complete contaminant destruction of the chemicals-of-concern (COCs). ISCO is a versatile treatment technology that is most often deployed in source zones characterized by moderate to high contaminant concentrations in sorbed contaminants, and the potential presence of residual, separate-phase contamination.

ISCO directly oxidizes contaminants while its unique catalytic component generates a range of highly oxidizing free radicals that rapidly and effectively destroy a range of target contaminants including both petroleum hydrocarbons and chlorinated compounds (if present). Chemicals such as RegenOx® and Petrocleanz™ are injectable, two-part ISCO reagents that combines a solid sodium percarbonate based alkaline oxidant (Part A), with a liquid mixture of sodium silicates, silica gel and ferrous sulfate (Part B), resulting in a powerful contaminant destroying technology.

Once emplaced in the subsurface, these chemicals produce a cascade of highly-efficient chemical oxidation reactions via a number of mechanisms including:

- Surface mediated oxidation
- Direct oxidation
- Free radical oxidation

These reactions destroy a range of contaminants and can be propagated for periods of up to 30 days on a single injection.

In addition to chemical destruction, ISCO provides a short-term oxygen footprint that is optimal for establishing aerobic conditions capable of supporting follow-on, aerobic biodegradation of petroleum hydrocarbons. Once aerobic conditions are in place, the ISCO may support long-term aerobic biodegradation. This “ISCO to bio” combined remedies approach can be highly effective at reducing a range of contaminant concentrations and associated costs. Since it is intended that the injection will also extend into the saturated zone, the water in the hydrocarbon plume will become oxygenated and assist in remediation of the dissolved hydrocarbon plume also.

ISCO chemicals are readily available from a number of vendors and have been proven to remediate hydrocarbon constituents in soil. The pilot test is discussed in Section 3.3.3.

Steam

When steam is used for subsurface remediation, the objective is to remove as much of the contamination as possible, thus reducing the residual to very low levels. Initially, the steam that is injected will heat the well bore, and the formation around the injection zone of the well. The steam condenses as the latent heat of vaporization of water is transferred from the steam to the well bore and the porous media where it enters the formation. As more steam is injected, the hot water moves into the formation, pushing the water initially in the formation (which is at ambient temperature) further into the porous media. When the porous media at the point of steam injection has absorbed enough heat to reach the temperature of the injected steam, steam itself actually enters the media, pushing the cold water and the bank of condensed steam (hot water) in front of it.

As these flowing fluids approach a region that contains the volatile contaminant at saturations greater than its residual saturation, the contaminant is displaced. First to come into contact with the contaminant is cold water, then the hot water bank, and finally the steam front. The cold water will flush the mobile contaminant (i.e., the contaminant saturation that is in excess of its residual saturation) from the pores. The hot water will reduce the viscosity of the contaminant, making it easier to be displaced by viscous forces, and may reduce the residual saturation of the contaminant. When the steam front reaches the contaminated area, no additional contaminant can be recovered by viscous forces. Additional recovery is achieved by volatilization, evaporation, and/or steam distillation of the volatile contaminants (Stewart and Udell, 1988).

This option is possible because the ERP Coke facility produces steam and the steam produced can be supplied to the area for in-situ treatment of the soil sources area.

3.3.1 Underground Injection Control Permit

An underground injection control (UIC) permit must be obtained prior to injecting either steam or ISCO into the subsurface. ERP Coke will apply for a Class V UIC permit from the Alabama Department of Environmental Management (ADEM) within 30 days of approval of this Work Plan. The UIC Permit application will request permission to inject both ISCO and steam so that the permit will cover both forms of remediation.

3.3.2 Source Area Treatment

A horizontal injection well field will be installed since there are concrete slabs and 4 foot of fill over a wide portion of the soil source area that was identified. The horizontal wells can be used for

either injection of ISCO or steam. We believe that 8 to 10 horizontal wells will be needed to provide adequate injection coverage which will be placed perpendicular to groundwater flow. The exact number of wells needed will be determined based on information obtained during the pilot study. The pilot test is discussed in Section 3.3.3. The wells will be located in the soil source area where high concentrations of benzene, toluene, and chlorobenzene were detected during the soil sampling conducted in 1999-2000. The soil source area is approximately 120 feet by 250 feet and is shown in Figure 3-1.

3.3.2.1 Horizontal Injection Well Installation

Site information will be used to establish a detailed drill plan. A benchmark point will be selected either at the beginning of the well screen or at the rig location. The benchmark will be used as the baseline elevation for checking the depth of the sonde in relation to ground elevation. An appropriate walk-over tracking system will be employed, based on site conditions, including target depth and potential sources of signal interference. It is anticipated that the borehole will be installed between five and seven feet below the original land surface.

The drilling procedure consists of three phases: pilot hole, reaming, and pullback. Pilot hole drilling is a critical phase of the project. It determines the ultimate position of the installed well. A 6-inch diameter drill bit penetrates the ground at the prescribed entry point at a predetermined angle, typically between 10-14 degrees. The entry angle is selected to optimize the drill path of the riser section while accommodating surface completion requirements. The drill string is then advanced joint by joint by using the pushing, rotation and drilling fluid forces of the drill rig. The drill head is manufactured in such away it allows for the directional control needed to follow the proposed drill path. At the completion of each joint, the location of the drill head is obtained by the use of a walkover radio detection receiver. Readings will be taken at least every 10 feet to 15 feet. More frequent readings may be required due to the presence of existing utilities, critical exit sites, changes in subsurface drilling conditions, screen placement accuracy requirements, or the use of shorter drill pipe. This information is then used to plan for the next joint that will be drilled. A computer program is used to continually adjust the drill path based on real-time as-built information that is collected and evaluated each time a walkover radio detection receiver reading is taken. Real-time analysis and adjustment of the drill path ensures that the well will be placed accurately per the specifications while avoiding subsurface obstructions and responding to changing drilling conditions caused by natural or man-made properties of the subsurface soils. When the drill head reaches the exit location, the drill head and related tooling will be removed so that reaming and pullback can commence. The wells can either be completed with the entry/exit well installation or blind well installation. The on-site geologist in conjunction with the drilling crew will determine the best method for installing the well based on the site conditions.

Entry/Exit Well Installations:

Entry/Exit Well Installations require two additional steps:

- Reaming – Under certain installation conditions, the completion pipe can be pulled directly into the pilot hole after it is drilled. In most installations, however, the wellbore will require reaming to enlarge the hole to accommodate the installation of the well materials. For this project a determination will be made during the drilling of the pilot hole. In general, the final wellbore diameter should be at least 1 1/2 times the outside diameter of the well completion material. This is necessary to allow for an annular void for the return of drilling fluids and cuttings and to allow for the bend radius of the completion material. This rule of thumb is subject to adjustments based on subsurface soil conditions. Depending on the size of the desired final wellbore and the subsurface soil conditions, reaming may consist of one or more passes.

- Pullback – Once the drilled hole is enlarged, the well can be pulled back into the reamed hole filled with drilling fluid. The well material will be assembled completely and laid out in an area behind the exit point. This lay-down area is readied for pullback when the wellbore drilling is complete. The drill pipe is connected to the well casing using a pulling head and a swivel. The swivel is used to prevent rotational torque from spinning the well material. A reamer is also placed between the pulling head and the drill string to ensure that the hole remains open and to allow additional lubricating and stabilizing drilling fluid to be pumped into the hole during the pullback. The pullback operation continues until the well is at the surface at the drill rig. The pulling head is then disconnected, and the well is prepared for development.

Blind Well Installations

For the blind hole installations, once the wellbore has reached its final target endpoint, drilling fluid properties will be adjusted as needed and drilling fluid will be circulated for a period of time that is determined based on wellbore volume and the observed cuttings content of drilling fluid returns. The drill string will then be back-reamed out of the wellbore while continually circulating the drilling fluid. Once the drill string has been removed from the wellbore it will then be tripped back to bottom of the wellbore. During this process, each drill rod will be rechecked for both pitch and depth. Once on bottom-of-hole, the drilling fluid will again be circulated and the drill string will then be extracted from the wellbore. Physical and chemical properties observed during this process will determine if the well screen can be installed immediately or if the process needs to be repeated with a modified drilling fluid formulation.

Wellbore Tracking and Field Adjustments

A walkover locating system which receives a location transmission from the sonde that is enclosed in the drill bit housing will be used to monitoring the drill bit location. The location system has the capability to receive transmissions from a maximum drill bit depth of 100 feet below the ground surface. Data relayed from the drill bit includes depth, rotational position, pitch/inclination,

pressures, and temperatures. The final specifications of any horizontal well system are determined in the field, during installation. The path of the pilot bore will reflect field realities such as subsurface obstructions, soil formation heterogeneity, changes in surface topography, and interference with the tracking system. No well installation plan can anticipate the exact impact of these factors. The well design is based on the anticipated, ideal well path. Some changes caused by field realities can measurably affect the way in which the well will operate.

Drilling Fluids

The drilling fluid formulation will be based on local drilling conditions, each mud program is developed for site specific conditions, and the drilling fluid is continually adjusted for maximum efficiency depending on subsurface soil conditions and wellbore stability. There are several possible drilling fluid additives which may be used during drilling operations. Bentonite is used effectively on environmental projects to maintain wellbore stability in hydraulically challenging drilling environments. A successful drilling fluids management program addresses all aspects of directional drilling and ensures wellbore stability, filtration control, cuttings removal, continuous circulation, and lubrication. These critical drilling fluid characteristics are controlled with the use of food-grade drilling fluid additives which are added in measured quantities during the drilling process based on continuous monitoring of the drilling fluid returns and down-hole mechanical and hydraulic response measurements at the drilling rig. The quantity and proportions of either bentonite or non-solids based drilling mud or a combination of both constitute proprietary information. The company chosen to install the horizontal wells is Directional Technologies Inc. which has the benefit of extensive experience on many different environmental sites and in a wide variety of hydrogeologic settings which enables us to design the optimal drilling fluids program for the site and subsurface soil conditions.

Well Development

The well development process begins immediately upon well installation. The procedure begins by pumping fresh potable water directly into the installed well. The fresh water passes through and clears the screen slots as it enters the wellbore annulus, where it displaces the cuttings-laden drilling fluid, forcing it to exit into the mud pit at either end of the wellbore. Fresh water flushing continues, with close monitoring of returns in the mud pits, until the bulk of drilling fluids and cuttings have been removed from the wellbore. The wellbore is then flooded with a solution of Aqua-Clear, a clay dispersant, or equivalent dispersant product. A sufficient volume of dispersant solution is pumped into the well to saturate the formation immediately adjacent to the wellbore in order to prevent formation damage, which can be caused by any drilling method using any drilling fluid. The solution is given at least 4-12 hours of residence time for the drilling fluid to de-flocculate, thereby allowing any remaining solids to be removed by flushing. The well is then flushed using fresh water with sufficient flow velocity to ensure that any remaining solids are suspended and removed from the wellbore as the fresh water circulates back into the mud pits. The volume and physical characteristics of fluid and solid returns are carefully monitored in order to confirm that

the wellbore has been cleaned of drilling fluid, and to determine if additional flushing or treatment with dispersant solution is needed. Any additional treatment with dispersant solution is again followed by fresh water flushing.

Cuttings and Water Management Methods

During drilling operations, a mud reclaiming system will be utilized as the primary means of both fluid and cuttings management. The mud reclaiming uses a multifunctional linear motion shaker, operating with two high conductance pre-tension screens. The bottom screen of the shaker acts as a primary cleaner, the top screen acts as a finer mud cleaner and dryer for finer particles which are deposited on the upper screen by the desilter cones. The mud shaker is used in conjunction with three 4 inch hydrocyclones for secondary sand and silt removal. During drilling operations, the exit platform of the shaker is directed into a plastic lined roll-off. The roll-offs are used for temporary storage of drilling fluids and solids during the course of the project. Upon completion of well installation, drilling fluids are cleaned of solids and the drilling fluid is then placed into an appropriate container for proper disposal.

Grouting

A grout seal will be emplaced in the riser section of the well in order to (a) prevent short-circuiting of air between the screen section and the ground surface, and (b) protect the subsurface from invasion of surface waters. Several methods are available for grouting, and the most effective method will be chosen based on subsurface conditions. Grout will be injected into the riser section of the wellbore annulus through tremie pipe after (a) the screen and riser casing has been installed, and (b) the well has been developed. Flexible, HDPE tremie pipe may be attached to a portion of the riser section as it is being inserted into the wellbore. Alternatively, rigid, steel tremie pipe may be inserted into the entry point of the well after the screen and riser casing has been inserted, but before the well is developed, in order to guard against possible collapse of the annular space around the riser section of the pipe prior to grouting. A pre-calculated volume of bentonite and portland cement grout mixture is pumped through the tremie pipe, with the goal of bringing the grout up to the surface.

3.3.3 Pilot Test

A pilot test will be performed to determine the effectiveness of the chosen remediation methods. Based on our research, we believe ISCO will help to remediate the soils source area and secondarily remediate groundwater. The pilot test will be used to determine if a full scale ISCO injection will effectively treat the entire soil source area. If the ISCO injection does not appear feasible based on the results of the pilot test, a second pilot test involving the injection of steam may be performed.

3.3.3.1 Horizontal Injection Well Installation

Two horizontal injection wells will be installed in the soil source area (Figure 3-1). The will be installed on the upgradient end of the soil source area and will be spaced 50 feet apart. The installation method was previously described.

3.3.3.2 Soil Sampling

Sampling of the soil in the area was conducted in 1999-2000. Therefore, we will collect soil samples prior to the start of remediation and subsequent to the remediation to determine the concentration of contaminants removed and the horizontal extent of influence of the treatment media. Soil borings will be installed approximately 10 feet from the horizontal wells and at 25 feet in between the horizontal wells. Soil samples will be collected at two-foot intervals from the original land surface (some of the areas contain fill on top of former building slabs) to refusal at the top of bedrock. Each interval will be sampled and the sample will be analyzed for VOCs by EPA Method 8260). The boring locations will be staked and surveyed using a handheld GPS unit, so that after the injection steam/ISCO, samples can be collected from an adjacent boring to determine the success of the remedial method chosen. The proposed soil sampling locations are shown on Figure 3-1. Sample collection and analysis will follow the procedures outlined in the QAPP.

Two of the soil borings will be completed as observation wells to determine if the radius of influence of the ISCO. The boring within 10 feet of each horizontal well and a boring located between the horizontal wells (25 feet from each) will be completed as two wells and screened in two zones. They will be screened between 3-7 feet below original land surface and a second zone from 10-15 feet below land surface. A two-foot thick bentonite layer will be emplaced above the screen of the lower zone well and below the screen of the upper zone. The wells will be completed as described in the QAPP previously submitted.

The observation wells plus monitoring wells MW-55 and MW-56 will be sampled prior to the initial ISCO injection, 30 to 45 days after the initial injection, and 30 to 45 days after the second injection. The groundwater from the wells will be analyzed for volatile organic compounds (VOCs) by EPA Method 8260. If a steam injection pilot study is conducted, the observation wells plus the performance wells will be sampled on a quarterly basis for VOCs by EPA Method 8260.

3.3.3.3 ISCO Injection

The ISCO injection approach is based on horizontal application techniques at the site utilizing a network of wells installed via directional drilling. The ISCO reagents will be prepared and applied via a custom injection trailer. The injection trailer is fully enclosed and contains mixing tanks, pumps, and delivery system equipped for direct connection to downhole injection tooling. In short, each trailer has the following components:

- Complete drain conical mixing tanks
- Vortex/Cyclone mixer
- Application pump
- Multiple fluid delivery lines
- Self-sufficient, dedicated power
- Slip-resistant and chemical resistant flooring
- Flow and pressure controls
- Backflow prevention
- Pressure bypass controls
- Emergency eyewash and First-Aid station

The solutions are prepared in two 350 gallon-sized conical tanks that are configured with chemical-resistant materials. A vortex/cyclone mixer mounted to the mixing tanks rated with a liquid movement of 1800 gpm in water is outfitted with a shaft and propellers within each of the mixing tanks.

The application pump is anticipated to be either a progressive cavity or centrifugal pump designed to prevent pulsation of the remediation chemistry while being applied. The application pump is capable of delivering the remediation chemistry at up to 250 pounds per square inch (psi) at up to 20 gallons per minute (gpm) to overcome potential hydraulic limitations. Mechanisms capable of maintaining injection pressures of 0 to 250 psi and injection flow rates of 0 to 20 gpm per injection point have been installed to control and maintain desired application pressures and flow rates. Safety bypass mechanisms are also installed to release back pressure buildup in the event injection pressures exceed commonly accepted application ranges. The application delivery system is capable of delivering the remediation chemistry at up to four (4) separate delivery lines simultaneously, each having the capability of monitoring injection pressures and injection flow rates at any given time. Each delivery line is capable of reaching beyond the injection trailer of at least 100 linear feet, limiting the need to move the injection trailer from point to point or in this case limiting the need to travel. If the trailer cannot be located within 100 feet of the treatment area, then the injection lines can be combined using cam lock fittings. The delivery radius of the injection trailer can be extended by an additional 400 ft.

The pilot test will consist of two injection events spaced between 30 to 45 days apart. The exact time between events will be made based on observation of the nearby monitoring wells; however, the time between injections will not exceed 60 days.

The newly installed observation wells plus monitoring wells MW-55 and MW-56 will be sampled prior to the initial ISCO injection, 30 to 45 days after the initial injection, and 30 to 45 days after the second injection. The groundwater from the wells will be analyzed for volatile organic compounds (VOCs) by EPA Method 8260.

3.3.3.4 Steam Injection

If it is determined that the ISCO is not effective at remediating the soil source area, a second pilot test may be conducted using steam. The steam would be run to the injection site from the nearest location where steam is present at the site (light oil facility). The steam will be connected to the injection wells using couplings that can handle very hot streams of vapors. Since the injection wells are both very hot and pressurized, couplings will be carefully designed.

Pressure cycling of the steam injection will be utilized as part of the system operation. Cycling is the process where, after breakthrough of steam at the extraction wells, the steam injection system is shut down while allowing the extraction process to continue. The loss of pressure thermodynamically destabilizes the system, forcing the temperature to drop to restore stability. The system loses heat by evaporation of residual moisture and the contaminants that are collected by the extraction wells. Davis (1998) and Davis et al. (2005) report on several studies where repeated cycling has resulted in increased contaminant concentrations in the extracted vapors.

The applicability of steam injection to a particular site is determined by the permeability of the soil, the depth at which the contaminants reside, and the type and degree of heterogeneity, as well as the contaminant type. The permeability of the soil must be high enough to allow sufficient steam to be injected to heat the entire source zone. Higher injection rates can be achieved by increasing the injection pressure. However, we will not use pressures higher than 1.65 pounds per square inch per meter of depth. Pressures above this could exceed the overburden pressure and fracturing to the surface might occur. Although, shallow treatment areas are difficult to heat with steam, and collection of the vapors generated may be challenging; an impermeable surface cover should help. The injection area is mostly covered by asphalt and former building slabs and much of the area also has an additional 4 foot of fill above the building pads; therefore, this should help make steam a viable remediation method.

If a steam injection pilot study is conducted, the observation wells plus the performance wells will be sampled on a quarterly basis for VOCs by EPA Method 8260. Quarterly sampling is more applicable to steam injection since the formation takes time to heat.

3.4 Groundwater Removal and Treatment

A groundwater containment system was installed as part of the Interim Measures (IM) for the FCP. As part of that system, six recovery wells (CW-1 through CW-6) were installed between December 2012 and February 2013. The recovery well locations are shown on Figure 3-1. The soil source area treatment area is surrounded on all sides by containment wells. The containment wells will recover the contaminants mobilized by the treatment of the soil source. The horizontal injections wells may also be used to recover groundwater between the ISCO injections. No

additional groundwater containment well(s) are proposed at this time; however, additional wells may be added if it is deemed necessary in the future.

A general layout of the groundwater containment system is presented on Figure 3.2. The system consists of the following:

- Electric-powered, submersible, total fluid pumps in each CW well;
- 1.5-inch diameter, metal pipe;
- Ball check valves;
- 1,500-gallon resin tank,
- Secondary containment vessel;
- Electric-powered transfer pump; and
- Totalizing flow meter.

Electric submersible pumps with flow controllers were placed in hydraulic control wells CW-1 through CW-6. Trenches were excavated from each hydraulic control well location to a central location where a 1,500 gallon above ground resin tank was placed. The tank was placed into a concrete secondary containment dike that is capable of holding at least 110% of the volume of the tank. An electric-powered transfer pump was installed to pump the water from the tank through metal piping to the light oil system for recycling.

Initial start-up of the groundwater containment system was conducted on April 18, 2013. Since the system start-up, the system has been routinely running with minor downtime to make repairs to parts or to add equipment such as the filter that is being used to prevent iron fouling. Walter Coke conducts a daily check of the system. A preventive maintenance (PM) form is filled out that contains:

- Flow meter reading (gallons)
- Operating normally
- Visually inspect the system and tank for leaks
- Replace filter bag as needed

In addition, ERP Coke has a PM that is conducted weekly that checks the pumps and equipment at each of the hydraulic control wells to determine if the pumps are operating correctly and that no leaks are present. The completed forms are kept on file at the ERP Coke facility.

Based on the groundwater sampling conducted during the IM over the last 5 years, the groundwater containment system has been effective at keeping contaminated groundwater from leaving the property line. Based on the effectiveness of the groundwater containment system, no further modifications are proposed as part of the CMI.

3.5 Corrective Action Groundwater Monitoring

The monitoring well network associated with the FCP are shown on Figure 3-1. These monitoring wells have been grouped into categories (Upgradient, Performance, Sentinel) which will be used to evaluate the effectiveness of the CMI. The categories include:

Upgradient Wells: MW-77, MW-80 and MW-81.

Performance Wells: MW-49S, MW-49D, MW-50, MW-51, MW-52, MW-53, MW-54, MW-55, MW-56, MW-78, and MW-90.

Sentinel Wells : MW-70, MW-71, MW-72, and MW-89.

The groundwater monitoring will be conducted in accordance with the approved IM Groundwater Sampling and Analysis Plan (Revision 1.0) [SAP] and associated planning documents that were prepared to describe the proposed monitoring locations, sample collection procedures, analyte list, laboratory analyses, quality assurance/quality control samples and procedures, investigative-derived waste management, health and safety procedures, and data evaluation and management procedures for the groundwater sampling and analysis conducted during the IM. The USEPA approved the SAP by letter dated December 4, 2012.

We are proposing the following groundwater sampling schedule for the CMI. Current Interim Measures (IM) quarterly sampling will continue until the final treatment remedy is implemented. Once the final remedy is implemented, then the first year we recommend quarterly sampling for the performance wells and annual sampling for the upgradient, performance, and sentinel wells, followed by semi-annual sampling in subsequent years for the performance wells and annual sampling for the upgradient, performance, and sentinel wells. During the corrective action groundwater monitoring, we recommend that groundwater samples be analyzed for volatile organic compounds by EPA Method 8260 and polynuclear aromatic hydrocarbons by EPA Method 8270SIM. The data obtained during the corrective action monitoring will be used in conjunction with other sampling to determine the effectiveness of the corrective action that is taking place.

3.6 Estimated Costs and Financial Assurance

The estimated costs for implementing this CMI Work Plan are included as Appendix C. According to the Order on Consent for ERP Compliant Coke, LLC ALD 000 828 848 dated July 2016, ERP will obtain a financial assurance mechanism described and allowable under 40 CFR 264.413 through 264.151 Subpart H within 60 calendar days of USEPA's approval of the CMI cost estimate.

3.7 Schedule of Activities

Upon USEPA's approval of this CMI Work Plan, the following activities will be performed:

- A UIC Permit will be requested within 30 days of approval of this document.
- A financial assurance mechanism will be provided to USEPA within 60 days of approval of this document.
- A survey of SMA 4 will be conducted.
- An environmental covenant will be placed on SMA 4 following the completion of the survey.
- Installation of the horizontal injection wells for the pilot study and soil sampling will be completed within 180 days of approval.
- Injection will begin once the UIC Permit is approved by ADEM. Approval usually takes at least 180 days.
- Pilot study will be performed followed by full scale remediation.
- Quarterly sampling, until one year after full scale remediation has been started, followed by semi-annual groundwater sampling will continue with Annual Reports.
- A report describing the well installation and pilot test will be submitted within 90 days of completion of the pilot test.
- An additional pilot test or full scale implementation of the chosen remedy.

A Gantt chart has been prepared that indicates the proposed timing on the schedule of activities and is included as Appendix D.

3.8 Reports

The following reports will be prepared during the implementation of the CMI:

- Quarterly Progress Reports will continue until all of the sites corrective measures have been completed.
- A LUCP will be submitted within 120 days from approval of the CMI Work Plan.
- A report documenting the filing of the Environmental Covenant will be submitted within 180 days from approval of the CMI Work Plan.
- A Class V Underground Injection Control Permit application will be submitted to ADEM within 30 days of approval of the CMI Work Plan. It will take approximately 180 days from submittal of the application to receive the permit.
- An Annual Report of the semi-annual groundwater sampling will be submitted within 90 days of the second sampling event.
- A Pilot Study Report will be submitted within 60 days of completion of the field activities associated with the pilot test.
- A Report will be prepared upon completion the in-situ treatment of the soil source area treatment.

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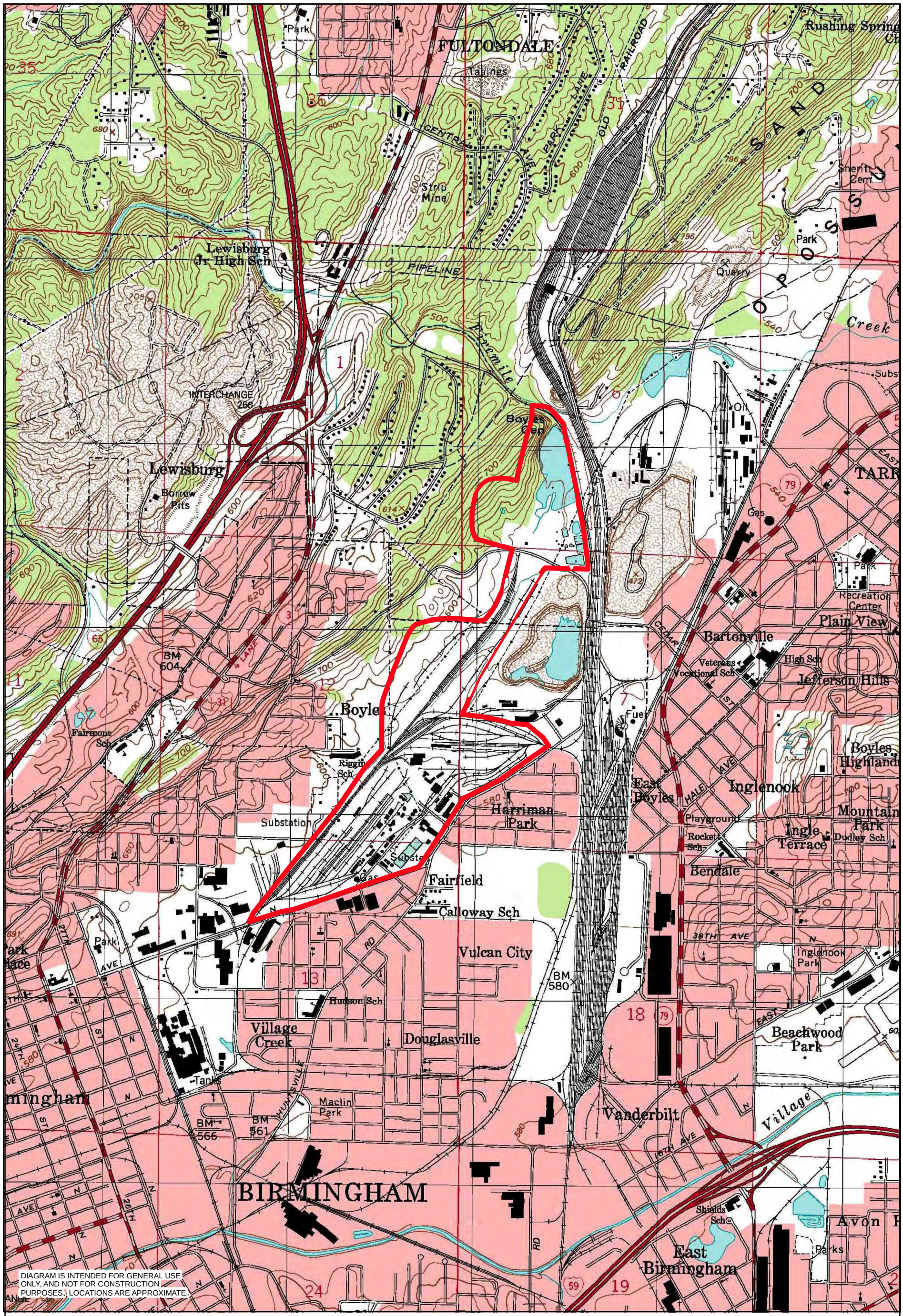
Figures



Legend

Facility Boundary

TOPOGRAPHIC
North Birmingham, AL
7.5 Minute Quadrangle, USGS, 1997

0 2,500 Feet

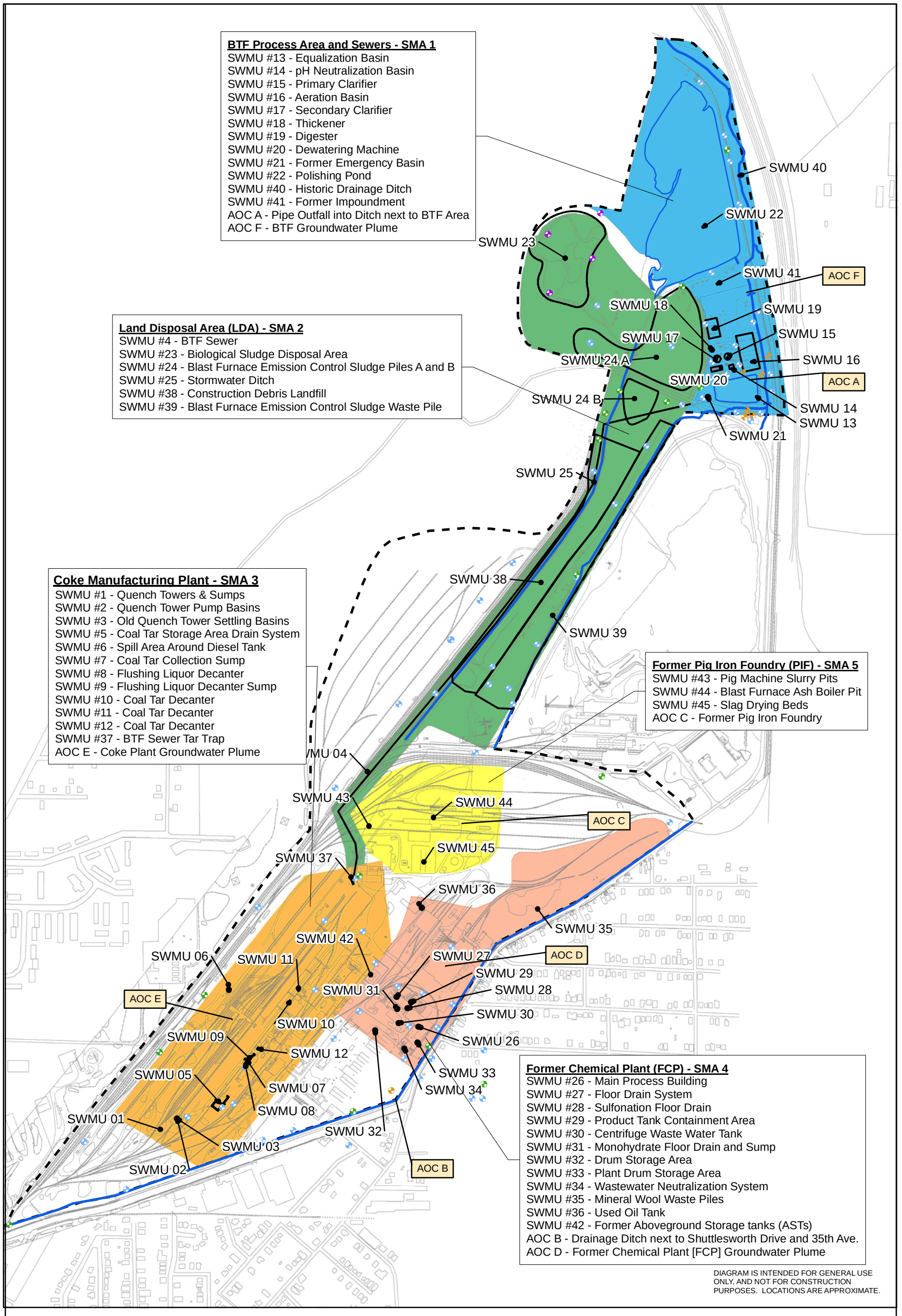
Date:	9/7/2018
PM:	TWR
Project:	E1187063
Author:	94

Terracon
110 12th St. North Birmingham, Alabama 35203
Phone: (205) 942-1289 Fax: (205) 443-5302

FACILITY LOCATION MAP

ERP Coke
3500 35th Avenue North
Birmingham, AL 35207

FIGURE **1-1**


BTF Process Area and Sewers - SMA 1
SWMU #13 - Equalization Basin
SWMU #14 - pH Neutralization Basin
SWMU #15 - Primary Clarifier
SWMU #16 - Aeration Basin
SWMU #17 - Secondary Clarifier
SWMU #18 - Thickener
SWMU #19 - Digester
SWMU #20 - Dewatering Machine
SWMU #21 - Former Emergency Basin
SWMU #22 - Polishing Pond
SWMU #40 - Historic Drainage Ditch
SWMU #41 - Former Impoundment
AOC A - Pipe Outfall into Ditch next to BTF Area
AOC F - BTF Groundwater Plume
Land Disposal Area (LDA) - SMA 2
SWMU #4 - BTF Sewer
SWMU #23 - Biological Sludge Disposal Area
SWMU #24 - Blast Furnace Emission Control Sludge Piles A and B
SWMU #25 - Stormwater Ditch
SWMU #38 - Construction Debris Landfill
SWMU #39 - Blast Furnace Emission Control Sludge Waste Pile
Coke Manufacturing Plant - SMA 3
SWMU #1 - Quench Towers & Sumps
SWMU #2 - Quench Tower Pump Basins
SWMU #3 - Old Quench Tower Settling Basins
SWMU #5 - Coal Tar Storage Area Drain System
SWMU #6 - Spill Area Around Diesel Tank
SWMU #7 - Coal Tar Collection Sump
SWMU #8 - Flushing Liquor Decanter
SWMU #9 - Flushing Liquor Decanter Sump
SWMU #10 - Coal Tar Decanter
SWMU #11 - Coal Tar Decanter
SWMU #12 - Coal Tar Decanter
SWMU #37 - BTF Sewer Tar Trap
AOC E - Coke Plant Groundwater Plume
Former Pig Iron Foundry (PIF) - SMA 5
SWMU #43 - Pig Machine Slurry Pits
SWMU #44 - Blast Furnace Ash Boiler Pit
SWMU #45 - Slag Drying Beds
AOC C - Former Pig Iron Foundry
Former Chemical Plant (FCP) - SMA 4
SWMU #26 - Main Process Building
SWMU #27 - Floor Drain System
SWMU #28 - Sulfonation Floor Drain
SWMU #29 - Product Tank Containment Area
SWMU #30 - Centrifuge Waste Water Tank
SWMU #31 - Monohydrate Floor Drain and Sump
SWMU #32 - Drum Storage Area
SWMU #33 - Plant Drum Storage Area
SWMU #34 - Wastewater Neutralization System
SWMU #35 - Mineral Wool Waste Piles
SWMU #36 - Used Oil Tank
SWMU #42 - Former Aboveground Storage tanks (ASTs)
AOC B - Drainage Ditch next to Shuttlesworth Drive and 35th Ave.
AOC D - Former Chemical Plant [FCP] Groundwater Plume
SWMU 40
SWMU 22
SWMU 23
SWMU 41
AOC F
SWMU 18
SWMU 19
SWMU 17
SWMU 15
SWMU 24 A
SWMU 16
SWMU 20
AOC A
SWMU 24 B
SWMU 14
SWMU 13
SWMU 21
SWMU 25
SWMU 38
SWMU 39
SWMU 04
SWMU 43
SWMU 44
AOC C
SWMU 45
SWMU 37
SWMU 36
SWMU 35
SWMU 42
SWMU 06
SWMU 11
SWMU 27
AOC D
SWMU 29
SWMU 31
SWMU 28
AOC E
SWMU 30
SWMU 10
SWMU 09
SWMU 26
SWMU 12
SWMU 33
SWMU 05
SWMU 34
SWMU 07
SWMU 08
SWMU 01
SWMU 32
SWMU 03
SWMU 02
AOC B
DIAGRAM IS INTENDED FOR GENERAL USE ONLY, AND NOT FOR CONSTRUCTION PURPOSES. LOCATIONS ARE APPROXIMATE.
Solid Waste Management Areas (SMAs)
BTF Process Area and Sewer - SMA 1
Land Disposal Area - SMA 2
Coke Manufacturing Plant - SMA 3
Former Chemical Plant - SMA 4
Former Pig Iron Foundary - SMA 5
Note:
1) SWMU - Solid Waste Management Unit
2) Management Area boundaries are approximations
3) AOC - Area of Concern
0 250 500 1,000
Feet
N
Date: 9/7/2018
PM: TWR
Project: E1187063
Author: 94
Terracon
110 12th St. North Birmingham, Alabama 35203
Phone: (205) 942-1289 Fax: (205) 443-5302
SITE MAP
ERP Coke
3500 35th Avenue North
Birmingham, AL 35207
FIGURE
1-2

SWMU #35 - Mineral Wool Waste Piles

SWMU #42 - Former Aboveground Storage Tanks (ASTs)

SWMU #36 - Used Oil Tank

MW-80

MW-81

SWMU #27 - Floor Drain System

SWMU #29 - Product Tank Containment Area

MW-55

MW-56

SWMU #28 - Salfonation Floor Drain

MW-78

MW-54

SWMU #30 - Centrifuge Waste Water Tank

MW-53

MW-52

MW-77

MW-49D

SWMU #26 - Main Process Building

MW-72

MW-51

MW-50

SWMU #33 - Plant Drum Storage Area

MW-70

MW-90

MW-89

SWMU #34 - Wastewater Neutralization System

MW-71

SWMU #31 - Monohydrate Floor Drain and Sump

SWMU #32 - Drum Storage Area

DIAGRAM IS INTENDED FOR GENERAL USE ONLY, AND NOT FOR CONSTRUCTION PURPOSES. LOCATIONS ARE APPROXIMATE.

Legend

- Shallow Bedrock Monitoring Well
- Deep Bedrock Monitoring Well
- Residium or Mixed Monitoring Well
- Non-Conasauga Limestone Monitoring Well
- Base

Note:
1) SWMU - Solid Waste Management Unit
2) Management Area boundaries are approximations
3) AOC - Area of Concern

0 120 240 480 Feet

N

Date:	9/7/2018
PM:	TWR
Project:	E1187063
Author:	94

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FORMER CHEMICAL PLANT MAP

ERP Coke
3500 35th Avenue North
Birmingham, AL 35207

FIGURE **1-3**

NOTES:

DATA SOURCES:
- Well locations: CH2M Hill
- Basemap imagery: ESRI

N

Project No	E1187063
Drawn By:	IMS
Reviewed By:	TWR
Date:	Sept 2018

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Soil-Source Area Map

ERP COKE, INC.
3500 35th AVENUE NORTH
BIRMINGHAM, ALABAMA

Figure
3-1

M:\GIS\E1127096_Walter_Coke_ALT_project\mxd\2018_06_AnnualReport_2017_08_Thru_2018_05\Working\E1177308_ERPCoke_BlankSiteLayout.mxd

Project Manager: TWR	Project No. E1187063	Terracon	Site Map Illustrating General System Layout
Drawn By: ECR	Scale: 1" ≈ 200'	110 12th Street North Birmingham, Alabama 35203	ERP Coke 3500 35th Avenue North Birmingham, Jefferson County, Alabama
Checked By: TWR	File Name: E1187063	PH. (205) 942-1289 FAX. (205) 443-5302	Figure 3-2
Approved By: TWR	Date: Sept 2018		

Appendix A
Alabama Uniform Environmental Covenants Program Division 335-5

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

DIVISION 335-5

1400 Coliseum Blvd.
Montgomery, Alabama 36110

CITE AS

ADEM Admin. Code r. 335-5-x-.xx

REVISED EFFECTIVE: MARCH 26, 2013

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

DIVISION 335-5

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ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

CHAPTER 335-5-1
GENERAL

TABLE OF CONTENTS

335-5-1-.01 Purpose. These regulations are promulgated to establish minimum requirements governing environmental covenants pursuant to the Alabama Uniform Environmental Covenants Act, Code of Alabama 1975, §§35-19-1 to 35-19-14.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-1; 35-19-13.
History: May 26, 2009.

335-5-1-.02 Applicability.

(1) These regulations apply to a property or site undergoing a response action that does not return the property to unrestricted use.

(a) An environmental covenant is required for a site if the approved environmental response project plan places a land use control on the site because it is not being remediated to unrestricted use, unless exempt in 335-5-1-.02(3).

(b) The Department, when considering the environmental response project plan for a site, may require the owner or operator or other responsible person to enter into an environmental covenant with the owner of the off-site parcels or properties to ensure that the remedy approved in the plan is protective of human health and the environment.

(c) An owner or operator or other responsible person whose environmental response project plan includes other off-site parcels or properties may voluntarily include the off-site parcels or properties in an environmental covenant.

(d) Failure to enter into an environmental covenant with an off-site property owner, for any reason, does not release or absolve the site owner or operator or other responsible person from any obligation to perform required remediation activities addressing on-site or off-site contamination, including land use controls. Lack of an environmental covenant may require the owner or operator or other responsible person to perform additional activities in the approved environmental response project plan to ensure effectiveness of the response action and the protection of human health and the environment for current and future uses of the on-site and/or off-site property.

(2) These regulations apply to environmental covenants arising from environmental response projects conducted under any of the following ADEM programs:

(a) Scrap tire remediation sites subject to 335-4.

(b) Soil and groundwater remediation sites subject to 335-6-8, 335-6-15 and 335-6-16.

(c) Solid waste disposal sites subject to 335-13.

(d) Hazardous waste disposal sites subject to 335-14.

(e) Voluntary cleanup program sites subject to 335-15.

(f) Dry cleaner remediation sites subject to 335-16.

(g) Sites subject to the Alabama Hazardous Substance Cleanup Fund Act, Code of Alabama 1975, §§22-30A-1 to 22-30A-11, and

(h) Sites being remediated by potentially responsible parties or the United States Environmental Protection Agency which are subject to the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601 et seq).

(3) For properties or sites owned by the federal government which are legally unable to execute an environmental covenant during the period of federal ownership, the following requirements shall apply:

(a) During the period of federal ownership.

(1) In lieu of an environmental covenant, a Notice of Environmental Use Restriction for properties or sites owned by the federal government shall be prepared and submitted to ADEM for approval that gives notice of the current and future use of the federal property. The Notice shall:

(i) Contain a provision that an environmental covenant shall be executed with ADEM and appropriately filed at such time the property is transferred to a non-federal owner.

(ii) Contain a provision that the Notice does not convey a property interest.

(iii) Contain a provision that, if the property is transferred to another federal agency, the environmental use restrictions shall remain in effect and be binding upon the recipient federal agency.

(iv) Be incorporated into the installation master plan or facility property management plan and shall be recorded into the land records of the property in compliance with 335-5-3-.02.

(v) Contain a provision that all cleanup plans, decision documents, permits and other instruments relying upon or referencing the Notice shall include appropriate conditions requiring that the Notice remain in place for the duration of federal ownership, and that a covenant shall be executed and filed at such time as the property is transferred to an owner that is not the federal government, and conditioning the continued approval of any selected remedies relying upon or referencing the Notice or covenant upon the timely execution and filing of a covenant at the time the property is transferred to an owner that is not the federal government.

(vi) Contain a provision that all other regulations applying to an environmental covenant shall apply to the Notice.

(b) At the time of transfer of property subject to 335-5-1-.02(3)(a) to non-federal ownership, an environmental covenant pursuant to this Division shall be executed.

(4) These regulations apply to interests in real property which are in existence at the time an environmental covenant is created or amended.

(a) An interest that has priority under other law is not affected by an environmental covenant unless the person owning the interest subordinates that interest to the covenant.

(b) A person owning a prior interest is not required to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(c) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the subordination agreement may be signed by any person authorized by the governing board of the owners' association.

(d) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not automatically impose any affirmative obligation on the person with respect to the environmental covenant.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §35-19-13.
History: May 26, 2009; March 26, 2013.

335-5-1-.03 Definitions. For the purpose of this Division, the following words and phrases, unless the context of 335-5 plainly indicates otherwise, shall have the following meanings:

(a) Activity and Use Limitations - Restrictions or obligations created under this Act with respect to real property.

(b) ADEM or Department - The Alabama Department of Environmental Management.

(c) Alabama Uniform Environmental Covenants Act or "Act" - Code of Alabama 1975, §§ 35-19-1 to 35-19-14.

(d) Common Interest Community - A condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(e) Director - The Director of the Alabama Department of Environmental Management or his or her designated representative.

(f) Environmental Covenant - A servitude arising under an environmental response project that imposes activity and use limitations.

(g) Environmental Response Project - A plan or work performed for environmental remediation of real property and conducted under a federal or state program governing environmental remediation of real property.

(h) Holder - The grantee of an environmental covenant that meets the requirements of 335-5-2-.01.

(i) Land Use Controls - Any restriction or control that serves to protect human health and the environment by limiting the use of or exposure to any portion of a property or site, including water resources. These controls include, but are not limited to:

1. Engineering controls for remedial actions directed toward containing or controlling the migration of contaminants through the environment. These include, but are not limited to, stormwater conveyance systems, slurry walls, liner systems, caps, leachate collection systems, pump-and-treat systems, and groundwater recovery systems. Engineering controls are classified as:

(i) Class 1, which include multi-layer caps or liner systems, soil vapor extraction systems, groundwater pump-and-treat systems, leachate and groundwater recovery systems, stormwater conveyance systems, slurry walls and active ventilation of closed spaces.

(ii) Class 2, which include clay or soil caps or liner systems, sub-structural vapor barriers, and passive ventilation of closed spaces.

(iii) Class 3, which include asphalt caps and fencing systems.

(iv) For other engineering controls not listed, ADEM shall determine the classification of the engineering control upon the request of an owner or operator or other responsible person.

2. Institutional controls that are legal or contractual restrictions on property use which remain effective after remediation is completed and are used to meet an approved environmental response project plan or proposal. These include, but are not limited to, deed notations, deed restrictions, groundwater use restrictions, restrictive covenants, conservation easements, and limited development rights. Institutional controls are classified as:

(i) Class 1, which includes any water use restriction.

(ii) Class 2, which include restrictive covenants for industrial or commercial use only or no schools or daycares, and imposition of conservation easements or limited developmental rights.

(iii) Class 3, which include restrictive covenants for no excavations, for use as greenspace only, and no hunting or fishing.

(iv) For other institutional controls not listed, ADEM shall determine the classification of the institutional control upon the request of an owner or operator or other responsible person.

(j) Owner or Operator - Includes the following:

1. In the case of a property or site, any person owning or operating that property or site.

2. Any person who owned, operated, or otherwise controlled activities at a property or site immediately prior to conveyance of title of that property or site to a unit of state or local government or loss of control of that property or site due to bankruptcy, foreclosure, tax delinquency, or abandonment.

3. The definition does not include the following:

(i) A person acting solely in a fiduciary capacity who can show evidence of ownership and who did not actively participate in the management, disposal, or release of hazardous wastes, hazardous constituents, hazardous substances or petroleum product from the property or site.

(ii) A unit of a state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or any other circumstance where the government involuntarily acquires title by virtue of its function as sovereign. This exclusion shall not apply to any state or local government that has caused or contributed to the release of hazardous wastes, hazardous constituents, or hazardous substances from the property or site.

(k) Person - An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(l) Property or Site - A parcel of land defined by boundaries of a legal description where a hazardous waste, hazardous constituent, hazardous substance or petroleum product has been or is suspected to have been deposited, discharged, stored, disposed of, placed, or otherwise come to be located.

(m) Record - Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(n) Response Action - Action taken in the event of a release or threatened release of a hazardous waste, hazardous substance, petroleum product, or other pollutant into the environment to remove or to prevent or minimize the threat to public health or the environment.

(o) Responsible Person - Any person who has contributed or is contributing to a release of any hazardous waste, hazardous constituent or hazardous substance at a property. This term includes any person who has contributed or is contributing to a release of petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. This term includes persons described in §§107(a)(1) through 107(a)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC Section 9601, et seq. (CERCLA). This term excludes persons described in §107(b) of CERCLA.

(p) Restricted Use - Any use of a property or site other than unrestricted use.

(q) State - The State of Alabama.

(r) Unrestricted Use - The designation of acceptable future use at a property or site where the remediation levels, based on either background or standard exposure factors, shall have been attained in all media to allow the property or site to be used for any purpose.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama. 1975, §§35-19-2; 35-19-13.
History: May 26, 2009; March 26, 2013.

335-5-1-.04 Holder.

(1) Any person may be a holder. An environmental covenant may identify more than one holder. The holder's interest is an interest in real property.

(2) A right of the Department under the Act or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(3) The Department is bound by any obligation it assumes in an environmental covenant, but does not assume obligations merely by signing an environmental covenant.

(4) Any other person who signs an environmental covenant is bound by the obligations the person assumes in the covenant; however, signing the covenant does not change the person's obligations, rights, or protections granted to or imposed upon that person under other law, except as provided in the covenant.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-3; 35-19-13.
History: May 26, 2009.

335-5-1-.05 Registry of Environmental Covenants.

(1) The Department shall establish and maintain a registry that contains all environmental covenants and any amendment or termination of those covenants executed pursuant to 335-5.

(2) In addition to the requirements of 335-5-1-.05(1), the registry may contain any other information concerning environmental covenants and the real property subject to them which the Department considers appropriate.

(3) The full text of the covenant, amendment, or termination and any other information required by ADEM shall be submitted to ADEM within thirty (30) days of its recording in the land records of the county where the property is located for inclusion in the ADEM Registry of Environmental Covenants. The person submitting the covenant may be the owner, operator, other responsible person, grantor or any holder of the covenant.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-12; 35-19-13.
History: May 26, 2009; March 26, 2013.

335-5-1-.06 Fees. The Department may assess fees to implement the provisions of the Act.

(a) A Processing and Review Fee shall be required to cover the cost of processing the covenant application and for reviewing the draft and final covenants. For sites utilizing both institutional controls and engineering controls, the processing and review fees shall be the greater of the applicable fees.

(b) A Registry Recording Fee shall be required to cover cost of establishing and maintaining the ADEM Registry of Environmental Covenants, for entering the site in this Registry, and for performing routine inspections at the site for a period of thirty (30) years to determine compliance with the covenant restrictions. For sites with more than one classification of institutional or engineering control, the Registry Recording Fee shall be the greater of the applicable fees.

(c) An owner or operator or other responsible person desiring to enter an environmental covenant shall submit a draft environmental covenant and all required fees.

(d) Fees required pursuant to this section are included in 335-1-6-.04, Schedule J.

(e) Exemptions. The following sites are exempt from paying fees in 335-1-6-.04, Fee Schedule J and in 335-5-1-.06, as specified below. These sites will be entered in the ADEM Registry of Environmental Covenants.

(1.) A site that is enrolled in the ADEM Voluntary Cleanup Program pursuant to 335-15 is exempt from paying processing and review fees in Fee Schedule J.

(2.) A site regulated under the programs listed in 335-5-1-.02(2) that has a provision for a post-closure permit which is renewable by payment of a permit fee and a provision for routine inspection by the Department or other environmental regulatory agency is exempt from paying all fees in Fee Schedule J.

(3.) A site regulated under the programs listed in 335-5-1-.02(2) that has a provision for cost reimbursement to the Department as contained in a cooperative agreement, a memorandum of agreement or an administrative order is exempt from paying the Processing and Review Fees in Fee Schedule J, to the extent such costs are reimbursable under these agreements.

(f) An owner or operator or other responsible person desiring to enter an environmental covenant for an environmental response project containing multiple individually deeded parcels off-site of the property or site which are subject to the environmental response project plan may submit an alternative fee schedule to the Department as part of its formal submittal of the environmental covenant in lieu of fees required in 335-1-6-.04, Fee Schedule J.

(1.) If submitting an alternative fee schedule, the owner or operator or other responsible person shall be required to pay the applicable processing and review fees found in 335-1-6-.04, Fee Schedule J for each individually worded covenant for off-site property that is different from land use controls or restrictions found in other covenants utilized for other individually deeded parcels off-site of the property or site subject to the environmental response project plan.

(2.) If submitting an alternative fee schedule, the owner or operator or other responsible person shall propose how to reimburse the Department for the registry recording fee which covers its cost to inspect each individually deeded off-site parcel to determine compliance with the covenant. The method to reimburse the Department shall be included in an order or agreement executed between the owner or operator or other responsible person and the Department. The length of time in years over which inspections will be conducted by the Department shall be negotiable and included in the covenant.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §35-19-13.
History: May 26, 2009; March 26, 2013.

335-5-1-.07 Process for Entering a Covenant.

(1) The owner or operator, the other responsible person or the person conducting an environmental response project may use land use control in lieu of remediating the property to a level supporting unrestricted use. The ADEM organizational unit under which the response action is being conducted shall approve the environmental response projectplan which proposes a land use control.

(2) For properties not remediated to a level supporting unrestricted use, an environmental covenant is required in accordance with 335-5-1-.02. To enter an environmental covenant, the owner or operator, the other responsible person or the person conducting an environmental response project shall submit the following to the ADEM organizational unit under which the response action is being conducted:

(a) A draft of the proposed environmental covenant.

(b) The applicable fees in Fee Schedule J of 335-1-6 and 335-5-1-.06.

(c) All pertinent information required in 335-5-2-.01(1).

(3) ADEM shall review and approve the draft covenant or request modifications. If requesting modifications to the draft covenant, ADEM shall provide the applicant with its reasons for requesting change. Upon submittal by the applicant of acceptable modifications, ADEM shall approve the draft covenant.

(4) Following ADEM review and approval of the draft covenant, the applicant shall submit two copies of the final covenant which complies with 335-5-2 for signature by the Director. Upon execution by the Director, both copies shall be returned to the applicant.

(5) Upon receiving the executed copies of the covenant from ADEM, the applicant shall have the covenant recorded in the land records of the county where the site is located, in compliance with 335-5-3-.02.

(6) One copy of the recorded covenant shall be submitted to ADEM in compliance with 335-5-1-.05(3) for entry into the ADEM Registry of Environmental Covenants.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-3; 35-19-13.
History: May 26, 2009; March 26, 2013.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

CHAPTER 335-5-2
ENVIRONMENTAL COVENANTS

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335-5-2-.01 Covenant Contents.

(1) An environmental covenant is not effective unless it includes all of the following information:

(a) A statement that the instrument is an environmental covenant executed pursuant to the Act.

(b) A legally sufficient description of the real property subject to the covenant.

(c) A description of the activity and use limitations on the real property.

(d) Identification of every holder.

(e) The signatures of the Director, every holder, and unless waived by the Department in writing, every owner of the fee simple of the real property subject to the covenant.

(f) The name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(2) The covenant may also contain any other information, restrictions, and requirements, including but not limited to any of the following:

(a) Requirements for notice following transfer of a specified interest in the property subject to the covenant.

(b) Requirements for notice concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant.

(c) Requirements for periodic reports of compliance with the covenant.

(d) Rights of access to the property which are granted in connection with implementation or enforcement of the covenant.

(e) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination.

(f) Limitations on amendment or termination of the covenant in addition to those provided in 335-5-4-.02.

(g) Rights of the holder in addition to the holder's right to enforce the covenant pursuant to 335-5-5-.01.

(h) The name of the person who shall submit the environmental covenant to ADEM for listing in the registry required in 335-5-1-.05.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-4; 35-19-13.
History: May 26, 2009.

335-5-2-.02 Covenant Rules.

(1) An environmental covenant that complies with the Act and 335-5 runs with the land.

(2) An environmental covenant that is otherwise effective is valid and enforceable even if one or more of the following conditions apply:

(a) It is not appurtenant to an interest in real property.

(b) It can be or has been assigned to a person other than the original holder.

(c) It is not of a character that has been recognized traditionally at common law.

(d) It imposes a negative burden.

(e) It imposes an affirmative obligation on a person having an interest in the real property or on the holder.

(f) The benefit or burden does not touch or concern real property.

(g) There is no privity of estate or contract.

(h) The holder dies, ceases to exist, resigns, or is replaced.

(i) The owner of an interest subject to the environmental covenant and the holder are the same person.

(3) An environmental covenant or an instrument that created restrictions or obligations with respect to real property and which was recorded before the effective date of 335-5 is not invalidated because it may not comply with all provisions of the Act or 335-5, or because it was identified as an easement, servitude, deed restriction, or other interest. 335-5 does not apply in any other respect to such an instrument.

(4) Neither the Act nor 335-5 invalidates or renders unenforceable any interest, whether designated as an environmental covenant or other interest, which is otherwise enforceable under the laws of this State.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-5; 35-19-13.
History: May 26, 2009.

335-5-2-.03 Relationship to Other Land Use Law. Neither the Act nor 335-5 authorizes use of real property which is otherwise prohibited by zoning, by other law which regulates the use of real property, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict a use of real property which is authorized by zoning or by law other than the Act.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-6; 35-19-13.
History: May 26, 2009.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

CHAPTER 335-5-3
NOTICE AND RECORDATION

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335-5-3-.01 Notices of Covenants.

(1) A copy of the environmental covenant shall be provided by the owner or operator or other responsible person and in the manner required by the Department to each of the following:

(a) Each person who signed the covenant.

(b) Each person holding a recorded interest in the real property subject to the covenant.

(c) Each person in possession of the real property subject to the covenant.

(d) Each municipality or other unit of local government in which the real property subject to the covenant is located, and

(e) Any persons that are due notice under the relevant regulatory program pursuant to which the environmental covenant is being granted.

(2) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under 335-5-3-.01(1).

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-7; 35-19-13.
History: May 26, 2009.

335-5-3-.02 Recording of Covenants.

(1) An environmental covenant and any amendment or termination of the covenant must be recorded by the owner or operator or other responsible person in every county where any portion of the real property subject to the covenant is located. The environmental covenant shall be indexed to the grantor's property in the land records. For purposes of indexing, a holder shall be treated as a grantee.

(2) Except as otherwise provided in 335-5-4-.01(3), an environmental covenant is subject to the laws of the State governing recording and priority of interests in real property.

(3) Content of Recording Instrument. In lieu of recording the entire covenant, a notice may be recorded which must contain all of the following:

(a) A legally sufficient description and any available street address of the real property subject to the covenant.

(b) The names and addresses of the owner of the fee simple interest in the real property, the Department, and the holder if other than the Department.

(c) A statement that the covenant, amendment, or termination is available in a registry at the Department.

(d) A statement that the notice is notification of an environmental covenant executed pursuant to this Act.

(4) The requirements of 335-5-3-.02(3) are satisfied with a statement, executed with the same formalities as a deed in the State of Alabama, in substantially the following form:

(a) This notice is filed in the land records of the Probate Office of _____ County, Alabama, pursuant to Section 12 of the Alabama Uniform Environmental Covenants Act.

(b) This notice and the covenant, amendment, or termination to which it refers may impose significant obligations with respect to the property described below.

(c) A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property] [not available].

(d) The name and address of the owner of the fee simple interest in the real property on the date of this notice is [insert name of current owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the property is located].

(e) The environmental covenant, amendment, or termination was signed by the Director of the Alabama Department of Environmental Management.

(f) The environmental covenant, amendment, or termination was filed in the registry on [insert date of filing].

(g) The full text of the covenant, amendment, or termination and any other information required by the Department is on file and available for inspection and copying in the registry maintained for that purpose by the Alabama Department of Environmental Management.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§ 35-19-8; 35-19-12; 35-19-13.
History: May 26, 2009; March 26, 2013

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

CHAPTER 335-5-4
DURATION AND AMENDMENT

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335-5-4-.01 Duration of Covenants.

(1) An environmental covenant is perpetual unless any of the following conditions apply:

(a) Its term is limited to a specific duration or terminated by the occurrence of a specific event.

(b) It is terminated or modified pursuant to 335-5-4-.01(2).

(c) It is terminated or modified by consent pursuant to 335-5-4-.02.

(d) It is terminated by foreclosure of an interest that has priority over the environmental covenant.

(e) It is terminated or modified in an eminent domain proceeding, but only if all of the following requirements are satisfied:

1. The Department is a party to the proceeding.

2. All persons identified in 335-5-4-.02(1) and (2) are given notice of the pendency of the proceeding.

3. The court determines, after hearing, that the termination or modification will not adversely affect human health, public welfare, or the environment.

(2) If the Department determines that the intended benefits of the covenant can no longer be realized, or are no longer protective of human health and the environment, it shall give notice of at least thirty (30) days to all persons identified in 335-5-4-.02(1) and (2), of its intention to petition a court, under the doctrine of changed circumstances, for termination of the covenant or reduction of its burden on the real property subject to the covenant. The Department's determination or its failure to make a determination upon request is subject to review pursuant to the Alabama Administrative Procedures Act, Code of Alabama 1975, §§41-22-1 to 41-22-27 (AAPA). After the applicable

provisions of AAPA have been satisfied, the Department may petition a court to terminate or reduce the covenant.

(3) Except as otherwise provided in 335-5-4-.01(1) and (2), an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or by application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(4) An environmental covenant may not be extinguished, limited, or impaired by the application of any law relating to marketable title or dormant mineral interests.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-9; 35-19-13.
History: May 26, 2009.

335-5-4-.02 Amendment of Covenants.

(1) Unless otherwise specified in the environmental covenant, no environmental covenant may be amended or terminated by consent unless the amendment or termination is signed by all of the following:

(a) The Department. Where the Department waives this requirement, the current owner of the fee simple of the real property subject to the covenant shall sign.

(b) Each person who originally signed the covenant, unless a person, in a signed record, waives the right to consent or a court finds that a person no longer exists or cannot be located or identified with the exercise of reasonable diligence.

(c) Except as otherwise provided in 335-5-4-.02(4)(b), the holder.

(2) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or waives, in a signed record, the right to consent to amendments.

(3) Except for an assignment undertaken pursuant to a governmental reorganization, an assignment of an environmental covenant to a new holder is an amendment.

(4) Except as otherwise provided in an environmental covenant:

(a) A holder may not assign its interest without consent of the other parties.

(b) A holder may be removed and replaced by agreement of the parties specified in 335-5-4-.02(1)(a) and (b).

(c) A court of competent jurisdiction may fill a vacancy in the position of holder.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-10; 35-19-13.
History: May 26, 2009.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

CHAPTER 335-5-5
ENFORCEMENT

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335-5-5-.01 Enforcement of Covenants.

(1) Pursuant to Code of Alabama 1975, §22-22A-5, ADEM may pursue enforcement action for violation of an environmental covenant established under 335-5.

(2) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by any of the following parties or entities:

(a) A party to the covenant.

(b) The Department.

(c) Any person to whom the covenant expressly grants power to enforce.

(d) A person whose collateral, liability, or interest in the real property may be affected by the alleged violation of the covenant.

(e) A municipality or other unit of local government in which the real property subject to the covenant is located.

(3) A person is not responsible for or subject to liability for environmental remediation solely because that person has the right to enforce an environmental covenant.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-11; 35-19-13.
History: May 26, 2009.

335-5-5-.02 Duties of the Department.

(1) The Department is designated as the administrating agency for the Act and 335-5 and is authorized to administer and enforce the Act and these regulations through the authorities granted to it by the Environmental Management Act, Code of Alabama 1975, §§22-22A-1, et seq.

(2) The designation provided in subsection (1) does not imply that the Department shall assume any administration or enforcement functions other than those directly related to the environmental covenant.

(3) With respect to an environmental response project, the Act does not limit the regulatory authority of the Department under other law.

Authors: James L. Bryant; Lawrence A. Norris.
Statutory Authority: Code of Alabama 1975, §§35-19-11; 35-19-13.
History: May 26, 2009.

Appendix B
Model Environmental Covenant

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

June 28, 2018

Budgetary Cost Estimate for CMI SMA 4

Subtasks	Description	Calendar Year Total
1	Apply for UIC Permit	$9,290
2	LUCP	$24,000
3	Environmental Covenant	$32,930
5	Horizontal Well Installation	$343,500
5	Soil Sampling and Observation Well Installation	$33,700
6	Pilot Test ISCO Injection	$54,200
7	Full Scale ISCO Injection	$427,600
8	Groundwater Removal and Sampling	$795,650
	Subtotal Closure Cost Estimate for CMI for SMA 4	**$1,720,870**
	Engineering Expenses (10% of closure costs)	$172,087.0
	Subtotal Engineering Expenses and Closure Cost Estimate for SMA 4	**$1,892,957.0**
	Contingency Allowance (Contengency Allowances are typically 20% engineering and closure costs)	$378,591.40
	Total Closure Cost Estimate for SMA 4	**$2,271,548.40**

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

June 28, 2018

Budgetary Cost Estimate for CMI SMA 4

1) Applying for UIC Permit (Section 3.3.1)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare UIC Permit Application	Ea	1	$5,000	$ 5,000
ADEM UIC Permit Fees	Ea	1	$4,290	$ 4,290
			SUBTOTAL	**$ 9,290**

2) LUCP
(Section 3.1 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare LUCP	Ea	1	$20,000	$ 20,000
Revise LUCP to address comments	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 24,000**

3) Environmental Covenant
(Section 3.2 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Survey	Ea	1	$6,800	$ 6,800
Prepare Environmental Covenant	Ea	1	$6,000	$ 6,000
ADEM Processing and Review Fees	Ea	1	$6,425	$ 6,425
ADEM Reistry and Recording Fees	Ea	1	$13,705	$ 13,705
			SUBTOTAL	**$ 32,930**

4) Horizontal Well Installation
(Section 3.3.3.1 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Horizontal well installation	foot	1250	$250	$ 312,500
Geologist Oversight	days	20	$1,200	$ 24,000
Expendable Sampling Supplies	days	20	$100	$ 2,000
Project Management/Reporting	Ea	1	$5,000	$ 5,000
			SUBTOTAL	**$ 343,500**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) This is the cost for installation of all horizontal wells not just the pilot test.
3) Assumes 10 horizontal wells

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

June 28, 2018

Budgetary Cost Estimate for CMI SMA 4

5) Soil Sampling and Observation Well Installation
(Section 3.3.3.2 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Mob/Demob	each	2	$1,000	$ 2,000
Hollow-Stem Auguer Rig	day	6	$2,000	$ 12,000
Monitoring Well Installation	ft	90	$50	$ 4,500
Soil Sample Analytical	each	40	$100	$ 4,000
Geologist Oversight	days	6	$1,200	$ 7,200
Project Management/Reporting	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 33,700**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) It is assumed that cased wells will not be installed.
3) This assumes pre- and post-pilot test soil sampling.

6) Pilot Test ISCO Injection
(Section 3.3.3.3 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	2	$21,000	$ 42,000
Field Oversight of Injection	day	2	$1,200	$ 2,400
Observation of monitoring wells after injection	hr	20	$90	$ 1,800
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 54,200**

7) Full Scale ISCO Injection
(Section 3.3.3.3. if the pilot test indicates appropraite for entire soil source area.)

For budgeting purposes the cost for a full scale injection of ISCO is provided. If it is determined that a steam pilot test or full scale implementation of steam injection is recommended, then a revise cost estimate will be prepared. In addition, if it is determined that a pilot test for steam injection should be tried after the results are received from the ISCO injection, then the cost estimate will be revised. We believe this cost is sufficient to cover the cost of full scale injection of ISCO or steam.

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	4	$95,000	$ 380,000
Field Oversight of Injection	day	30	$1,200	$ 36,000
Observation of monitoring wells after injection	hr	40	$90	$ 3,600
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 427,600**

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

June 28, 2018

Budgetary Cost Estimate for CMI SMA 4

8) Groundwater Removal and Sampling
(Section 3.4 and 3.5 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Groundwater Removal (pump and filter maintenance for 30 years	year	30	$5,000	$ 150,000
Quarterly Sampling	year	1	$20,800	$ 20,800
Analytical Costs for Quarterly sampling	year	1	$8,500	$ 8,500
Semi-Annual sampling	year	29	$10,400	$ 301,600
Analytical Costs for Semi-Annual sampling	year	29	$4,750	$ 137,750
Annual Report	year	30	$5,900	$ 177,000
			SUBTOTAL	**$ 795,650**

ENVIRONMENTAL COVENANT

The NAME (hereinafter "Grantor") grants an Environmental Covenant (hereinafter "Covenant") this ___ day of _____, 201X, to the following entities pursuant to The Alabama Uniform Environmental Covenants Act, Ala. Code §§ 35-19-1 to 35-19-14 (2014 Cum. Supp.) (hereinafter "the Act" or "Act"), and the regulations promulgated thereunder: the Alabama Department of Environmental Management and the identified holders or other applicable parties: HOLDER(S) NAME(S) IF APPLICABLE.

WHEREAS, the Grantor was the owner of certain real property located in the City of XXXXXXX, Alabama, identified as the former SITE NAME situated at PHYSICAL ADDRESS, in COUNTY NAME County, Alabama, (hereinafter "the Property"). The property which was conveyed to Grantor by deed dated DEED DATE, and recorded in the Office of the Judge of Probate for COUNTY NAME County, Alabama, in Deed Book XXX at Page XX;

WHEREAS, the Property is more particularly described as the following:

COMPLETE LEGAL SURVEY DEED DESCRIPTION OF AFFECTED AREA;

WHEREAS, this instrument is an Environmental Covenant developed and executed pursuant to the Act and the regulations promulgated thereunder;

WHEREAS, a release/disposal of hazardous substances, including, but not limited to, IDENTIFIED CONTAMINANT(S) AND MEDIA, occurred on the Property;

WHEREAS, the selected "remedial action" for the Property, which has now been implemented, providing in part, for the following actions:

DESCRIPTION OF REMEDIAL ACTION

WHEREAS, pursuant to the approved Remedial Action Plan, the Grantor and assignees agreed to perform operation and maintenance activities at the Property to address the effects of the release/disposal, which includes controlling exposure to the hazardous wastes, hazardous constituents, hazardous substances, pollutants, or contaminants;

WHEREAS, the Remedial Action Plan requires institutional controls to be implemented to address the effects of the release/disposal and to protect the remedy so that exposure to the hazardous waste, hazardous constituents, hazardous substances, pollutants, or contaminants is controlled by restricting the use of the Property and the activities on the Property;

WHEREAS, hazardous wastes, hazardous constituents, hazardous substances, pollutants, or other contaminants remain on the Property, specifically contamination has

occurred in (LIST ENVIRONMENTAL MEDIA, SUCH AS GROUNDWATER, SURFACE SOILS, SUBSURFACE SOILS, SURFACE WATER, ETC.) and the following contaminant(s) remain at the site: (LIST ALL CONTAMINANTS REMAINING IN GROUNDWATER, SOIL, SEDIMENT, AND SURFACE WATERS);

WHEREAS, the purpose of this Covenant is to ensure protection of human health and the environment by placing restrictions on the Property to reduce the risk to human health to below the target risk levels for those hazardous wastes, hazardous constituents, hazardous substances, pollutants, or contaminants that remain on the Property;

WHEREAS, further information concerning the release/disposal and the activities to correct the effects of the release/disposal may be obtained by contacting Chief, Land Division, Alabama Department of Environmental Management ("ADEM"), or his or her designated representative, at 1400 Coliseum Boulevard, Montgomery, Alabama, 36110; and

WHEREAS, the Administrative Record concerning the Property is located at:

XXXXXXXXXXXXXX
XXXXXXXXXXXXXX
XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

and

Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, Alabama 36110

NOW, THEREFORE, Grantor hereby grants this Environmental Covenant to ADEM and the identified Holders, and declares that the Property shall hereinafter be bound by, held, sold, used, improved, occupied, leased, hypothecated, encumbered, and/or conveyed subject to the following requirements set forth in paragraphs 1 through 3 below:

1. **DEFINITIONS**

Owner. "Owner" means the GRANTOR, its successors and assigns in interest.

2. **USE RESTRICTIONS**

The following activity(ies) shall not take place on the identified Property without first obtaining written approval from ADEM through modification of this covenant:

EXAMPLE: Property is restricted to Industrial Use Only.

Use of groundwater for potable purposes.

3. **GENERAL PROVISIONS**

A. **Restrictions to Run with the Land.** This Environmental Covenant runs with the land pursuant to Ala. Code §35-19-5 (2014 Cum Supp.); is perpetual, unless modified or terminated pursuant to the terms of this Covenant pursuant to Ala. Code §35-19-9 (Cum Supp. 2014); is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof; inures to the benefit of and passes with each and every portion of the Property; and binds the Owner, the Holders, all persons using the land, all persons, their heirs, successors and assigns having any right, title or interest in the Property, or any part thereof who have subordinated those interests to this Environmental Covenant, and all persons, their heirs, successors and assigns who obtain any right, title or interest in the Property, or any part thereof after the recordation of this Environmental Covenant.

B. **Notices Required.** In accordance with Ala. Code §35-19-4(b) (2014 Cum Supp.), the Owner shall send written notification, pursuant to Section J, below, following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the Property. Said notification shall be sent within fifteen (15) days of each event listed in this Section.

C. **Registry/Recordation of Environmental Covenant; Amendment; or Termination.** Pursuant to Ala. Code §35-19-12(b) (2014 Cum Supp.), this Environmental Covenant and any amendment or termination thereof, shall be contained in ADEM's registry for environmental covenants. After an environmental covenant, amendment, or termination is filed in the registry, a notice of the covenant, amendment, or termination may be recorded in the land records in lieu of recording the entire covenant in compliance with §35-19-12(b). Grantor shall be responsible for filing the Environmental Covenant within thirty (30) days of the final required signature upon this Environmental Covenant.

D. **Compliance Certification.** In accordance with Ala. Code §35-19-4(b) (2014 Cum Supp.), the Owner shall submit an annual report to the Director of the EPA Region 4 Superfund Division, and to the Chief of the ADEM Land Division, on the anniversary of the date this Covenant was signed by the Grantor. Said report shall detail the Owner's compliance, and any lack of compliance with the terms of the Covenant.

E. **Right of Access.** The Owner hereby grants ADEM; ADEM's agents, contractors and employees; the Owner's agents, contractors and employees; and any Holders the right of access to the Property for implementation or enforcement of this Environmental Covenant.

F. **ADEM Reservations.** Notwithstanding any other provision of this Environmental Covenant, ADEM retains all of its access authorities and rights, as well as all of its rights to require additional land/water use restrictions, including enforcement authorities related thereto.

G. **Representations and Warranties.** Grantor hereby represents and warrants to the other signatories hereto:

i) That the Grantor has the power and authority to enter into this Environmental Covenant, to grant the rights and interests herein provided and to carry out all obligations hereunder;

ii) That the Grantor is the sole owner of the Property and holds fee simple title which is free, clear and unencumbered;

iii) That _____has agreed to subordinate its interests in the Property to the Environmental Covenant, pursuant to Ala. Code §35-19-3(d) (2014 Cum. Supp.) in accordance with the subordination agreement *[attached hereto as Exhibit ____ or recorded at _____]*;

iv) That the Grantor has identified all other parties that hold any interest (e.g., encumbrance) in the Property and notified such parties of the Grantor's intention to enter into this Environmental Covenant;

v) That this Environmental Covenant will not materially violate, contravene, or constitute a material default under, any other agreement, document, or instrument to which Grantor is a party, by which Grantor may be bound or affected;

vi) That this Environmental Covenant will not materially violate or contravene any zoning law or other law regulating use of the Property;

vii) That this Environmental Covenant does not authorize a use of the Property which is otherwise prohibited by a recorded instrument that has priority over the Environmental Covenant.

H. **Compliance Enforcement.** In accordance with Ala. Code §35-19-11(b) (2014 Cum Supp.), the terms of the Environmental Covenant may be enforced by the parties to this Environmental Covenant; any person to whom this Covenant expressly grants power to enforce; any person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the Covenant; or a municipality or other unit of local

government in which the real property subject to the Covenant is located, in accordance with applicable law. The parties hereto expressly agree that ADEM has the power to enforce this Environmental Covenant. Failure to timely enforce compliance with this Environmental Covenant or the use or activity limitations contained herein by any person shall not bar subsequent enforcement by such person and shall not be deemed a waiver of the person's right to take action to enforce any non-compliance. Nothing in this Environmental Covenant shall restrict ADEM, or the Grantor, from exercising any authority under applicable law.

I. **Modifications/Termination.** Any modifications or terminations to this Environmental Covenant must be made in accordance with Ala. Code §§35-19-9 and 35-19-10 (2014 Cum Supp.).

J. **Notices.** Any document or communication required to be sent pursuant to the terms of this Environmental Covenant shall be sent to the following persons:

ADEM

Chief, Land Division
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110

Grantor

Responsible Party Name
Position
Company
Mailing Address,
City, Alabama ZIP

Holder(s) or Other Applicable Party(ies)

Name
Position
Company Name
Mailing Address
City, Alabama

K. **No Property Interest Created in ADEM.** This Environmental Covenant does not in any way create any interest by ADEM in the Property that is subject to the Environmental Covenant. Furthermore, the act of approving this Environmental Covenant does not in any way create any interest by ADEM in the Property in accordance with Ala. Code §35-19-3(b) (2014 Cum. Supp.).

L. **Severability.** If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

M. **Governing Law.** This Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Alabama.

N. **Recordation.** In accordance with Ala. Code §35-19-8(a) (2014 Cum. Supp.), Grantor shall record this Environmental Covenant and any amendment or termination of the Environmental Covenant in every county in which any portion of the real property subject to this Environmental Covenant is located. Grantor agrees to record this Environmental Covenant within fifteen (15) days after the date of the final required signature upon this Environmental Covenant.

O. **Effective Date.** The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded, in accordance with Ala. Code §35-19-8(a) (2014 Cum. Supp).

P. **Distribution of Environmental Covenant.** Within fifteen (15) days of filing this Environmental Covenant, the Grantor shall distribute a recorded and date stamped copy of the recorded Environmental Covenant in accordance with Ala. Code §35-19-7(a) (2014 Cum Supp.). However, the validity of this Environmental Covenant will not be affected by the failure to provide a copy of the Covenant as provided herein.

Q. **ADEM References.** All references to ADEM shall include successor agencies, departments, divisions, or other successor entities.

R. **Grantor References.** All references to the Grantor shall include successor agencies, departments, divisions, or other successor entities.

S. **Other Applicable Party(ies).** All references to Other Applicable Party(ies) shall include successor agencies, departments, divisions, or other successor entities.

Property owner has caused this Environmental Covenant to be executed pursuant to The Alabama Uniform Environmental Covenants Act, on this ___ day of _____, 201X.

IN TESTIMONY WHEREOF, the parties have hereunto set their hands this the day and year first above written.

NAME OF GRANTOR

This Environmental Covenant is hereby approved by the NAME OF GRANTOR, Alabama this ___ day of _____, 201X.

By: _____
Name & Title

Grantor

STATE OF _____)
)
COUNTY OF _____)

I, _____, a _____ in and for said County in said State or Commonwealth, hereby certify that _____, whose name as _____ [title] of _____ [Grantor] is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, (s)he, as such officer and with full authority executed the same voluntarily for and as the act of said corporation.

Given under my hand this the ____ day of _____, 201X

Notary Public: _____

My Commission Expires: _____

OTHER APPLICABLE PARTY(IES)

This Environmental Covenant is hereby approved by any OTHER APPLICABLE PARTY(IES)this ___ day of _____, 201X.

By: _____
Name & Title

Holder

STATE OF _____)
)
COUNTY OF _____)

I, _____, a _____ in and for said County in said State or Commonwealth, hereby certify that _____, whose name as _____ [title] of _____ [Party] is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, (s)he, as such officer and with full authority executed the same voluntarily for and as the act of said corporation.

Given under my hand this the ____ day of _____, 201X

Notary Public: _____

My Commission Expires: _____

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

This Environmental Covenant is hereby approved by the State of Alabama this ___ day of _____, 201X.

By: _____

Phillip D. Davis
Chief, Land Division
Alabama Department of Environmental Management

State of Alabama}

Montgomery, County}

I, the undersigned Notary Public in and for said County and State, hereby certify that Phillip D. Davis, whose name as Chief, Land Division, Alabama Department of Environmental Management is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he approved the same voluntarily on the day the same bears date and with full authority to do so.

Given under my hand and official seal this ____ day of _____, 201X

_____
Notary Public

My Commission Expires: _____

STATE OF ALABAMA

COUNTY OF XXXXXXXXXXX

I, _____, Clerk of the XXXX County Court, do certify that the foregoing Environmental Covenant *[and, if applicable, attached Subordination Agreement]* was lodged in my office for record, and that I have recorded it, this ___ day of _____, 201X in the Deed Recordation Book ### on Page ###.

_____

County Clerk

This instrument prepared by:

GRANTOR
Mailing Address
City, Alabama ZIP

SUBORDINATION AGREEMENT

[Name of Interest Holder] (hereinafter "Subordinator of Interest"), of [address], [county], [State], is the holder of a [type of interest, lien, mortgage, easement, etc] granted by _____ to _____, dated _____ and recorded with the _____ County Clerks Office in [Deed, Lis Pendens, etc.] Book _____, Page _____.

[Name of Interest Holder] hereby assents to the grant of this Environmental Covenant granted by (Property Owner) to (Grantees i.e. Holders) and recorded with the _____ County Clerk in Deed Book _____, Page_____[to be filled in upon recordation simultaneously with filing of Environmental Covenant] [Or to the grant of the attached Environmental Covenant granted by (Grantor) to (Grantees, i.e. Holders)] and agrees that the [type of interest] shall be subject to said Environmental Covenant and to the rights, covenants, restrictions and easements created by and under said Environmental Covenant insofar as the interests created under the [type of interest] affect the Property or Impacted Area identified in the Environmental Covenant and as if for all purposes said Environmental Covenant had been executed, delivered and recorded prior to the execution, delivery and recordation and/or registration of the [type of interest].

The execution of this subordination agreement by [Name of Interest Holder] shall not subject such person to liability for environmental remediation pursuant to (Applicable Alabama Legal Authorities), provided that such person shall not otherwise be liable for environmental remediation under another provision of law.

The execution of this subordination agreement by [Name of Interest Holder] shall not be presumed to impose any affirmative obligation on the person with respect to said Environmental Covenant.

[Name of Interest Holder] act of subordinating his/her/its prior interest in the Property to said Environmental Covenant shall not affect the priority of that interest in relation to any other interests that exist in relation to the property.

[Name of Interest Holder] further assents specifically to the subsequent recordation and/or registration of a modification to the Environmental Covenant, in accordance with the terms as referenced in the Environmental Covenant and agrees that [type of interest] shall be subject to the Modified Environmental Covenant and to the rights, covenants, restrictions, and easements created thereby and there under insofar as the interests created under the [type of interest] affect the Property or Impacted Areas as so modified and as if for all purposes said Modified Environmental

Covenant had been executed, delivered and recorded prior to the execution, delivery and recordation of the [type of interest].

[Name of Interest Holder] has caused this instrument to be executed this ___ day of _____, 201X.

_____ _____
Name of Interest Holder Date

STATE OF _____)
)
COUNTY OF _____)

I, _____, a _____ in and for said County in said State or Commonwealth, hereby certify that _____, whose name as _____ [title] of _____ [Party] is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, (s)he, as such officer and with full authority executed the same voluntarily for and as the act of said corporation.

Given under my hand this the ____ day of _____, 201X

Notary Public: _____

My Commission Expires: _____

[To be added if not attached to the Covenant]

STATE OF ALABAMA

COUNTY OF _____

I, _____, Clerk of the _____ County Court, do certify that the foregoing Subordination Agreement was lodged in my office for record, and that I have recorded it, and the certificate thereon, this ___ day of _____, 201X.

_____
County Clerk

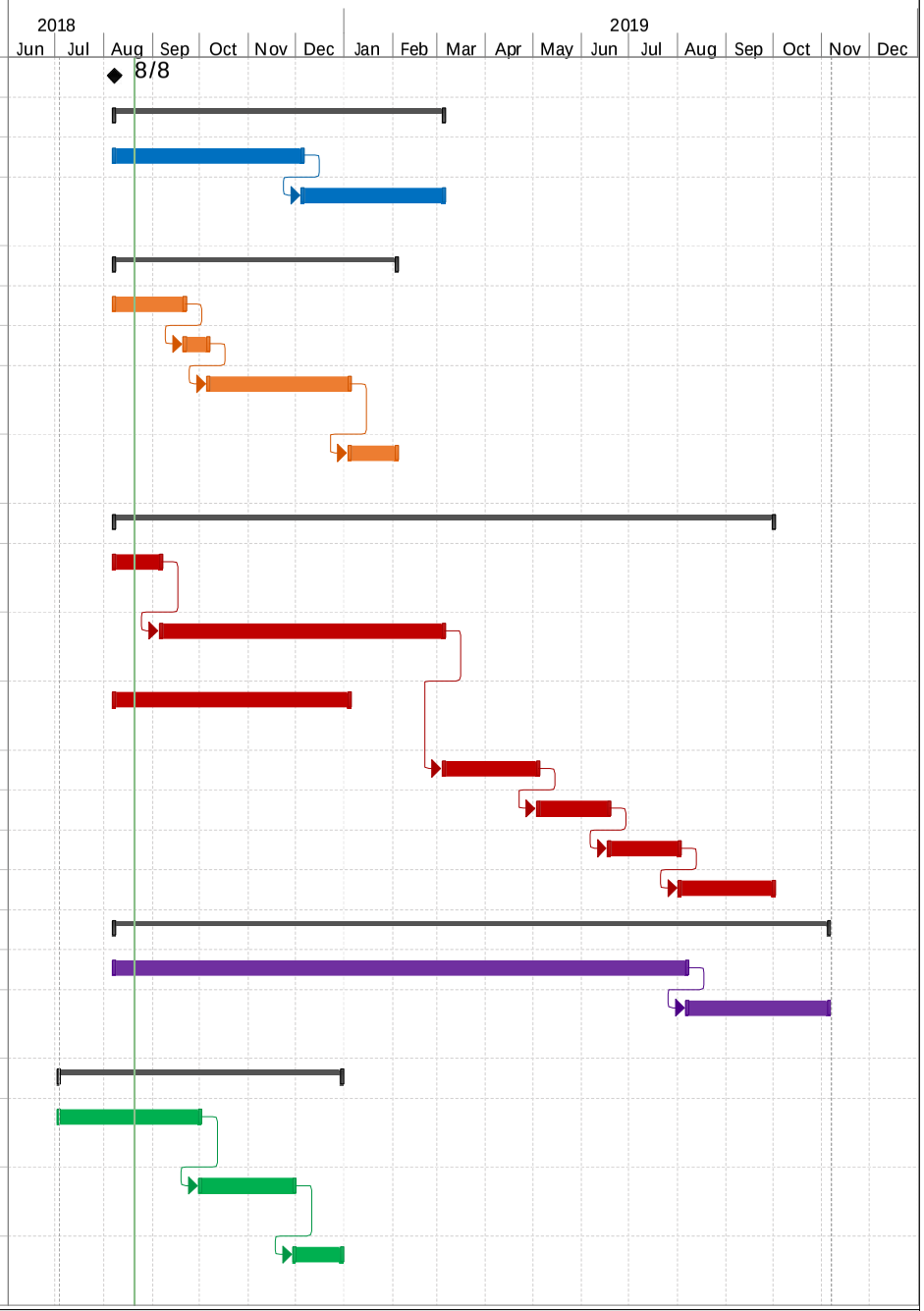
Appendix C
Cost Estimate

Appendix D
Gantt Chart

CMI SMA 4 First Year Timeline

ERP Compliant Coke, LLC

ID	Task Name	Start	Finish	Duration
1	Approval of CMI Work Plan	8/8/2018	8/8/2018	0 days
2	Task 1: LUCP	8/8/2018	3/6/2019	210 days
3	LUCP Prepared and Submitted	8/8/2018	12/6/2018	120 days
4	Review/Revision and Final Approval of LUCP	12/6/2018	3/6/2019	90 days
5	Task 2: Environmental Covenant	8/8/2018	2/4/2019	180 days
6	Survey Conducted	8/8/2018	9/22/2018	45 days
7	Draft EC Submitted	9/22/2018	10/7/2018	15 days
8	Review/Revision and final submittal of EC	10/7/2018	1/5/2019	90 days
9	Filing EC and Submittal of Filing Documentation	1/5/2019	2/4/2019	30 days
10	Task 3: ISCO Pilot Test	8/8/2018	10/2/2019	420 days
11	Class V Injection Permit Prepared and Submitted	8/8/2018	9/7/2018	30 days
12	Class V Injection Permit Application Reviewed and Approved	9/7/2018	3/6/2019	180 days
13	Horizontal Well Installation and Soil Sampling	8/8/2018	1/5/2019	150 days
14	ISCO Injection 1	3/6/2019	5/5/2019	60 days
15	ISCO Injection 2	5/5/2019	6/19/2019	45 days
16	Post ISCO Injection Monitoring	6/19/2019	8/3/2019	45 days
17	ISCO Pilot Test Report	8/3/2019	10/2/2019	60 days
18	Task 4: Remedy Monitoring	8/8/2018	11/6/2019	455 days
19	Quarterly Groundwater Monitoring	8/8/2018	8/8/2019	365 days
20	First Annual Remedy Effectiveness Report	8/8/2019	11/6/2019	90 days
21	Task 5: Financial Assurance	7/4/2018	12/31/2018	180 days
22	Review/Revise and Final Approval of Cost Estimate	7/4/2018	10/2/2018	90 days
23	Financial Assurance Mechanism Submitted	10/2/2018	12/1/2018	60 days
24	EPA Review, Comment and Approval of Financial Assurance Mechanism	12/1/2018	12/31/2018	30 days



Revised Cost Estimate

Rippstein, Terry W. <Terry.Rippstein@terracon.com>

Mon 9/16/2019 3:38 PM

To:Hardegree, Wesley <Hardegree.Wes@epa.gov>;Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc:Don Wiggins (dwiggins@erpcoke.com) <dwiggins@erpcoke.com>

2 attachments (15 KB)

ATT00001.txt; Cost form for SMA 4revised 9-16-19.pdf;

As we discussed last week, I have revised the attached cost estimate to include the groundwater treatment. Please let me know if you have any questions.

Thanks,
Terry

Terrell W. Rippstein, P.G.
Principal
Regional Manager

Terracon Consultants, Inc.
2147 Riverchase Office Road I Birmingham, AL 35244
P 205 443 5244 I F 205 443 5302 I M 205 515 0040
Terry.Rippstein@terracon.com I terracon.com

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

Subtasks	Description	Calendar Year Total
1	Apply for UIC Permit	$9,290
2	LUCP	$24,000
3	Environmental Covenant	$32,930
5	Horizontal Well Installation	$343,500
5	Soil Sampling and Observation Well Installation	$33,700
6	Pilot Test ISCO Injection	$54,200
7	Full Scale ISCO Injection	$427,600
8	Groundwater Removal and Sampling	$2,106,550
9	Annual Inspection and Documentation	$31,500
	Subtotal Closure Cost Estimate for CMI for SMA 4	**$3,063,270**
Engineering Expenses (10% of closure costs)		$306,327.0
	Subtotal Engineering Expenses and Closure Cost Estimate for SMA 4	**$3,369,597.0**
Contingency Allowance (Contengency Allowances are typically 20% engineering and closure costs)		$673,919.40
	Total Closure Cost Estimate for SMA 4	**$4,043,516.41**

ERP Compliant Coke, LLC
3500 35th Avenue North
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Terracon Project No. E1187063

Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

1) Applying for UIC Permit (Section 3.3.1)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare UIC Permit Application	Ea	1	$5,000	$ 5,000
ADEM UIC Permit Fees	Ea	1	$4,290	$ 4,290
			SUBTOTAL	**$ 9,290**

2) LUCP
(Section 3.1 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare LUCP	Ea	1	$20,000	$ 20,000
Revise LUCP to address comments	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 24,000**

3) Environmental Covenant
(Section 3.2 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Survey	Ea	1	$6,800	$ 6,800
Prepare Environmental Covenant	Ea	1	$6,000	$ 6,000
ADEM Processing and Review Fees	Ea	1	$6,425	$ 6,425
ADEM Reistry and Recording Fees	Ea	1	$13,705	$ 13,705
			SUBTOTAL	**$ 32,930**

4) Horizontal Well Installation
(Section 3.3.3.1 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Horizontal well installation	foot	1250	$250	$ 312,500
Geologist Oversight	days	20	$1,200	$ 24,000
Expendable Sampling Supplies	days	20	$100	$ 2,000
Project Management/Reporting	Ea	1	$5,000	$ 5,000
			SUBTOTAL	**$ 343,500**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) This is the cost for installation of all horizontal wells not just the pilot test.
3) Assumes 10 horizontal wells

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Birmingham, Alabama
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Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

5) Soil Sampling and Observation Well Installation
(Section 3.3.3.2 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Mob/Demob	each	2	$1,000	$ 2,000
Hollow-Stem Auguer Rig	day	6	$2,000	$ 12,000
Monitoring Well Installation	ft	90	$50	$ 4,500
Soil Sample Analytical	each	40	$100	$ 4,000
Geologist Oversight	days	6	$1,200	$ 7,200
Project Management/Reporting	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 33,700**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) It is assumed that cased wells will not be installed.
3) This assumes pre- and post-pilot test soil sampling.

6) Pilot Test ISCO Injection
(Section 3.3.3.3 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	2	$21,000	$ 42,000
Field Oversight of Injection	day	2	$1,200	$ 2,400
Observation of monitoring wells after injection	hr	20	$90	$ 1,800
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 54,200**

7) Full Scale ISCO Injection
(Section 3.3.3.3. if the pilot test indicates appropraite for entire soil source area.)

For budgeting purposes the cost for a full scale injection of ISCO is provided. If it is determined that a steam pilot test or full scale implementation of steam injection is recommended, then a revise cost estimate will be prepared. In addition, if it is determined that a pilot test for steam injection should be tried after the results are received from the ISCO injection, then the cost estimate will be revised. We believe this cost is sufficient to cover the cost of full scale injection of ISCO or steam.

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	4	$95,000	$ 380,000
Field Oversight of Injection	day	30	$1,200	$ 36,000
Observation of monitoring wells after injection	hr	40	$90	$ 3,600
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 427,600**

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Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

8) Groundwater Removal and Sampling
(Section 3.4 and 3.5 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Groundwater Removal (pump and filter O&M for 30 years including personnel)	year	30	$7,500	$ 225,000
*Treatment of Groundwater	year	30	$35,197	$ 1,055,900
Electricity for system	year	30	$6,000	$ 180,000
Quarterly Sampling	year	1	$20,800	$ 20,800
Analytical Costs for Quarterly sampling	year	1	$8,500	$ 8,500
Semi-Annual sampling	year	29	$10,400	$ 301,600
Analytical Costs for Semi-Annual sampling	year	29	$4,750	$ 137,750
Annual Report	year	30	$5,900	$ 177,000
			SUBTOTAL	**$ 2,106,550**

*For budgeting purposes: If the facility was no longer able to treat the groundwater in the light oil system an alternative method of treatment would be employed. We are goin gto assume treatment can be accomplished by treatment in the Jefferson County sanitary sewer.

9) Annual Inspection and Documentation

Task	Units	Number of Units	Unit Cost	Cost Estimate
Yearly Site Reconnaissance	Ea	30	$500	$ 15,000
Annual Report	Ea	30	$500	$ 15,000
Mileage, Misc.	Ea	30	$50	$ 1,500
			SUBTOTAL	**$ 31,500**

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

1) Applying for UIC Permit (Section 3.3.1)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare UIC Permit Application	Ea	1	$5,000	$ 5,000
ADEM UIC Permit Fees	Ea	1	$4,290	$ 4,290
			SUBTOTAL	**$ 9,290**

2) LUCP
(Section 3.1 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Prepare LUCP	Ea	1	$20,000	$ 20,000
Revise LUCP to address comments	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 24,000**

3) Environmental Covenant
(Section 3.2 of CMI Work Plan for SMA 5)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Survey	Ea	1	$6,800	$ 6,800
Prepare Environmental Covenant	Ea	1	$6,000	$ 6,000
ADEM Processing and Review Fees	Ea	1	$6,425	$ 6,425
ADEM Reistry and Recording Fees	Ea	1	$13,705	$ 13,705
			SUBTOTAL	**$ 32,930**

4) Horizontal Well Installation
(Section 3.3.3.1 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Horizontal well installation	foot	1250	$250	$ 312,500
Geologist Oversight	days	20	$1,200	$ 24,000
Expendable Sampling Supplies	days	20	$100	$ 2,000
Project Management/Reporting	Ea	1	$5,000	$ 5,000
			SUBTOTAL	**$ 343,500**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) This is the cost for installation of all horizontal wells not just the pilot test.
3) Assumes 10 horizontal wells

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
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Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

5) Soil Sampling and Observation Well Installation
(Section 3.3.3.2 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Mob/Demob	each	2	$1,000	$ 2,000
Hollow-Stem Auguer Rig	day	6	$2,000	$ 12,000
Monitoring Well Installation	ft	90	$50	$ 4,500
Soil Sample Analytical	each	40	$100	$ 4,000
Geologist Oversight	days	6	$1,200	$ 7,200
Project Management/Reporting	Ea	1	$4,000	$ 4,000
			SUBTOTAL	**$ 33,700**

Assumptions:
1) Level D or lower PPE attire needed for activities.
2) It is assumed that cased wells will not be installed.
3) This assumes pre- and post-pilot test soil sampling.

6) Pilot Test ISCO Injection
(Section 3.3.3.3 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	2	$21,000	$ 42,000
Field Oversight of Injection	day	2	$1,200	$ 2,400
Observation of monitoring wells after injection	hr	20	$90	$ 1,800
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 54,200**

7) Full Scale ISCO Injection
(Section 3.3.3.3. if the pilot test indicates appropraite for entire soil source area.)

For budgeting purposes the cost for a full scale injection of ISCO is provided. If it is determined that a steam pilot test or full scale implementation of steam injection is recommended, then a revise cost estimate will be prepared. In addition, if it is determined that a pilot test for steam injection should be tried after the results are received from the ISCO injection, then the cost estimate will be revised. We believe this cost is sufficient to cover the cost of full scale injection of ISCO or steam.

Task	Units	Number of Units	Unit Cost	Cost Estimate
ISCO Injection	Ea	4	$95,000	$ 380,000
Field Oversight of Injection	day	30	$1,200	$ 36,000
Observation of monitoring wells after injection	hr	40	$90	$ 3,600
Project Management/Reporting	Ea	1	$8,000	$ 8,000
			SUBTOTAL	**$ 427,600**

ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama
ALD 000 828 848
Terracon Project No. E1187063

Revised 9/16/2019

Budgetary Cost Estimate for CMI SMA 4

8) Groundwater Removal and Sampling
(Section 3.4 and 3.5 of CMI Work Plan for SMA 4)

Task	Units	Number of Units	Unit Cost	Cost Estimate
Groundwater Removal (pump and filter O&M for 30 years including personnel)	year	30	$7,500	$ 225,000
*Treatment of Groundwater	year	30	$35,197	$ 1,055,900
Electricity for system	year	30	$6,000	$ 180,000
Quarterly Sampling	year	1	$20,800	$ 20,800
Analytical Costs for Quarterly sampling	year	1	$8,500	$ 8,500
Semi-Annual sampling	year	29	$10,400	$ 301,600
Analytical Costs for Semi-Annual sampling	year	29	$4,750	$ 137,750
Annual Report	year	30	$5,900	$ 177,000
			SUBTOTAL	**$ 2,106,550**

*For budgeting purposes: If the facility was no longer able to treat the groundwater in the light oil system an alternative method of treatment would be employed. We are goin gto assume treatment can be accomplished by treatment in the Jefferson County sanitary sewer.

9) Annual Inspection and Documentation

Task	Units	Number of Units	Unit Cost	Cost Estimate
Yearly Site Reconnaissance	Ea	30	$500	$ 15,000
Annual Report	Ea	30	$500	$ 15,000
Mileage, Misc.	Ea	30	$50	$ 1,500
			SUBTOTAL	**$ 31,500**

Exhibit CX21

RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism (and upcoming SMA 4 submission)

Hunter Naff <hunter.naff@bluestone-coal.com>

Wed 5/6/2020 8:43 AM

To:Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc:Hardegree, Wesley <Hardegree.Wes@epa.gov>;Steve Ball <steve.ball@bluestone-coal.com>;Don Wiggins <dwiggins@bluestonecoke.com>

Mr. Hendrix:

After consultation with our insurance broker, he indicated that James River Insurance Company, Ltd. ("JRI") is licensed in Bermuda, which was the mechanism we intended to use for corrective action coverage of SMA 5. He noted in his experience that Fortune 500 companies would be unable to complete their insurance programs if Bermuda-licensed insurers were excluded, and that's why we felt that JRI would provide an acceptable coverage policy for SMA-5's Corrective Action Assurance Plan.

Since then, we have worked diligently to provide an alternate Financial Assurance Mechanism, but the COVID-19 pandemic has had a severe financial impact on our already cash-strapped plant.

While we still believe insurance would be the most direct route to achieve financial assurance for SMA-5, most insurance policies would require full collateralization, and we are simply not in a position to meet that demand today.

I will continue to keep you apprised of all developments on our end, and hope to submit an acceptable financial assurance mechanism for corrective action as soon as possible.

Sincerely,

Hunter

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Thursday, April 30, 2020 10:16 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism (and upcoming SMA 4 submission)

Hello Mr. Naff,

To date, EPA has still not received a satisfactory financial assurance instrument for corrective action coverage of SMA 5. Our records show that coverage was required per the Administrative Order on Consent by February 16, 2020. Please provide evidence of acceptable financial assurance coverage as soon as possible.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov

404-562-8738

From: Hendrix, Corey
Sent: Friday, April 3, 2020 10:44 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism (and upcoming SMA 4 submission)

Dear Mr. Naff,

To date EPA has no record of receipt of a satisfactory financial assurance instrument for financial assurance coverage of SMA 5. As you are aware, the cost estimate for SMA 5 was approved by EPA on December 18, 2019. Per RCRA 3008(h) Administrative Order on Consent Docket No. RCRA-04-2016-4250, Attachment C: Financial Assurance, paragraph 1(e) and (f) , satisfactory financial assurance is required within 60 days of EPA's written approval of the Estimated Cost of the Corrective Measures Work for each remedy. Please provide EPA with the requested information and updated policy as soon as possible.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hendrix, Corey
Sent: Wednesday, February 12, 2020 5:06 PM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism (and upcoming SMA 4 submission)

Hi Hunter-

I appreciate your response and explanation. At a minimum, James River Insurance Company Ltd. needs to show me that they are licensed to transact the business of insurance or eligible as an excess or surplus lines insurer in at least one or more States. I need verification of that in order to make a determination.

Per the RCRA 3008(h) Administrative Order on Consent Docket No., RCRA-04-2016-4250, you must use a mechanism for financial assurance that is described and allowable in 40 C.F .R. §§ 264.140 through 264. 151 Subpart H. I do not have a template policy to share with you and would suggest sharing the requirements set forth in 40 CFR 264.143(e) with your insurer.

I am available to discuss further with you and/or your insurer.

Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW

Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hunter Naff <hunter.naff@bluestone-coal.com>
Sent: Wednesday, February 12, 2020 3:06 PM
To: Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism (and upcoming SMA 4 submission)

Good afternoon Corey:

Thank you for your patience as I worked to review your responses and in turn provide answers.

Regarding the insurer itself, James River Insurance Company. Ltd ("JRI") is regulated by the Bermuda Regulatory Authority. Bermuda is one of the world's largest sources of USA casualty capacity. Like Lloyds, and others, JRI trades as a non-admitted insurer, which we believe is permissible in AL.

A point of confusion I raise is that following our initial submission, the EPA requested the policy be written for "corrective action" purposes, not for "closure" purposes. While we changed both the certificate and policy to reflect "corrective action," we were unable to provide our insurer with exact language to include in a "corrective action" plan.

As a way to fulfill your requests, do you have a template policy with the provisions you would like to see covered by the corrective action policy? Or, would you suggest providing the insurer with the exact requirements set forth in 40 CFR 264.143(e) (1)- (10) and ensure the policy fully covers all aspects?

On a related note, and as you are likely aware, we'll soon need to provide the EPA with our Financial Assurance Mechanism for SMA-4 (Former Chemical Plant). We are working with our insurer to determine the viability for such extensive coverage. However, in the event you find there are issues with JRI covering closure/corrective action costs for either SMA, I'm nearly certain we would need additional time to pursue other routes for adequate financial assurance. Given this fact, please let us know your determination on JRI ability to issues such policies.

Thank you for your guidance and attention to this matter. I look forward to your response.

Best regards,

Hunter

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Tuesday, February 4, 2020 9:32 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: FW: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

Good morning Mr. Naff,

I have reviewed the submitted policy (# 1891128) issued by James River Insurance Company, Ltd. to Bluestone Coke, LLC. for corrective action financial assurance coverage of SMA 5- Former Pig Iron Foundry at the ERP COMPLIANT COKE, LLC BIRMINGHAM facility (ALD000828848). My review showed that the policy does not conform to the regulations outlined in 40 CFR 264.143(e) and 40 CFR 264.145(e). For example, it is missing just about all of the requirements from 40 CFR 264.143(e)(4) to 264.143(e)(10). I also need additional information on which US States, if any, regulate or examine James River Insurance Company, Ltd. and proof of James River Insurance Company Ltd.'s authority to issue insurance policies in Alabama. I am available to discuss further with you and/or your insurance provider in order to bring the policy into compliance. Please just let me know who is best to work with and available times to discuss.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hardegree, Wesley <Hardegree.Wes@epa.gov>
Sent: Friday, January 17, 2020 10:18 AM
To: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: FW: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

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From: Hunter Naff <hunter.naff@bluestone-coal.com>
Sent: Monday, January 13, 2020 9:19 PM
To: Hardegree, Wesley <Hardegree.Wes@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

Mr. Hardegree:

Per Don's request, please find an unexecuted copy of the insurance policy to serve as Bluestone Coke's financial assurance mechanism. We were unable to get the required documents circulated timely for signature. Our broker assures us that the policy has been agreed to by James River Insurance Company, and we anticipate having a fully executed version to you by tomorrow. I will forward same upon receipt.

In addition, I will provide you with an updated and signed insurance certificate reflecting the requested changes.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Best regards,

Hunter Naff
Associate General Counsel, Bluestone Coke, LLC.
(540) 988-3068

Hunter Naff

Exhibit CX22

Policy Issued by	**James River Insurance Company, Ltd.**	A Stock Company Herein Called the Company	Policy No. PKG1891127-01
Producer's Name and Address	James River Insurance Company, Ltd. Butterfield Bank Building (6th Floor) 65 Front Street Hamilton HM 12 Bermuda	Producer's Code 0001	Renewal N/A

DECLARATIONS PAGE

IMPORTANT NOTICE: Please read the policy carefully, especially "Your Duties In The Event of a **"**Claim" and "Extended Reporting Period" sections.

IMPORTANT NOTICE: THE INSURANCE POLICY THAT YOU HAVE APPLIED FOR HAS BEEN PLACED WITH OR IS BEING OBTAINED FROM AN INSURER NOT APPROVED BY THE STATE CORPORATION COMMISSION FOR ISSUANCE OF SURPLUS LINES INSURANCE IN THE STATE IN WHICH YOU ARE DOMICILED, JAMES RIVER IS NEITHER LICENSED NOR REGULATED BY THE STATE CORPORATION COMMISSION AND IS UNAFFILIATED WITH JAMES A. SCOTT AND SON. THEREFORE YOU, THE POLICYHOLDER, AND PERSONS FILING A CLAIM AGAINST YOU ARE NOT PROTECTED UNDER VARIOUS GUARANTY ASSOCIATION ACTS AGAINST DEFAULT OF THE COMPANY DUE TO INSOLVENCY. IN THE EVENT OF INSURANCE COMPANY INSOLVENCY YOU MAY BE UNABLE TO COLLECT ANY AMOUNT OWED TO YOU BY THE COMPANY REGARDLESS OF THE TERMS OF THIS INSURANCE POLICY, AND YOU MAY HAVE TO PAY FOR ANY CLAIMS MADE AGAINST YOU. EMPLOYEES OF SCOTT MAY HOLD A MINORITY INTEREST IN JRI.

BY SIGNING BELOW, WE, THE NAMED INSURED, ACKNOWLEDGE THAT WE UNDERSTAND THE RISKS ASSOCIATED WITH PURCHASING COVERAGE WITH A NON-ADMITTED CARRIER.

SYMPHONY MANAGEMENT, LTD., BUTTERFIELD BANK BUILDING, 6TH FLOOR, 65 FRONT STREET, HAMILTON, HM 12, BERMUDA IS DESIGNATED AS THE AGENT FOR SERVICE OF PROCESS IN ANY ACTION ARISING OUT OF, OR IN CONNECTION WITH TRANSACTIONS OCCURRING AS A RESULT OF THIS POLICY. THE COURTS THAT WILL HAVE JURISDICTION IN THE EVENT OF A DISPUTE BETWEEN THE INSURED AND THE INSURER AND THE LAWS THAT WILL APPLY ARE THOSE OF BERMUDA.

1. Insured and Insured Location	**Bluestone Coke, LLC** 3500 35th Avenue N. Birmingham, AL 35207	Business Description: Coking
2. **Policy Period**	Effective from January 1, 2020 to January 1, 2021 at 12:01 A.M. Standard Time at your address shown above.	
3. **Retroactive Date**	**Retroactive Date**: N/A	
4. **Coverage**	Only those "Coverage Parts" for which a premium is indicated are included in this Policy. The premium may be subject to adjustment. I. Corrective Action $ 3,750 Deposit Premium $ 3,750 JRI Administrative Fee $ Included FET $ Included $ 3,750 * Additional Premium may be due as set forth in the Policy or any Policy Endorsements	

5. Limits of Liability	Policy Limits of Liability: I. Corrective Action $ 125,000 per occurrence Policy Aggregate $ 125,000
6. Forms/ Endorsements	Form(s) and Endorsement(s) attached to this policy at inception: A. COMMON CONDITIONS B. CORRECTIVE ACTION – SOLID WASTE MANAGEMENT FACILITY

COUNTERSIGNED _____ _____

Date BY _____
(Authorized Representative)

Keep this document in a safe place. It is evidence of your insurance coverage.

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

ACKNOWLEDGED _____ BY _____
Date (Bluestone Coke, LLC)

James River Insurance Company, Ltd.

COMMON CONDITIONS

Throughout this policy the words You and Your refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under the coverage section.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section XXIV - Definitions.

I. Terms and Conditions

The terms and conditions of each “Coverage Form” apply only to that “Coverage Form” and shall not

apply to any other "Coverage Form". If any provision in these Common Conditions is inconsistent or in conflict with the terms and conditions of any "Coverage Form", the terms and conditions of such "Coverage Form" shall control for purposes of that "Coverage Form".

II. Your Duties As The First Named Insured On the Declarations

When there is more than one of you named in the Declarations, the first of you named, on behalf of all others, will be:

A. authorized to make changes in the terms of this policy with our consent;

B. the payee of any premiums we refund;

C. responsible for:

1. the payment of all premiums due;
2. keeping records of the information we need for premium computation, and sending us copies at such times as we may request;
3. notifying us that you want to cancel this policy.

III. Limits of Insurance

A. **Claim expenses** are part of the limits of insurance. We shall pay "claim expenses" in connection with covered "claims"**.**

B. The Limits of Insurance are subject to the rules set forth under each "coverage form" under the sections entitled "limits of insurance".

C. The Limits of Insurance for each "coverage form" are subject to the Policy Aggregate Limit of Insurance if, and as, specified in Item 5 of the Declarations. As such, each such "coverage form" limit of insurance is a sublimit which further limits and does not increase our maximum liability for all such "coverage forms". If no Policy Aggregate Limit of Insurance is set forth in the Declarations, the limits of insurance set forth in each "coverage part" are not subject to a Policy Aggregate Limit of Insurance;

IV. Assistance and Cooperation

If there is a "claim"**,** the Insured must:

A. forward to us or to our designee all notices, summonses or other or any other documents regarding legal proceedings;

B. fully cooperate with us or our designee in the making of settlements, the conduct of "suits" or other proceedings, enforcing any right of contribution or indemnity against another who may be liable to the Insured because of the "claim". The Insured shall attend hearings and trials, assist in securing and giving evidence, and obtaining the attendance of witnesses;

C. refuse, except at the Insured's own cost, to voluntarily make any payment, assume any obligation or incur any expense other than reasonable medical expenses incurred at the time of the event.

V. Separation of Insureds

This policy applies separately to each of you against whom a "claim" is brought except with respect to:

A. the limits of insurance; and

B. any of your duties as the first named insured on the Declarations.

VI. Inspections and Surveys

We have the right but are not obligated to:

A. make inspections and surveys at any time;

B. give you reports on the conditions we find;

C. recommend changes; or

D. conduct loss control and prevention activity.

Any inspections, surveys, reports, or recommendations relate only to insurability and the premiums to be charged. We do not:

A. make safety inspections;

B. undertake to perform the duty of any entity to provide for the health or safety of workers or the public; nor

C. warrant that conditions:

1. are safe or healthful; or
2. comply with laws, regulations, codes or standards.

This provision applies not only to us, but also to any rating, advisory, rate service, or similar organization which makes insurance inspections, surveys, recommendations, reports, or gives loss control or prevention advice, on our behalf.

VII. Examination of Your Books and Records

We may examine and audit your books and records as they relate to this policy at any time during the "Policy period" and up to 3 years afterward.

VIII. Changes

Notice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change in any part of this policy. It also will not prevent us from asserting any rights under the provisions of this policy. None of the provisions of this policy will be waived, changed or modified except by written endorsement issued to form a part of this policy.

At some time, we may make changes in our insurance policy forms. Where appropriate, these changes must conform to and be filed with state insurance supervisory authorities for approval. If, during your "Policy period", we make a policy change that extends or broadens your coverage, without increasing your premium, your coverage will automatically include such extension or broadening, on the effective date the change is approved in your state, except that this provision will not apply to "claims" that were reported to us prior to the effective date of such revision.

IX. Transfer of Interest

Assignment of interest under this policy shall not bind us unless our consent is endorsed hereon.

X. Other Insurance or Risk Transfer Arrangements

Any "claim" insured under any other insurance policy or risk transfer instrument, including, but not limited to, self-insured retentions, deductibles or other alternative arrangements, which applies to this "claim", shall be paid first by those instruments, policies or other arrangements. It is the intent of this policy to apply only to loss that is more than the total limit of all deductibles, retentions, limits of insurance, self-insured amounts or other valid and collectible insurance or risk transfer arrangements, whether primary, contributory, excess, contingent, or otherwise. In no event will we pay more than our limit of insurance.

If this policy and any other policy issued by us, our predecessor, or any of our affiliated companies or their predecessors apply to the same "claim", the limits of insurance which apply to such "claim" will be the highest of the limits of insurance available under this policy, or any other single policy.

These provisions do not apply to other insurance policies or risk transfer arrangements written as specific excess insurance over the limits of insurance of the policy.

XI. Insurance Under More Than One Coverage

If more than one of this policy's coverage forms applies to the same "claim", only the coverage form most applicable to that type of "claim" or suit shall apply to it. We will not pay more than the limit of insurance of the one individual coverage form, or the actual amount of "damages" for which the Insured is liable, whichever is less.

XII. Transfer of Rights of Recovery

If any Insured for whom we make payment under this policy has rights to recover amounts from another, those rights are transferred to us to the extent of our payment. The Insured must do everything necessary to secure our rights and must do nothing after a "claim" to impair them.

XIII. Legal Action Limitation

No Insured may bring any legal action against us concerning this policy until:

A. the terms and conditions of this Policy have been fully complied with; and

B. the amount of the Insured's obligation to pay has been decided. Such amount can be set by judgment against the Insured after actual trial or by written agreement between the Insured, the claimant and us.

Any entity, or its legal representative, is entitled to recover under this policy after it has secured a judgment or written agreement. Recovery is limited to the extent of the insurance afforded by this policy. No entity has any right under this policy to include us in any action against any Insured to determine their liability, nor will any Insured or their representative bring us into such an action.

XIV. Bankruptcy

If you or your estate becomes bankrupt or insolvent, it does not change any of our obligations under this policy, provided premiums are current.

XV. Premium

All premium charges under this policy will be computed according to our rules and rating plans which apply at the inception of the current "Policy period". The deposit premium is due on the inception date of the policy.

We compute the premium you pay for this policy using information available prior to the effective date of the policy. On some policies we charge a fixed amount with no adjustment later. On other policies, all or part of your premium may be based on estimates.

If estimates are used, we compute your actual premium when complete information is available after the end of the "Policy period". If it is more than you have already paid, you owe us the difference. If it is less, we shall pay you back the difference. But you will not pay less than any minimum annual premium agreed upon.

Your must keep accurate records of the information we will need to compute your premium. You agree to send us these records at the end of each "Policy period", or any other time we request them.

XVI. Entire Contract

By acceptance of this Policy, the Insureds agree that:

A. this Policy, consisting of the "Application", the "Declarations", these Common Conditions, the "Coverage Forms", and all endorsements listed in the Declarations, constitute the entire contract existing between them and us relating to this insurance, and

B. this Policy is issued in reliance upon the Insured's representations;

C. the misrepresentation of any material matter by the Insured or the Insured's agent will render this Policy null and void and relieve us from all liability herein.

XVII. Headings

The description in the headings and subheadings of this policy is solely for convenience, and forms no part of the terms and conditions of coverage.

XVIII. Subrogation

In the event of any payment under this Policy, we shall be subrogated to all the Insured's rights of recovery thereof against any person or organization, including any rights such Insured may have against any other Insured involved in dishonest, fraudulent, criminal, malicious or intentional conduct. The Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure and collect upon such rights. The Insured shall do nothing to prejudice such rights.

XVIV "Subsidiaries" and "newly acquired subsidiary"

1. With respect to any "subsidiary" on the date during the "Policy period", that your direct or indirect ownership interest in a "subsidiary" becomes less than 50%, of the issued and outstanding voting stock, such corporation shall cease to be a "subsidiary" under the terms of this Policy. In such event, coverage will be provided under the Policy but only with respect to occurrences committed prior to such date in accordance with all other terms and conditions of this Policy. No coverage will be afforded under the Policy with respect to "claims" made against an Insured based on any occurrences committed or allegedly committed on or subsequent to such date.

2. No "newly acquired subsidiary" is an insured unless we have specifically agreed in writing to add such "newly acquired subsidiary" to the policy as an insured by endorsement specifying the terms and conditions of its coverage.

XX. Changes to your business, Acquisitions and Mergers

1. The first of you named on the Declarations must provide prior notice to us of the following events:
   a. material or significant changes to the type or volume of the "professional services" reported to us in your application.
   b. your merger with another entity; or
   c. the acquisition of all or substantially all of your assets by another entity;

2. Upon receipt of such notice, we may:
   a. adjust the premium to reflect the added exposure; or
   b. solely with respect to items b and c, deem this Policy to have ceased with respect to "claims" made against the Insured based on any "occurrence" or "personal and advertising injury" committed or allegedly committed on or subsequent to the time and date of said event. In such case, the "Policy period" shall remain unaltered and coverage will continue but only with respect to "occurrence" or "personal and advertising injury" committed prior to the time and date of any such events in accordance with all other terms and conditions of this Policy.

XXI. Legal Representatives

An Insured's estate, heirs, executors, administrators, assigns and legal representatives shall be considered insured under this Policy in the event of such Insured's death, incapacity, insolvency or bankruptcy, but only to the extent that such Insured would have been provided coverage under this Policy.

XXII. Waiver of Immunity

We will waive, both in the adjustment of claims and in the defense of "suits" against the insured, any charitable immunity of the insured, unless the insured requests in writing that we do not do so.
Waiver of immunity as a defense will not subject us to liability for any portion of a claim or judgment in excess of the applicable limit of insurance.

XXIII. Extended Reporting Period

1. Automatic Extended Reporting Period

   If this policy is terminated for any reason other than non payment of premium, we will provide you with an automatic, noncancelable "extended reporting period" starting at the termination of the "Policy period" if you have not obtained another policy of professional liability insurance within sixty (60) days of the termination of this Policy. This automatic "extended reporting period" will terminate after sixty (60) days.

2. Optional Extended Reported Period

   If you write to us within 60 days of the termination date telling us that you want to purchase an optional “extended reporting period”, and you pay the premium to us promptly when due together with any earned but unpaid premium which may be due under the terminated policy, an optional “extended reporting period” will be provided to you in accordance with our rules, rates and rating plans. Once paid, the premium for this option is non-refundable and considered fully earned.

3. ““Extended reporting periods” limits of insurance

   Our limit of insurance for all “claims” reported during the automatic and optional “extended reporting periods" shall be part of and not in addition to the limits of insurance for the “Policy period” as set forth in the Declarations.

4. Such “extended reporting periods" as set forth in 1. or 2. shall not apply to “claims” that are covered under any subsequent insurance you purchase, or that would be covered but for exhaustion of the limit of insurance applicable to such “claims”.

5. It is understood and agreed that the “extended reporting period” shall not be construed to be a new policy and any “claim” submitted during such period shall otherwise be governed by this Policy.

6. The optional “extended reporting period” will cover, collectively, the initial 60-day automatic “extended reporting period” and the optional “extended reporting period”, if purchased. “Extended reporting period” coverage may not be cancelled.

XXIV. Definitions

For purposes of this Policy, words in bold have the meaning set forth below. However, any bolded word referenced in these Common Conditions but defined in a “Coverage Form” shall, for purposes of coverage under that “Coverage Form”, have the meaning set forth in that “Coverage Form”. : Claim should be separately defined in each coverage form.

“Application” means all signed applications for this Policy and for any policy in an uninterrupted series of policies issued by us or any affiliate of ours of which this Policy is a renewal or replacement. “Application” includes any materials submitted or required to be submitted therewith. An "affiliate" means an insurer controlling, controlled by or under common control with us.

“Coverage Form” means only those coverage forms designated as included in Item 6 of the Declarations.

“Extended reporting period” means the period of time after the termination of the “Policy period” for reporting “claims” to us that are made against the Insured during the applicable “extended reporting period” by reason of an occurrence that happened after the retroactive date and prior to the termination of the “Policy period” and is otherwise covered by this Policy.

Insured has the meaning set forth in each “Coverage Form”.

“Newly acquired subsidiary” means any entity, newly formed or acquired by you during the “Policy period”.

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

“Personal and advertising injury” means injury, including consequential “bodily injury” arising out of one or more of the following offenses committed in the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you:

a. false arrest, detention or imprisonment;
b. malicious prosecution;
c. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
d. oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; or
e. oral or written publication of material that violates a person’s right of privacy.
f. the use of another’s advertising ideas in your “advertisement”; or
g. infringing upon another’s copyright, trade dress, or slogan in your “advertisement”.

“Prejudgment interest and postjudgment interest” means interest that accrues prior to or after entry of a judgment, verdict or award. However, any interest which is awarded as a penalty against an Insured does not constitute “prejudgment interest and postjudgment interest”.

“Policy period” means the time from 12:01 A.M. on the effective date of this Policy as set forth in Item 2 of the Declarations to the earlier of 12:01 A.M. of the expiration, termination or cancellation date of this Policy.

“Subsidiary” means those of you**,** other than the first of you**,** listed on the Declarations at the inception of this Policy.

Effective date of this Coverage: 1/1/2020
This Endorsement is attached to and forms a part of Policy Number: PKG1891127-01

CORRECTIVE ACTION – SOLID WASTE MANAGEMENT FACILITY

James River Insurance Company, Ltd.

In consideration of the premium charged for the Policy, it is hereby understood and agreed that:

1. Item 5. of the Declarations is amended by the addition of the following:

   Dedicated Annual Sublimit of Liability:

   $125,000 **Corrective Action** Aggregate Limit of Liability

2. Solely with respect to the **Covered Locations** scheduled in paragraph 9. of this Endorsement, **I. it is understood and agreed that the following coverage applies**:

   E. Corrective Action

   To pay on behalf of the **Insured**:

   Corrective Action Costs up to the aggregate limit shown in paragraph 1. of this Endorsement because of a **Claim** made by the **Insured** and reported in writing to the Underwriters during the **Policy Period** provided that:

   1. the **Insured** is legally obligated to pay such **Corrective Action Costs** by reason of the **Final Closure** of the **Covered Location** identified below; and

   2. The **Insured** has received written instructions for **Corrective Action Costs** from a government agency acting under the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July, 2011), including any amendments, or by similar state laws and regulations, which requires final corrective action of a unit, cell, facility or location.

3. Solely with respect to the coverage offered under this Endorsement, Clause **XXIV., DEFINITIONS**, is amended by the addition of the following:

   D. "**Claim**" means a written request by the **Insured** for payment of a statement or bill of expenditures made for **Correction Action Costs** by reason of the **Final Closure** of a **Solid Waste Management Unit(s)** in accordance with its **Corrective Action Plan**.

4. Solely with respect to the coverage offered under this Endorsement Clause **XXIV. DEFINITIONS** , is amended by the addition of the following:

   "**Final Closure**" means the permanent closure of all **Solid Waste Management Unit(s)** at the **Covered Location** identified in paragraph 9. of this Endorsement in accordance with the **Corrective Action Plan**.

"**Corrective Action Costs**" mean all expenses specifically identified in the **Corrective Action Plan** and approved in writing by the government agency acting under the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July, 2011), including any amendments, or by similar state laws and regulations.

"**Corrective Action Plan**" means the written documents required by the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July 2011), including any amendments, or by similar state laws and regulations, that addresses the partial or final closure or post-closure of a unit, cell, facility or location.

"**Solid Waste Management Unit(s)**" means a waste management unit as identified and described within the **Corrective Action Plan**.

5. Solely with respect to the coverage offered under this Endorsement, the **COMMON CONDITIONS** are amended by the addition of the following:

6.

VI. EXCLUSIONS

The coverage under this Insurance does not apply to **Corrective Action Costs:**

A. Fines and Penalties

arising out of criminal fines, taxes or loss of tax benefits, sanctions or criminal penalties assessed against the **Insured** or civil fines and penalties assessed against the **Insured**, punitive damages, exemplary damages or any damages which are a multiple of compensatory damages.

B. Intentional Acts

arising out of a **Responsible Insured's** intentional disregard of, or willful, deliberate, or dishonest non compliance with, any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, order or instruction by or on behalf of any governmental agency or representative.

C. Material Change in Use

arising out of a material change in the use of, or operations at, a **Covered Location** from the use or operations identified by the **Insured** in the statements and information contained in the **Application** and other supplemental materials submitted to the Underwriters prior to the Inception Date of this **Policy Period** or prior to adding such location as a **Covered Location** as specified in Item 9. of the Declarations.

7. Solely with respect to the coverage offered under this Endorsement, **Item 5. of the Declarations** is amended by the addition of the following:

A. The Dedicated Annual Sublimit of Liability set forth in Item 5. of the Declarations can only be reduced by **Corrective Action Costs** required to satisfy the **Insured's** Corrective Action obligations for the **Covered Location** listed in paragraph 9 of this Endorsement.

B. Except as outlined in paragraph D. above, the Dedicated Annual Sublimit of Liability set forth above is not available to satisfy any coverage otherwise afforded by this Policy.

C. Notwithstanding the terms and conditions in paragraphs D. and E. above, the maximum Limit of Liability applicable under this Policy will not exceed the Aggregate Liability shown in Item 5. of the Declarations.

8. Solely with respect to the coverage offered under this Endorsement, Clause **XXIII. EXTENDED REPORTING PERIOD** is deleted in its entirety.

9. **Covered Locations**:

SMA 5- Former Pig Iron Foundry
EPA ID Number: ALD 000 828 848
RCRA Docket Number: RCRA-04-2016-4250

All other terms and conditions of this Policy remain unchanged.

Exhibit CX23

RE: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

Hardegree, Wesley <Hardegree.Wes@epa.gov>

Tue 2/4/2020 11:56 AM

To:Hendrix, Corey <Hendrix.Corey@epa.gov>

1 attachments (384 KB)

2020-1-21 - Insurance Policy Certificate and Policy - Signed.pdf;

Corey,

You should already have a hard copy of this (I dropped it off last week I think), but here is an electronic copy of the signed policy.

Wes

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Tuesday, February 4, 2020 9:32 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: Hardegree, Wesley <Hardegree.Wes@epa.gov>; Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: FW: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

Good morning Mr. Naff,

I have reviewed the submitted policy (# 1891128) issued by James River Insurance Company, Ltd. to Bluestone Coke, LLC. for corrective action financial assurance coverage of SMA 5- Former Pig Iron Foundry at the ERP COMPLIANT COKE, LLC BIRMINGHAM facility (ALD000828848). My review showed that the policy does not conform to the regulations outlined in 40 CFR 264.143(e) and 40 CFR 264.145(e). For example, it is missing just about all of the requirements from 40 CFR 264.143(e)(4) to 264.143(e)(10). I also need additional information on which US States, if any, regulate or examine James River Insurance Company, Ltd. and proof of James River Insurance Company Ltd.'s authority to issue insurance policies in Alabama. I am available to discuss further with you and/or your insurance provider in order to bring the policy into compliance. Please just let me know who is best to work with and available times to discuss.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hardegree, Wesley <Hardegree.Wes@epa.gov>
Sent: Friday, January 17, 2020 10:18 AM
To: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: FW: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

From: Hunter Naff <hunter.naff@bluestone-coal.com>
Sent: Monday, January 13, 2020 9:19 PM
To: Hardegree, Wesley <Hardegree.Wes@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>; Don Wiggins <DWiggins@bluestonecoke.com>
Subject: Bluestone Coke LLC- SMA 5 Former Pig Iron Foundry - Financial Assurance Mechanism

Mr. Hardegree:

Per Don's request, please find an unexecuted copy of the insurance policy to serve as Bluestone Coke's financial assurance mechanism. We were unable to get the required documents circulated timely for signature. Our broker assures us that the policy has been agreed to by James River Insurance Company, and we anticipate having a fully executed version to you by tomorrow. I will forward same upon receipt.

In addition, I will provide you with an updated and signed insurance certificate reflecting the requested changes.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Best regards,

Hunter Naff
Associate General Counsel, Bluestone Coke, LLC.
(540) 988-3068

Hunter Naff

Name and Address of Insurer
(herein called the "Insurer"): James River Insurance Company, Ltd.
65 Front Street, 6th Floor
Hamilton HM12, Bermuda

Name and Address of Insured
(herein called the "Insured"): Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

Facilities Covered: SMA 5- Former Pig Iron Foundry
EPA Identification Number: ALD 000 828 848,
Bluestone Coke, LLC
3500 35th Avenue North
Birmingham, AL 35207

Amount of insurance for corrective action: $121,294.80

Face Amount: $125,000.00
Policy Number: PKG 1891128
Effective Date: January 1, 2020

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance for corrective action for the facility identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 40 CFR 264.143(e), 264.145(e), 265.143(d), and 265.145(d), as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the EPA Regional Administrator(s) of the U.S. Environmental Protection Agency, the Insurer agrees to furnish to the EPA Regional Administrator(s) a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is substantially equivalent to the wording specified in 40 CFR 264.151(e) as such regulations were constituted on the date shown immediately below.

Authorized signature for Insurer: _____
Printed Name: William Izard
Title: Director

Witness Signature: _____ Date: 1/21/20

Policy Issued by	James River Insurance Company, Ltd.	A Stock Company Herein Called the Company	Policy No. PKG1891128
Producer's Name and Address	James River Insurance Company, Ltd. Butterfield Bank Building (6th Floor) 65 Front Street Hamilton HM 12 Bermuda	Producer's Code 0001	Renewal N/A

DECLARATIONS PAGE

IMPORTANT NOTICE: Please read the policy carefully, especially "Your Duties In The Event of a "Claim" and "Extended Reporting Period" sections.

IMPORTANT NOTICE: THE INSURANCE POLICY THAT YOU HAVE APPLIED FOR HAS BEEN PLACED WITH OR IS BEING OBTAINED FROM AN INSURER NOT APPROVED BY THE STATE CORPORATION COMMISSION FOR ISSUANCE OF SURPLUS LINES INSURANCE IN THE STATE IN WHICH YOU ARE DOMICILED, JAMES RIVER IS NEITHER LICENSED NOR REGULATED BY THE STATE CORPORATION COMMISSION AND IS UNAFFILIATED WITH JAMES A. SCOTT AND SON. THEREFORE YOU, THE POLICYHOLDER, AND PERSONS FILING A CLAIM AGAINST YOU ARE NOT PROTECTED UNDER VARIOUS GUARANTY ASSOCIATION ACTS AGAINST DEFAULT OF THE COMPANY DUE TO INSOLVENCY. IN THE EVENT OF INSURANCE COMPANY INSOLVENCY YOU MAY BE UNABLE TO COLLECT ANY AMOUNT OWED TO YOU BY THE COMPANY REGARDLESS OF THE TERMS OF THIS INSURANCE POLICY, AND YOU MAY HAVE TO PAY FOR ANY CLAIMS MADE AGAINST YOU. EMPLOYEES OF SCOTT MAY HOLD A MINORITY INTEREST IN JRI.

BY SIGNING BELOW, WE, THE NAMED INSURED, ACKNOWLEDGE THAT WE UNDERSTAND THE RISKS ASSOCIATED WITH PURCHASING COVERAGE WITH A NON-ADMITTED CARRIER.

SYMPHONY MANAGEMENT, LTD., BUTTERFIELD BANK BUILDING· 6TH FLOOR, 65 FRONT STREET, HAMILTON, HM 12, BERMUDA IS DESIGNATED AS THE AGENT FOR SERVICE OF PROCESS IN ANY ACTION ARISING OUT OF, OR IN CONNECTION WITH TRANSACTIONS OCCURRING AS A RESULT OF THIS POLICY. THE COURTS THAT WILL HAVE JURISDICTION IN THE EVENT OF A DISPUTE BETWEEN THE INSURED AND THE INSURER AND THE LAWS THAT WILL APPLY ARE THOSE OF BERMUDA.

1. Insured and Insured Location	**Bluestone Coke, LLC** 3500 35th Avenue N. Birmingham, AL 35207	Business Description: Coking
2. Policy Period	Effective from January 1, 2020 to January 1, 2021 at 12:01 A.M. Standard Time at your address shown above.	
3. Retroactive Date	**Retroactive Date:** N/A	
4. Coverage	Only those "Coverage Parts" for which a premium is indicated are included in this Policy. The premium may be subject to adjustment. I. Corrective Action $ 3,750 Deposit Premium $ 3,750 JRI Administrative Fee $ Included FET $ Included $ 3,750 * Additional Premium may be due as set forth in the Policy or any Policy Endorsements	

G-141434-A

Ed. 8/01

5. Limits of Liability	Policy Limits of Liability: I. Corrective Action $ 125,000 per occurrence Policy Aggregate $ 125,000
6. Forms/ Endorsements	Form(s) and Endorsement(s) attached to this policy at inception: A. COMMON CONDITIONS B. CORRECTIVE ACTION – SOLID WASTE MANAGEMENT FACILITY

COUNTERSIGNED JANUARY 15, 2020
Date

BY JOHN S. NEAL - DIRECTOR
(Authorized Representative)

Keep this document in a safe place. It is evidence of your insurance coverage.

THESE DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND FORMS AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THE ABOVE NUMBERED POLICY.

ACKNOWLEDGED January 15, 2020
Date

BY
(Bluestone Coke, LLC)

G-141434-A
Ed. 8/01

COMMON CONDITIONS

Throughout this policy the words You and Your refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under the coverage section.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section XXIV - Definitions.

I. Terms and Conditions

The terms and conditions of each "Coverage Form" apply only to that "Coverage Form" and shall not

apply to any other "Coverage Form". If any provision in these Common Conditions is inconsistent or in conflict with the terms and conditions of any "Coverage Form", the terms and conditions of such "Coverage Form" shall control for purposes of that "Coverage Form".

II. Your Duties As The First Named Insured On the Declarations

When there is more than one of you named in the Declarations, the first of you named, on behalf of all others, will be:

A. authorized to make changes in the terms of this policy with our consent;

B. the payee of any premiums we refund;

C. responsible for:

1. the payment of all premiums due;
2. keeping records of the information we need for premium computation, and sending us copies at such times as we may request;
3. notifying us that you want to cancel this policy.

III. Limits of Insurance

A. **Claim expenses** are part of the limits of insurance. We shall pay "claim expenses" in connection with covered "claims".

B. The Limits of Insurance are subject to the rules set forth under each "coverage form" under the sections entitled "limits of insurance".

C. The Limits of Insurance for each "coverage form" are subject to the Policy Aggregate Limit of Insurance if, and as, specified in Item 5 of the Declarations. As such, each such "coverage form" limit of insurance is a sublimit which further limits and does not increase our maximum liability for all such "coverage forms". If no Policy Aggregate Limit of Insurance is set forth in the Declarations, the limits of insurance set forth in each "coverage part" are not subject to a Policy Aggregate Limit of Insurance;

IV. Assistance and Cooperation

If there is a "claim", the Insured must:

A. forward to us or to our designee all notices, summonses or other or any other documents regarding legal proceedings;

B. fully cooperate with us or our designee in the making of settlements, the conduct of "suits" or other proceedings, enforcing any right of contribution or indemnity against another who may be liable to the Insured because of the "claim". The Insured shall attend hearings and trials, assist in securing and giving evidence, and obtaining the attendance of witnesses;

C. refuse, except at the Insured's own cost, to voluntarily make any payment, assume any obligation or incur any expense other than reasonable medical expenses incurred at the time of the event.

V. Separation of Insureds

This policy applies separately to each of you against whom a "claim" is brought except with respect to:

A. the limits of insurance; and

B. any of your duties as the first named insured on the Declarations.

VI. Inspections and Surveys

We have the right but are not obligated to:

A. make inspections and surveys at any time;

B. give you reports on the conditions we find;

C. recommend changes; or

D. conduct loss control and prevention activity.

Any inspections, surveys, reports, or recommendations relate only to insurability and the premiums to be charged. We do not:

A. make safety inspections;

B. undertake to perform the duty of any entity to provide for the health or safety of workers or the public; nor

C. warrant that conditions:

1. are safe or healthful; or
2. comply with laws, regulations, codes or standards.

This provision applies not only to us, but also to any rating, advisory, rate service, or similar organization which makes insurance inspections, surveys, recommendations, reports, or gives loss control or prevention advice, on our behalf.

VII. Examination of Your Books and Records

We may examine and audit your books and records as they relate to this policy at any time during the "Policy period" and up to 3 years afterward.

VIII. Changes

Notice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change in any part of this policy. It also will not prevent us from asserting any rights under the provisions of this policy. None of the provisions of this policy will be waived, changed or modified except by written endorsement issued to form a part of this policy.

At some time, we may make changes in our insurance policy forms. Where appropriate, these changes must conform to and be filed with state insurance supervisory authorities for approval. If, during your "Policy period", we make a policy change that extends or broadens your coverage, without increasing your premium, your coverage will automatically include such extension or broadening, on the effective date the change is approved in your state, except that this provision will not apply to "claims" that were reported to us prior to the effective date of such revision.

IX. Transfer of Interest

Assignment of interest under this policy shall not bind us unless our consent is endorsed hereon.

X. Other Insurance or Risk Transfer Arrangements

Any "claim" insured under any other insurance policy or risk transfer instrument, including, but not limited to, self-insured retentions, deductibles or other alternative arrangements, which applies to this "claim", shall be paid first by those instruments, policies or other arrangements. It is the intent of this policy to apply only to loss that is more than the total limit of all deductibles, retentions, limits of insurance, self-insured amounts or other valid and collectible insurance or risk transfer arrangements, whether primary, contributory, excess, contingent, or otherwise. In no event will we pay more than our limit of insurance.

If this policy and any other policy issued by us, our predecessor, or any of our affiliated companies or their predecessors apply to the same "claim", the limits of insurance which apply to such "claim" will be the highest of the limits of insurance available under this policy, or any other single policy.

These provisions do not apply to other insurance policies or risk transfer arrangements written as specific excess insurance over the limits of insurance of the policy.

XI. Insurance Under More Than One Coverage

If more than one of this policy's coverage forms applies to the same "claim", only the coverage form most applicable to that type of "claim" or suit shall apply to it. We will not pay more than the limit of insurance of the one individual coverage form, or the actual amount of "damages" for which the Insured is liable, whichever is less.

XII. Transfer of Rights of Recovery

If any Insured for whom we make payment under this policy has rights to recover amounts from another, those rights are transferred to us to the extent of our payment. The Insured must do everything necessary to secure our rights and must do nothing after a "claim" to impair them.

XIII. Legal Action Limitation

No Insured may bring any legal action against us concerning this policy until:

A. the terms and conditions of this Policy have been fully complied with; and

B. the amount of the Insured's obligation to pay has been decided. Such amount can be set by judgment against the Insured after actual trial or by written agreement between the Insured, the claimant and us.

Any entity, or its legal representative, is entitled to recover under this policy after it has secured a judgment or written agreement. Recovery is limited to the extent of the insurance afforded by this policy. No entity has any right under this policy to include us in any action against any Insured to determine their liability, nor will any Insured or their representative bring us into such an action.

XIV. Bankruptcy

If you or your estate becomes bankrupt or insolvent, it does not change any of our obligations under this policy, provided premiums are current.

XV. Premium

All premium charges under this policy will be computed according to our rules and rating plans which apply at the inception of the current "Policy period". The deposit premium is due on the inception date of the policy.

We compute the premium you pay for this policy using information available prior to the effective date of the policy. On some policies we charge a fixed amount with no adjustment later. On other policies, all or part of your premium may be based on estimates.

If estimates are used, we compute your actual premium when complete information is available after the end of the "Policy period". If it is more than you have already paid, you owe us the difference. If it is less, we shall pay you back the difference. But you will not pay less than any minimum annual premium agreed upon.

Your must keep accurate records of the information we will need to compute your premium. You agree to send us these records at the end of each "Policy period", or any other time we request them.

XVI. Entire Contract

By acceptance of this Policy, the Insureds agree that:

A. this Policy, consisting of the "Application", the "Declarations", these Common Conditions, the "Coverage Forms", and all endorsements listed in the Declarations, constitute the entire contract existing between them and us relating to this insurance, and

B. this Policy is issued in reliance upon the Insured's representations;

C. the misrepresentation of any material matter by the Insured or the Insured's agent will render this Policy null and void and relieve us from all liability herein.

XVII. Headings

The description in the headings and subheadings of this policy is solely for convenience, and forms no part of the terms and conditions of coverage.

XVIII. Subrogation

In the event of any payment under this Policy, we shall be subrogated to all the Insured's rights of recovery thereof against any person or organization, including any rights such Insured may have against any other Insured involved in dishonest, fraudulent, criminal, malicious or intentional conduct. The Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure and collect upon such rights. The Insured shall do nothing to prejudice such rights.

XVIV "Subsidiaries" and "newly acquired subsidiary"

1. With respect to any "subsidiary" on the date during the "Policy period", that your direct or indirect ownership interest in a "subsidiary" becomes less than 50%, of the issued and outstanding voting stock, such corporation shall cease to be a "subsidiary" under the terms of this Policy. In such event, coverage will be provided under the Policy but only with respect to occurrences committed prior to such date in accordance with all other terms and conditions of this Policy. No coverage will be afforded under the Policy with respect to "claims" made against an Insured based on any occurrences committed or allegedly committed on or subsequent to such date.

2. No "newly acquired subsidiary" is an insured unless we have specifically agreed in writing to add such "newly acquired subsidiary" to the policy as an insured by endorsement specifying the terms and conditions of its coverage.

XX. Changes to your business, Acquisitions and Mergers

1. The first of you named on the Declarations must provide prior notice to us of the following events:
   a. material or significant changes to the type or volume of the "professional services" reported to us in your application.
   b. your merger with another entity; or
   c. the acquisition of all or substantially all of your assets by another entity;

2. Upon receipt of such notice, we may:
   a. adjust the premium to reflect the added exposure; or
   b. solely with respect to items b and c, deem this Policy to have ceased with respect to "claims" made against the Insured based on any "occurrence" or "personal and advertising injury" committed or allegedly committed on or subsequent to the time and date of said event. In such case, the "Policy period" shall remain unaltered and coverage will continue but only with respect to "occurrence" or "personal and advertising injury" committed prior to the time and date of any such events in accordance with all other terms and conditions of this Policy.

XXI. Legal Representatives

An Insured's estate, heirs, executors, administrators, assigns and legal representatives shall be considered insured under this Policy in the event of such Insured's death, incapacity, insolvency or bankruptcy, but only to the extent that such Insured would have been provided coverage under this Policy.

XXII. Waiver of Immunity

We will waive, both in the adjustment of claims and in the defense of "suits" against the insured, any charitable immunity of the insured, unless the insured requests in writing that we do not do so.
Waiver of immunity as a defense will not subject us to liability for any portion of a claim or judgment in excess of the applicable limit of insurance.

XXIII. Extended Reporting Period

1. Automatic Extended Reporting Period

   If this policy is terminated for any reason other than non payment of premium, we will provide you with an automatic, noncancelable "extended reporting period" starting at the termination of the "Policy period" if you have not obtained another policy of professional liability insurance within sixty (60) days of the termination of this Policy. This automatic "extended reporting period" will terminate after sixty (60) days.

2. Optional Extended Reported Period

   If you write to us within 60 days of the termination date telling us that you want to purchase an optional "extended reporting period", and you pay the premium to us promptly when due together with any earned but unpaid premium which may be due under the terminated policy, an optional "extended reporting period" will be provided to you in accordance with our rules, rates and rating plans. Once paid, the premium for this option is non-refundable and considered fully earned.

3. ""Extended reporting periods" limits of insurance

   Our limit of insurance for all "claims" reported during the automatic and optional "extended reporting periods" shall be part of and not in addition to the limits of insurance for the "Policy period" as set forth in the Declarations.

4. Such "extended reporting periods" as set forth in 1. or 2. shall not apply to "claims" that are covered under any subsequent insurance you purchase, or that would be covered but for exhaustion of the limit of insurance applicable to such "claims".

5. It is understood and agreed that the "extended reporting period" shall not be construed to be a new policy and any "claim" submitted during such period shall otherwise be governed by this Policy.

6. The optional "extended reporting period" will cover, collectively, the initial 60-day automatic "extended reporting period" and the optional "extended reporting period", if purchased. "Extended reporting period" coverage may not be cancelled.

XXIV. Definitions

For purposes of this Policy, words in bold have the meaning set forth below. However, any bolded word referenced in these Common Conditions but defined in a "Coverage Form" shall, for purposes of coverage under that "Coverage Form", have the meaning set forth in that "Coverage Form". : Claim should be separately defined in each coverage form.

"Application" means all signed applications for this Policy and for any policy in an uninterrupted series of policies issued by us or any affiliate of ours of which this Policy is a renewal or replacement. "Application" includes any materials submitted or required to be submitted therewith. An "affiliate" means an insurer controlling, controlled by or under common control with us.

"Coverage Form" means only those coverage forms designated as included in Item 6 of the Declarations.

"Extended reporting period" means the period of time after the termination of the "Policy period" for reporting "claims" to us that are made against the Insured during the applicable "extended reporting period" by reason of an occurrence that happened after the retroactive date and prior to the termination of the "Policy period" and is otherwise covered by this Policy.

Insured has the meaning set forth in each "Coverage Form".

"Newly acquired subsidiary" means any entity, newly formed or acquired by you during the "Policy period".

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

"Personal and advertising injury" means injury, including consequential "bodily injury" arising out of one or more of the following offenses committed in the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you:

a. false arrest, detention or imprisonment;
b. malicious prosecution;
c. the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
d. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
e. oral or written publication of material that violates a person's right of privacy.
f. the use of another's advertising ideas in your "advertisement"; or
g. infringing upon another's copyright, trade dress, or slogan in your "advertisement".

"Prejudgment interest and postjudgment interest" means interest that accrues prior to or after entry of a judgment, verdict or award. However, any interest which is awarded as a penalty against an Insured does not constitute "prejudgment interest and postjudgment interest".

"Policy period" means the time from 12:01 A.M. on the effective date of this Policy as set forth in Item 2 of the Declarations to the earlier of 12:01 A.M. of the expiration, termination or cancellation date of this Policy.

"Subsidiary" means those of you, other than the first of you, listed on the Declarations at the inception of this Policy.

Effective date of this Coverage: 1/1/2020
This Endorsement is attached to and forms a part of Policy Number: PKG1891128

CORRECTIVE ACTION – SOLID WASTE MANAGEMENT FACILITY

James River Insurance Company, Ltd.

In consideration of the premium charged for the Policy, it is hereby understood and agreed that:

1. Item 5. of the Declarations is amended by the addition of the following:

   Dedicated Annual Sublimit of Liability:

   $125,000 **Corrective Action** Aggregate Limit of Liability

2. Solely with respect to the **Covered Locations** scheduled in paragraph 9. of this Endorsement, **I. it is understood and agreed that the following coverage applies**:

   E. Corrective Action

   To pay on behalf of the **Insured**:

   Corrective Action Costs up to the aggregate limit shown in paragraph 1. of this Endorsement because of a **Claim** made by the **Insured** and reported in writing to the Underwriters during the **Policy Period** provided that:

   1. the **Insured** is legally obligated to pay such **Corrective Action Costs** by reason of the **Final Closure** of the **Covered Location** identified below; and

   2. The **Insured** has received written instructions for **Corrective Action Costs** from a government agency acting under the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July, 2011), including any amendments, or by similar state laws and regulations, which requires final corrective action of a unit, cell, facility or location.

3. Solely with respect to the coverage offered under this Endorsement, Clause **XXIV., DEFINITIONS**, is amended by the addition of the following:

   D. "**Claim**" means a written request by the **Insured** for payment of a statement or bill of expenditures made for **Correction Action Costs** by reason of the **Final Closure** of a **Solid Waste Management Unit(s)** in accordance with its **Corrective Action Plan**.

4. Solely with respect to the coverage offered under this Endorsement Clause **XXIV. DEFINITIONS**, is amended by the addition of the following:

   "**Final Closure**" means the permanent closure of all **Solid Waste Management Unit(s)** at the **Covered Location** identified in paragraph 9. of this Endorsement in accordance with the **Corrective Action Plan**.

"**Corrective Action Costs**" mean all expenses specifically identified in the **Corrective Action Plan** and approved in writing by the government agency acting under the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July, 2011), including any amendments, or by similar state laws and regulations.

"**Corrective Action Plan**" means the written documents required by the Code of Federal Regulations, 40 CFR Parts 260 – 299 (revised as of July 2011), including any amendments, or by similar state laws and regulations, that addresses the partial or final closure or post-closure of a unit, cell, facility or location.

"**Solid Waste Management Unit(s)**" means a waste management unit as identified and described within the **Corrective Action Plan**.

5. Solely with respect to the coverage offered under this Endorsement, the **COMMON CONDITIONS** are amended by the addition of the following:

6.

VI. EXCLUSIONS

The coverage under this Insurance does not apply to **Corrective Action Costs:**

A. Fines and Penalties

arising out of criminal fines, taxes or loss of tax benefits, sanctions or criminal penalties assessed against the **Insured** or civil fines and penalties assessed against the **Insured**, punitive damages, exemplary damages or any damages which are a multiple of compensatory damages.

B. Intentional Acts

arising out of a **Responsible Insured's** intentional disregard of, or willful, deliberate, or dishonest non compliance with, any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, order or instruction by or on behalf of any governmental agency or representative.

C. Material Change in Use

arising out of a material change in the use of, or operations at, a **Covered Location** from the use or operations identified by the **Insured** in the statements and information contained in the **Application** and other supplemental materials submitted to the Underwriters prior to the Inception Date of this **Policy Period** or prior to adding such location as a **Covered Location** as specified in Item 9. of the Declarations.

7. Solely with respect to the coverage offered under this Endorsement, **Item 5. of the Declarations** is amended by the addition of the following:

A. The Dedicated Annual Sublimit of Liability set forth in Item 5. of the Declarations can only be reduced by **Corrective Action Costs** required to satisfy the **Insured's** Corrective Action obligations for the **Covered Location** listed in paragraph 9 of this Endorsement.

B. Except as outlined in paragraph D. above, the Dedicated Annual Sublimit of Liability set forth above is not available to satisfy any coverage otherwise afforded by this Policy.

C. Notwithstanding the terms and conditions in paragraphs D. and E. above, the maximum Limit of Liability applicable under this Policy will not exceed the Aggregate Liability shown in Item 5. of the Declarations.

8. Solely with respect to the coverage offered under this Endorsement, Clause **XXIII. EXTENDED REPORTING PERIOD** is deleted in its entirety.

9. **Covered Locations:**

SMA 5- Former Pig Iron Foundry
EPA ID Number: ALD 000 828 848
RCRA Docket Number: RCRA-04-2016-4250

All other terms and conditions of this Policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
RETROSPECTIVE RATING ENDORSEMENT

This Endorsement modifies insurance provided under the Declarations and Coverage Parts of the policy.

I. Additional Premium/Retrospective Premium

A. In the event Incurred Losses exceeds the deposit premium, the Insureds shall pay to the Company an Additional Premium up to the maximum premium noted below.

Corrective Action	$ 120,000

B. Any Additional Premium due hereunder is payable by the Insureds within 10 days upon receipt of an invoice from the Company. Failure to pay the Additional Premium when due shall be grounds for automatic rescinding of the Policy retroactive to the inception date by the Company for non-payment of premium as stated herein.

C. A retrospective rating agreement applies to the lines of insurance that are listed in Section 4 the Declarations Page of the policy. This rating agreement will apply to the coverage for the period beginning 1/1/2020 and ending 1/1/2021. We will calculate the Retrospective Premium using the audited exposure base and rates agreed. Retro adjustments will be made by us as soon as practicable.

D. James River Insurance Company, Ltd. has sole discretion with regard to the amount to be invoiced for additional premium/retrospective premium and the timing of the invoicing for additional premium/retrospective premium

II. Payment Obligations

A. James River Insurance Company Ltd.'s receipt of payment from the Insureds is a condition precedent to James River Insurance Company Ltd.'s obligation to make payment under this policy.

III. Indemnification

A. The Insureds shall at all times indemnify, exonerate and hold James River harmless from and against all Loss, claims, demands, liabilities, suits and causes of action which are in any way related to any claim made under this policy. Insureds shall

immediately notify James River in writing of any demand, notice, suit, claim, action or proceeding relating to any claim.

B. Representations. The Insureds represent, warrant and agree that they have a substantial, material and beneficial interest in James River providing this coverage. The Insureds confirm their full power and authorization to execute, deliver and perform this Agreement. The Insureds further acknowledge and agree that their execution, delivery and performance of this Agreement shall not be in conflict with or result in a violation of any term, condition or provision of any documents, bylaws, operating agreements or similar formation or operational documents of such Insureds, or any law, rule, regulation, order, writ, injunction, judgment or decree of any court or governmental authority or any other agreement binding upon Insureds, nor shall it constitute a Default thereunder. Insureds confirm that there have been no verbal representations made to induce the Insureds to execute this Agreement and that each and every agreement, term, commitment, condition and waiver contained in this.

C. It is understood that Steve Ball be and hereby is (are) authorized to execute on behalf of this Company, any agreement or agreements of indemnity required by JAMES RIVER as consideration for the provision of this policy of insurance.

ACKNOWLEDGED 1/16/2020 Date BY _____ (Bluestone Coke, LLC)

ACKNOWLEDGED 1/16/2020 Date BY _____ (Justice Family Group, LLC)

Employee Owned

SCOTT

Est. 1864

CHARLOTTE
704-556-1341

GREENSBORO
336-273-6599

GREENVILLE
864-568-8550

KNOXVILLE
865-588-0111

LYNCHBURG
434-832-2100

NASHVILLE
615-771-9600

RALEIGH
919-844-0640

RICHMOND
804-545-2200

ROANOKE
540-343-8071

Invoice # 74901	Page 1 of 1
Account Number	Date
JUSTFAM-01	1/17/2020
BALANCE DUE ON	
2/6/2020	
AMOUNT PAID	Amount Due
	$3,750.00
SKOMA1	

Justice Family Group, LLC
101 Main Street W
White Sulphur Springs, WV 24986

PLEASE PAY FROM THIS INVOICE

REMIT TO: Scott Insurance • PO Box 603438 • Charlotte, NC 28260

Item #	Eff Date	Trans Type	Policy #	Description	Billing Company	Amount
560291	1/1/2020	NEWB CMIS	PKG1891128-01	Closure / Corrective Action Policy Premium	James River Insurance Compan	$3,750.00

Total Invoice Balance: **$3,750.00**

Exhibit CX24

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC MAIL
CONFIRMATION OF RECEIPT EMAIL REQUESTED

Bluestone Coke, LLC
Attn: Hunter Naff, Associate General Counsel
3500 35th Avenue North
Birmingham, Alabama 35207
hunter.naff@bluestone-coal.com

SUBJ: Resource Conservation Recovery Act (RCRA) Opportunity to Show Cause
RCRA Section 3008(h) Administrative Order on Consent Docket No. RCRA-04-2016-4250
Bluestone Coke, LLC, Birmingham, EPA ID ALD000828848

Dear Mr. Naff:

On May 6, 2020, the U.S. Environmental Protection Agency, conducted a financial record review of Bluestone Coke, LLC (Bluestone) located at 3500 35th Avenue, Birmingham, Alabama 35207 (the facility) to determine its compliance with the financial assurance requirements set forth in the Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order). On June 3, 2020, the EPA requested additional information from Bluestone pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 regarding the facility's compliance with the financial assurance requirements of the Order.

The first two solid waste management unit (SWMU) management areas (SMA) that require financial assurance under the Order are SMA 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant). The EPA has determined that the facility may not be in compliance with several financial assurance requirements of the Order based on apparent deficiencies observed during the financial record review and a review of additional information obtained from the June 3, 2020, information request. For each SMA, the observations made during these reviews are summarized below.

SMA 5 (Former Pig Iron Foundry)

On July 11, 2019, the EPA issued a Final Approval of Corrective Measures Implementation Work Plan for SMA 5, which included the Estimated Cost of the Corrective Measures Work dated October 29, 2018 for $121,294.80. Pursuant to Section XII of the Order which references Attachment C, Paragraph 1.e., Bluestone shall provide financial assurance coverage within 60 calendar days of the EPA's written approval of the Estimated Cost of the Corrective Measures Work (or by September 9, 2019). On September 5, 2019, Bluestone requested a forty-five (45) day extension to submit the financial assurance for SMA 5 (or by October 31, 2019). On September 6, 2019, the EPA approved this extension request.

On October 31, 2019, Bluestone submitted a certificate of insurance from James River Insurance Company, Ltd., policy number PKG1891128 effective October 31, 2019 (the Policy), as evidence of financial assurance for corrective action at SMA 5. The EPA requested a complete copy of the Policy on December 11, 2019. A review of the Policy found that it did not conform to the requirements of Section XII of the Order which references Attachment C and 40 CFR §§ 264.143(e) or 264.145(e). The apparent deficiencies identifed during the review of the Policy include but are not limited to:

1. Pursuant to Section XII of the Order which references Attachment C Paragraph 10 and 40 C.F.R. §§ 264.143(e)(1) or 264.145(e)(1), at a minumum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

2. Pursuant toSection XII of the Order which references Attachment C Paragraph 1.e , Respondent shall establish and maintain financial assurance for the benefit of EPA for the amount stated in the approved Estimated Cost of the Corrective Measures Work.

3. Pursuant to 40 C.F.R. §§ 264.143(e)(7) or 264.145(e)(7), each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

4. Pursuant to 40 C.F.R. §§ 40 CFR 264.143(e)(8) or 264.145(e)(8), the policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Regional Administrator. Cancellation, termination, or failure to renew may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Regional Administrator and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

    (i) The Regional Administrator deems the facility abandoned; or

    (ii) The permit is terminated or revoked, or a new permit is denied; or

    (iii) Closure is ordered by the Regional Administrator or a U.S. district court or other court of competent jurisdiction; or

    (iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

    (v) The premium due is paid.

On February 4, 2020, the EPA requested that Bluestone submit a policy that meets the requirements. Additionally, the EPA requested information pertaining to which state(s) within the U.S. regulate or examine James River Insurance Company, Ltd. and proof of James River Insurance Company Ltd.'s authority to issue insurance policies in Alabama as required by 40 C.F.R. § 264.143 and 40 C.F.R. § 264.145. The EPA reaffirmed this request via email on February 12, 2020, April 3, 2020 and April 30, 2020. On May 6, 2020, the EPA received an email from Bluestone stating that they "have worked

diligently to provide an alternative Financial Assurance Mechanism, but the COVID 19 pandemic has had severe financial impact on our already cash-strapped plant."

On June 3, 2020, the EPA requested additional information pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 regarding Bluestone's compliance with the financial assurance requirements of the Order. The information received on June 18, 2020, in response to the formal information request appears to indicate that adequate financial assurance has not been obtained by Bluestone.

SMA 4 (Former Chemical Plant)

On December 18, 2019, the EPA issued Final Approval of Corrective Measures Implementation Work Plan for SMA 4, which included the Estimated Cost of the Corrective Measures Work dated September 16, 2019 for $4,043,516.41. Pursuant to Section XII of the Order which references Attachment C, Paragraph 1.e., Bluestone shall provide financial assurance coverage within 60 calendar days of the EPA's written approval of the Estimated Cost of the Corrective Measures Work (or by February 16, 2020). To date, the EPA has received no financial assurance coverage for this unit.

In summary, Bluestone appears to have failed to provide the EPA satisfactory financial assurance as required by the Order for SMA 4 or SMA 5 at its Birmingham, Alabama facility.

Please provide a detailed written response within fourteen (14) days following receipt of this letter describing any actions that Bluestone has taken and/or intends to take related to the observations documented in this letter . Your response should be emailed to:

Brooke York
Land, Asbestos and Lead Section
Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division
U.S. EPA Region 4
York.Brooke@epa.gov

Bluestone is also being offered the opportunity to meet with the EPA by teleconference, to show cause why the EPA should not take formal enforcement action against Bluestone. Bluestone may elect to be represented by legal counsel at this meeting and should be prepared to present relevant information and documentation pertaining to the EPA's alleged deficiencies.

The EPA may determine that a formal enforcement action is appropriate and may assess civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). Therefore, Bluestone has the opportunity to present factors and documentation that could mitigate any penalties that may be assessed against the facility, including information on Bluestone's ability to pay a penalty. Prior to the meeting, Bluestone may review the RCRA Civil Penalty Policy found at http://www2.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf, and the revised penalty matrices found at https://www.epa.gov/sites/production/files/2018-01/documents/amendmentstotheepascivilpenaltypoliciestoaccountforinflation011518.pdf.

Please be advised that any information provided by Bluestone at the meeting may be used by the EPA in any civil or criminal proceedings related to this or other matters. Any false, fictitious, or fraudulent material omissions, statements, or representations may subject Bluestone to criminal penalties under Section 3008(d)(3) of RCRA, 42 U.S.C. § 6928(d)(3).

If Bluestone chooses to accept this offer to meet with the EPA, the facility should contact Brooke York at (404) 562-8025 or by email at york.brooke@epa.gov **within fourteen (14) days** following receipt of this letter to schedule a conference call. If you decide not to accept this offer to meet to discuss the observed deficiencies, the EPA may proceed with enforcement action against Bluestone as authorized under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), including the assessment of appropriate civil penalties and injunctive relief.

If Bluestone is a Small Business or a Small Community, you can find compliance and enforcement resources specifically designed to meet your needs at: http://www2.epa.gov/enforcement/small-businesses-and-enforcement. In that webpage you can find information about the Small Business Regulatory Enforcement Fairness Act (SBREFA) that accords some rights to small businesses and is aimed at providing assistance to small businesses and other small entities, making tools available for better understanding of the regulatory and enforcement processes, and seeing that there is no unfair treatment relating to the regulatory enforcement process.

Please feel free to contact Brooke York if you have any technical questions or Joan Redleaf Durbin for any legal questions at redleaf-durbin.joan@epa.gov or by phone at (404) 562-9544 regarding the review performed on Bluestone's facility.

Sincerely,

Kimberly Bingham
Digitally signed by Kimberly Bingham
Date: 2020.08.28 09:36:43 -04'00'

Kimberly L. Bingham
Chief
Chemical Safety and Land Enforcement Branch

Exhibit CX25

From: Francis Robinson, Simone
To: hunter.naff@bluestone-coal.com
Cc: York, Brooke; Annicella, Alan (he/him/his)
Subject: ERP Coke Show Cause Letter
Date: Friday, August 28, 2020 10:47:52 AM
Attachments: ERP Coke RCRA SC Letter.pdf
Importance: High

Dear Mr. Naff:

On May 6, 2020, the U.S. Environmental Protection Agency, conducted a financial record review of Bluestone Coke, LLC (Bluestone) located at 3500 35th Avenue, Birmingham, Alabama 35207 (the facility) to determine its compliance with the financial assurance requirements set forth in the Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order). We ask that you acknowledge receipt of this email and respond accordingly to Ms. Brooke York as outlined in the attached letter.

Sincerely,

Simone Francis Robinson | **Staff Assistant** | Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division | U.S. Environmental Protection Agency Region 4
61 Forsyth Street, SW Atlanta, GA 30303 | Voice: 404-562-8499 | Email: **francisrobinson.simone@epa.gov**

Exhibit CX26

Bluestone

February 24th, 2021

via electronic mail only:
Brooke York (York.Brooke@epa.gov)
Corey Hendrix (Hendrix.Corey@epa.gov)

U.S. Environmental Protection Agency
Region 4
Atlanta Federal Center
61 Forsyth Street
Atlanta, Georgia 30303-8960

SUBJ: Bluestone Coke, LLC, Birmingham, AL response to EPA Letter dated January 28, 2021
EPA ID ALD000828848
Resource Conservation and Recovery Act Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250
SMA 5 and SMA 4 Financial Assurance
Financial Test and Corporate Guarantee Review

CONFIDENTIAL BUSINESS INFORMATION UNDER 40 C.F.R. § 2.201 ET. SEQ.

Ms. York:

I hope this message finds you well. In response to the above-referenced letter, signed by Mr. Hendrix, and noting deficiencies in our initial submission, Bluestone Resources, Inc. ("BRI") responds with the information contained under this cover letter. As with the previous information submitted pursuant to satisfying Bluestone Coke, LLC's financial assurance obligation, BRI asserts that all information provided hereunder is Confidential Business Information ("CBI") and thus states the following:

As this information is subject to revisions by your office and BRI, and pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Aside from existing publicly available information produced, Bluestone considers each response to contain either proprietary, business confidential, or employee's personally identifiable information which collectively shall remain confidential and limited to the purpose of EPA's request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order on Consent.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Hunter Naff

Encl/

Bluestone Resources, Inc.'s Responses to EPA's Comments set forth in Letter dated January 28th, 2021 ("the Letter")

[redacted]

[redacted]

Bluestone

February 24, 2021

Mary S. Walker
Regional Administrator, Region 4
Main Regional Office - EPA Region 4
61 Forsyth Street SW
Atlanta, GA 30303

Re: Financial Test Letter

Facility: Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

I am the Executive Vice President of Bluestone Resources, Inc.[1] This letter is in support of this firm's use of the financial test to demonstrate financial assurance for closure and/or post-closure costs, as specified in subpart H of 40 CFR parts 264 and 265.

1. This firm is the owner or operator of the following facility for which financial assurance for corrective action care is demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265. The estimated sum of all environmental remediation obligations covered by the test are shown for each facility:

Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

- SMA 4 $4,115,701.00
- SMA 5 $ 126,424.00
- UIC Injection Pilot Study $ [redacted]

2. This firm guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, the corrective action care of the following facilities owned or operated by the guaranteed party. The current cost estimates for the corrective action care so guaranteed are shown for each facility:

Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

SMA 4 $4,115,701.00
SMA 5 $ 126,424.00

[1] Bluestone Resources, Inc. does not employ the title Chief Financial Officer. As Executive Vice President the undersigned is the most senior officer responsible for the financial functions of the firm.

The firm identified above is the direct or higher-tier parent corporation of the owner or operator. Bluestone Coke, LLC is wholly owned by Bluestone Mineral Inc. which is in turn wholly owned by the undersigned firm, Bluestone Resources, Inc.,

3. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 264 or 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility: **NONE**.

4. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: **NONE**.

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under part 144. The current closure cost estimates as required by 40 CFR 144.62 are shown for each facility: **NONE**.

This firm is not required to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this firm ends on December 31st. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended December 31, 2019.

ALTERNATIVE I

1. Sum of current closure and post-closure cost estimate [total of all cost estimates shown in the five paragraphs above] [redacted]

*2. Total liabilities [if any portion of the closure or post-closure cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4] [redacted]

*3. Tangible net worth [redacted]

*4. Net worth [redacted]

*5. Current assets [redacted]

*6. Current liabilities [redacted]

7. Net working capital [line 5 minus line 6] [redacted]

*8. The sum of net income plus depreciation, depletion, and amortization [redacted]

*9. Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) [redacted]

10. Is line 3 at least $10 million? (Yes/No) [redacted]

11. Is line 3 at least 6 times line 1? (Yes/No) [redacted]

12. Is line 7 at least 6 times line 1? (Yes/No) [redacted]

*13. Are at least 90% of firm's assets located in the U.S.? If not, complete line 14 (Yes/No) [redacted]

14. Is line 9 at least 6 times line 1? (Yes/No) [redacted]

15. Is line 2 divided by line 4 less than 2.0? (Yes/No) [redacted]

16. Is line 8 divided by line 2 greater than 0.1? (Yes/No) [redacted]

17. Is line 5 divided by line 6 greater than 1.5? (Yes/No) [redacted]

I hereby certify that the wording of this letter is substantially similar to the wording specified in 40 CFR 264.151(f) as such regulations were constituted on the date shown immediately below.

Respectfully,

[redacted]

Stephen W. Ball
Executive Vice President
February 24, 2021

Guarantee made this [redacted] by [redacted] a business corporation organized under the laws of the State of Delaware, herein referred to as guarantor. This guarantee is made on behalf of [redacted] of [redacted], which is our subsidiary, to the United States Environmental Protection Agency (EPA).

RECITALS

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 264.143(f), 264.145(f), 265.143(e), and 265.145(e).

2. [redacted] owns or operates the following hazardous waste management facility covered by this guarantee:

[redacted]

3. "Corrective action" refers to the plans maintained as required for the corrective action requirements of the facility as identified above.

4. For value received from [redacted] the sufficiency of which is hereby acknowledged, guarantor guarantees to EPA that in the event that [redacted] fails to perform corrective action at the above facility in accordance with certain corrective action plans and other permit or interim status requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in subpart H of 40 CFR part 264 or 265, as applicable, in the name of [redacted] in the amount of the current corrective action or corrective action cost estimates as substantially similar to the language found in subpart H of 40 CFR parts 264 and 265.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator for the Region in which the facility is located and to [redacted] that it intends to provide alternate financial assurance as specified in subpart H of 40 CFR part 264 or 265, as applicable, in the name of [redacted] Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless [redacted] has done so.

6. The guarantor agrees to notify the EPA Regional Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

7. Guarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor of corrective action

or corrective action care, he shall establish alternate financial assurance as specified in subpart H of 40 CFR part 264 or 265, as applicable, in the name of [redacted] unless [redacted] has done so.

8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the corrective action or corrective action plan, amendment or modification of the permit, the extension or reduction of the time of performance of corrective action or corrective action, or any other modification or alteration of an obligation of the owner or operator pursuant to 40 CFR part 264 or 265.

9. Guarantor agrees to remain bound under this guarantee for as long as [redacted] must comply with the applicable financial assurance requirements of subpart H of 40 CFR parts 264 and 265 for the above-listed facilities, except as provided in paragraph 10 of this agreement.

10. Guarantor may terminate this guarantee by sending notice by certified mail to the EPA Regional Administrator for the Region in which the facility is located and to [redacted] provided that this guarantee may not be terminated unless and until [redacted] obtains, and the EPA Regional Administrator(s) approve(s), alternate corrective action complying with 40 CFR 264.143, 264.145, 265.143, and/or 265.145.

11. Guarantor agrees that if [redacted] fails to provide alternate financial assurance as specified in subpart H of 40 CFR part 264 or 265, as applicable, and obtain written approval of such assurance from the EPA Regional Administrator(s) within 90 days after a notice of cancellation by the guarantor is received by an EPA Regional Administrator from guarantor, guarantor shall provide such alternate financial assurance in the name of [redacted]

12. Guarantor expressly waives notice of acceptance of this guarantee by the EPA or by [redacted] Guarantor also expressly waives notice of amendments or modifications of the corrective action and/or post-corrective action plan and of amendments or modifications of the facility permit(s).

I hereby certify that the wording of this guarantee is substantially equivalent to the wording specified in 40 CFR 264.151(h) as such regulations were constituted on the date first above written.

Effective date: [redacted]

[redacted]

Exhibit CX27

From: Hunter Naff
To: York, Brooke
Subject: Bluestone Coke - Revised Financial Assurance Docs (CBI Privilege Asserted)
Date: Wednesday, February 24, 2021 4:24:46 PM

Ms. York:

In response to the Deficiency Letter received January 28th, 2021, please find attached for your review and to ensure the deficiencies are adequately addressed. By separate e-mail, I will provide the password.

Should you have any questions, please let me know.

Best regards,

Hunter

Hunter Naff
Bluestone Resources, Inc.
(o) 540-613-5795
(c) 540-988-3068

Exhibit CX28

From: Hendrix, Corey
To: Hunter Naff
Cc: York, Brooke; Redleaf-Durbin, Joan; McKeePerez, Nancy
Subject: Bluestone Coke - Financial Assurance Documents 2021, based on 2020 financials
Date: Wednesday, May 12, 2021 1:39:00 PM

Hello Mr. Naff,

Are you available for a short call to discuss the status of this required submittal? To the best of my knowledge, EPA has not yet received the updated CFO letter based on 2020 financial information for corrective action financial assurance coverage. Please let me know when would be a good time to discuss.

Sincerely,
Corey Hendrix

From: Hendrix, Corey
Sent: Monday, April 26, 2021 11:00 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: York, Brooke <York.Brooke@epa.gov>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: RE: Bluestone Coke - Financial Assurance Documents 2021, based on 2020 financials (CBI Privilege Asserted)

Hello Mr. Naff,

I hope this email finds you well. To date, EPA has still not received a new Financial Test and Corporate Guarantee based on FY 2020 data for financial assurance coverage in 2021. The new financial assurance was due 90 days after the company's close of fiscal year. Please let me know the status of this required submittal.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hendrix, Corey
Sent: Thursday, April 1, 2021 9:52 AM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: York, Brooke <York.Brooke@epa.gov>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Bluestone Coke - Financial Assurance Documents 2021, based on 2020 financials (CBI Privilege Asserted)

Hello Mr. Naff,

EPA has received the original, signed and witnessed CFO Letter and Corporate Guarantee dated March 22, 2021 with information based off of the FY 2019 company financials.

To date, EPA has not received a new Financial Test and Corporate Guarantee based on FY 2020 data for financial assurance coverage in 2021. The new financial assurance was due 90 days after the company's close of fiscal year. Original, signed and witnessed CFO Letter and Corporate Guarantee are still required to be sent to the office. An electronic copy emailed to Hendrix.corey@epa.gov is also appreciated. Please also send an electronic copy to Hendrix.corey@epa.gov. Remember that any records that you intend to assert a CBI claim on, can be electronically submitted to myself at Hendrix.corey@epa.gov in a preferably single document/file pdf format, and labeled as such. Send the password to me separately.

Please let me know if you have any questions.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hendrix, Corey
Sent: Tuesday, March 2, 2021 5:46 PM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: York, Brooke <York.Brooke@epa.gov>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: RE: Bluestone Coke - Revised Financial Assurance Docs (CBI Privilege Asserted)

Dear Mr. Naff,

EPA has reviewed the financial assurance information submitted February 24, 2021. Please submit an original, signed and witnessed CFO Letter and Corporate Guarantee, as required, to EPA at:

U.S. EPA Region 4

Attn: Corey Hendrix, RCRA Financial Assurance

61 Forsyth Street SW

Atlanta, GA 30338

At this time, EPA does not need mailed hard copies of Bluestone Resources, Inc.'s 2019

financial statements, because these documents have already been provided and reviewed electronically.

Per the Administrative Order on Consent (AOC) Attachment C: Financial Assurance, Paragraph 6 and 40 CFR § 264.143(f)(5), a new Financial Test and Corporate Guarantee based on FY 2020 data will be due March 30, 2021 or 90 days after the company's close of each succeeding fiscal year. Due to the pandemic, please send an electronic version of your next submittal to Hendrix.corey@epa.gov in addition to an original, signed and witnessed CFO Letter and Corporate Guarantee to the address above. Any financial assurance documents that may be considered CBI, can be sent directly to me in a password protected pdf format, preferably in a single document/file. Send the password to me separately. As a reminder, Bluestone Resources, Inc. may continue to assert a business confidentiality claim covering part or all the information required, in the manner described in 40 C.F.R. § 2.203(b), by attaching to such information, at the time it is submitted, a suitable notice employing language such as trade secret or proprietary or company confidential.

In EPA's recent review of the CFO letter we noticed an opportunity for improvement in future submittals. Line 1 of Alternative I of the CFO letter does not correctly add up all environmental costs as outlined in the AOC Attachment C: Financial Assurance, Paragraph 7. Bluestone did provide a narrative in recent correspondence to account for UIC costs and also included these costs in Paragraph 1 of the CFO letter, but these UIC costs were not added to Line 1 of Alternative I of the CFO letter. In future submittals it is suggest that the language of Line 1 of Alternative I of the CFO letter be changed from "Sum of current closure and post-closure cost estimate" to "the sum of all environmental remediation obligations" to better align with the AOC. In future submittals, Line 1 of Alternative I should include all obligations under CERCLA, RCRA, UIC, TSCA and any other state or tribal environmental obligation guaranteed by Bluestone Resources, Inc.

If you have any questions, please let me know.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

Exhibit CX29

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC MAIL
CONFIRMATION OF RECIEPT EMAIL REQUESTED

Mr. Hunter Naff
Associate General Counsel
Bluestone Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207
hunter.naff@bluestone-coal.com

SUBJ: Notice of Violation, Bluestone Coke, LLC
3500 35th Avenue, Birmingham, EPA ID ALD000828848
RCRA Section 3008(h) Administrative Order on Consent Docket No. RCRA-04-2016-4250

Dear Mr. Naff:

This Notice of Violation (NOV) is to inform Bluestone Coke, LLC of its violations of the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq) (RCRA), RCRA's implementing regulations (inter alia, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order). Pursuant to the regulations and the Order, Bluestone Coke, LLC (Bluestone) is required to provide RCRA financial assurance for corrective action. On April 1, 2021, the U.S. Environmental Protection Agency conducted a review of Bluestone Coke, LLC located at 3500 35th Avenue, Birmingham, Alabama 35207 (the facility) to determine its compliance with the financial assurance requirements set forth in the regulations and the Order. The first two solid waste management unit (SWMU) management areas (SMA) that require financial assurance under the Order are SMA 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant).

Based on this review, the EPA has determined that the facility is not in compliance with certain financial assurance requirements set forth in 40 C.F.R. Part 265 and the Order for SMA 5 and SMA 4. The specific requirements that were identified as areas of non-compliance are found below.

Violation 1
Since April 1, 2021, Bluestone has failed to comply with the Order and with 40 C.F.R. § 265.143(e) by failing to maintain financial assurance for the benefit of the EPA in the amount stated in the approved Estimated Costs of Corrective Measures Work for SMA 5 and SMA 4.

Pursuant to Section XII of the Order, which references Attachment C Paragraph 1.e, Respondent shall, within 60 calendar days of the EPA's written approval of the Estimated Cost of the Corrective Measures Work for each remedy, establish and maintain financial assurance for the benefit of the EPA for the amount stated in the approved Estimated Cost of the Corrective Measures Work in order to secure the full and final completion of work in accordance with this Order.

Pursuant to Section XII of the Order, which references Attachment C Paragraph 8, if at any time the EPA determines that a financial assurance instrument provided pursuant to this Section is inadequate, or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, the EPA shall so notify the Respondent in writing. Within thirty (30) days of receipt of notice of the EPA's determination, or within thirty (30) days of the Respondent becoming aware of such information, as the case may be, Respondent shall obtain and present to the EPA for approval, a proposal for a revised or alternative form of financial assurance listed in 40 C.F.R. § 264.151 that satisfies all requirements set forth or incorporated by reference in this Section.

On March 2, 2021, Bluestone provided a financial test and corporate guarantee from its parent company, Bluestone Resources, Inc., to demonstrate corrective action financial assurance for Bluestone at SMA 5 and SMA 4. The financial test was based on Bluestone Resources, Inc.'s 2019 financial statements. This submittal provided adequate coverage for Bluestone from March 2, 2021 to March 31, 2021. Bluestone Resources, Inc.'s fiscal year ended on December 31, 2020. Therefore, Bluestone's financial assurance submittal for coverage from April 1, 2021 to March 31, 2022 was due to the EPA on or before March 31, 2021. The EPA notified Bluestone of the need for a new financial assurance mechanism in writing via email on April 1, 2021, April 26, 2021 and May 12, 2021. To date, Bluestone has not responded to the EPA's requests for an adequate financial assurance mechanism as required by the Order and by 40 C.F.R. § 265.143(e). Bluestone is at least 85 days late with its required annual financial test and corporate guarantee submittal.

Violation 2

Since April 1, 2021, Bluestone has failed to comply with the Order and with 40 C.F.R. § 265.143(e) by failing to submit annual financial reports and statements to the Regional Administrator, as required with use of the financial test and corporate guarantee for financial assurance coverage.

Pursuant to Section XII of the Order, which references Attachment C Paragraph 6, if at any time during the effective period of this Order, the Respondent provides financial assurance by means of a corporate guarantee or financial test pursuant to 40 C.F.R. § 264.151. Respondent shall also comply with the other relevant requirements of 40 C.F.R. § 265.143(e), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(l) relating to these methods, unless otherwise provided in this Order, including but not limited to, (1) initial submission of required financial reports and statements from the guarantors' chief financial officer and independent certified public accountant; (2) annual re-submission of such reports and statements within ninety (90) days after the close of each of the guarantors' fiscal years; and (3) notification to the EPA within ninety (90) days after the close of any of the guarantors' fiscal years in which any such guarantor no longer satisfies the financial test requirements set forth at 40 C.F.R. § 265.143(e)(l). Respondent further agrees that if the Respondent provides financial assurance by means of a corporate guarantee or financial test, the EPA may request additional information (including financial statements and accountant's reports) from the Respondent or corporate guarantor at any time.

Pursuant to 40 C.F.R. § 265.143(e)(5), after the initial submission of items specified in Paragraph (f)(3) of this Section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

Pursuant to 40 C.F.R. § 265.143(e)(3), to demonstrate that he meets this test, the owner or operator must submit the following items to the Regional Administrator:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 264.151(f);
(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and
(iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

Bluestone has failed to submit Bluestone Resource, Inc.'s updated financial statements and reports for 2021. This information must consist of all three items specified in 40 C.F.R. § 265.143(e)(3) including the chief financial officer's (CFO's) letter, the independent certified public accountant's report on financial statements of the latest completed fiscal year, and the independent certified public accountant's report that CFO data will not be adjusted.

In summary, Bluestone has failed to provide the EPA satisfactory financial assurance and the requisite financial statements and reports as required by the Order and by 40 C.F.R. § 265.143(e) for SMA 4 or SMA 5 at its Birmingham, Alabama facility.

Please provide financial assurance as required by the Order within fourteen (14) days following receipt of this letter. Required documents should be mailed to:

Corey Hendrix, Financial Specialist
U.S. Environmental Protection Agency, Region 4
Land, Chemicals, and Redevelopment Division
61 Forsyth Street SW
Atlanta, Georgia 30303

An electronic version of the documents shall also be emailed to hendrix.corey@epa.gov.

If an acceptable financial assurance mechanism is not received within 14 days, the EPA may determine that a formal enforcement action is appropriate and may assess civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

Please feel free to contact Corey Hendrix at hendrix.corey@epa.gov or by phone at (404) 562-8738 with any technical questions and Joan Redleaf Durbin, Senior Attorney, at redleaf-durbin.joan@epa.gov or by phone at (404) 562-9544 with any legal questions.

Sincerely,

KIMBERLY BINGHAM Digitally signed by KIMBERLY BINGHAM Date: 2021.06.28 14:09:37 -04'00'

Kimberly L. Bingham
Chief
Chemical Safety and Land Enforcement Branch

Exhibit CX30

Bluestone Coke, LLC Notice of Violation

Francis Robinson, Simone <FrancisRobinson.Simone@epa.gov>

Mon 6/28/2021 3:40 PM

To:hunter.naff@bluestone-coal.com <hunter.naff@bluestone-coal.com>
Cc:Hendrix, Corey <Hendrix.Corey@epa.gov>;Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>;York, Brooke <York.Brooke@epa.gov>;Chavez, Araceli <Chavez.Araceli@epa.gov>

1 attachments (235 KB)
2021 NOV Bluestone Coke LLC FA.pdf;

Dear Mr. Naff:

This Notice of Violation (NOV) is to inform Bluestone Coke, LLC of its violations of the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq) (RCRA), RCRA's implementing regulations (inter alia, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order). Please feel free to contact Corey Hendrix at hendrix.corey@epa.gov or by phone at (404) 562-8738 with any technical questions and Joan Redleaf Durbin, Senior Attorney, at redleaf-durbin.joan@epa.gov or by phone at (404) 562-9544 with any legal questions.

Sincerely,

Simone Francis Robinson | **Staff Assistant** | Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division | U.S. Environmental Protection Agency Region 4
61 Forsyth Street, SW Atlanta, GA 30303 | Voice: 404-562-8499 | Email: **francisrobinson.simone@epa.gov**

Exhibit CX31

Bluestone

August 9, 2021

VIA ELECTRONIC MAIL
Redleaf-Durbin.Joan@epa.gov
Hendrix.corey@epa.gov

Joan Redleaf-Durbin, Senior Attorney
Corey Hendrix, Financial Specialist
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St, SW
10th floor
Atlanta, GA 30303

SUBJ: Bluestone Coke, LLC, Birmingham, EPA ID ALD000828848
SMA-4 and SMA-5 Financial Assurance Mechanism
Confidential Business Information provided to evaluate viability of corporate guarantee under C.F.R. § 264.143(f) (10) and 40 C.F.R. § 265.143(e) (10)

CONFIDENTIAL BUSINESS INFORMATION UNDER 40 C.F.R. § 2.201 ET. SEQ.

Ms. Durbin:

I hope this message finds you well. Thus, we hereby notify you and your office that our response to your letter sent to Hunter Naff, is considered Confidential Business Information. The information you are provide will be managed as CBI."

Pursuant to these instructions, and in reliance upon these representations, Bluestone Resources, Inc. ("BRI') provides under this cover letter the information needed to evaluate its financial ability to act as a Corporate Guarantor for the financial assurance required of Bluestone Coke, LLC, for SMA-4 and SMA-5.

As this information is subject to revisions by your office and BRI, and pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Aside from existing publicly available information produced, Bluestone considers each response to contain either proprietary, business confidential, or employee's personally identifiable information which collectively shall remain confidential and limited to the purpose of EPA's

request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order on Consent.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Stephen W. Ball

Encl/

Bluestone

August 9, 2021

CONFIDENTIAL

VIA ELECTRONIC MAIL
Redleaf-Durbin.Joan@epa.gov
Hendrix.corey@epa.gov

Joan Redleaf-Durbin, Senior Attorney
Corey Hendrix, Financial Specialist
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St, SW
10th floor
Atlanta, GA 30303

Re: Financial Test Letter

Facility: Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

I am the Executive Vice President of Bluestone Resources, Inc.[1] This letter is in support of this firm's use of the financial test to demonstrate financial assurance for closure and/or post-closure costs, as specified in subpart H of 40 CFR parts 264 and 265.

1. This firm is the owner or operator of the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility:

Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

- SMA 4 $ 4,115,701.00
- SMA 5 $ 126,424.00
- UIC Injection Pilot Study $ [redacted]

2. This firm guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, the closure or post-closure care of the following facilities owned or operated by the guaranteed party. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility:

[1] Bluestone Resources, Inc. does not employ the title Chief Financial Officer. As Executive Vice President the undersigned is the most senior officer responsible for the financial functions of the firm.

CONFIDENTIAL

Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

- SMA 4 $ 4,115,701.00
- SMA 5 $ 126,424.00

The firm identified above is the direct or higher-tier parent corporation of the owner or operator. Bluestone Coke, LLC is wholly owned by Bluestone Mineral Inc. which is in turn wholly owned by the undersigned firm, Bluestone Resources, Inc.,

3. In States where EPA is not administering the financial requirements of subpart H of 40 CFR part 264 or 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility: **NONE**.

4. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in subpart H of 40 CFR parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: **NONE**.

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under part 144. The current closure cost estimates as required by 40 CFR 144.62 are shown for each facility: **NONE**.

This firm is not required to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this firm ends on December 31st. The figures for the following items marked with an asterisk are derived from this firm's internal, year-end financial statements for the latest completed fiscal year, ended December 31, 2020.[2]

ALTERNATIVE I

1. Sum of current closure and post-closure cost estimate [total of all cost estimates shown in the five paragraphs above] [redacted]

*2. Total liabilities [if any portion of the closure or post-closure cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4] [redacted]

[2] An audit of the firm's December 31, 2020, year-end internally prepared statements conducted by a certified public accountant has not yet been completed. The information provided herein is based on internally prepared financial statements and is subject to change based on adjustments that may be required by the aforementioned audit.

CONFIDENTIAL

*3. Tangible net worth [redacted]

*4. Net worth [redacted]

*5. Current assets [redacted]

*6. Current liabilities [redacted]

7. Net working capital [line 5 minus line 6] [redacted]

*8. The sum of net income plus depreciation, depletion, and amortization [redacted]

*9. Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) [redacted]

10. Is line 3 at least $10 million? (Yes/No) [redacted]

11. Is line 3 at least 6 times line 1? (Yes/No)
12. Is line 7 at least 6 times line 1? (Yes/No) [redacted]

*13. Are at least 90% of firm's assets located in the U.S.? If not, complete line 14 (Yes/No) [redacted]

14. Is line 9 at least 6 times line 1? (Yes/No) [redacted]

15. Is line 2 divided by line 4 less than 2.0? (Yes/No) [redacted]

16. Is line 8 divided by line 2 greater than 0.1? (Yes/No) [redacted]

17. Is line 5 divided by line 6 greater than 1.5? (Yes/No) [redacted]

I hereby certify that the wording of this letter, except for as modified by footnote 2, is substantially similar to the wording specified in 40 CFR 264.151(f) as such regulations were constituted on the date shown immediately below.

Respectfully,

Stephen W. Ball
Executive Vice President
August 9, 2021

Witness: Polly Hansen

Exhibit CX32

From: Polly Hansen
To: Redleaf-Durbin, Joan; Hendrix, Corey
Cc: Steve Ball
Subject: EPA Response from Bluestone
Date: Monday, August 9, 2021 5:43:18 PM

On behalf of Mr. Ball, please find attached our response to Bluestone Coke, LLC EPA IS ALD000828848.

Should you have any questions or concerns, please contact our office at any time.

Thank you.

Polly Hansen
Paralegal
Bluestone Resources, Inc.
Office: 540-613-1460

Exhibit CX33

From: Hendrix, Corey
To: Steve Ball
Cc: Polly Hansen; Redleaf-Durbin, Joan; York, Brooke
Subject: RE: EPA Response from Bluestone
Date: Tuesday, August 24, 2021 10:24:00 AM

Hello Mr. Ball,

EPA has not yet received an updated financial assurance submittal addressing the comments below. Please provide a complete financial assurance instrument to EPA by Friday, August 27.

Thank you!
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Hendrix, Corey
Sent: Wednesday, August 11, 2021 1:05 PM
To: Steve Ball <steve.ball@bluestone-coal.com>
Cc: Polly Hansen <polly.hansen@bluestone-coal.com>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: RE: EPA Response from Bluestone

Dear Mr. Ball,

EPA has reviewed the information dated August 9, 2021 submitted by Bluestone Resources, Inc. in support of use of the Financial Test and Corporate Guarantee for financial assurance coverage related to the Bluestone Coke, LLC facility in Birmingham, AL. In order to use the Financial Test and Corporate Guarantee to meet the obligation for financial assurance related to Resource Conservation and Recovery Act (RCRA) 3008(h) Administrative Order on Consent (AOC) Docket No., RCRA-04-2016-4250, the following deficiencies and comments need to be addressed.

- Per AOC Attachment C: Financial Assurance, Paragraph 6 and 40 CFR § 265.143(e)(10), a written guarantee must be provided with wording as specified in 264.151(h).
- Per AOC Attachment C: Financial Assurance, Paragraph 6 and 40 CFR § 265.143(e)(3)(ii), a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year must be provided.
- Per AOC Attachment C: Financial Assurance, Paragraph 6 and 40 CFR § 265.143(e)(3)(iii), a special report from the owner's or operator's independent certified public accountant to the owner or operator must be provided.
- Per AOC Attachment C: Financial Assurance, Paragraph 6, provide a copy of Bluestone

Resources, Inc. fiscal year 2020 audited financial statements.

- As communicated to Mr. Naff on March 2, 2021, Line 1 of Alternative I of the CFO letter does not correctly add up all environmental costs as outlined in the AOC Attachment C: Financial Assurance, Paragraph 7. Bluestone did include these costs in Paragraph 1 of the CFO letter, but UIC costs were not added to Line 1 of Alternative I of the CFO letter. In future submittals it is suggest that the language of Line 1 of Alternative I of the CFO letter be changed from "Sum of current closure and post-closure cost estimate" to "the sum of all environmental remediation obligations" to better align with the AOC. In future submittals, Line 1 of Alternative I should include all obligations under CERCLA, RCRA, UIC, TSCA and any other state or tribal environmental obligation guaranteed by Bluestone Resources, Inc.

Original, signed and witnessed CFO Letter and a Corporate Guarantee are required to be sent to the EPA office. An electronic copy should also be emailed to Hendrix.corey@epa.gov. Any records that you intend to assert a CBI claim on, can be electronically submitted directly to Hendrix.corey@epa.gov in a preferably single document/file pdf format, labeled as such. The password should be sent in a separate email. The submittal received August 9, 2021 will be handled as CBI as requested.

Please let us know if you have any questions.

Sincerely,

Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Polly Hansen <polly.hansen@bluestone-coal.com>
Sent: Monday, August 9, 2021 5:40 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>; Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: EPA Response from Bluestone

On behalf of Mr. Ball, please find attached our response to Bluestone Coke, LLC EPA IS ALD000828848.

Should you have any questions or concerns, please contact our office at any time.

Thank you.

Polly Hansen
Paralegal
Bluestone Resources, Inc.
Office: 540-613-1460

Exhibit CX34

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

September 29, 2021

ELECTRONIC MAIL

Bluestone Resources, Inc.
Attn: Steven Ball, Vice President and General Counsel
3500 35th Avenue North
Birmingham, Alabama 35207
steve.ball@bluestone-coal.com

Re: Financial Assurance for Corrective Action, Bluestone Coke, LLC facility
3500 35th Avenue, Birmingham, Alabama, EPA ID ALD000828848
RCRA Section 3008(h) Administrative Order on Consent Docket No.
RCRA-04-2016-4250

Dear Mr. Ball:

Pursuant to the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq*) (RCRA), RCRA's implementing regulations (*inter alia*, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order), Bluestone Coke, LLC (Bluestone Coke) is required to provide RCRA financial assurance for corrective action at its 3500 35th Avenue, Birmingham, Alabama facility (the Facility). As of March 22, 2021, Bluestone Resources, Inc. (Bluestone Resources) guarantees financial assurance obligations at the Facility utilizing a corporate guarentee. The United States Environmental Protection Agency finds that Bluestone Resources has failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore is unable to provide a corporate guarantee, as outlined in 40 C.F.R. § 265.143(e)(10) for the Facility. This finding is based on Bluestone Resources' failure to provide the following:

- A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year pursuant to Attachment C: Financial Assurance, Paragraph 6 of the Order and 40 C.F.R. § 265.143(e)(3)(ii).
- A special report from the owner's or operator's independent certified public accountant to the owner or operator pursuant to Attachment C: Financial Assurance, Paragraph 6 of the Order and 40 C.F.R. § 265.143(e)(3)(iii).
- Fiscal year 2020 audited financial statements as requested by the EPA on August 11, 2021, pursuant to Attachment C: Financial Assurance, Paragraph 6, of the Order and 40 C.F.R. § 265.143(e)(7).

Based upon the EPA's determination that Bluestone Resources has failed to meet the requirements of the financial test, Bluestone Resources shall immediately upon receipt of this letter, but not later than 30 days after receipt of this letter, obtain alternative financial assurance through one or more of the approved financial assurance mechanisms identified in Subpart H of 40 C.F.R. Parts 264 and 265 unless Bluestone Coke has already done so. The financial value of the new third party mechanisms shall reflect current corrective action costs for solid waste management areas (SMA) 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant) at the Facility.

All financial assurance documents shall be mailed to:

U.S. Environmental Protection Agency- Region 4
RCRA Financial Assurance Specialist
Attn: Corey Hendrix
61 Forsyth Street SW
Atlanta, Georgia 30303

An electronic version of all hard copy financial assurance documents shall also be emailed to hendrix.corey@epa.gov.

If you have any questions regarding this matter or need assistance, please contact Corey Hendrix, RCRA Financial Assurance Specialist, at 404-562-8738 or hendrix.corey@epa.gov, or Joan Redleaf Durbin, Associate Regional Counsel, at 404-562-9544.

Sincerely,

CESAR ZAPATA

Digitally signed by CESAR ZAPATA
Date: 2021.09.29 11:28:49 -04'00'

Cesar Zapata
Director
Land, Chemicals and Redevelopment Division

cc: Brent Watson, ADEM

Exhibit CX35

EPA ID ALD000828848

Hendrix, Corey <Hendrix.Corey@epa.gov>

Wed 9/29/2021 11:50 AM

To:Steve Ball <steve.ball@bluestone-coal.com>
Cc:Polly Hansen <polly.hansen@bluestone-coal.com>;Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>;York, Brooke <York.Brooke@epa.gov>;Hardegree, Wesley <Hardegree.Wes@epa.gov>;Zapata, Cesar <Zapata.Cesar@epa.gov>;Anderson, Meredith <Anderson.Meredith@epa.gov>;McKeePerez, Nancy <McKeePerez.Nancy@epa.gov>

1 attachments (278 KB)

2021 Bluestone Coke LLC Alternative Financial Assurance Request Letter.pdf;

Hello Mr. Ball,

Please see the attached letter requesting alternative financial assurance for corrective action at the Bluestone Coke, LLC facility in Birmingham, Alabama. If you have any questions regarding this matter, please feel free to reach out to Joan Redleaf Durbin, Associate Regional Counsel, or myself.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Polly Hansen <polly.hansen@bluestone-coal.com>
Sent: Friday, August 27, 2021 4:59 PM
To: Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: EPA ID ALD000828848

On behalf of Mr. Ball, please find attached documents related to the above EPA ID number. These documents have also been sent via UPS.

Should you have any questions or concerns, please do not hesitate to contact our office at any time.

Thank you.

Polly Hansen
Paralegal
Bluestone Resources, Inc.
Office: 540-613-1460

Exhibit CX36

From: Redleaf-Durbin, Joan
To: Steve Ball
Cc: Polly Hansen; Hendrix, Corey; York, Brooke
Subject: RE: EPA ID ALD000828848
Date: Thursday, October 28, 2021 1:10:44 PM

Steve – thank you for getting back to me.

EPA's September letter noted that Bluestone Resources has failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore is unable to provide a corporate guarantee, as outlined in 40 C.F.R. § 265.143(e)(10) for the Facility.

As a result of this determination, EPA required Bluestone Resources to immediately, but no later than tomorrow, obtain alternative financial assurance through one or more of the approved financial assurance mechanisms identified in Subpart H of 40 C.F.R. Parts 264 and 265.

Please get back to me today and let me know how Bluestone Resources plans to meet the requirement to provide alternative financial assurance by tomorrow. I would be happy to schedule a call if that would be easier. Please provide me with your phone number.

Thanks
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Steve Ball <steve.ball@bluestone-coal.com>
Sent: Thursday, October 28, 2021 12:28 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Cc: Polly Hansen <polly.hansen@bluestone-coal.com>
Subject: Re: EPA ID ALD000828848

Joan,

The 2020 audit has not yet been completed. I am requesting an update from our external auditors as to an estimated completion date. I will provide you an update as soon as I have it from the auditors.

Thanks and best regards,

Steve

On Thu, Oct 28, 2021 at 11:06 AM Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov> wrote:

> Hi – could one of you please call me today and let me know the status of the Financial assurance for Bluestone Coke
>
> 404-562-9544
>
> Thx
> Joan
>
> Joan Redleaf Durbin (she/her)
> Senior Attorney
> RCRA/FIFRA/TSCA Law Office
> US EPA, Region 4
> 404/562-9544
>
> This email is from an attorney and may contain privileged information and attorney-client communications and should not be released under FOIA or discovery to individuals or entities outside of EPA or the U.S. Department of Justice without the knowledge of the sender.
>
> ---
>
> **From:** Redleaf-Durbin, Joan
> **Sent:** Tuesday, October 26, 2021 11:33 AM
> **To:** Steve Ball <steve.ball@bluestone-coal.com>
> **Cc:** Polly Hansen <polly.hansen@bluestone-coal.com>
> **Subject:** RE: EPA ID ALD000828848
>
> Hi Steve – I am following up on this letter we sent you last month. I left a message with Polly today trying to reach you. Please let me know whether Bluestone Resources plans on complying with the EPA request for updated or alternative financial assurance for Bluestone Coke.
>
> Thank you,
> Joan
>
> Joan Redleaf Durbin (she/her)
> Senior Attorney
> RCRA/FIFRA/TSCA Law Office
> US EPA, Region 4
> 404/562-9544
>
> This email is from an attorney and may contain privileged information and attorney-client communications and should not be released under FOIA or discovery to individuals or entities outside of EPA or the U.S. Department of Justice without the knowledge of the

sender.

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Wednesday, September 29, 2021 11:50 AM
To: Steve Ball <steve.ball@bluestone-coal.com>
Cc: Polly Hansen <polly.hansen@bluestone-coal.com>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>; York, Brooke <York.Brooke@epa.gov>; Hardegree, Wesley <Hardegree.Wes@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Anderson, Meredith <Anderson.Meredith@epa.gov>; McKeePerez, Nancy <McKeePerez.Nancy@epa.gov>
Subject: EPA ID ALD000828848

Hello Mr. Ball,

Please see the attached letter requesting alternative financial assurance for corrective action at the Bluestone Coke, LLC facility in Birmingham, Alabama. If you have any questions regarding this matter, please feel free to reach out to Joan Redleaf Durbin, Associate Regional Counsel, or myself.

Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

From: Polly Hansen <polly.hansen@bluestone-coal.com>
Sent: Friday, August 27, 2021 4:59 PM
To: Hendrix, Corey <Hendrix.Corey@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: EPA ID ALD000828848

On behalf of Mr. Ball, please find attached documents related to the above EPA ID number. These documents have also been sent via UPS.

Should you have any questions or concerns, please do not hesitate to contact our office at any time.

Thank you.

Polly Hansen
Paralegal
Bluestone Resources, Inc.

Office: 540-613-1460

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****

******** CONFIDENTIALITY NOTICE AND WARNINGS *********

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****

Exhibit CX37

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC MAIL
CONFIRMATION OF RECEIPT EMAIL REQUESTED

Mr. Ronald H. Hatfield, Jr.
General Counsel-Litigation
Bluestone Coke, LLC
302 S. Jefferson Street
Roanoke, Virginia 24011
Ron.Hatfield@bluestone-coal.com

Re: Notification of Accrual of Stipulated Penalties Related to Financial Assurance
Bluestone Coke, LLC
3500 35th Avenue, Birmingham, Alabama, EPA ID: ALD000828848
RCRA Section 3008(h) Administrative Order on Consent
Docket No.: RCRA-04-2016-4250

Dear Mr. Hatfield:

Pursuant to the Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (Order), Bluestone Coke, LLC (Bluestone Coke or Respondent) is currently required to provide RCRA financial assurance for corrective action at its 3500 35th Avenue, Birmingham, Alabama facility (the Facility) for solid waste management areas (SMA) 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant). On March 2, 2021, Bluestone Resources, Inc. (Bluestone Resources) guaranteed financial assurance obligations at the Facility utilizing a financial test and corporate guarantee. The financial test was based on Bluestone Resources' 2019 financial statements. This submittal provided adequate coverage for Bluestone Coke from March 2, 2021 to March 31, 2021.

Pursuant to Attachment C: Financial Assurance, Condition 6. of the Order, using the financial test to secure a corporate guarantee requires annual re-submission of company financials each year within 90 days of the end of its previous fiscal year, using the prior year's financial statements. Bluestone Resources' fiscal year ended December 31, 2020. Therefore, Bluestone Resources was required to provide the U.S. Environmental Protection Agency with an updated financial test based on its 2020 financial statements before April 1, 2021, to provide the financial assurance for the period April 1, 2021 to March 31, 2022. On June 28, 2021, the EPA notified Bluestone Coke that it has not been in compliance since April 1, 2021, with certain financial assurance requirements set forth in the Order. On September 29, 2021, the EPA notified Bluestone Resources that the financial test and corporate guarantee requirements had not been met and therefore, alternative financial assurance was required pursuant to Attachment C: Financial Assurance, Condition 8 on or before October 29, 2021. To date, the EPA has not received alternative financial assurance as required.

History of Financial Assurance

SMA 5

- On July 11, 2019 – The EPA issued a Final Approval of Corrective Measures Implementation Work Plans (including previously approved cost estimate) for SMA 5. Per the terms of the Order (Attachment C: Financial Assurance, Term 1.e.), Respondent shall provide the EPA with financial assurance coverage within 60 calendar days after the EPA's written approval of the cost estimate for SMA 5 (on or before September 9, 2019).

- September 5, 2019 - Bluestone Coke requested a 45-day extension to submit the Financial Assurance for SMA 5. The EPA granted an extension until October 31, 2019.

- September 31, 2019 - Bluestone Mineral, Inc. submitted a certificate of insurance in relation to financial assurance coverage at SMA 5.

- February 4, 2020 – The EPA informed Bluestone Coke that the submitted insurance policy is insufficient. The EPA's review showed that the policy does not conform to the regulations outlined in 40 C.F.R. § 264.143(e) and 40 C.F.R. § 264.145(e).

SMA 4

- December 18, 2019 – The EPA issued a Final Approval of Corrective Measures Implementation Work Plans (including cost estimate) for SMA 4 (Former Chemical Plant). Per the terms of the Order (Attachment C: Financial Assurance, Term 1.e.), Respondent shall provide the EPA with financial assurance coverage within 60 calendar days after the EPA's written approval of the cost estimate for SMA 4 (on or before February 16, 2020).

SMA 5 and SMA 4

- February 12, 2020, April 3, 2020, and April 30, 2020 – The EPA reaffirmed the requests to Bluestone Coke for adequate financial assurance.

- May 6, 2020 - Bluestone Coke informed the EPA that it has been working to provide financial assurance to the EPA, but the COVID-19 pandemic had a severe financial impact on the plant and therefore it is unable to afford acceptable financial assurance.

- June 3, 2020 – The EPA sent Bluestone Coke a request for information pursuant to Section 3007 of RCRA (Information Request Letter) to inquire further about Bluestone Coke's attempts to obtain financial assurance and its financial status. A response was requested within 14-days (on or before June 17, 2020).

- June 18, 2020 - Bluestone Coke partially replied to the Information Request Letter. The EPA granted Bluestone Coke a two-week extension to provide the remainder of the information requested (on or before July 3, 2020). Despite multiple communications between the EPA and Bluestone Coke on the need for a complete response to the Information Request Letter, no additional information was ever received by the EPA.

- August 28, 2020 – The EPA sent Bluestone Coke an Opportunity to Show Cause why the EPA should not take formal enforcement action against Bluestone Coke.

- October 29, 2020 - Bluestone Coke and Bluestone Resources participated in a Show Cause Meeting with the EPA to discuss issues related to financial assurance.

- March 2, 2021 - Bluestone Resources, on behalf of Bluestone Coke, submitted a Financial Test and Corporate Guarantee providing financial assurance coverage based on information from Bluestone Resources' fiscal year 2019 company financials. This submittal provided sufficient financial assurance coverage for SMA 5 and SMA 4 until March 30, 2021.

- March 2, 2021, April 1, 2021, April 26, 2021, and May 12, 2021 – The EPA informed Bluestone Resources that a new financial test and corporate guarantee submittal based on fiscal year 2020 was due on or before March 30, 2021.

- June 28, 2021 – The EPA sent a Notice of Violation documenting that since April 1, 2021, Bluestone Coke has failed to comply with the Order and with 40 C.F.R. § 264.143(f) by failing to submit annual financial reports and statements to the Regional Administrator, as required with use of the financial test and corporate guarentee for financial assurance coverage at SMA 5 and SMA 4.

- August 9, 2021 - Bluestone Resources submitted a partial financial assurance submittal.

- August 11, 2021 and August 24, 2021 – The EPA requested information from Bluestone Resources that was missing from the August 9, 2021 financial assurance submittal.

- August 27, 2021 - Bluestone Resources responded to the EPA stating that it did not have the documents necessary to complete the financial assurance submission.

- September 29, 2021 – The EPA sent Bluestone Resource a letter documenting the finding that Bluestone Resources has failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore is unable to provide a corporate guarantee, as outlined in 40 C.F.R. § 265.143(e)(10) for the Facility. Bluestone Resources was given 30 days to provide alternative financial assurance (on or before October 29, 2021).

- October 28, 2021 – The EPA again notified Bluestone Resources that it has failed to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) and therefore is unable to provide a corporate guarantee as outlined in 40 C.F.R. § 265.143(e)(10). As a result of this determination, the EPA required Bluestone Resources to immediately, but no later than October 29, 2021, obtain alternative financial assurance through one or more of the approved financial assurance mechanisms identified in Subpart H of 40 C.F.R. Parts 264 and 265.

Since October 28, 2021, no additional information or alternate financial assurance has been provided to the EPA by either Bluestone Coke or Bluestone Resources. Pursuant to Section XXVIII (Delay In Performance/Stipulated Penalties) of the Order, the EPA may seek stipulated penalties from Respondent for Respondent's failure to comply with any term or condition of the Order. Stipulated penalties begin to accrue on the date Respondent fails to comply with any term or condition of the Order. Due to Respondent's violation of Paragraph 34 of the Order, daily stipulated penalties began to accrue on April 1, 2021, which is the day Respondent's violation of the Order began. Stipulated penalties continue to accrue through the day of correction of the violation. As of March 1, 2022, stipulated penalties for Respondent's failure to provide financial assurance have accrued to $1,306,000, and will continue to increase by $2000 each business day until Respondent comes into compliance with the financial assurance provisions of the Order.

Please contact Joan Redleaf Durbin, Senior Attorney, at (404) 562-9544 or redleaf-durbin.joan@epa.gov within 10 business days of the reciept of this letter to discuss how Bluestone Coke will come into compliance with the financial assurance requirements of the Order and RCRA regulations.

Sincerely,

KERIEMA NEWMAN

Digitally signed by KERIEMA NEWMAN
Date: 2022.03.24 11:54:16 -04'00'

Keriema S. Newman
Deputy Director
Enforcement and Compliance Assurance Division

cc: Mr. Steven Ball; Bluestone Resources, Inc. (steve.ball@bluestone-coal.com)
Mr. Don Wiggins; Bluestone Coke, LLC. (dwiggins@bluestonecoke.com)
Ms. Sonja Favors; ADEM (SMB@adem.alabama.gov)

Exhibit CX38

Bluestone Coke, LLC Notification of Accrual of Stipulated Penalties Related to Financial Assurance

Francis Robinson, Simone <FrancisRobinson.Simone@epa.gov>

Thu 3/24/2022 12:02 PM

To:Ron.Hatfield@bluestone-coal.com <Ron.Hatfield@bluestone-coal.com>
Cc:steve.ball@bluestone-coal.com <steve.ball@bluestone-coal.com>;dwiggins@bluestonecoke.com <dwiggins@bluestonecoke.com>; smb@adem.alabama.gov <smb@adem.alabama.gov>;Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>;Hendrix, Corey <Hendrix.Corey@epa.gov>;Himes, Daryl <Himes.Daryl@epa.gov>;Chavez, Araceli <Chavez.Araceli@epa.gov>

1 attachments (229 KB)

2022 March Bluestone Coke LLC SIP Notification Letter.pdf;

Dear Mr. Hatfield:

Pursuant to the Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (Order), Bluestone Coke, LLC (Bluestone Coke or Respondent) is currently required to provide RCRA financial assurance for corrective action at its 3500 35th Avenue, Birmingham, Alabama facility. Please contact Joan Redleaf Durbin, Senior Attorney, at (404) 562-9544 or redleaf-durbin.joan@epa.gov within 10 business days of the receipt of this letter to discuss how Bluestone Coke will come into compliance with the financial assurance requirements of the Order and RCRA regulations.

Sincerely,

Simone Francis Robinson | **Staff Assistant** | Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division | U.S. Environmental Protection Agency Region 4
61 Forsyth Street, SW Atlanta, GA 30303 | Voice: 404-562-8499 | Email: **francisrobinson.simone@epa.gov**

Exhibit CX39

From: Redleaf-Durbin, Joan
To: Hendrix, Corey
Subject: FW: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order
Date: Thursday, October 20, 2022 1:47:02 PM
Attachments: 2302_001.pdf

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Wednesday, October 19, 2022 11:04 AM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Re: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

I will keep trying to get an answer for you.

> On Oct 19, 2022, at 9:42 AM, Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov> wrote:
>
> Thanks. This is the last correspondence we received from Steve Ball. We have received nothing since this letter.
>
> Joan Redleaf Durbin (she/her)
> Senior Attorney
> RCRA/FIFRA/TSCA Law Office
> US EPA, Region 4
> 404/562-9544
>
>
>
> ---
>
> **From:** Rob Fowler <rfowler@bluestone-coal.com>
> **Sent:** Wednesday, October 19, 2022 10:32 AM

To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Re: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

It looks like Steve Ball is the person that knows the financing. They are still in the middle of working out financing with Credit Suisse. I am not sure where that stands. I will push again today.

> On Oct 19, 2022, at 9:17 AM, Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov> wrote:
>
> Hi Rob – any updates?
>
> Thanks
> Joan
>
> Joan Redleaf Durbin (she/her)
> Senior Attorney
> RCRA/FIFRA/TSCA Law Office
> US EPA, Region 4
> 404/562-9544
>
>
>
> ---
>
> **From:** Rob Fowler <rfowler@bluestone-coal.com>
> **Sent:** Wednesday, October 12, 2022 10:38 AM
> **To:** Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
> **Subject:** RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order
>
> Joan,
> I am just touching base to let you know that I am still pushing for the name of our financial person who has the necessary financial information of the parent company. I will keep pushing this and keep you informed.
> Rob
>
> ---
>
> **From:** Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
> **Sent:** Thursday, October 6, 2022 12:46 PM
> **To:** Rob Fowler <rfowler@bluestone-coal.com>
> **Cc:** Hendrix, Corey <Hendrix.Corey@epa.gov>
> **Subject:** RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative

Consent Order

Thanks
joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Thursday, October 6, 2022 1:39 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Cc: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

I am checking with them now and will let you know.

From: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Sent: Thursday, October 6, 2022 10:25 AM
To: Rob Fowler <rfowler@bluestone-coal.com>
Cc: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Thanks Rob.

I think it would be helpful for EPA to speak with your financial folks who make these determinations. By our logic, if Bluestone Resources will be able to demonstrate in December that it has sufficient resources to support the Corporate Guarantee, then it must have the resources currently available to provide an alternate form of financial assurance as required by the Order.

Please let me know some dates/times we could set up a call.

Thanks

Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Tuesday, October 4, 2022 1:49 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Cc: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Joan,
Unfortunately, I still do not have an answer for you. I have forwarded your concerns and request to our finance department and am waiting to hear back. I will continue to press them for an answer. Thus far, the answer is we cannot get a bond or insurance on this. I will push for a more rapid response to the audit. I will keep you posted. Rob

---

From: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Sent: Monday, October 3, 2022 1:32 PM
To: Rob Fowler <rfowler@bluestone-coal.com>
Cc: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Hi Rob – I realize I didn't put a definitive date in my initial email.

However, as it has been almost two weeks, please let me know where Bluestone Resources is in its efforts to obtain alternate financial assurance.

If Bluestone Resources has not already obtained alternate financial assurance, please let me know what the timing is for that to happen.

Thank you

Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Tuesday, September 20, 2022 4:04 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Cc: Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: Re: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Joan, Thank you for your email. I am forwarding to our financial folks and letting them know EPA's position. I will let you know anything as soon as I do. Rob

> On Sep 20, 2022, at 2:38 PM, Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov> wrote:
>
> Hi Rob – EPA has discussed the continued violation of the financial assurance provisions of Bluestone Coke's 3008h Order.
>
> Bluestone Resources' inability to provide updated audited financials does not demonstrate that Bluestone Resources has no money and cannot comply with the requirement to obtain alternative financial assurance now. Bluestone Resources isn't complying with Term 7 of the Corporate Guarantee which requires Bluestone Resources to establish alternative financial assurance within 30 days after being notified by EPA. This notification occurred on September 29, 2021.
>
> EPA does not have any tangible information from Bluestone Resources to justify flexibility on the Financial Assurance

terms of the Order. Bluestone Resources has not demonstrated in any way that it cannot obtain a bond or Letter of Credit. Rather, if Bluestone Resources is planning to continue to use the Corporate Guarantee, it should have sufficient tangible net worth and net working capital to secure another instrument, or to open a trust fund for $4+ million to cover the Corrective Action costs - that is the point of the Corporate Guarantee.

Bluestone Resources' 2018 and 2019 financials demonstrate that it has ample cash on hand to pay for financial assurance. Granted a lot has happen since 2019, but EPA has no new financials to evaluate Bluestone Resources' ability to pay or otherwise justify leniency. The language of the Corporate Guarantee states that the Guarantor will establish alternative financial assurance 30 days after being notified by EPA of an determination that the Guarantor no longer meets the financial test criteria.

The idea that Bluestone Resources' financials will demonstrate in December that it has at least $10 million in tangible net worth, does not support the argument that it cannot obtain another form of FA now as required by the Order and the Corporate Guarantee.

Please have Bluestone Resources provide an alternative form of financial assurance immediately to comply with its obligations under the Order.

Thanks
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>

Sent: Wednesday, August 24, 2022 12:53 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Joan,
I apologize for just getting back to you. I have been working out of state. I am available Friday late afternoon and Monday and Tuesday of next week.

From: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Sent: Monday, August 22, 2022 3:04 PM
To: Rob Fowler <rfowler@bluestone-coal.com>
Subject: RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Hi Rob – I would like to discuss the status of the financial assurance with you and the requirements for the parent guarantee that haven't been met. I will ask our financial assurance specialist, Corey Hendrix, to join us.

Can you please provide me with some dates/times that work for you this week?

Thanks much
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Redleaf-Durbin, Joan
Sent: Wednesday, August 17, 2022 1:26 PM
To: Rob Fowler <rfowler@bluestone-coal.com>
Subject: Re: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Hi. There are requirements that have to be met when providing a parent guarantee. I am also out this week so speaking next week is fine. Thanks
Joan

Sent from my iPhone

> On Aug 17, 2022, at 12:30 PM, Rob Fowler <rfowler@bluestone-coal.com> wrote:
>
> Joan,
> I apologize for this taking over a week. However, our General Counsel that you previously spoke with has been (and still is) out with COVID. He indicated that you had requested an audit for 2021 for Bluestone Coke. Unfortunately, he indicated that due to the Greensill bankruptcy, it has not possible to complete that audit. He indicated that he provided financial assurance through a parent guarantee. Is that correct? If so, why is that not sufficient? Just so you know, I will be out of the office until next Monday, sending my daughter away on a 10-month mission trip around the world. Let's plan to talk early next week if that works for you. Rob
>
> ---
>
> **From:** Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
> **Sent:** Monday, August 8, 2022 10:17 AM
> **To:** Rob Fowler <rfowler@bluestone-coal.com>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
> **Subject:** RE: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order
>
> Hi Rob – thank you for this update. Unfortunately I didn't receive a voice mail – so I am sorry I didn't respond / contact you back.
>
> I will share this and be back in touch shortly.
>
> Are you the appropriate person / counsel for

me to communicate with? I have had a number of names/contacts recently.

Thanks
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Monday, August 8, 2022 11:11 AM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Bluestone Coke, LLC/RCRA Section 3008(h) Administrative Consent Order

Dear Ms. Redleaf Durbin,
I contacted you via voice message last week regarding the above referenced consent order. Bluestone has paid for the second phase of the CMI underground injection pilot study. Due to manpower shortages and scheduling with the contractor that will conduct the study, it will likely be September/October timeframe to complete the study. We are waiting on Regenisis to complete the study. I don't know if you are aware; however, Bluestone Coke shut down its ovens in October 2021. I am available to discuss this whenever you are available.
Thanks. Rob

Robert P. Fowler
Executive Vice President &
General Counsel for Environmental Affairs

302 S. Jefferson Street
Roanoke, VA 24011
Telephone (205)613-6756

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******** CONFIDENTIALITY NOTICE AND WARNINGS *********

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Exhibit CX40

From:	Chavez, Araceli
To:	steve.ball@bluestone-coal.com
Cc:	Ron.Hatfield@bluestone-coal.com; rfowler@bluestone-coal.com; dwiggins@bluestonecoke.com; smb@adem.alabama.gov; Redleaf-Durbin, Joan (she/her/hers); Himes, Daryl; Hendrix, Corey
Subject:	Final Request for Alternative Financial Assurance Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama
Date:	Tuesday, February 7, 2023 2:12:15 PM
Attachments:	2023 January Bluestone Coke LLC Financial Assurance Demand Letter.pdf 2022 March Bluestone Coke LLC SIP Notification Letter.pdf

Dear Stephen W. Ball:

Pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., RCRA's implementing regulations (inter alia, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order), Bluestone Coke, LLC (Bluestone Coke) is required to provide RCRA financial assurance for corrective action at its facility located at 3500 35th Avenue, Birmingham, Alabama (the Facility). Please contact Joan Redleaf Durbin, Senior Attorney, at 404-562-9544 or via email at redleaf-durbin.joan@epa.gov within seven (7) business days of the receipt of this letter to discuss how Bluestone Coke and Bluestone Resources will come into compliance with the financial assurance requirements of the Order and RCRA regulations.

Thank you,

Araceli B. Chavez, Chief
RCRA Enforcement Section
Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division
USEPA-Region 4
61 Forsyth Street
Atlanta, GA 30303
404-562-9790
chavez.araceli@epa.gov

Exhibit CX41

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC MAIL
CONFIRMATION OF EMAIL RECEIPT REQUESTED

Stephen W. Ball
Executive Vice President and General Counsel
Bluestone Coke, LLC
Bluestone Resources, Inc.
302 S. Jefferson Street
Roanoke, Virginia 24011
steve.ball@bluestone-coal.com

Re: Final Request for Alternative Financial Assurance
Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama
EPA ID#: ALD000828848
RCRA Section 3008(h) Administrative Order on Consent
Docket No. RCRA-04-2016-4250

Dear Stephen W. Ball:

Pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, RCRA's implementing regulations (*inter alia*, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order), Bluestone Coke, LLC (Bluestone Coke) is required to provide RCRA financial assurance for corrective action at its facility located at 3500 35th Avenue, Birmingham, Alabama (the Facility). As of March 22, 2021, Bluestone Resources, Inc. (Bluestone Resources) provided financial assurance for the Facility through a corporate guarantee, which was valid through March 31, 2021. On September 29, 2021, the U.S. Environmental Protection Agency notified Bluestone Resources that the financial test and corporate guarantee requirements had not been met and therefore, alternative financial assurance was required pursuant to the terms of the Order (*see* Attachment C: Financial Assurance, Condition 8) on or before October 29, 2021. Bluestone Resources has been unable to meet the requirements of the financial test found in 40 C.F.R. § 265.143(e) since March 31, 2021, and therefore has been unable to provide a corporate guarantee, as outlined in 40 C.F.R. § 265.143(e)(10) for the Facility. Pursuant to Attachment C: Financial Assurance, Condition 8 of the Order, alternative financial assurance is still required by either Bluestone Coke or Bluestone Resources.

As outlined in the EPA's March 24, 2022, letter (attached), the EPA has notified Bluestone Resources and Bluestone Coke of their noncompliance multiple times. On April 7, 2022, Bluestone Resources informed the EPA that due to the Greensill Capital (UK) Ltd. bankruptcy, Bluestone Resources had not been able to complete its annual audit and had no access to the working capital necessary to obtain

alternative financial assurance given that Greensill Capital (UK) Ltd. was Bluestone Resource's primary lender and source of credit. To date, however, Bluestone Resources and Bluestone Coke have provided no documentation to support this claim. On January 6, 2023, Bluestone Resources anticipated completion of its annual audit by March 31, 2023, covering both Bluestone Coke and Bluestone Resources. However, even if this audit is completed by March 31, 2023, this will be over two years since Bluestone Coke's financial assurance was found to be insufficient and completion of the audit, even if the numbers indicate that Bluestone Resources will pass the financial test, will still not fulfill the financial assurance requirement of the Order. Until a sufficient financial assurance mechanism is put in place, Bluestone Coke remains out of compliance with its financial assurance requirement.

Please contact Joan Redleaf Durbin, Senior Attorney, at 404-562-9544 or via email at redleaf-durbin.joan@epa.gov within seven (7) business days of the receipt of this letter to discuss how Bluestone Coke and Bluestone Resources will come into compliance with the financial assurance requirements of the Order and RCRA regulations.

If Bluestone Coke and Bluestone Resources have not come into compliance within fourteen (14) days of contacting Joan Redleaf-Durbin, the EPA may determine that a formal enforcement action is appropriate and may seek civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

Sincerely,

KERIEMA NEWMAN Digitally signed by KERIEMA NEWMAN
Date: 2023.02.07 08:29:52 -05'00'

Keriema S. Newman
Deputy Director
Enforcement and Compliance Assurance Division

Attachment

cc: Ronald H. Hatfield, Jr., General Counsel-Litigation
Bluestone Resources, Inc., Ron.Hatfield@bluestone-coal.com

Robert P. Fowler, Executive Vice President & General Counsel for Environmental Affairs
Bluestone Resources, Inc., rfowler@bluestone-coal.com

Don Wiggins, Manager of Technical Services
Bluestone Coke, LLC., dwiggins@bluestonecoke.com

Sonja Favors, Land Division
Alabama Department of Environmental Management, SMB@adem.alabama.gov

Exhibit CX42

From:	Redleaf-Durbin, Joan (she/her/hers)
To:	Hendrix, Corey (she/her/hers)
Subject:	FW: Final Request for Alternative Financial Assurance Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama
Date:	Monday, August 19, 2024 7:53:08 AM

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Steve Ball <steve.ball@bluestone-coal.com>
Sent: Monday, February 20, 2023 10:48 AM
To: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Cc: Rob Fowler <rfowler@bluestone-coal.com>
Subject: Re: Final Request for Alternative Financial Assurance Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama

Joan,

Yes, I am in receipt of the February 7th letter. As previously communicated we are continuing to work on the financial audit for Bluestone Resources, Inc. and will provide it as soon as it is complete. In the January 6th, 2023 letter from Hess Stewart and Campbell, CPAs, they indicate the anticipated completion date is March 31, 2023 which we expect will be met.

Regards,

Steve

Stephen W. Ball
Executive Vice President & General Counsel
302 S. Jefferson Street
Roanoke, VA 24011

On Fri, Feb 17, 2023 at 2:18 PM Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov> wrote:

> Hi Steve – please confirm receipt of EPA's letter on February 7.
>
> Thx
> Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Redleaf-Durbin, Joan (she/her/hers)
Sent: Thursday, February 16, 2023 9:04 AM
To: Steve Ball <steve.ball@bluestone-coal.com>
Subject: FW: Final Request for Alternative Financial Assurance Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama

Hi Steve – I want to confirm you received this – please let me know

Thanks
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

This email is from an attorney and may contain privileged information and attorney-client communications and should not be released under FOIA or discovery to individuals or entities outside of EPA or the U.S. Department of Justice without the knowledge of the sender.

From: Chavez, Araceli <Chavez.Araceli@epa.gov>
Sent: Tuesday, February 7, 2023 2:12 PM
To: steve.ball@bluestone-coal.com
Cc: Ron.Hatfield@bluestone-coal.com; rfowler@bluestone-coal.com; dwiggins@bluestonecoke.com; smb@adem.alabama.gov; Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>; Himes, Daryl <Himes.Daryl@epa.gov>; Hendrix, Corey <Hendrix.Corey@epa.gov>
Subject: Final Request for Alternative Financial Assurance Bluestone Coke, LLC, 3500 35th Avenue, Birmingham, Alabama

Dear Stephen W. Ball:

Pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., RCRA's implementing regulations (inter alia, 40 C.F.R. Part 265), and the RCRA Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (the Order), Bluestone Coke, LLC (Bluestone Coke) is required to provide RCRA financial assurance for corrective action at its facility located at 3500 35th Avenue, Birmingham, Alabama (the Facility). Please contact Joan Redleaf Durbin, Senior Attorney, at 404-562-9544 or via email at redleaf-durbin.joan@epa.gov within seven (7) business days of the receipt of this letter to discuss how Bluestone Coke and Bluestone Resources will come into compliance with the financial assurance requirements of the Order and RCRA regulations.

Thank you,

Araceli B. Chavez, Chief
RCRA Enforcement Section
Chemical Safety and Land Enforcement Branch
Enforcement and Compliance Assurance Division
USEPA-Region 4
61 Forsyth Street
Atlanta, GA 30303
404-562-9790
chavez.araceli@epa.gov

please advise by return email and delete immediately without reading, copying or forwarding to others.

****

Exhibit CX43

May 26, 2023

VIA ELECTRONIC MAIL
Redleaf-Durbin.Joan@epa.gov

Joan Redleaf-Durbin, Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St., SW
10th Floor
Atlanta, GA 30303

SUBJ: Bluestone Coke, LLC, Birmingham, EPA ID ALD000828848
SMA-4 and SMA-5 Financial Assurance Mechanism
Confidential Business Information provided to evaluate viability of corporate guarantee under C.F.R. § 264.143(f) (10) and 40 C.F.R. § 265.143(e) (10)

CONFIDENTIAL BUSINESS INFORMATION UNDER 40 C.F.R. § 2.201 ET. SEQ.

Dear Ms. Redleaf-Durbin:

Bluestone Resources, Inc. ("BRI') provides under this cover letter the 2022 Independent Auditor's Report to establish its financial ability to act as a Corporate Guarantor for the financial assurance required of Bluestone Coke, LLC, for SMA-4 and SMA-5.

Pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Bluestone considers this information to contain either proprietary or business confidential information which collectively shall remain confidential and limited to the purpose of EPA's request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order.

Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Stephen W. Ball
Executive Vice President &
General Counsel

BLUESTONE RESOURCES, INC. AND SUBSIDIARIES

CONSOLIDATED FINANCIAL STATEMENTS

Year Ended December 31, 2022

C O N T E N T S

Exhibit CX44

From: Redleaf-Durbin, Joan (she/her/hers)
To: Hendrix, Corey
Subject: FW: Audit Proposal-year end 2022/Company Confidential Information
Date: Tuesday, May 30, 2023 1:14:45 PM
Attachments: 2022_BRI_Audit_w_Cover_Letter.pdf

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Friday, May 26, 2023 7:02 PM
To: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: RE: Audit Proposal-year end 2022/Company Confidential Information

Joan,
I sincerely appreciate you patience on this matter. Attached is a transmittal letter and Bluestone Resources, Inc's Independent Auditor's Report for year ending December 31, 2022.

Pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), **BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Bluestone considers this information to contain either proprietary or business confidential information which collectively shall remain confidential and limited to the purpose of EPA's request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order.**

Please let me know if you need anything further. Rob

From: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Sent: Friday, May 26, 2023 10:50 AM
To: Rob Fowler <rfowler@bluestone-coal.com>
Subject: RE: Audit Proposal-year end 2022

HI Rob. Any updates you want to share given that it is the end of May?

Thx

Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

Exhibit CX45

From: Redleaf-Durbin, Joan (she/her/hers)
To: Hendrix, Corey (she/her/hers)
Subject: FW: Audit Proposal-year end 2022/Company Confidential Information
Date: Thursday, August 15, 2024 11:10:26 AM

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Tuesday, May 30, 2023 1:39 PM
To: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Subject: Re: Audit Proposal-year end 2022/Company Confidential Information

Thanks Joan. I forwarded to Steve commenting on the requirement. FYI. I submitted my resignation (effective June 3rd) and will no longer be with the Justice companies after that date.

> On May 30, 2023, at 12:33 PM, Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov> wrote:
>
> Thanks Rob – I haven't looked at this yet – but at a quick glance, this submittal is still deficient as regards to the requirements to obtain / maintain the corporate guarantee for Bluestone Coke.
>
> EPA has stated a number of times that pursuant to the regulations, the 3008h Order and the corporate guarantee itself that Bluestone Coke and Bluestone Resources must provide alternate financial assurance given their repeated, and now continued, failure to comply with the corporate guarantee provisions.
>
> Please provide alternate financial assurance within two weeks.
>
> Thanks
> Joan
>
> Joan Redleaf Durbin (she/her)

Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Rob Fowler <rfowler@bluestone-coal.com>
Sent: Friday, May 26, 2023 7:02 PM
To: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: RE: Audit Proposal-year end 2022/Company Confidential Information

Joan,
I sincerely appreciate you patience on this matter. Attached is a transmittal letter and Bluestone Resources, Inc's Independent Auditor's Report for year ending December 31, 2022.

Pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), **BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Bluestone considers this information to contain either proprietary or business confidential information which collectively shall remain confidential and limited to the purpose of EPA's request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order.**

Please let me know if you need anything further. Rob

From: Redleaf-Durbin, Joan (she/her/hers) <Redleaf-Durbin.Joan@epa.gov>
Sent: Friday, May 26, 2023 10:50 AM
To: Rob Fowler <rfowler@bluestone-coal.com>
Subject: RE: Audit Proposal-year end 2022

HI Rob. Any updates you want to share given that it is the end of May?

Thx
Joan

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office

US EPA, Region 4
404/562-9544

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Exhibit CX46

Table 1.1.9. Implicit Price Deflators for Gross Domestic Product

[Index numbers, 2017=100]

Last Revised on: July 25, 2024 - Next Release Date August 29, 2024

Line		2018	2019	2020	2021	2022	2023
Line							
1	**Gross domestic product**	**102.291**	**104.008**	**105.381**	**110.213**	**117.973**	**122.273**
2	**Personal consumption expenditures**	**102.047**	**103.513**	**104.635**	**109.001**	**116.043**	**120.384**
3	Goods	100.811	100.427	99.646	104.572	113.548	114.919
4	Durable goods	98.633	97.679	96.782	102.112	108.621	107.685
5	Nondurable goods	101.935	101.853	101.137	105.826	116.245	118.993
6	Services	102.626	104.972	107.054	111.103	117.066	122.978
7	**Gross private domestic investment**	**101.545**	**102.965**	**104.049**	**107.711**	**115.936**	**119.547**
8	Fixed investment	101.568	103.014	104.292	108.162	116.754	120.821
9	Nonresidential	100.427	101.457	102.092	103.458	109.624	113.586
10	Structures	101.174	105.258	106.811	110.459	126.692	134.130
11	Equipment	99.921	99.980	99.502	100.066	106.238	110.876
12	Intellectual property products	100.582	100.882	102.208	103.235	104.978	106.886
13	Residential	105.640	108.656	112.280	124.605	141.785	146.089
14	Change in private inventories	---	---	---	---	---	---
15	**Net exports of goods and services**	**---**	**---**	**---**	**---**	**---**	**---**
16	Exports	103.325	102.814	100.247	111.801	122.767	120.901
17	Goods	103.545	101.851	97.870	111.693	124.796	119.692
18	Services	102.910	104.649	104.917	111.584	117.948	122.946
19	Imports	102.662	100.987	98.870	106.023	113.623	111.478
20	Goods	102.709	100.452	97.756	105.203	113.034	109.622
21	Services	102.464	103.341	103.972	109.539	115.945	119.650
22	**Government consumption expenditures and gross investment**	**103.619**	**105.235**	**107.516**	**113.181**	**121.153**	**124.226**
23	Federal	102.775	104.560	105.599	109.024	115.108	119.652
24	National defense	102.642	104.312	105.458	109.181	116.038	120.201
25	Nondefense	102.968	104.923	105.806	108.835	113.924	118.956
26	State and local	104.126	105.640	108.689	115.792	124.970	127.111
	Addendum:						
27	Gross national product	102.225	103.937	105.309	110.130	117.885	122.179

Exhibit CX47

EPA
TRANSMITTAL

Classification No. TN-121 Addressee:

Approval Date: 1/30, 2015

Delegation Manual

1. **Purpose.** This transmittal provides revisions to delegations in Chapter 8 (Solid Waste Disposal Act, As Amended) of the EPA Region 4 Delegation Manual.

2. **Explanation.** The delegations listed below in Chapter 8 (Solid Waste Disposal Act, As Amended) are hereby revised to reflect the reorganization of the Resource Conservation and Recovery Act (RCRA) Division to the Resource Conservation and Restoration Division (RCRD).

3. **Filing Instructions**. Post receipt of this transmittal on the EPA Transmittal Checklist and file with the Delegation Manual.

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Delegation 8-9-A (9-20-1996)	Delegation 8-9-A
Delegation 8-9-B (8-18-2010)	Delegation 8-9-B
Delegation 8-12 (8-18-2010)	Delegation 8-12
Delegation 8-13 (8-18-2010)	Delegation 8-13
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Delegation 8-21 (undated)	Delegation 8-21
Delegation 8-22-A (8-18-2010)	Delegation 8-22-A
Delegation 8-22-B (8-18-2010)	Delegation 8-22-B
Delegation 8-22-C (8-18-2010)	Delegation 8-22-C
Delegation 8-23 (8-18-2010)	Delegation 8-23
Delegation 8-24 (6-12-2007)	Delegation 8-24
Delegation 8-25 (6-12-2007)	Delegation 8-25
Delegation 8-26 (6-12-2007)	Delegation 8-26
Delegation 8-28 (undated)	Delegation 8-28

Delegation 8-31 (8-18-2010)	Delegation 8-31
Delegation 8-32 (8-18-2010)	Delegation 8-32
Delegation 8-33 (6-12-2007)	Delegation 8-33
Delegation 8-35 (undated)	Delegation 8-35
Delegation 8-37 (6-12-2007)	Delegation 8-37
Delegation 8-38 (6-12-2007)	Delegation 8-38
Delegation 8-42 (6-19-1995)	Delegation 8-42
Delegation 8-43 (undated)	Delegation 8-43
Delegation 8-44 (undated)	Delegation 8-44
Delegation 8-45 (undated)	Delegation 8-45-A and 8-45-B

JAN 30 2015

Heather McTeer Toney
Regional Administrator

Date

8-9-A. Administrative Enforcement: Issuance of Complaints, Signing of Consent Agreements, etc.

1. **AUTHORITY.** Pursuant to the Solid Waste Disposal Act (SWDA), as amended:

a. To make determinations of violations of Subtitle C; and

b. To issue warning letters or other notices; to issue compliance orders; to issue notices to states; to issue complaints; and to negotiate and sign consent agreements memorializing settlements between the Agency and respondents prior to the alleged violator's filing of an answer or failure to file an answer to a complaint.

2. **TO WHOM DELEGATED.**

a. The authority in Section 1(a) is delegated to and through the Director, Resource Conservation Division (RCRD), to and through the Chief, Enforcement and Compliance Branch, RCRD, to the Chief, Hazardous Waste Enforcement and Compliance Section, RCRD, and to the Chief, UST and PCB/OPA Enforcement and Compliance Section, RCRD.

b. The authority in Section 1(b) is delegated to and through the Director, RCRD to the Chief, Enforcement and Compliance Branch, RCRD.

3. **RETENTION OF AUTHORITY.** The Regional Administrator, the Director, RCRD, and the Chief, Enforcement and Compliance Branch, RCRD, expressly retain the authority set forth in Section 1. The Regional Administrator may revoke or modify this redelegation at any time.

4. **LIMITATIONS.**

a. Assistant Administrator, Office of Solid Waste and Emergency Response (OSWER) has waived advance concurrence to issue compliance orders, complaints and negotiate and sign consent agreements (Region must submit copies of all orders).

b. Assistant Administrator, OLEC has designated all, consultation functions to AEC level and Regional Counsels.

c. All other limitations contained in Headquarters Delegation 8-9-A apply to this redelegation.

5. **REDELEGATION AUTHORITY.** This authority may be redelegated.

8-9-A. Administrative Enforcement: Issuance of Complaints, Signing of Consent Agreements, etc., Cont'd.

6. **ADDITIONAL REFERENCES.** Sections 3001(b)(3)(B)(iv) and 3008 (except 3008(h)) of the SWDA, as amended; OSWER memo dated April 7, 1983.

Exhibit CX48

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OMS Home / Office of Resources / Administrative Policy / Manuals / Delegations Manual / Delegations Manual TOC Chapter 8 TOC: SOLID WASTE DISPOSAL ACT (SWDA) 8-32. Administrative Enforcement - Corrective Action Authority

8-32. Administrative Enforcement - Corrective Action Authority: Issuance of Orders and Signing of Consent Agreements Office of Human Resources

1200 TN 350
5/11/94

1. **AUTHORITY.** Pursuant to Subtitle C, Section 3008(h) of the SWDA, to issue order requiring corrective action or other responses deemed necessary to protect human health or the environment; to issue orders which suspend or revoke authorization to operate under Section 3005(e) of the SWDA; to negotiate and sign consent agreements memorializing settlements between the Agency and respondents; and to represent the Agency in administrative enforcement actions.
2. **TO WHOM DELEGATED.** The Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance.
3. **LIMITATIONS.**
    1. Regional Administrators or their designees must obtain the advance concurrence of the Assistant Administrator for Enforcement before exercising any of the above authorities. In addition, once the recipient of an order requests or fails to request a hearing within the specified time period, the Regional Counsels or their designees and technical program staff may conduct any negotiations, and negotiate and sign resulting agreements. Delegatees of the Regional Administrators must consult with the Regional Counsels or designees when exercising any of the above authorities.
    2. The Assistant Administrator for Enforcement and Compliance Assurance must notify any affected Regional Administrator or designee before exercising any of the above authorities. In addition, once the recipient of an order requests or fails to request a hearing within the specified time period, the Assistant Administrator for Enforcement and Compliance Assurance or designee will conduct negotiations, and negotiate and sign any resulting agreements.

OMS Headquarters Pages

3. The Assistant Administrator for Enforcement and Compliance Assurance may exercise this authority only for those cases initiated by Headquarters.
4. Regional Administrators may exercise this authority only for those cases initiated by the Region.
5. The Assistant Administrator for Enforcement and Compliance Assurance may waive the advance concurrence requirement by memorandum.
6. The Assistant Administrator for Enforcement and Compliance Assurance may waive the notification requirement by memorandum.

4. **REDELEGATION AUTHORITY.** This authority may be redelegated.

5. **ADDITIONAL REFERENCES.**

1. Section 3008(h) of SWDA.
2. See the Chapter 8 Delegations entitled:
    1. "Determination That There Is or Has Been a Release";
    2. "Civil Judicial Enforcement Actions";
    3. "Settlement or Concurrence in Settlement of Civil Judicial Enforcement Actions"; and
    4. "Emergency TRO's".

This page was last updated on 03/09/2021

Exhibit CX49

United States Environmental Protection Agency

Delegation of Authority

1200 TN 350 8-9A
05/11/1994
Administrative Update 02/04/2016

8-9A. Administrative Enforcement: Issuance of Complaints, Signing of Consent Agreements, etc.

1. **AUTHORITY.** Pursuant to the Solid Waste Disposal Act (SWDA): to make determinations of violations of Subtitle C; to issue warning letters or other notices; to issue compliance orders; to issue notices to States; to issue complaints; and to negotiate and sign consent agreements memorializing settlements between the Agency and respondents.
2. **TO WHOM DELEGATED.** Regional Administrators and Assistant Administrator for Enforcement and Compliance Assurance.
3. **LIMITATIONS.**
    a. The Assistant Administrator for Enforcement and Compliance Assurance may exercise these authorities for cases initiated by Headquarters, in multi-Regional cases or cases of national significance, and must notify any affected Regional Administrators or their designees when exercising any of the above authorities.
    b. The Regional Administrators may exercise these authorities only for those cases initiated by the Regions. The delegatees of the Regional Administrators must consult with the Regional Counsels or their designees prior to issuing complaints.
4. **REDELEGATION AUTHORITY.**
    a. This authority may be redelegated.
    b. An officer or employee who redelegates authority does not divest herself or himself of the power to exercise that authority, and an official who redelegates authority may revoke such redelegation at any time.
5. **ADDITIONAL REFERENCES.**
    a. Sections 3001(b)(3)(B)(iv) and 3008 (except 3008(h)) of SWDA.
    b. See the Chapter 8 Delegations entitled:
        1. "Determination That There Is or Has Been a Release";
        2. "Administrative Enforcement - Corrective Action Authority: Issuance of Complaints and Orders, Signing of Consent Agreements"; and
        3. "Administrative Enforcement - Corrective Action: Agency Representation in Hearings and Signing of Consent Agreements."

Exhibit CX50

EPA
TRANSMITTAL

Classification No. TN-121 Addressee:

Approval Date: 1/30, 2015

Delegation Manual

1. **Purpose.** This transmittal provides revisions to delegations in Chapter 8 (Solid Waste Disposal Act, As Amended) of the EPA Region 4 Delegation Manual.

2. **Explanation.** The delegations listed below in Chapter 8 (Solid Waste Disposal Act, As Amended) are hereby revised to reflect the reorganization of the Resource Conservation and Recovery Act (RCRA) Division to the Resource Conservation and Restoration Division (RCRD).

3. **Filing Instructions**. Post receipt of this transmittal on the EPA Transmittal Checklist and file with the Delegation Manual.

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Delegation 8-43 (undated)	Delegation 8-43
Delegation 8-44 (undated)	Delegation 8-44
Delegation 8-45 (undated)	Delegation 8-45-A and 8-45-B

JAN 30 2015

Heather McTeer Toney
Regional Administrator

Date

8-32. Administrative Enforcement – Corrective Action Authority: Issuance of Orders and Signing of Consent Agreements

1. **AUTHORITY.** Pursuant to Subtitle C, Section 3008(h) of the Solid Waste Disposal Act (SWDA), as amended, to issue orders requiring corrective action or other responses deemed necessary to protect human health or the environment; to issue orders which suspend or revoke authorization to operate under Section 3005(e) of the SWDA, as amended; to negotiate and sign consent agreements memorializing settlements between the Agency and respondents; and to represent the Agency in administrative enforcement actions.

2. **TO WHOM DELEGATED.** This authority is delegated to and through the Director, Resource Conservation and Restoration Division (RCRD), to the Deputy Director, RCRD.

3. **RETENTION OF AUTHORITY.** The Regional Administrator and Director, RCRD, expressly retains the authority set forth in Section 1. The Regional Administrator may revoke or modify this redelegation at any time.

4. **LIMITATIONS.** The Regional Administrator or its delegate must obtain the advance concurrence of the Assistant Administrator for Enforcement and Compliance Assurance before exercising any of the above authorities. In addition, once the recipient of an order requests or fails to request a hearing within the specified period, the Regional Counsel or his/her designee may conduct any negotiations, and negotiate and sign resulting agreements. Delegatees of the Regional Administrators must consult with the Regional Counsels or his/her designee when exercising any of the above authorities.

5. **REDELEGATION AUTHORITY.** This authority may not be redelegated.

6. **ADDITIONAL REFERENCES.**

a. Section 3008(h) of the SWDA, as amended.

b. See Chapter 8 Delegations entitled:

(1) "Determination That There Is or Has Been a Release";

(2) "Civil Judicial Enforcement Actions";

(3) "Settlement or Concurrence in Settlement of Civil Judicial Enforcement Actions"; and

(4) "Emergency TRO's."

Exhibit CX51

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

OCT 16 1985

MEMORANDUM

SUBJECT: Interpretation of Section 3008(h) of the Solid Waste Disposal Act

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

Courtney M. Price, Assistant Administrator
Office of Enforcement and Compliance Monitoring

TO: Regional Administrators
Regional Counsels
Regional Waste Management Division Directors
Director, National Enforcement Investigation Center

As part of our effort to support case development activities undertaken by United States Environmental Protection Agency personnel, we are transmitting to you guidance on the use of Section 3008(h), one of the corrective action authorities added to the Solid Waste Disposal Act by the Hazardous and Solid Waste Amendments of 1984. As you are aware, Section 3008(h) allows the Agency to take enforcement action to require corrective action or any other response necessary to protect human health or the environment when a release is identified at an interim status hazardous waste treatment, storage or disposal facility. Because the authority is broad, both with respect to the kinds of environmental problems that can be addressed and the actions that the Agency may compel, we have produced the attached document to provide initial guidance on the interpretation of the terms of the provision and to describe administrative requirements. The document will be revised as case law and Agency policy develop. In addition, the Office of Solid Waste and Emergency Response intends to develop technical guidance on various types of response measures and the circumstances in which they might be appropriate.

In view of the need to issue RCRA permits and to ensure that the substantial number of interim status facilities expected to cease operation in the near future are closed in an environmentally sound manner, we encourage you to use the interim status corrective action authority as appropriate to supplement the closure and permitting processes. Questions or comments on this document or the use of Section 3008(h) authority in general can be addressed to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (FTS 382-4814, WH-527) or Fred Stiehl, Associate Enforcement Counsel for Waste (FTS 382-3050, LE-134S).

Attachment

RCRA SECTION 3008(h)

THE INTERIM STATUS CORRECTIVE ACTION AUTHORITY

DECEMBER 16, 1985

I. INTRODUCTION

The Hazardous and Solid Waste Amendments of 1984 have substantially expanded the scope of the RCRA hazardous waste management program. One of the most significant provisions is the interim status corrective action authority, which allows EPA to take enforcement action to compel response measures when the Agency determines that there is or has been a release of hazardous waste at a RCRA interim status facility. Prior to the 1984 Amendments, EPA could require remedial action at interim status facilities by, inter alia, (1) using RCRA §7003 or CERCLA §106 authorities if an imminent and substantial endangerment may have been presented, or (2) when significant ground-water contamination was detected, calling in Part B of the RCRA permit application and requiring corrective action as a condition of the permit. The Amendments added Section 3008(h) to deal directly with environmental problems by requiring clean-up at facilities that have operated or are operating subject to RCRA interim status requirements.

The purpose of this document is to provide preliminary guidelines on the scope of Section 3008(h) and to summarize appropriate procedures. The document will be revised as case law and Agency policy develop. Other relevant RCRA guidances that may be consulted include:

- Final Revised Guidance on the Use and Issuance of Administrative Orders under Section 7003 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response - September, 1984.
- Issuance of Administrative Orders under Section 3013 of RCRA, Office of Enforcement and Compliance Monitoring and Office of Solid Waste and Emergency Response - September, 1984.
- Draft Guidance on Corrective Action for Continuing Releases, Office of Solid Waste and Emergency Response - February, 1985.
- Final RCRA Ground-Water Monitoring Compliance Order Guidance, Office of Solid Waste and Emergency Response - August, 1985.

° Draft RCRA Ground-Water Monitoring Technical Enforcement Guidance Document, Office of Solid Waste and Emergency Response - August, 1985.

° Draft RCRA Preliminary Assessment/Site Investigation Guidance, Office of Solid Waste and Emergency Response - August, 1985.

II. DELEGATIONS OF AUTHORITY

On April 16, 1985, the Administrator signed delegations enabling the Regional Administrators, the Assistant Administrator for Solid Waste and Emergency Response and the Assistant Administrator for Enforcement and Compliance Monitoring to exercise Section 3008(h) authority. There are three new delegations, 8-31, 32 and 33. The first enables the Regional Administrator or the Assistant Administrator for Solid Waste and Emergency Response to determine that there is or has been a release of hazardous waste at or from a RCRA interim status facility. The second and third delegate the authority to issue orders and sign consent agreements. The authority to refer civil judicial actions is found in Delegation 8-10.

Because Section 3008(h) is quite broad, both with respect to the types of environmental problems that may be addressed and the actions that EPA may compel, delegation of Section 3008(h) authority is subject to limitations. To issue an administrative order or sign a consent agreement, the Regions must obtain advance concurrence from the Director, Office of Waste Programs Enforcement, Office of Solid Waste and Emergency Response and must notify the Associate Enforcement Counsel for Waste, Office of Enforcement and Compliance Monitoring. Until the Agency as a whole gains experience in using the new authority, this requirement is necessary to ensure that sound precedent is established and national program priorities are addressed. The Office of Waste Programs Enforcement intends to waive advance concurrence, however, for those Regions that demonstrate sufficient experience in using Section 3008(h) as indicated by the number and quality of §3008(h) orders submitted for review in the next six months. Civil judicial actions will be handled in accordance with existing procedures for referrals.

To expedite §3008(h) actions, the Regions should establish procedures for drafting and reviewing orders and referrals and clearly delineate the roles and responsibilities of Regional RCRA enforcement and program personnel (including CERCLA personnel as necessary) and the Office of Regional Counsel in those processes. Draft orders should be sent to the Chief, Compliance and Implementation Branch, RCRA Enforcement Division, Office of Waste Programs Enforcement.

Headquarters is committed to conducting timely review of §3008(h) orders. To avoid the delays associated with discussion and review of rough drafts, we ask that orders be in "near final" form when they are submitted. Generally, the orders will be examined to determine whether (1) the elements of proof are adequately defined and documented, (2) the response to be compelled is practicable and environmentally sound, and (3) the action supports national RCRA program goals. Written comments or concurrence will be provided to the Regions within ten working days of receipt.

III. SCOPE OF SECTION 3008(h)

Section 3008(h) provides:

> " (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment, or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.
>
> (2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under Section 3005(e) of this subtitle, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such a person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order."

To exercise the interim status corrective action authority, the Agency must first have information that there is or has been a release of hazardous waste to the environment at or from an interim status facility. Second, the corrective action or other response measure, in the judgment of the Agency, must be necessary to protect human health or the environment. Key terms are discussed below in greater detail.

"Whenever on the basis of any information the Administrator determines ..."

The opening clause of Section 3008(h) authorizes the Agency to make the determination that there is or has been a release of hazardous waste into the environment on the basis of 'any information'. Appropriate information can be obtained from a variety of sources, including data from laboratory analyses of soil, air, surface water or ground water samples, observations recorded during inspections, photographs, and facts obtained from facility records.

The reference to a determination by the Administrator should be considered in the context of the term 'any information'. To satisfy any requirement imposed by the statute, an order should contain a specific determination. A civil referral should also be based on a written determination that there is or has been a release.

" ...that there is or has been a release...into the environment..."

The trigger for issuing §3008(h) orders and initiating civil referrals is the existence of information that there is or has been a release, which is a lower threshold than the showing of 'substantial hazard' under RCRA Section 3013 or 'imminent and substantial endangerment' under RCRA Section 7003 or CERCLA Section 106. While the statute does not define the term 'release', the Agency believes that, given the broad remedial purpose of Section 3008(h), the term should encompass at least as much as the definition of release under CERCLA. See 42 U.S.C. §9601(22). Therefore a release is any spilling, leaking, pumping,

pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment. The exemptions described in the CERCLA definition are considered inapplicable or inappropriate for RCRA purposes, however, and are not included in the RCRA definition.

The term 'environment' is also broad. The legislative history for Section 3008(h), which discusses use of the authority to respond to releases to various environmental media, makes it clear that Section 3008(h) is not limited to a particular medium. H. Rep. No. 1133, 98th Cong., 2d Sess. 111-112 (1984). The Agency will use Section 3008(h) to address releases to surface waters, groundwater, land surface or subsurface strata and air.

It is not necessary to have actual sampling data to show a release. An inspector may find other evidence that a release has occurred, such as a broken dike at a surface impoundment. Less obvious indications of release might also be adequate to make the determination. For example, the Agency could have sufficient information on the contents of a land disposal unit, the design and operating characteristics of the unit, and the hydrogeology of the area in which the unit is located to conclude that there has been a release to groundwater.

In addition to on-site information gathering undertaken specifically to support a §3008(h) action, other sources that may provide information on releases include:

- Inspection Reports.
- RCRA Part A and Part B permit applications.
- Responses to RCRA §3007 information requests.
- Information obtained through RCRA §3013 orders.
- Notifications required by CERCLA §103.
- Information-gathering activities conducted under CERCLA §104.
- Informants' tips or citizens' complaints corroborated by supporting information.

A determination that there is or has been a release does not require that specific amounts of hazardous waste or hazardous constituents be found in the environment. Quantities or concentrations of hazardous wastes or hazardous constituents should be considered when ordering interim or complete corrective actions, however, because response actions compelled by the Agency must be necessary to protect human health or the environment.

"...of hazardous waste..."

In contrast to many Subtitle C provisions, the language of Section 3008(h) refers to "hazardous waste" rather than "hazardous waste identified or listed under Subtitle C". The Agency believes that the omission of a reference to wastes listed or identified at 40 CFR Part 261 was deliberate, and Congress did not intend to limit Section 3008(h) only to materials meeting the regulatory definition of hazardous waste. The Conference Report specifically endorses the use of corrective action orders to respond to releases of hazardous constituents. H. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984). The legislative history also indicates that the new authority should be at least as broad as the corrective action authority in the federal RCRA permit program. Id. at 111-112. Those regulations address both hazardous waste and hazardous constituents. Moreover, Section 3004(u), the 'Continuing Releases' provision requiring clean-up of releases from any solid waste management unit at a treatment, storage or disposal facility seeking a RCRA permit, applies to releases of hazardous constituents as well as releases of listed and characteristic wastes. H. Rep. No. 198, 98th Cong., 1st Sess. 60 (1983). Therefore, Section 3008(h) may also be used to compel response measures for releases of hazardous constituents from hazardous or solid waste.

"Hazardous constituents" are the substances listed in Appendix VIII to 40 CFR Part 261. H. Rep. No. 198, 98th Cong., 1st Sess. 60-61 (1983). According to the legislative history for Section 3004(u), which is read in conjunction with Section 3008(h), the term also includes Appendix VIII hazardous constituents released from solid waste and hazardous constituents that are reaction by-products. S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983). It should be noted that the legislative history for the new underground storage tank provisions states that Section 3008 is not applicable to underground storage tanks regulated under Subtitle I. Such releases may be addressed by Section 7002 and Section 7003 authorities, however. H. Rep. No. 1133, 98th Cong., 2d Sess. 127 (1984). Section 3008(h) remains applicable to releases from underground tanks containing hazardous or solid waste subject to Subtitle C provisions.

"...from a facility..."

For interim status corrective action purposes, EPA intends to employ the definition of 'facility' adopted by the Agency in the corrective action program for releases from permitted facilities. The preamble to the permitting requirements for land disposal facilities indicates that the term 'facility' refers to ..."the broadest extent of EPA's area jurisdiction under Section 3004 of RCRA...[meaning] the entire site that is under the control of the owner or operator engaged in hazardous waste management." 47 FR 32288-89 (July 26, 1982). See also the Final Codification Rule. 50 FR 28712 (July 15, 1985). Therefore, the definition of facility encompasses all contiguous property under the owner or operator's control.

The permit program, as amended by Section 3004(u), requires corrective action for releases of hazardous waste and hazardous constituents from solid waste management units at a facility. EPA interprets 'solid waste management unit'

to include any discernable unit used for waste management. See 50 FR 28712 (July 15, 1985). Since the legislative history describes the interim status corrective action authority as a "supplement" to permitting authority and indicates that the interim status authority should be at least as broad as the permit authority, Section 3008(h) clearly authorizes EPA to require corrective action for any release of hazardous waste from discernable waste management units. The Agency's authority to use Section 3008(h) to address releases from solid waste management units as well as hazardous waste management units is discussed in the Final Codification Rule. 50 FR 28716 (July 15, 1985).

The language of Section 3008(h), however, suggests that Congress did not intend to limit EPA's authority to releases from discernable units. Unlike Section 3004(u), Section 3008(h) broadly authorizes corrective action for any release from a "facility". It does not require the Agency to find that a release originated in a discernable waste management "unit".

The legislative history supports this interpretation. Prior to enactment of Section 3008(h), the RCRA regulations required corrective action for releases to groundwater from permitted 'regulated units' (surface impoundments, waste piles, landfills and land treatment areas that received Subtitle C hazardous waste after a specified date). 40 CFR 264.100 and 40 CFR 264.90. Congress criticized this approach as too slow and too limited, however, and created the interim status corrective action authority to "deal directly with an ongoing environmental problem at interim status facilities." H. Rep. No. 1133, 98th Cong., 2d Sess. 110-112 (1984). Moreover, Congress clearly did not intend the authority to be limited to the scope of the existing permit program. For instance, the legislative history lists several examples of releases outside the regulatory program for which a §3008(h) action is appropriate, including

releases from waste management units not required to undertake corrective action or otherwise exempt from RCRA regulations and releases, such as air emissions, to environmental media other than groundwater. Id. at 112.

The text of the statute, the broad remedial purpose, and the clear intent to authorize action beyond the scope of the permit regulations support the position that Section 3008(h) authorizes EPA to address all types of releases of hazardous waste within a facility. As discussed previously, the term 'hazardous waste' encompasses 'hazardous constituents' from both hazardous and solid waste.

Section 3008(h) will also be used to address releases that have migrated from the facility. New Section 3004(v), which provides that EPA may issue orders requiring corrective action for releases that have crossed the facility boundary if the permission of the owner of the affected property can be obtained, supports the Agency's interpretation that such releases are subject to action under Section 3008(h). See also the Final Codification Rule. 50 FR 28716 (July 15, 1985).

In a §3008(h) order or judicial referral, Agency personnel should describe hazardous and solid waste management units within the boundary of the facility and hazardous and solid wastes (and associated hazardous constituents) managed by the facility in addition to information indicating that a release has occurred. Since Section 3008(h) unequivocally authorizes EPA to address releases from units, the order or complaint should establish some link between the hazardous constituents in a release and the hazardous or solid wastes in waste management units where possible. For example, the findings of fact might state that the facility treats, stores or disposes of certain listed Subtitle C wastes, that those wastes were listed because they contain the hazardous constituents cited in Appendix VII to 40 CFR Part 261 and that some or all of those constituents have been found in the environment, thereby indicating a release.

"...authorized to operate under Section 3005(e)..."

This clause encompasses several classes of hazardous waste treatment, storage and disposal facilities. First, facilities that have met each requirement for obtaining interim status in a timely manner are subject to Section 3008(h). With respect to those facilities brought into the hazardous waste management system when the Phase I RCRA rules went into effect, to establish interim status EPA must demonstrate that: (1) the facility was in existence on November 19, 1980, and; (2) the owner or operator complied with the requirements of Section 3010(a), regarding notification of hazardous waste activity, and; (3) the owner or operator submitted a Part A application in accordance with 40 CFR 270.10. As to those facilities in existence on the date of regulatory or statutory changes that render the facility subject to the requirement to obtain a permit under Section 3005, to establish interim status the Agency must demonstrate (1) that the facility was in existence on the appropriate date and (2) submitted a Part A permit application in accordance with the requirements of 40 CFR 270.10. If a statutory or regulatory change requires notification under Section 3010, EPA must also establish that the facility submitted the notification.

Second, Section 3008(h) applies to facilities that treat, store, or dispose of hazardous waste, but have not actually obtained interim status because the owner or operator did not fully comply with the requirements to submit a Section 3010 notification and/or a Part A. Such facilities have been allowed to operate in accordance with a formal enforcement action or an Interim Status Compliance Letter requiring compliance with Part 265 standards. Furthermore, the owners or operators are not relieved of the duty to apply for and obtain a final RCRA permit. See e.g., the notice of implementation and enforcement policy for loss of interim status under Section 3005(e), 50 FR 38947-48 (September 25, 1985).

The Agency believes that Congress intended the interim status corrective action authority to apply to such facilities. The legislative history for Section 3008(h) supports this position by making it clear that the authority can be used to address releases from units that do not have interim status, such as wastewater treatment tanks. H. Rep. No. 1133, 98th Cong., 2d Sess. 112 (1984).

Third, EPA considers Section 3008(h) to be applicable not only to owners or operators of facilities in the above two categories but also to units or facilities at which active operations have ceased and interim status has been terminated pursuant to 40 CFR Part 124 or Sections 3005(c) and 3005(e)(2) of RCRA. Section 3008(h) specifically provides that the interim status corrective action orders may include a suspension or revocation of the authority to operate under interim status, as well as any other response necessary to protect human health or the environment. Consequently, a corrective measures program can be imposed under Section 3008(h), even if a facility's interim status has been taken away as a result of an interim status corrective action order. The Agency also believes that Section 3008(h) can be used to compel responses to releases at facilities that lost interim status prior to a §3008(h) action. This approach is consistent with Congressional intent to assure that significant environmental problems are addressed at facilities that treat, store or dispose of hazardous waste but do not have a final RCRA operating or post-closure permit. H. Rep. No. 1133, 98th Cong., 2d Sess. 110-112 (1984).

Where a State is authorized to administer the RCRA program, the requirements for obtaining the State's equivalent to interim status may differ from those of the federal program. In authorized States that do not duplicate the federal procedures, hazardous waste treatment, storage and disposal facilities that have not been granted or denied a final RCRA permit are generally considered interim status facilities. Land disposal facilities that were issued State permits

after November 8, 1984 but have not yet received the federal portion of the permit applicable to continuing releases under Section 3004(u) are treated for purposes of this guidance in the same manner as interim status facilities. Similarly, hazardous waste underground injection wells that did not receive a UIC permit prior to that date will also be treated in the same manner as interim status facilities. See the notice of implementation and enforcement policy for loss of interim status under Section 3005(e). 50 FR 38947 (September 25, 1985).

"...Corrective action or such other response measure as he deems necessary to protect human health or the environment ..."

Prior to the Hazardous and Solid Waste Amendments of 1984, the term "corrective action", in the RCRA regulatory context, referred to removal or treatment in place of Appendix VIII hazardous constituents in groundwater. 40 CFR 264.100. Section 3008(h) is not restricted to remedial action for ground-water contamination, however. The statutory language and the legislative history indicate that a wide range of responses to releases to all media from waste management activities may be compelled. Financial assurance for any response measure may also be required.

The authority can be used to require implementation of one or more stages of a clean-up program, such as:

- Containment, stabilization or removal of the source of contamination,
- Studies to characterize the nature and extent of contamination and to assess exposure and health and environmental effects,
- Identification and evaluation of remedies,
- Design and construction of the chosen remedy,
- Implementation of the remedy, and
- Monitoring to determine the effectiveness of the remedy.

For example, a §3008(h) order might require that the owner or operator conduct a study to characterize the nature and extent of contamination, then select a remedy and submit a corrective action plan to EPA. The Agency and the owner or operator would then confer on the plan and amend the order to reflect any modifications. H. Rep. No. 1133, 98th Cong., 2d Sess., 111 (1984). Because a study on the nature and extent of contamination and the selection and design of a remedy may require a significant amount of time, Section 3008(h) should be employed to require interim measures as necessary to protect human health and the environment prior to completion of the study and selection of a remedy. Examples of interim remedies that could be compelled include removal of the waste or containment of the source of the contamination by lining a unit or erecting dikes. In some instances, preliminary pumping and treating of affected groundwater may be appropriate.

While the information needed to make a determination that there is or has been a release is minimal, more information may be needed to justify a specific interim or full remedy. The Administrator can require "corrective action or such other response measures as he deems necessary to protect human health or the environment." To show that a response may be necessary to protect human health or the environment, the present or potential threat posed by the release should be described. The Agency may consider a variety of factors, including the quantity of hazardous waste; the nature and concentration of hazardous constituents or other hazardous properties exhibited by the waste; the facility's waste management practices; potential exposure pathways; transport and environmental fate of hazardous constituents; humans or environmental receptors that might be exposed; the effects of exposure, and; any other appropriate factors. To compel corrective action investigations or studies, only a general threat to human health or the environment needs to be identified.

IV. ADMINISTRATIVE ACTIONS

Under Section 3008(h), the Agency can issue administrative orders or commence a civil judicial action. The decision to pursue an administrative or judicial remedy must be made on a case-by-case basis since each approach has advantages and disadvantages. An administrative order, for instance, can usually be issued quickly, while preparation for a judicial action may be more time-consuming and must be referred to the Department of Justice. On the other hand, a judicial order or consent decree can be enforced readily since the court already has jurisdiction of the matter.

EPA may issue a §3008(h) administrative order to require corrective action or any response necessary to protect human health or the environment. The order may include a suspension or revocation of authorization to operate. If any person named in the order fails to comply with the order, the Agency may impose a civil penalty not to exceed $25,000 for each day of noncompliance.

Notice to States

Section 3008(h) does not require that States be given notice of an impending action. To ensure that the Agency is fully informed of relevant facts and, in view of the Federal/State relationship, consultation with the State should usually precede an EPA action. To avoid misunderstandings, reasonable notice should be given to the State when an action is taken. The notice should include the location and a description of the facility, the names and addresses of the owners and operators, the conditions requiring a response and a description of the action that EPA will require.

Elements of Orders

Because it is the focal point in all proceedings subsequent to its issuance, the initial order must be as complete as possible. Failure to develop an adequate document may have adverse consequences if the Agency seeks judicial enforcement. All §3008(h) orders should contain the following general elements:

- A statement of the statutory basis for the order.
- Factual allegations showing that there is or has been (1) a release (2) of hazardous waste or hazardous constituents (3) into the environment (4) at or from an interim status facility. Facts indicating that the response is necessary to protect human health or the environment should also be presented.
- A determination, based on the factual allegations, that there is or has been a release of hazardous waste or hazardous constituents to the environment from an interim status facility.
- An order that clearly identifies the tasks to be performed, and a schedule of compliance accompanied by appropriate reporting and approval requirements.
- A statement informing the respondent that he has a right to request a hearing within 30 days of issuance concerning any material fact in the order or the terms of the order.
- A notice of opportunity for an informal settlement conference. It is the Agency's policy to encourage settlement of §3008(h) actions through informal discussions. The respondent should be cautioned, however, that a request for a conference does not affect the 30 day period for requesting a hearing.
- A statement that EPA may assess penalties not to exceed $25,000 per day of non-compliance with the order.

It may be appropriate to include a provision for stipulated penalties in orders on consent. Such a provision, however, should be drafted to make it clear that the stipulated penalty is not EPA's sole remedy and that Agency has not waived its statutory authority to assess penalties under Section 3008(h)(2). It is recommended that the Regions pursue judicial referrals to impose penalties for noncompliance with a §3008(h) administrative order rather than issuing a subsequent order for penalties.

Releases from liability and covenants not to sue may be sought by parties negotiating §3008(h) orders. These provisions terminate or seriously impair the Federal Government's right of action against a party. In general, the interim CERCLA Settlement Policy (December 5, 1984) may be followed. Releases generally will not be appropriate, however, where the extent of contamination, the reliability of the remedy or long-term operation and maintenance requirements are uncertain. If provided, they should be narrowly drawn. In addition, EPA personnel should exercise particular care in drafting such provisions to ensure that they do not restrict the operation and enforcement of the on-going RCRA regulatory program. Moreover, the order should also contain a provision reserving the Agency's right to take additional action under RCRA and other laws. For example, EPA should reserve the right to expend and recover funds under CERCLA; to bring imminent and substantial endangerment actions under RCRA §7003 and CERCLA §106; to assess penalties for violations of and require compliance with RCRA requirements under §3008(a); to address releases other than those identified in the order; to require further action as necessary to respond to the releases addressed in the order, and; to take action against nonparties if appropriate.

Hearing Requirement

To issue a unilateral §3008(h) order, EPA must comply with the requirements of Section 3008(b) with respect to an opportunity for a hearing. 130 Cong. Rec. S9175 (daily ed. July 25, 1984). Although procedures for §3008(a) administrative actions have been established by regulation (See 40 CFR Part 22), those regulations are not legally applicable to §3008(h) actions. Hearing procedures for §3008(h) actions are under development. Until formal guidance is available, a Region that intends to issue a unilateral order should contact the Office of Waste Programs Enforcement, Office of Solid Waste and Emergency Response.

Development and Preservation of the Administrative Record

§3008(h) orders might be reviewed in administrative or judicial proceedings. Therefore, it is essential that information required by the statute and all other relevant information or documents obtained by the Agency be compiled in an administrative record, preserved and readily retrievable. The EPA official initiating the action should maintain a file that contains the following:

- EPA investigative records, such as inspection reports, sampling and analytical data, copies of business records, photographs, etc.;
- Reports and internal Agency documents used in generating or supporting the enforcement action, including expert witness statements;
- Copies of all documents filed with the Regional Hearing Clerk or the Presiding Officer;
- Copies of all relevant correspondence between EPA and the respondent;
- Written records of conferences and telephone conversations between EPA and the respondents, and;
- Copies of all correspondence between EPA and State or other federal agencies pertaining to the enforcement action.

V. CIVIL JUDICIAL ACTIONS

Under Section 3008(h), EPA may initiate civil judicial action to compel appropriate relief, including a temporary or permanent injunction, or to enforce a §3008(h) administrative order. As noted previously, the decision to pursue administrative or judicial remedies will be made on a case-by-case basis. Generally, however, a civil judicial action may be preferable to issuance of an administrative order in the following types of situations:

- A person is not likely to comply with an order or has failed to comply with a §3008(h) order.
- A person's conduct must be stopped immediately to prevent irreparable injury, loss or damage to human health or the environment.
- Long-term, complex and costly response measures will be required. (Because compliance problems are more likely to arise during implementation of these actions than while carrying out a simple, short-term action, it may be better to have the matter already before the court for ease of enforcement.)

Other factors that could be considered include the value of a favorable decision as precedent and the need to deter noncompliance by other potential targets for EPA enforcement action under Section 3008(h).

A request to file a civil judicial action must be referred by the Assistant Administrator for Enforcement and Compliance Monitoring to the Department of of Justice. The procedures that Agency personnel should follow to develop a referral and support litigation are described in the RCRA/CERCLA Case Management Handbook (August, 1984) and the RCRA Compliance/Enforcement Guidance Manual (September, 1984).

VI. USE OF SECTION 3008(h) IN RELATION TO PERMITTING, CLOSURE AND OTHER AUTHORITIES

RCRA Permits

The pre-HSWA regulations applicable to corrective action at permitted facilities deal only with a remedial program for treatment in place or removal of groundwater contaminated by a release from a 'regulated unit'. (Prior to HSWA, the term 'regulated unit' meant a surface impoundment, landfill, land treatment unit or waste pile that operated after January 26, 1983. Enactment of new Section 3005(i), which provides that the Part 264 groundwater monitoring, unsaturated zone monitoring and corrective action requirements are applicable at the time of permitting to landfills, surface impoundments, waste piles and land treatment units that received Subtitle C hazardous wastes after July 26, 1982, necessitated a corresponding change in the definition of regulated unit). Enactment of Section 3004(u) enlarged the universe of units subject to corrective action at RCRA facilities by requiring that a facility seeking a RCRA permit address all releases of hazardous waste and hazardous constituents at any hazardous or solid waste management unit.

In addition to increasing the number and kinds of units subject to corrective action, EPA will use the Section 3004(u) authority to address releases to air, land and surface waters as well as to groundwater. Furthermore, Section 3004(v) allows EPA to require corrective action beyond the facility boundary where necessary to protect human health and the environment unless the facility owner or operator is unable to obtain permission from the owner of the affected property.

Permitting can be a lengthy process. Therefore, the interim status corrective action authority should be used to address significant environmental problems prior to issuance of the permit. With respect to 'regulated units', which cannot be permitted until the facility is in compliance with Part 270 requirements to assess ground-water contamination and develop a corrective action plan if necessary, Section 3008(h) may be particularly useful for compelling activities not addressed by the Part 265 and Part 270 regulations. For instance, interim corrective action measures could be required prior to permit issuance. For releases from solid waste management units and hazardous waste management units other than 'regulated units', Section 3008(h) may be used to compel interim measures, studies to characterize the nature and extent of contamination and the threat posed by the release, selection of remedy and design, construction and implementation of the remedy.

If an interim status facility is seeking an operating permit or will be required to obtain a post-closure permit, any §3008(h) action at that facility should be designed to meet the needs of the permitting process to the extent possible. If all necessary steps in a corrective measures program will not be completed prior to issuance of a permit, compliance schedules in the order should be developed so that they can be readily incorporated in the permit.

RCRA Closures

EPA believes that the interim status corrective action authority will be useful in assuring environmentally sound closures of RCRA hazardous waste management units. Section 3008(h) may be used to supplement the interim status closure regulations. Approval of a closure plan does not limit the Agency's ability to use Section 3008(h), as well as other applicable corrective action authorities, to deal with releases of hazardous waste or hazardous constituents. In view of the number of interim status closures anticipated as a result of new statutory and regulatory requirements, the Regions are encouraged to employ the interim status corrective action authority to assure that RCRA hazardous waste management units are closed in a manner that properly protects human health and the environment.

Other Enforcement Authorities

Because of the broad scope of Section 3008(h) and the variety of activities that can be compelled, the interim status corrective action authority may be employed in conjunction with other enforcement authorities, although it may be appropriate to issue separate,concurrent orders due to differing hearing requirements. For example, where a violation is associated with a release of hazardous waste or hazardous constituents, a Section 3008(a) action should be used to require compliance with the regulation and assess penalties while a Section 3003(h) action could be employed to compel response actions that go beyond regulatory requirements. Section 3013, which allows the Agency to compel owners or operators of treatment, storage or disposal facilities to conduct certain types of studies, may be used when the presence of hazardous waste may present a substantial threat but EPA does not have sufficient information to make a determination that there is or has been a release.

With regard to imminent and substantial endangerment actions, the legislative history makes it clear that enactment of Section 3008(h) does not alter the Agency's interpretation of Section 7003. H. Rep. No. 1133, 98th Cong., 2d Sess. 111 (1984). RCRA §7003 or CERCLA §106 actions are appropriate if conditions at an interim status facility may present an imminent and substantial endangerment and the Agency needs to move quickly to address the problem. The 'imminent hazard' provisions of RCRA and CERCLA may be especially helpful if the Agency wishes to take action against responsible parties other than or in addition to the current owner or operator.

VII. RESERVATION

The policies and procedures set forth herein and the internal office procedures adopted pursuant hereto are intended solely for the guidance of United States Environmental Protection Agency personnel. These policies and procedures are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or that is not in compliance with internal office procedures that may be adopted pursuant to these materials.

Exhibit CX52

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.

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

Table of Contents

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

[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.

[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

[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

[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

[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.

This is a living document and may be revised periodically without public notice.

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.

Exhibit CX53

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

JUN 2 3 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revisions to the 1990 RCRA Civil Penalty Policy

FROM: John Peter Suarez
Assistant Administrator

TO: Regional Counsel, Regions 1 - 10
Regional Enforcement Division Directors, Regions 1, 2, 4, 6 and 8
Waste Management Division Directors, Regions 1 - 10

This memorandum transmits to you the final revised Civil Penalty Policy ("Penalty Policy") for actions taken under Subtitle C of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq,* for immediate use in RCRA enforcement actions.[1] This document includes numerous revisions to the 1990 Civil Penalty Policy, the most significant of which are referenced below. In developing this document, the Office of Regulatory Enforcement, RCRA Enforcement Division, coordinated with RCRA regional enforcement managers, relevant Headquarters offices and the Department of Justice. These revisions are the result of significant review and comment by these offices, and reflect case law and EPA policy that has evolved over the last twelve years.

I would like to express my appreciation to the workgroup members whose hard work and informative review and consultation is reflected in the revised Penalty Policy. I believe these changes significantly improve the Penalty Policy and make it an up-to-date, practical guide for the assessment of RCRA penalties.

As you know, the Penalty Policy provides guidance on developing penalty amounts that should be sought in administrative actions filed under RCRA and penalty amounts that would be

[1] As stated in the Policy, the Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative actions or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the Policy, regardless of the date of the violation. To the maximum extent practicable, the Policy shall also apply to the settlement of administrative andjudicial enforcement actions instituted prior to but not yet resolved as of the date the Policy is issued.

be acceptable in settlement of administrative and judicial enforcement actions under RCRA. As stressed in the Penalty Policy, this document is only guidance and all penalties associated with RCRA enforcement actions must meet the statutory requirements (42 U.S.C. § 6928).

The revisions that have been made include:

1. The penalty numbers have been adjusted upward by 10% as required by the Debt Collection Improvement Act of 1996 (another potential increase is pending).

2. The amount of economic benefit considered "significant" warranting inclusion in a complaint has been increased as follows: $3,000 for penalties less than $30,000; 10% of penalties between $30,000 and $50,000; and $5,000 for penalties greater than $50,000.

3. The Section on economic benefit has been updated to include "illegal competitive advantage" concept and "rule of thumb" approach (for calculating small EBN penalties).

4. A penalty mitigation factor has been added to allow for consideration of a violator's "cooperative attitude" which may allow further penalty reduction up to 10%.

5. A discussion has been added regarding notice pleading (pleading statutory maximum) in some cases to address concerns raised by amendments to the Equal Access to Justice Act and to match changes to the Consolidated Rules of Practice (40 CFR Part 22).

6. The History of Noncompliance consideration has been expanded to include other state and federal environmental laws.

7. The discussion regarding violations which present harm to the regulatory program has been revised to demonstrate the connection to potential harm to human health and the environment.

8. The Policy has been updated to reflect recent case law developments regarding statute of limitations and continuing violations.

9. A presumption has been added that small non-profit organizations and small municipalities may not be as sophisticated as other regulated entities.

10. A discussion and sample complaint language have been added regarding violations continuing after complaint is filed; alternatives include reserving rights to amend complaint or actually pleading a per day amount to be added to penalty.

11. References have been added-to relevant policies such as the Small Business Compliance Policy, the Incentives for Self-Policing Policy (Audit Policy) and the Supplemental Environmental Projects Policy.

If you would like to discuss this matter further, please contact Rosemarie Kelley of the RCRA Enforcement Division at (202) 564-4014 or your staff can call Pete Raack at (202) 564-4075.

Attachment

cc: Enforcement Coordinators, Regions 1-10
Robert Kaplan, Acting Director, Multimedia Enforcement Division
RCRA Enforcement Branch Chiefs
Walker Smith, Office of Regulatory Enforcement
Karen Dworkin, U.S. Department of Justice
Robert Springer, Office of Solid Waste
Earl Salo, Office of General Counsel
Susan Bromm, Office of Site Remediation Enforcement
Donna Inman, Office of Compliance

RCRA CIVIL PENALTY POLICY

RCRA Enforcement Division
Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance
U.S. EPA

June 2003

RCRA CIVIL PENALTY POLICY

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I. SUMMARY OF THE POLICY

The penalty calculation system established through U.S. Environmental Protection Agency's RCRA Civil Penalty Policy ("Penalty Policy" or "Policy") is based upon Section 3008 of RCRA, 42 U.S.C. § 6928. Under this section, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. Consistent with this statutory direction, this Penalty Policy consists of: (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance. More specifically, the revised RCRA Civil Penalty Policy establishes the following penalty calculation methodology:

Penalty Amount = gravity-based + multi-day +/- adjustments + economic benefit
component component

In administrative civil penalty cases, EPA will perform two separate calculations under this Policy: (1) to determine an appropriate amount to seek in the administrative complaint and subsequent litigation, and (2) to explain and document the process by which the Agency arrived at the penalty figure it has agreed to accept in settlement. The methodology for these calculations will differ only in that no downward adjustments (other than those reflecting a violator's good faith efforts to comply with applicable requirements) will usually be included in the calculation of the proposed penalty for the administrative complaint. In those instances where the respondent or reliable information demonstrates prior to the issuance of the complaint that applying further downward adjustment factors (over and above those reflecting a violator's good faith efforts to comply) is appropriate, enforcement personnel may in their discretion (but are not required to) make such further downward adjustments in the amount of the penalty proposed in the complaint.

In determining the amount of the penalty to be included in the complaint, enforcement personnel should consider all possible ramifications posed by the violation and resolve any doubts (*e.g.*, as to the application of adjustment factors or the assumptions underlying the amount of the economic benefit enjoyed by the violator) against the violator in a manner consistent with the facts and findings so as to preserve EPA's ability to litigate for the strongest penalty possible. It should be noted that assumptions underlying any upward adjustments or refusal to apply downward adjustments in the penalty amount are subject to revision later as new information becomes available.

In civil judicial cases, EPA will use the narrative penalty assessment criteria set forth in the Policy to explain the penalty amount agreed to in settlement. In litigation, the penalty that is sought should be based on the statutory factors set forth in Section 3008, 42 U.S.C. § 6928 as well as relevant case law.

Under this Policy, two factors are considered in determining the gravity-based penalty component:

- potential for harm; and
- extent of deviation from a statutory or regulatory requirement.

These two factors constitute the seriousness of a violation under RCRA, and have been incorporated into the following penalty matrix from which the gravity-based component will be chosen.

MATRIX[1]

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$27,500 to 22,000	$21,999 to 16,500	$16,499 to 12,100
MODERATE	$12,099 to 8800	$8,799 to 5,500	$5,499 to 3,300
MINOR	$3,299 to 1,650	$1,649 to 550	$549 to 110

The Policy also explains how to factor into the calculation of the gravity-based component the presence of multiple and multi-day (continuing) violations. The Policy provides that for days 2 through 180 of multi-day violations, the calculation of penalties using a multi-day component is mandatory, presumed, or discretionary, depending on the "potential for harm" and "extent of deviation" of the violations. For each day for which multi-day penalties are sought, the penalty amounts should be determined using the multi-day penalty matrix. The penalty amounts in the multi-day penalty matrix range from 5% to 20% (with a minimum of $110 per day) of the penalty amounts in the corresponding gravity-based matrix cells. Enforcement personnel also retain discretion to impose multi-day penalties: (1) of up to $27,500 per day, when appropriate under

[1]Although the upper end of the penalty range exceeds the statutory maximum found in RCRA Section 3008, 42 U.S.C. § 6928, a 10% increase in the statutory penalty amount was authorized by Congress in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See footnote 3 for further discussion.

the circumstances, and (2) for days of violation after the first 180, as needed to achieve deterrence.

Where a company has derived significant savings or profits by its failure to comply with RCRA requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty amount. The Agency has developed and made available to Agency personnel several methodologies that can be used to quickly and accurately calculate economic benefit. See Section VIII.A.2.

After the appropriate gravity-based penalty amount (including the multi-day component) has been determined, it may be adjusted upward or downward to reflect particular circumstances surrounding the violation. Except in the unusual circumstances outlined in Section VIII, the amount of any economic benefit enjoyed by the violator is not subject to adjustment. When adjusting the gravity-based penalty amount the following factors should be considered:[2]

- good faith efforts to comply/lack of good faith (downward or upward adjustment);
- degree of willfulness and/or negligence (upward or downward adjustment);
- history of noncompliance (upward adjustment);
- ability to pay (downward adjustment);
- environmental projects to be undertaken by the violator (downward adjustment); and
- other unique factors, including but not limited to the risk and cost of litigation and the cooperation of the facility during the inspection, case development and enforcement process prior to prehearing exchange (upward or downward adjustment).

These factors (with the exception of the upward adjustment factor for history of noncompliance and the statutory downward adjustment factor for a violator's good faith efforts to comply) should usually be considered after the penalty has been proposed, i.e., during the settlement stage.

A detailed discussion of the Policy follows. In addition, this document includes a few hypothetical cases where the step-by-step assessment of penalties is illustrated. The steps included are choosing the correct penalty cell in the matrix, calculating the economic benefit of noncompliance, where appropriate, and adjusting the penalty assessment on the basis of the factors set forth above. Note that these examples are provided merely to illustrate application of the components of this Policy. Actual cases may require consideration of a wider range of facts and conditions in calculating penalties under this Policy. For example, in actual cases, there may be more complex circumstances that should be taken into account in determining the appropriate degree of "potential for harm." Also, the penalty justifications for real cases may require more

[2]Note that RCRA Section 3008, 42 U.S.C. § 6928, requires consideration of good faith efforts to comply; the additional factors are consistent with the statutory mandate of Section 3008(a)(3) and ensure that penalties are assessed in a manner that treats the regulated community equitably (similar violations are treated similarly) while maintaining case-specific flexibility.

case-specific details supporting the decision from where in the matrix cell range the penalty is taken.

II. INTRODUCTION

To respond to the problem of improper management of hazardous waste, Congress amended the Solid Waste Disposal Act with the Resource Conservation and Recovery Act (RCRA) of 1976. Although the Act has several objectives, Congress' overriding purpose in enacting RCRA was to establish the basic statutory framework for a national system that would ensure the proper management of hazardous waste. Since 1976, the Solid Waste Disposal Act has been amended by the Quiet Communities Act of 1978, P.L. 95-609, the Used Oil Recycling Act of 1980, P.L. 96-463, the Hazardous and Solid Waste Amendments of 1984, P.L. 98-221, the Safe Drinking Water Act Amendments of 1986, P.L. 99-39, the Superfund Amendments and Reauthorization Act of 1988, P.L. 99-499, and the Federal Facility Compliance Act of 1992, P.L. 102-386. For simplicity and convenience, the Solid Waste Disposal Act, as amended, will hereinafter be referred to as "RCRA."

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), provides that if any person has violated or is in violation of a requirement of Subtitle C, the Administrator of the Environmental Protection Agency (EPA) may, among other options, issue an order assessing a civil penalty of up to $25,000 per day for each violation. This amount has subsequently been increased to $27,500.[3] Section 3008(a)(3), 42 U.S.C. § 6928(a)(3), provides that any order assessing a penalty shall take into account:

- the seriousness of the violation, and
- any good faith efforts to comply with the applicable requirements.

Section 3008(g) applies to civil judicial enforcement actions and establishes liability to the United States for civil penalties of up to $27,500 per day for each violation of Subtitle C. This document sets forth the Agency's Policy and internal guidelines for determining penalty amounts that: (1) should be sought in administrative actions filed under RCRA[4] and (2) would be

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[3]The amount that may be sought was adjusted upward from the statutory maximum of $25,000 to $27,500 pursuant to the authority of the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and regulations implementing that Act found at 40 CFR Part 19. For more information, see the May 19, 1997, Memorandum from Steven A. Herman “Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996).”

[4]This Policy does not limit the penalty amount that may be sought in civil judicial actions. In civil judicial actions brought pursuant to RCRA, the United States may, in its discretion, continue to file complaints requesting a civil penalty up to the statutory maximum amount, and may litigate for the maximum amount justifiable on the facts of the case.

acceptable in settlement of administrative and judicial enforcement actions under RCRA[5]. This Policy supersedes the guidance document entitled, "Applicability of RCRA Penalty Policy to LOIS Cases" (November 16, 1987). It does not, however, apply to penalties assessed under Subtitle I (UST) of RCRA, 42 U.S.C. § 6991, *et seq*, and penalties assessed under the Mercury-Containing and Rechargeable Battery Management Act of 1996 ("Battery Act"), 42 U.S.C. §§ 14301-14336[6].

The purposes of the Policy are to ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

This Policy does not address whether assessment of a civil penalty is the correct enforcement response to a particular violation. Rather, this Policy focuses on determining the proper civil penalty amount that the Agency should obtain once a decision has been made that a civil penalty is the proper enforcement remedy to pursue. For guidance on when to assess administrative penalties, enforcement personnel should consult the Hazardous Waste Civil Enforcement Response Policy, March 15, 1996, and any subsequent amendments to that document. The Enforcement Response Policy provides a general framework for identifying violations and violators of concern as well as guidance on selecting the appropriate enforcement response to various RCRA violations.

While this Policy addresses the calculation of specific penalty amounts for the purposes of administrative enforcement actions, under appropriate circumstances, Agency personnel may plead the statutory maximum penalty. This form of notice pleading, which is allowed under the revised Consolidated Rules of Practice,[7] 40 CFR § 22.14(a)(4), permits the Agency to avoid

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[5]In addition to administrative actions and administrative and judicial settlements brought under RCRA Subtitle C, this Policy applies to penalties sought in administrative complaints and accepted in settlement of administrative and judicial enforcement actions brought pursuant to the authority of RCRA Section 4005(c)(2)(A), 42 U.S.C. § 6945(c)(2)(A). This provision allows for federal enforcement where EPA has determined that the state has not adopted an adequate program.

[6]This Policy does, however, apply to penalties assessed under Section 14323 of the Battery Act relating to the collection, storage or transportation of some types of batteries.

[7]The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("the Consolidated Rules of Practice" or "the Rules") are found at 40

potential issues regarding the proposing of a penalty where information, such as the financial viability of the respondent, cannot be obtained before the complaint is filed. For more information, see the May 28, 1996, Memorandum from Robert Van Heuvelen "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act" and the preamble to the revised Consolidated Rules of Practice, 64 Fed. Reg. 40137, 40151 (7/23/99).

The RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative actions or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the Policy, regardless of the date of the violation. To the maximum extent practicable, the Policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the Policy is issued.[8]

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this Policy and to change it at any time without public notice.

III. RELATIONSHIP TO AGENCY PENALTY POLICY

The RCRA Civil Penalty Policy sets forth a method for calculating penalties consistent with the established goals of the Agency's Policy on Civil Penalties[9] which was issued on February 16, 1984. These goals are:

- deterrence;
- fair and equitable treatment of the regulated community; and
- swift resolution of environmental problems.

CFR Part 22. Revisions to these Rules were published on July 23, 1999, (64 Fed. Reg. 40137), and were effective August 23, 1999.

[8]For more information on the role of Agency penalty policies in administrative litigation and their use by Presiding Officers and the Environmental Appeals Board, see the March 19, 1997, Memorandum from Robert Van Heuvelen "Impact of Wausau on Use of Penalty Policies" and the December 15, 1995, Memorandum from Robert Van Heuvelen "Guidance on Use of Penalty Policies in Administrative Litigation." For EAB discussions on this subject, see In re: Catalina Yachts, 8 E.A.D. 199 (EAB, 3/24/99); In re: Ocean State Asbestos Removal, 7 E.A.D. 522 (EAB, 3/13/98). The Regions are counseled to review current caselaw and policies issued which may affect the role of the Agency's penalty policies in administrative litigation.

[9]Codified as Policy PT.1-1 in the Revised General Enforcement Policy Compendium.

The RCRA Penalty Policy also adheres to the Agency's 1984 Civil Penalty Policy's framework for assessing civil penalties by:

- calculating a preliminary deterrence amount consisting of a gravity component and a component reflecting a violator's economic benefit of noncompliance; and
- applying adjustment factors to account for differences between cases.

IV. DOCUMENTATION AND RELEASE OF INFORMATION

A. DOCUMENTATION FOR PENALTY SOUGHT IN ADMINISTRATIVE LITIGATION

In order to support the penalty proposed in the administrative enforcement action, enforcement personnel must include in the case file an explanation of how the proposed penalty amount was calculated. As a sound case management practice in administrative cases, a case "record" file should document or reference all factual information on which EPA will need to rely to support the penalty amount sought in the enforcement action. Full documentation of the reasons and rationale for the penalty complaint amount is important to expeditious, successful administrative enforcement of RCRA violations. The documentation should include all relevant information and documents which served as the basis for the penalty complaint amount and were relied upon by the Agency decision-maker. In general, only final documents, but not preliminary documents, such as drafts and internal memoranda reflecting earlier deliberations, should be included in the record file. All documentation supporting the penalty calculation should be in the record file at the time the complaint is issued. The documentation should be supplemented to include a justification for any adjustments to the penalty amount in the complaint made after initial issuance of the complaint, if such adjustments are necessary.

Additionally, Agency regulations governing administrative assessment of civil penalties, at 40 CFR § 22.14(a)(4)(i), require that in cases where a specific penalty demand is included in the complaint, a brief explanation of the rationale for the proposed penalty must be included. The regulations require that in such cases the Agency must additionally explain in the prehearing exchange of information how the proposed penalty was calculated in accordance with any criteria set forth in RCRA. See 40 CFR § 22.19(a)(3). For those penalty cases where the statutory maximum is pled in the complaint, the regulations require that the Agency include in the prehearing exchange all factual information relevant to the assessment of the penalty and that the Agency file, within fifteen days after respondent files its prehearing information exchange, a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in RCRA.[10] See 40 CFR § 22.19(a)(4).

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[10]For those complaints which contain the statutory maximum, the Consolidated Rules of Practice require that the complaints state the number of violations (and where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation

To ensure that RCRA administrative complaints comply with the statute and the rules for those cases where a specific proposed penalty is sought when the complaint is initially issued, as long as sufficient facts are alleged in the complaint, enforcement personnel may plead the following:

> Based upon the facts alleged in this Complaint, upon those factors set forth in Section 3008(a)(3) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(3), and the RCRA Civil Penalty Policy, including the seriousness of the violations, any good faith efforts by the respondent to comply with applicable requirements, any economic benefit accruing to the respondent, and such other matters as justice may require, the Complainant proposes that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint:
>
> Count 1..... $25,000
>
> Count 2..... $80,000

Where a specific penalty is sought, enforcement personnel may use the above general language in the complaint and should include a copy of the penalty calculation worksheets or the analogous regional penalty calculation summary as an attachment to the complaint. When the proposed penalty is sent to the respondent in the pre-hearing exchange submission, the penalty calculation worksheets or the analogous regional penalty calculation summary should be included at that time. Enforcement personnel must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint. For example, evidence of specific instances where the violation actually did, could have, or still might result in harm could be presented to the trier of fact to illustrate the potential for harm factor of the penalty.

The record supporting the penalty amount specified in the complaint should include a penalty computation worksheet or the analogous regional penalty calculation summary which explains the potential for harm, extent of deviation from statutory or regulatory requirements, economic benefit of noncompliance, and any adjustment factors applied (*e.g.*, good faith efforts to comply). An example of the worksheet is attached in the Appendix to this Policy. Also, the record should include any inspection reports and other documents relating to the penalty calculation. For more information, see the August 9, 1990, Memorandum from James Strock "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions."

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alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint. See 40 CFR § 22.14(a)(4)(ii).

B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

Until settlement discussions or the pre-hearing information exchanges occur with the respondent, mitigating and equitable factors and overall strength of the Agency's enforcement case may be difficult to assess. Accordingly, preparation of a penalty calculation worksheet for purposes of establishing the Agency's settlement position on penalty amount may not be feasible prior to the time that negotiations with the violator commence. Once the violator has presented the Region with its best arguments relative to penalty mitigation, the Region may, at its discretion, complete and document a penalty calculation to establish its initial "bottom line" settlement position. However, at a minimum, prior to final approval of any settlement, whether administrative or judicial, enforcement personnel should complete a final worksheet and narrative explanation or an analogous regional penalty calculation summary which provides the rationale for the final settlement amount to be included in the case file. As noted above, enforcement personnel may, in arriving at a penalty settlement amount, deviate significantly from the penalty amount sought in an administrative complaint, provided such discretion is exercised in accordance with the provisions of this Policy.

An example of the penalty computation worksheet that may be included in the case file is attached to this Policy in Section X.A.

C. RELEASE OF INFORMATION

Release of information to members of the public relating to the use of the RCRA Civil Penalty Policy in enforcement cases is subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Agency regulations implementing that Act, 40 CFR Part 2. FOIA, as implemented through Agency regulations, sets forth procedural and substantive requirements governing the disclosure of information by Federal agencies. While the Agency maintains a policy of openness and freely discloses much of what is requested by the public, there are a number of exemptions in FOIA which allow the Agency to withhold and protect from disclosure certain documents and information in appropriate circumstances.

In ongoing enforcement cases, documents and other material that deal with establishing the appropriate amount of a civil penalty (particularly penalty computation worksheets and similar calculation summaries) may be covered by two different FOIA exemptions, 5 U.S.C.§§ 552(b)(5) and (7). Documents that support or relate to the amount of the civil penalty the Agency would be willing to accept in settlement are likely to fall within the scope of these exemptions and in many cases can be withheld. Documents that support or relate to the amount of a penalty the Agency has proposed in an administrative complaint may also qualify for protection under the exemptions.[11] It is important to note that the Agency should, under most circumstances, release

[11]If EPA receives a FOIA request relating to the civil penalty in a judicial enforcement action, it must notify and coordinate with the Department of Justice before responding.

the final draft of the penalty computation worksheets or the analogous regional penalty calculation summary at the time a specific penalty amount is proposed. For more information on the Agency's policy of releasing information, see the August 15, 1996, Memorandum from Steven A. Herman "Public Release of EPA Enforcement Information." Because issues relating to FOIA and application of its exemptions require special attention, the Regional Freedom of Information Act Officer or appropriate attorney in the regional legal office should be consulted whenever any request is made by a member of the public relating to the application of the RCRA Penalty Policy in general or in a specific enforcement action. For additional information on FOIA and current Agency FOIA policy, Agency enforcement personnel should consult the 1992 EPA Freedom of Information Act Manual and contact the Office of General Counsel (Finance and Operations Law Office).

V. RELATIONSHIP BETWEEN PENALTY AMOUNT SOUGHT IN AN ADMINISTRATIVE ACTION AND ACCEPTED IN SETTLEMENT

The Consolidated Rules of Practice for administrative proceedings allow the Agency to include a specific proposed penalty in the complaint or within 15 days after the respondent files its prehearing exchange of information. The Rules require that, in either situation, the Agency must provide the respondent with an explanation of how the penalty was calculated in accordance with any criteria set forth in RCRA.[12] The Penalty Policy not only facilitates compliance with the Rules of Practice by requiring that enforcement personnel calculate a proposed penalty (and include this amount and the underlying rationale for adopting it either in the complaint or within 15 days after the respondent files the prehearing exchange), but also identifies a methodology for calculating penalty amounts which would be acceptable to EPA in settlement of administrative and judicial enforcement actions. The Agency expects that the dollar amount of the proposed penalty that will be sought in the administrative hearing will often exceed the amount of the penalty the Agency would accept in settlement. This may be so for several reasons.

First, at the time the complaint is filed, the Agency will often not be aware of mitigating factors (then known only to the respondent) on the basis of which the penalty may be adjusted downward. Second, it is appropriate that the Agency have the enforcement discretion to accept in settlement a lower penalty than it has sought in its complaint, because in settling a case the Agency is able to avoid the costs and risks of litigation. Moreover respondents must perceive that they face some significant risk of higher penalties through litigation to have appropriate incentives to agree to penalty amounts acceptable to the Agency in settlement.
Therefore, Agency enforcement personnel should, as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty and the other to be placed in the administrative file as support for the final penalty amount the

[12]See 40 CFR §§ 22.19(a)(3) and (4).

Agency accepts in settlement.[13] In calculating the amount of the proposed penalty to be sought in an administrative proceeding, Agency personnel should total: (1) the gravity-based penalty amount (including any multi-day component), and (2) an amount reflecting upward adjustments[14] of the penalty, and subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's "good faith efforts[15] to comply with applicable requirements." This total should then be added to the amount of any economic benefit accruing to the violator. The result will be the proposed penalty the Agency will seek in the administrative proceeding.

The methodology for determining and documenting the penalty figure the Agency accepts in settlement should be basically identical to that employed in calculating the proposed penalty, but should also include consideration of: (1) any new and relevant information obtained from the violator or elsewhere, and (2) all other downward adjustment factors (in addition to the "good faith efforts" factor weighed in calculating the proposed penalty).

It may be noted that the RCRA Penalty Policy serves as guidance not only to Agency personnel charged with responsibility for calculating appropriate penalty amounts for RCRA violations but also under 40 CFR § 22.27(b) to judicial officers presiding over administrative

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[13] In judicial actions, it will generally only be necessary to calculate a penalty amount to support any penalty the Agency is to accept in settlement. Counsel for the United States may point out to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the Penalty Policy. However, counsel should not suggest that the court is bound to follow the Policy in assessing a civil penalty.

[14] While the Agency may at this early juncture have limited knowledge of facts necessary to calculate any upward adjustments in the penalty, it should be remembered that amendments to the complaint (including the amount of the proposed penalty) may be made after an answer is filed only with the leave of the presiding officer. See 40 CFR § 22.14(c).

[15] Since Section 3008(a)(3) of RCRA requires that a violator's "good faith efforts to comply with applicable requirements" be considered by the Agency in assessing any penalty, it is appropriate that this factor be weighed in calculating the proposed penalty based on information available to EPA. While Section 3008(a)(3) also requires that the Agency weigh the seriousness of the violation in assessing a penalty, this requirement is generally satisfied by including a gravity-based component which reflects the seriousness (i.e., the potential for harm and extent of deviation from applicable requirements) of the violation. As noted above, enforcement personnel may in their discretion further adjust the amount of the proposed penalty downward where the violator or information obtained from other sources has convincingly demonstrated prior to the time EPA files the administrative complaint or the subsequent proposed penalty calculation document (where the statutory maximum is sought in the complaint) that application of additional downward adjustment factors is warranted by the facts.

proceedings at which proper penalty amounts for violations redressable under RCRA Sections 3008(a) and (g) are at issue. Such judicial officers thus have discretion to apply most of the upward or downward adjustment factors described in this Policy in determining what penalty should be imposed on a violator. However, judgments as to whether a penalty should be reduced in settlement because: (1) the violator is willing to undertake an environmental project in settlement of a penalty claim, (2) the Agency faces certain litigative risks in proceeding to hearing or trial, or (3) the violator demonstrates a highly cooperative attitude throughout the compliance inspection and enforcement process, are decisions involving matters of policy and prosecutorial discretion which by their nature are only appropriate to apply in the context of settling a penalty claim. It is therefore contemplated that decisionmakers in administrative proceedings would not adjust penalty amounts downward based upon their assessment of any of these three "settlement only" factors in assessing a civil penalty.

VI. DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT

RCRA Section 3008(a)(3) states that the seriousness of a violation must be taken into account in assessing a penalty for the violation. The gravity-based component is a measure of the seriousness of violation. The gravity-based penalty amount should be determined by examining two factors:

- potential for harm; and
- extent of deviation from a statutory or regulatory requirement.

Section VI. sets forth the considerations that should be evaluated in determining the appropriate severity of each factor that will then be used to calculate the initial gravity penalty component based on the circumstances of a single violation or a set of violations. This Section also provides a matrix to be used to arrive at that initial gravity penalty amount based on the chosen level for each of the factors. Lastly, this Section includes a discussion of how to approach the frequently-arising situation of storage violations that result after a failure to meet conditions for exemption at generator facilities.

A. POTENTIAL FOR HARM

The RCRA requirements were promulgated in order to prevent harm to human health and the environment. Thus, noncompliance with any RCRA requirement can result in a situation where there is a potential for harm to human health or the environment. In addition to those violations that involve actual or potential contamination from the release of hazardous wastes, violations such as failure to comply with recordkeeping requirements create a risk of harm to the environment or human health as well as undermine the integrity of the RCRA regulatory program. Accordingly, the assessment of the potential for harm resulting from a violation should be based on two factors:

- the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and

- the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.

1. Risk of Exposure

The risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents and the degree of such potential exposure. Evaluating the risk of exposure may be simplified by considering the factors which follow below.

a. Probability of Exposure

Where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions posing a threat of exposure to hazardous waste or waste constituents. The determination of the likelihood of a release should be based on whether the integrity and/or stability of the waste management unit or waste management practice is likely to have been compromised.

Some factors to consider in making this determination would be:

- evidence of release (*e.g.*, existing soil or groundwater contamination),
- evidence of waste mismanagement (*e.g.*, rusting drums), and
- adequacy of provisions for detecting and preventing a release (*e.g.*, monitoring equipment and inspection procedures).

A larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases of hazardous waste and constituents.

b. Potential Seriousness of Contamination

When calculating risk of exposure, enforcement personnel should weigh the harm which would result if the hazardous waste or constituents were in fact released to the environment.

Some factors to consider in making this determination would be:

- quantity and toxicity of wastes (potentially) released,
- likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater), and

- existence, size, and proximity of receptor populations (*e.g.*, local residents, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (*e.g.*, surface waters and aquifers).[16]

In considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. Violators rarely have any control over whether their pollution actually causes harm. Therefore, such violators should not be rewarded with lower penalties simply because the violations did not result in actual harm.

2. Harm To The RCRA Regulatory Program

There are some requirements of the RCRA program which, if violated, may not appear to give rise as directly or immediately to a significant risk of contamination as other requirements of the program. Noncompliance with these requirements, however, directly increases the threat of harm to human health and the environment. Therefore, all regulatory requirements are fundamental to the continued integrity of the RCRA program. Violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program. Some examples of this kind of regulatory harm include:

- failure to notify as a generator or transporter of hazardous waste, and/or owner/ operator of a hazardous waste facility pursuant to section 3010;
- failure to comply with financial assurance requirements;
- failure to submit a timely/adequate Part B application;
- failure to respond to a formal information request;
- operating without a permit or interim status;
- failure to prepare or maintain a manifest; or
- failure to maintain groundwater monitoring results.

It should also be clear that these types of requirements are based squarely on protection concerns and are fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner. For example, preparation and maintenance of manifests are vital to ensure that hazardous waste is not mishandled, responses to information requests are necessary to ensure that crucial information is obtained and, in some cases, immediately acted upon, and groundwater monitoring results must be maintained to ensure releases can be fully addressed and

[16]In considering this factor, the environmental sensitivity of the receptor areas or populations should be examined. The risk of exposure to a particularly sensitive environmental area, such as a wetlands, a drinking water source, or the habitat of a threatened or endangered species, may be a basis for an upward adjustment of the category chosen for the potential harm (i.e., minor to moderate, moderate to major) or a selection of a higher amount in the range of the chosen penalty matrix cell.

the spreading of contamination is stopped.

3. Applying the Potential for Harm Factor

a. Evaluating the Potential for Harm

Enforcement personnel should evaluate whether the potential for harm is major, moderate, or minor in a particular situation. The degree of potential harm represented by each category is defined as:

MAJOR:	(1) The violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.
MODERATE:	(1) The violation poses or may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.
MINOR:	(1) The violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

The examples which follow illustrate the differences between major, moderate, and minor potential for harm. Just as important as the violation involved are the case specific factors surrounding the violation. Enforcement personnel should avoid automatic classification of particular violations.

b. Examples

Example 1 - Major Potential for Harm

40 CFR § 265.143 requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under 40 CFR § 265.143(a)(2), the wording of a trust agreement establishing financial assurance for

closure must be identical to the wording specified in 40 CFR § 264.151(a)(1). Failure to word the trust agreement as required may appear inconsequential. However, even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of the regulation thereby preventing the funds from being available for closure. Such a facility could potentially become another abandoned hazardous waste site. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk of exposure). This violation would therefore be assigned to the major potential for harm category.

Example 2 - Moderate Potential for Harm

Owners and operators of hazardous waste facilities that store containers must comply with the regulations found at 40 CFR Part 264, Subpart I. One of the regulations found in this Subpart requires owners/operators to inspect, at least weekly, container storage areas to ensure containers are not deteriorating or leaking (40 CFR § 264.174). If a facility was inspecting storage areas twice monthly, this situation could present a significant risk of release of hazardous wastes to the environment. Because some inspections were occurring, it is unlikely that a leak would go completely undetected; however, the frequency of the inspections may allow a container to leak for up to two weeks unnoticed. The moderate potential for harm category would be appropriate in this case.

Example 3 - Minor Potential for Harm

Owners or operators of hazardous waste facilities must, under 40 CFR § 262.23, sign each manifest certification by hand. If a facility was using manifests that had a type-written name where the signature should be, this would create a potential for harm. Enforcement personnel would need to examine the impact that failure to sign the manifest certification would have on the integrity of the manifest system and the validity and reliability of the information indicated on the manifest. If the manifests were otherwise completed correctly and had other indicia that the information was correct, the likelihood of exposure and adverse effect on the implementation of RCRA may be relatively low. The minor potential for harm category could be appropriate for such a situation.

B. EXTENT OF DEVIATION FROM REQUIREMENT

1. Evaluating the Extent of Deviation

The "extent of deviation" from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance with the subject requirement exists. In other words, a violator

may be substantially in compliance with the provisions of the requirement or it may have totally disregarded the requirement (or a point in between). In determining the extent of the deviation, the following categories should be used:

MAJOR: The violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance.

MODERATE: The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

MINOR: The violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

a. Examples

A few examples will help demonstrate how a given violation is to be placed in the proper category:

Example 1 - Closure Plan

40 CFR § 265.112 requires that owners or operators of treatment, storage, and disposal facilities have a written closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having a plan which is somewhat inadequate (*e.g.*, it omits one minor step in the procedures for cleaning and decontaminating the equipment while complying with the other requirements). Such violations should be assigned to the "major" and "minor" categories respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on-site and would be assigned to the moderate category.

Example 2 - Failure to Maintain Adequate Security

40 CFR § 265.14 requires that owners or operators of treatment, storage, and disposal facilities take reasonable care to keep unauthorized persons from entering the active portion of a facility where injury could occur. Generally, a physical barrier must be installed and any access routes controlled.

The range of potential noncompliance with the security requirements is quite broad. In a particular situation, the violator may prove to have totally failed to supply any security systems. Total noncompliance with regulatory requirements such as this would result in classification into

the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. Obviously, the degree of noncompliance in the latter situation is less significant. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

C. PENALTY ASSESSMENT MATRIX

Each of the above factors -- potential for harm and extent of deviation from a requirement -- forms one of the axes of the penalty assessment matrix. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor.

The complete matrix is illustrated below.

Extent of Deviation from Requirement

Potential for Harm

	MAJOR	MODERATE	MINOR
MAJOR	$27,500 to 22,000	$21,999 to 16,500	$16,499 to 12,100
MODERATE	$12,099 to 8,800	$8,799 to 5,500	$5,499 to 3,300
MINOR	$3,299 to 1,650	$1,649 to 550	$549 to 110

The lowest cell (minor potential for harm/minor extent of deviation) contains a penalty range from $110 to $549. The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of $27,500 per day for each violation.[17]

[17]Note that all references in this Policy to matrix cells consist of the Potential for Harm factor followed by the Extent of Deviation factor (*e.g.*, major potential for harm/moderate extent of deviation is referred to as major/moderate).

The selection of the exact penalty amount within each cell is left to the discretion of enforcement personnel in any given case. The range of numbers provided in each matrix cell serves as a "fine tuning" device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. Enforcement personnel should analyze and rely on case-specific factors in selecting a dollar figure from this range. Such factors include the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator,[18] the number of days of violation,[19] and other relevant matters. For guidance on recalculation of the gravity based penalty based on new information, see Section IX A.2.

For some continuing violations, it is possible that circumstances may change during the period of violation in some manner that could affect the Potential for Harm or Extent of Deviation determinations. Enforcement personnel may choose different matrix cells for different periods of the same violation. For example, for a violation that lasts for 100 days, the circumstances during the first 50 days may warrant a penalty from the major/major cell. On day 51, if the violator takes affirmative steps to come into compliance or otherwise address the noncompliance but does not completely end the violation, the Potential for Harm or Extent of Deviation may change enough to warrant a different category (i.e., moderate or minor). In such a case, enforcement personnel should calculate separate penalties for the distinct periods of violation. This adjustment only applies where actions of the violator change the circumstances; natural attenuation or other natural changes in the circumstances should not result in this type of bifurcated penalty calculation.

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[18]When considering the sophistication of the violator, enforcement personnel may presume, in the absence of information to the contrary, that entities such as small non-profit organizations and small municipalities do not possess the same level of sophistication as other regulated entities. This presumption should, in most circumstances, result in a lower penalty amount than would otherwise be selected for similar violations. The sophistication of the violator is also relevant in the case of a small business. Agency personnel should consult the April 5, 2000, “Small Business Compliance Policy” and consider all relevant factors in determining the appropriate enforcement response in these circumstances.

[19]For example, for violations that continue for more than one day, when a multi-day component is not part of the penalty calculation, the number of days can be considered as a factor to select an appropriate penalty from this matrix.

VI. D. PLEADING AND ASSESSING PENALTIES FOR VIOLATIONS OF STORAGE REQUIREMENTS BY GENERATORS

1. Introduction

Many generators of Subtitle C hazardous waste qualify or attempt to qualify for the exemption from the requirement to obtain a hazardous waste permit and the storage facility operating requirements. This exemption is found in 40 C.F.R. Part 262.[20] As a result, RCRA enforcement actions against generators frequently arise when generators fail to meet the conditions for the permit exemption, and the consequent violations of storage facility requirements. This section addresses pleading choices and penalty calculation in this enforcement situation.

2. Generator "Conditions for Exemption"

The RCRA generator regulations (40 CFR Part 262) provide generators who wish to store hazardous waste and obtain an exemption from the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265, with "conditions for exemption" from those requirements. See 40 CFR §§ 262.14 - 262.17. These conditions for exemption apply only to generators who store hazardous waste at the generating facility. A generator must meet these conditions in order to be exempted from the storage facility permitting and operating requirements.[21] Without this exemption, permit and operating requirements would otherwise apply to generators that choose to store hazardous waste. Similarly, permit and operating requirements would apply to a generator that chooses to engage in disposal or treatment of hazardous waste.

As the 2016 Generator Improvements Rule clearly states, and given the optional nature of the conditional exemption, noncompliance with any condition for exemption from the storage facility permit and operating requirements cannot be cited and penalized as a violation of Part 262. *See* 40 CFR § 262.10(g)(2). Rather, noncompliance with one or more conditions for the exemption means that the generator's storage is not exempt from, and can potentially result in violations of, applicable storage facility permitting and operating requirements in 40 CFR Parts 124, 264 through 267, and 270 and Section 3010 of RCRA.[22]

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[20] While this Section refers to the generator exemption generally as a single exemption, it is important to keep in mind that the generator conditional exemptions in Sections 262.14(a), 262.15(a), 262,16(a) and 262.17(a) are exemptions from multiple distinct requirements, for example the requirement to obtain a storage permit found in Section 3005 and 40 C.F.R. Part 270 and the storage facility operating requirements found in 40 C.F.R. Parts 264 and 265.

[21] There is no statutory or regulatory requirement that a generator must obtain an exemption from those requirements. A generator that fails to meet the conditions of exemption, however, is required to comply with the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265.

[22] *See, e.g.,* U.S. v. Baytank (Houston) Inc., 934 F.2d 599, 607 (5th Cir.1991) (government can prove a hazardous waste generator's criminal violation of the RCRA storage permit requirement "either by showing unpermitted storage for longer than 90 days . . . or by showing unpermitted storage for any period of time in violation of any of the safe storage conditions of 40 C.F.R. Sec.262.34(a) [re-numbered to Sec. 262.17]").

3. Determining Violations to Plead

EPA retains the discretion to determine appropriate enforcement actions and penalties that are proportionate to the seriousness of the violation(s). Consistent with 40 C.F.R. § 262.10(g)(2), EPA may determine whether and how to take enforcement action stemming from noncompliance with the conditions for exemption. Where generator noncompliance with conditions for exemption results in violation(s) of storage facility permit and operating requirements that merit a penalty, enforcement personnel must determine, on a case-by-case basis, which storage facility requirements to separately plead as violations. The decision as to which violations to plead may have significant impact on the "proportionality" of the overall proposed penalty.

As set out in the bullets below, EPA has broad discretion that is consistent with 40 CFR § 262.10(g) to select the appropriate violation(s) to plead in order to assess a penalty that accurately reflects and is proportionate to the overall seriousness of the violation(s).[23] For example:

- The case team can allege a violation of the corresponding Part 264 or 265 requirement where a condition for exemption has a corresponding requirement in Part 264 or 265. See 40 CFR § 262.10(g)(2). Many of the conditions that ensure safe storage at a generator's exempt storage facility are based on the storage facility operating requirements that serve the same purpose. For example, if a large quantity generator failed to meet the condition found at 40 C.F.R. § 262.17(a)(7) regarding personnel training, the case team could allege a violation of the personnel training requirements found in 40 C.F.R. § 264.16/265.16.

- The case team can allege a violation of Part 264 or 265 operating requirements that does not have a corresponding condition in Part 262, but the violation of which merits a penalty given the circumstances of the case. For example, if the manner in which the facility was storing its waste indicated that the facility was not being diligent enough to minimize the chance for hazardous waste releases, the case team may choose to allege a violation of 40 C.F.R. § 264.31/265.31.

- The case team can allege "storage without a permit" as a violation of the Part 270 storage permit[24] requirement (and/or the statutory prohibition found in RCRA Section 3005(a)). Depending upon the facts of each case, this claim could appropriately be brought in addition to, or in lieu of, alleging a violation of the specific operating requirement(s), with potentially different penalty implications that should be considered when making the pleading decision. It is important to note that cases based on storage violations do not necessarily need to include a formal claim of storage without a permit.

[23]This includes the discretion to decide which requirements to formally cite as separate violations subject to separate penalties, and which requirements to "compress" within a particular claim or count in the complaint. *See Compression of Penalties for Related Violations*, Section VII.A.2.

[24] References to the "the permit requirement" include the alternative interim status requirement.

However, the pleading documents should include the general or background allegations that failure to meet all the conditions subjected the facility to permitting requirements and should set out the connection between the alleged violations and the requirement to have a permit. The pleading decision should ensure that penalties disproportionate to the violation(s) or insufficient for the violation(s) are avoided.[25]

- The case team can allege a combination of violations from the above options to ensure the enforcement action is representative of the totality and gravity of the circumstances.

4. Calculating Penalties for Generator Storage Permit Violations

RCRA section 3008(a)(3) requires that penalties for RCRA violations reflect the "seriousness of the violation." As already set forth in this Penalty Policy, the seriousness of the violation is measured initially in terms of:

- the potential for harm it poses; and
- its extent of deviation from the applicable requirement(s).

Adjustments are then made to this initial measure, to reflect certain factors that appropriately increase or decrease the penalty. This general approach is appropriate for all generator violations of storage permit and operating requirements. Furthermore, as part of this general approach, it is appropriate to also consider the circumstances and facts related to a generator's compliance as well as its failure to meet the conditions for the exemption from storage permit requirements when determining the seriousness of such violations.[26]

For alleged violations of storage facility operating requirements (found in Parts 264 or 265), the

[25] A decision to include a claim of failure to have a storage permit against a generator does not necessarily mean that settlement of that case must include a requirement to obtain a storage permit in order to return to compliance. While EPA could require a permit, just as it can require closure of the illegal storage facility, in appropriate cases, the facility may be allowed to operate in compliance with the conditions for exemption rather than be required to apply for a permit.

[26] This is consistent with the clarifications regarding enforcement related to the RCRA generator conditional exemption regulations provided by the 2016 Generator Improvements Rule. *See, e.g.*, the preamble to the revisions of 40 C.F.R. § 262.10(g) at 81 Fed. Reg. 85732, 85800 (Nov. 28, 2016). Moreover, considering the extent of the generator's compliance with the conditions for exemption in cases alleging the generator's violation of the storage permit requirement, has been employed in some manner by EPA for many years. One such case is the EAB's decision in *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598 (EAB2002). This Policy expands upon aspects of the EAB's penalty approach in *Bruder*. Whereas the EAB in the *Bruder* decision considered only whether the generator met the conditions for exemption in determining just the 'extent of deviation', this Policy establishes that both the generator's adherence to the conditions for exemption and the circumstances related to the generator's noncompliance should be considered for both factors of the penalty analysis, 'extent of deviation' and 'potential for harm.'

determination of the seriousness of each violation is the same for violations by generators who store hazardous waste as it is for violations by non-generators who store hazardous waste. The potential for harm of the violation is a measure solely of the potential for harm from the violation of the Part 264 or 265 requirement (rather than from not having a permit). Similarly, the extent of deviation is a measure solely of the generator's deviation from the Part 264 or Part 265 requirement alleged to have been violated. In calculating penalties for violations of storage facility operating permits, consideration of whether the generator met a few or most of the conditions for exemption is neither relevant nor appropriate.

For alleged violations of Part 270 and RCRA 3005 storage permit requirements, case teams should similarly calculate a penalty based on consideration of both the potential for harm and extent of deviation. However, in calculating penalties for these violations, case teams should consider how many of the conditions for exemption the generator met and the circumstances related to the generator's noncompliance with the underlying requirement alleged to be violated. Where the generator has met most of the conditions for exemption, the potential for harm element of the penalty evaluation (minor, moderate, or major) should reflect the lower potential for harm from not having a permit as a result of the generator meeting most of the conditions for exemption. This lower potential for harm is based on the presumption that the conditions that the generator met decreased the risk of harm from the storage of waste. Where the generator meets few or none of the conditions, the potential for harm determination should reflect a higher level of potential harm given that the conditions for exemption are designed to ensure safe storage. Similarly, where the generator has met many of the conditions for exemption, the overall "extent of deviation" could be considered low, whereas failure to meet many conditions might be considered a high "extent of deviation." Substantial adherence to many of the conditions for exemption by a generator represents less deviation from a fully compliant operation than a situation where a generator failed to meet many conditions. However, even where there was no effort made to secure a permit, the case team may conclude that the extent of deviation is low if there was substantial compliance with the operational requirements related to storage of hazardous waste.

Because there are numerous conditions and a variety of ways in which noncompliance could occur for each condition, there is a large range of circumstances that may arise between near full compliance and noncompliance with most or all of the conditions. Consideration of the penalty factors for each set of circumstances does not lend itself to any formulaic application; rather the amount of weight given to a generator's efforts to adhere to the conditions for exemption and operate under exempt status should be proportional to those efforts and the objective facts that indicate the nature and extent of the generator's efforts.

After both the potential for harm and the extent of deviation have been examined, the case team should determine the most appropriate Section VI.C matrix categories that best represent the potential for harm and extent of deviation based on all of the relevant facts and circumstances that were considered. As with all other penalty calculations under this Policy, any facts and circumstances not fully accounted for in the analyses described immediately above should be used to 'fine tune' the penalty chosen from the range provided in the applicable matrix cell.

5. Avoiding Duplication of Identical Considerations

In cases where the case team is separately assessing penalties for violations of both Parts 264 or 265 operating requirements and the RCRA Section 3005/Part 270 storage permit requirement, it should not include the same considerations and facts in the determination of the seriousness of the permit violation as those used to support the determination of the seriousness of the alleged Part 264/265 operating violations. This will ensure that each penalty calculation is independently supportable and will avoid 'double-counting' issues and duplicative penalties.

VII. MULTIPLE AND MULTI-DAY PENALTIES

A. PENALTIES FOR MULTIPLE VIOLATIONS

1. Multiple Violations Criteria

In certain situations, EPA may find that a facility has violated several different RCRA requirements. A separate penalty should be proposed in an administrative proceeding and obtained in settlement or litigation for each separate violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other claim in the complaint for which a penalty is to be assessed. A given claim is independent of, and substantially distinguishable from, any other claim when it requires an element of proof not needed by the others. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations. For example, failure to implement a groundwater monitoring program, 40 CFR § 265.90, and failure to have a written closure plan, 40 CFR § 265.112, are violations which can be proven only if the Agency substantiates different sets of factual allegations. In the case of a facility which has violated both of these sections of the regulations, a separate count should be charged for each violation. For litigation or settlement purposes, each of the violations should be assessed separately and the amounts added to determine a total penalty to pursue.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, in the case of a regulated entity which has open containers of hazardous waste in its storage area, 40 CFR § 265.173(a), and which also ruptured these or different hazardous waste containers while moving them on-site, 40 CFR § 265.173(b), there are two independent acts. While the violations are both of the same regulatory section, each requires distinct elements of proof. In this situation, two counts with two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totaled.

Penalties for multiple violations also should be sought in litigation or obtained in settlement where one company has violated the same requirement in substantially different locations. An example of this type of violation is failure to clean up discharged hazardous waste during transportation, 40 CFR § 263.31. A transporter who did not clean up waste discharged in two separate locations during the same trip should be charged with two counts. In these situations, the separate locations present separate and distinct risks to public health and the environment. Thus, separate penalty assessments are justified.

Similarly, penalties for multiple violations are appropriate when a company violates the same requirement on separate occasions not cognizable as multi-day violations (See Section VII.B.). An example would be the case where a facility fails for a year to take required quarterly groundwater monitoring samples. For penalty purposes, each failure to take a groundwater

monitoring sample during the year, which is four total violations, should be assessed separately.

Enforcement personnel are counseled to only calculate penalties for those violations that have occurred within five years of the date of the complaint. Therefore, generally, penalties should not be calculated for one-time violations occurring more than five years before the date the complaint is to be filed and for continuing violations[27] ending more than five years before the date the complaint is to be filed. However, for violations for which injunctive relief is sought, the amount of time elapsed is generally not a relevant consideration.

2. Compression of Penalties for Related Violations

In general, penalties for multiple violations may be less likely to be appropriate where the violations are not independent or not substantially distinguishable. Where a claim derives from or merely restates another claim, a separate penalty may not be warranted. For example, if a corporate owner/operator of a facility submitted a permit application with a cover letter, signed by the plant manager's secretary, but failed to sign the application, 40 CFR § 270.11(a), and also thereby failed to have the appropriate responsible corporate officer sign the application, 40 CFR § 270.11(a)(1), the owner/operator has violated the requirement that the application be signed by a responsible corporate officer. EPA has the discretion to view the violations resulting from the same factual event, failure to sign the application at all, and failure to have the person legally responsible for the permit application sign it, as posing one legal risk. In this situation, both sections violated should be cited in the complaint, but one penalty, rather than two, may be appropriate to pursue in litigation or obtain in settlement, depending upon the facts of a case. The fact that two separate sections were violated may be taken into account in choosing higher "potential for harm" and "extent of deviation" categories on the penalty matrix.

There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violations of numerous other independent

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[27]Continuing violations are those violations that involve an ongoing course of illegal activity (*e.g.*, operating without a permit) or where the violator is under a continuing obligation to meet regulatory requirements (*e.g.*, failure to conduct closure activities). For more discussion on this concept, *see* In re: Harmon Electronics, Inc., 7 E.A.D. 1 (EAB, 3/24/97) (the failure to obtain a permit, the failure to have a groundwater monitoring program in place, the failure to obtain, establish, or maintain closure/post-closure financial assurance and the failure to submit a notification under RCRA Section 3010 were all continuing violations); Harmon Industries, Inc. v. Browner, 19 F.Supp.2d 988 (W.D.Mo. 1998) (affirming the EAB's decision regarding the continuing violations); and Cornerstone Realty, Inc., v. Dresser-Rand Company, 993 F.Supp. 107 (D.Conn. 1997) (the failure to comply with closure requirements while hazardous waste remained at the site was a continuing violation). For violations that are not continuing in nature, *see* In re: Lazarus Inc., 7 E.A.D. 318 (EAB, 9/30/97) (the requirement to prepare and maintain PCB annual documents is not continuing in nature).

regulatory requirements. Examples are the case where: (1) a company through ignorance of the law fails to obtain a permit or interim status as required by Section 3005 of RCRA and as a consequence runs afoul of the numerous other (regulatory) requirements imposed on it by 40 CFR Part 265, or (2) a company fails to install groundwater monitoring equipment as required by 40 CFR §§ 265.90 and 265.91 and is thus unable to comply with other requirements of Subpart F of Part 265 (*e.g.*, requirements that it develop a sampling plan, keep the plan at the facility, undertake quarterly monitoring, prepare an outline of groundwater quality assessment program, etc.). In cases such as these where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high. Accordingly, in the specifically limited circumstances described, enforcement personnel have discretion to forego separate gravity-based and multi-day penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and is sufficient to deter similar future behavior and recoup economic benefit.

In deciding which penalties should be compressed (i.e., the violations for which separate penalties should not be calculated), enforcement personnel should consider the seriousness of the violation, the importance of the underlying requirement to the regulatory scheme, and the economic benefit resulting from each violation. Violations that involve substantial noncompliance or that result in economic benefit that should be recaptured (see Section VIII below) should be set forth separately in the complaint. For example, a failure to make a hazardous waste determination, 40 CFR § 262.11, should not be compressed because this requirement determines which wastestreams are subject to further regulation.

Even where separate penalties are not calculated for distinguishable violations, all significant violations should still be cited separately in the complaint to demonstrate the magnitude and scope of the violations.[28] The recitation of all significant violations will provide further support for a penalty that is based on a risk of harm and extent of deviation for the totality of the violations.

3. Multiple Violations Treated as Multi-day Violations

As discussed above, multiple violations are appropriate where EPA can demonstrate that independent and substantially distinguishable violations have occurred. As discussed in the next section, violations should be treated as multi-day violations (one penalty with a multi-day component) where the same violation continues uninterrupted for more than one day.

Where a facility has through a series of independent acts or omissions repeatedly violated the same statutory or regulatory requirement, the violations may begin to closely resemble multi-day violations in their number and similarity to each other. This is particularly true where the

[28]All complaints should cite those violations for which injunctive relief is sought.

violations occur within close proximity in time to each other and are based on similar acts by the violator. In these circumstances, enforcement personnel have discretion to treat each violation after the first in the series as multi-day violations (assessable at the rates provided in the multi-day matrix), if to do so would produce a more equitable penalty calculation. For example, if a facility fails to submit four quarterly reports in the same year, the Agency may treat these as four separate violations. However, if a facility is required to conduct daily inspections but fails to do so for an entire month or longer, the Agency may calculate the penalty utilizing the multi-day matrix. In those cases where a series of recurring, separate violations are treated as multi-day violations, enforcement personnel should treat each occurrence as one day for purposes of calculating the multi-day component.

As a matter of policy, in those cases where enforcement personnel are calculating a penalty with a multi-day component for a series of independent acts or omissions, the calculation should be based on those violations that occur within five years of the date the complaint is to be filed.

B. PENALTIES FOR MULTI-DAY VIOLATIONS

RCRA provides EPA with the authority to assess in administrative actions or seek in court civil penalties of up to $27,500 [29] per day of non-compliance for each violation of a requirement of Subtitle C (or the regulations which implement that subtitle). This language explicitly authorizes the Agency to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, any penalty assessed should consist of a gravity-based component, economic benefit component, and to the extent that violations can be shown or presumed to have continued for more than one day, an appropriate multi-day component. The multi-day component should reflect the duration of the violation at issue, subject to the guidelines set forth in Section VII C., below.

After it has been determined that any of the violations alleged has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is mandatory, presumed, or discretionary.[30] In most instances, the Agency should only seek to obtain multi-day penalties, if a multi-day penalty is appropriate, for the number of days it can document that the violation in question persisted. However, in some circumstances, reasonable assumptions as to the duration of a violation can be made. For example, a violation by an owner/operator of a land disposal facility for operating after it had lost interim status pursuant to RCRA Section 3005(e)(2) can generally be deemed to have begun on November 8, 1985, and continued at least until the time of the last inspection in which it was determined the facility was being operated without interim status. In the case where an

[29] See footnote 3.

[30] See footnote 27 for more information on continuing violations.

inspection reveals that a facility has no groundwater monitoring wells in place it can be assumed, in the absence of evidence to the contrary, that the facility has never had any wells. Here the violation can be treated as having commenced on the day that waste management operations triggering the Part 265, Subpart F requirements began or the effective date of the regulations, whichever is later. A multi-day penalty could then be calculated for the entire period from the date the facility was required to have wells in place until the date of the inspection showing they did not.

Conversely, in cases where there is no statutory or regulatory deadline from which it may be assumed compliance obligations began to run, a multi-day penalty should account only for each day for which information provides a reasonable basis for concluding that a violation has occurred. For example, if an inspection revealed that a generator was storing unlabeled drums of hazardous wastes without complying with 40 CFR § 262.34, the facility would be in violation of the storage requirements for permitted facilities found in 40 CFR Part 264. Enforcement personnel should allege in the complaint and present evidence as to the number of days each violation lasted. Documentation in a case such as this might consist of an admission from a facility employee that drums were stored improperly for a certain number of days. In such a case, a multi-day penalty would then be calculated for the number of days stated.

Where EPA determines that a violation persists, enforcement personnel may calculate the penalty for a period ending on the date of compliance or the date the complaint is filed or, if the complaint references only the statutory maximum, the date the proposed penalty is submitted.

If the calculation is based on the date the complaint is filed, and if the violation continues after that date, the complaint should include language stating that EPA may amend the complaint because the violation may continue to occur after filing. For example, the complaint could state:

> The violation alleged in Count 1 of this complaint is of a continuing nature and continues, to the best of EPA's knowledge and belief, as of the date of the filing of this complaint. EPA, therefore, reserves the right to amend this complaint and the penalty proposed herein to reflect additional days of violation for the violation alleged in Count 1.

Alternatively, enforcement personnel may consider including language in the complaint stating that the penalty will include a specific, additional per day amount until the violation is corrected. The language of the complaint should be clear that the amount chosen is based on the circumstances as they are known at the time the complaint is filed and that if the conditions change, the amount of the penalty sought may change. For example, the complaint could state:

> The violation alleged in Count 1 of this complaint is of a continuing nature and continues, to the best of EPA's

knowledge and belief, as of the date of the filing of this complaint. In addition to the penalty proposed in paragraph___of this complaint, EPA is hereby assessing an additional penalty of $_____for each day after the filing of the complaint that the violation alleged in Count 1 continues. This additional penalty assessment is based on the same factors on which the penalty in paragraph____is based. Should circumstances or conditions relating to the alleged violation change, EPA reserves the right to adjust the continuing penalty amount accordingly.

If the complaint includes only the statutory maximum with a proposed penalty to be submitted after the prehearing exchange, the complaint should include general reservation language similar to the first sample language above. The proposed penalty should then be calculated to the date of the proposed penalty submission (including the days between the date of the complaint and the date of the proposed penalty submission). To account for the continuing violation, the proposed penalty submission should include a per day penalty amount that will be sought at hearing above the proposed amount, similar to the second sample language above.

C. CALCULATION OF THE MULTI-DAY PENALTY

After the duration of the violation has been determined, the multi-day component of the total penalty is calculated, pursuant to the Multi-Day Matrix, as outlined below.

Step 1: Determine the gravity-based designations for the violation, *e.g.*, major-major, moderate-minor, or minor-minor;

Step 2: Determine, for the specific violation, whether multi-day penalties are mandatory, presumed, or discretionary, as follows:

Mandatory multi-day penalties - Multi-day penalties are considered mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate. The only exception is when they have been waived or reduced, in "highly unusual cases," as described below.[31] Multi-day penalties for days 181+ are discretionary.

Presumption in favor of multi-day penalties - Multi-day penalties are presumed appropriate for

[31]Because the Regions can make this determination without Headquarters involvement, this Policy supersedes the January 1992 Memorandum "Procedures for Consulting with Headquarters Before Waiving the Mandatory Multi-day Penalties in 'Highly Unusual' RCRA Administrative Actions."

days 2-180 of violations with the following gravity-based designations: major-minor, moderate-major, moderate-moderate. Therefore, multi-day penalties should be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. The presumption may be overcome for one or more days. Multi-day penalties for days 181+ are discretionary.

Discretionary multi-day penalties - Multi-day penalties are discretionary, generally, for all days of all violations with the following gravity-based designations: minor-major, moderate-minor, minor-moderate, minor-minor. In these cases, multi-day penalties should be sought where case-specific facts support such an assessment. Discretionary multi-day penalties may be imposed for some or all days. The bases for decisions to impose or not impose any discretionary multi-day penalties must be documented in the case files.

Step 3: Locate the corresponding cell in the following Multi-Day Matrix. Multiply a dollar amount selected from the appropriate cell in the multi-day matrix (or, where appropriate, a larger dollar amount not to exceed $27,500) by the number of days the violation lasted. (Note: the duration used in the multi-day calculation is the length of the violation minus one day, to account for the first day of violation at the gravity-based penalty rate.)

MULTI-DAY MATRIX OF MINIMUM DAILY PENALTIES (in dollars)

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$5,500 to 1,100	$4,400 to 825	$3,300 to 605
MODERATE	$2,420 to 440	$1,760 to 275	$1,100 to 165
MINOR	$660 to 110	$330 to 110	$110

The dollar figure to be multiplied by the number of days of violation will generally be selected from the range provided in the appropriate multi-day cell. The figure selected should not be less than the lowest number in the range provided. Selections of a dollar figure from the range of penalty amounts can be made at the Region's discretion based

on an assessment of case-specific factors, including those discussed below.

In determining whether to assess multi-day penalties and what penaltyamount is appropriate to select from the multi-day matrix, the Regions must analyze carefully the specific facts of the case. This analysis should be conducted in the context of the Penalty Policy's broad goals of: (1) ensuring fair and consistent penalties which reflect the seriousness (gravity) of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

Additional factors which may be relevant in analyzing these Policy goals in the context of a specific case include the seriousness of the violation relative to other violations falling within the same matrix cell, efforts at remediation or the promptness and degree of cooperation evidenced by the facility (to the extent not otherwise accounted for in the proposed penalty or settlement amount), the size and sophistication of the violator, the total number of days of violation, and other relevant considerations. All of these factors must be analyzed in light of the overriding goals of the Penalty Policy to determine the appropriate penalties in a specific case.

As discussed above, this Penalty Policy permits a Region to waive or reduce multi-day penalties, when otherwise mandatory for a violation, in a "highly unusual case." Because EPA has determined that almost all continuing "major" violations warrant multi-day penalties, it is anticipated that such a waiver will occur very infrequently. As required with the presumptive multi-day violations, when the Region has determined that it will either reduce the number of days of violation or will not use the multi-day matrix for violations that fall into the mandatory category, the case-specific facts justifying the reduction or waiver must be documented in the case file.

Where a violation continues for more than one day, enforcement personnel have the discretion to calculate a penalty for the entire duration of the violation. However, enforcement personnel should first calculate the penalty based on the period of violation occurring within five years of the date the complaint will be filed. If this calculation does not result in an appropriate penalty for the violation, enforcement personnel should then determine the duration of the violation that would result in an appropriate penalty.

While this Policy provides general guidance on the use of multi-day penalties, nothing in this Policy precludes or should be construed to preclude the assessment of penalties of up to $27,500 for each day after the first day of any given violation. Particularly in circumstances where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to human health or the environment, it may be appropriate to demand the statutory maximum.

VIII. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The Agency's 1984 Policy on Civil Penalties mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Enforcement personnel shall evaluate the economic benefit of noncompliance when penalties are calculated. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to calculate economic benefit. An "economic benefit" component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator, as defined below. Economic benefit can result from a violator delaying or avoiding compliance costs, or when the violator achieves an illegal competitive advantage through its noncompliance.

The following are examples of regulatory areas for which violations are likely to result in significant economic benefits: groundwater monitoring, financial requirements, closure/ post-closure, surface impoundment retrofitting, improper land disposal of restricted waste, clean-up of discharges, Part B permit application submittals, and minimum technology requirements.

For certain RCRA requirements, the economic benefit of noncompliance may be relatively insignificant (*e.g.*, failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego the inclusion of the benefit component where it appears that the amount of the component is likely to be less than the applicable amount shown in the chart below for <u>all</u> violations alleged in the complaint.

When the gravity-based and multi-day total penalty is:	EBN should be pursued if it totals:
$30,000 or less	at least $3,000
$30,001 to $49,999	at least 10% of the proposed penalty
$50,000 or more	$5,000 or more

In order to determine this, a calculation of economic benefit should be conducted for each violation that is estimated to have an economic benefit penalty of greater than $200 unless it is obvious that the relevant EBN total (from the right side of the above chart) will not be reached. The total economic benefit amount (all violations added together) should be compared to the chart to determine whether an economic benefit component should be included in the proposed penalty. Any decision not to seek an economic benefit penalty and the rationale for such a

decision should be documented on the Penalty Computation Worksheet or analogous regional office penalty calculation summary.

In some cases, a corporate entity related to the violating facility (*e.g.*, a parent corporation) may actually realize an economic benefit as a result of noncompliance by the violating facility. For example, a subsidiary company may be able to supply a product to a parent company at a cost significantly below its competitors due to noncompliance with RCRA requirements. The parent company may then sell that product (or utilize it in the manufacturing of a different product) and realize the benefit from reduced costs of the supplier subsidiary. When information to support such a calculation is available, enforcement personnel may consider economic benefits that accrue to related corporate entities in calculating a specific penalty.

It is generally the Agency's policy not to settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling the total penalty amount for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor.[32] The four exceptions are:

- the economic benefit component consists of an insignificant amount (see the chart above for the minimum amounts to pursue);
- there are compelling public concerns that would not be served by taking a case to trial;
- it is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- the company has documented an inability to pay the total proposed penalty.

If a case is settled for less than the economic benefit component, a justification must be included on the Penalty Computation Worksheet or in an appropriate section of the analogous regional penalty calculation summary.

A. ECONOMIC BENEFIT FROM DELAYED COSTS AND AVOIDED COSTS

1. Background

This section discusses two types of economic benefit from noncompliance in determining the economic benefit component:

- benefit from delayed costs; and

[32]See Section IX.A.3.d. below.

- benefit from avoided costs.

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. Delayed costs are either capital costs (essentially equipment) or one-time nondepreciable costs (*e.g.*, cleaning up a spill).[33] Examples of violations which result in savings from delayed costs are:

- failure to timely install groundwater monitoring equipment;
- failure to timely submit a Part B permit application; and
- failure to timely develop a waste analysis plan.

Avoided costs are expenditures which will never be incurred. Avoided costs include the usual operating and maintenance costs which would include any annual periodic costs such as leasing monitoring equipment. Examples of violations which result in savings from avoided costs are:

- failure to perform annual and semi-annual groundwater monitoring sampling and analysis;
- failure to use registered hazardous waste transporters (where the violator will not be responsible for cleaning up the waste);
- failure to perform waste analysis before adding waste to tanks, waste piles, incinerators; and
- failure to install secondary containment around a tank, where such a containment is never installed because the violator chooses closure rather than correction and continued operation.[34]

2. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "the rule of thumb" approach to calculate the economic benefit of noncompliance.[35] The rule of thumb approach is a straight forward method to calculate economic savings from delayed and avoided

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[33]See BEN Users Manual for further guidance on this subject at pages 3-9 to 3-10.

[34]While this cost is an avoided one, it does not fit into the annual cost category in the BEN model. This is an avoided one-time nondepreciable expense and requires a slightly modified BEN analysis. See BEN Users Manual for further guidance on this subject at page 3-11.

[35]"Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment" November 5, 1984 (Codified as Policy Number PT.1-5 of the General Enforcement Policy Compendium) at pages 2-3.

compliance expenditures. It is discussed more fully in the policy document "A Framework for Statute-Specific Approaches to Penalty Assessments" at pages 7-9.[36] It is now available in a Lotus spreadsheet.[37] Enforcement personnel may use the rule of thumb approach whenever the economic benefit penalty is not substantial (generally under $10,000) and use of an expert financial witness may not be warranted.

For economic benefit penalties that are more substantial (generally more than $10,000), enforcement personnel should use the BEN model to calculate noncompliance economic benefits. The primary purpose of the BEN model is to calculate economic savings for settlement purposes.[38] The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including inputs that consist of optional data items and standard values already contained in the program (see BEN Worksheet in the Appendix, Section X). As discussed in the BEN Users Manual, unless case-specific reasons dictate otherwise, enforcement personnel should rely on the least expensive costs of compliance (i.e., facility expenditures) in calculating economic benefit penalties.

Enforcement personnel should have a copy of the revised BEN User's Manual (September 1999).[39] The User's Manual describes how to use BEN, a computer program that calculates the economic benefit from delayed and avoided costs for any type of entity, including Federal facilities. It is designed to aid enforcement personnel with procedures for utilizing BEN, and to explain the program's results.[40] Except for smaller economic benefit calculations where the "rule

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[36]This document is dated February 16, 1984 (Codified as Policy Number PT.1-2 of the General Enforcement Policy Compendium)

[37]The Rule of Thumb Spreadsheet and information on its use is available to EPA enforcement personnel from the Multimedia Enforcement Division of the Office of Regulatory Enforcement.

[38]While the BEN model can be used to develop a proposed penalty for an administrative hearing, enforcement personnel must be prepared to present a financial expert witness to support the penalty calculation. In the appropriate circumstances, Agency personnel, with the assistance of a financial expert, can use case-specific information, relevant regional knowledge and past experience in the calculation of the economic benefit component. Regardless of which approach is taken, all calculations must be documented in the case file.

[39]Both the BEN model and the BEN User's Manual are downloadable from the Agency's website at www.epa.gov.

[40] In addition to the Manual "Estimating Costs for the Economic Benefits of RCRA Noncompliance" (September 1997), enforcement personnel are encouraged to use whatever cost documentation is available to calculate RCRA compliance costs (*e.g.,* contractors and

of thumb" approach is appropriate, BEN supersedes previous methodologies used to calculate the economic benefit for civil penalties. Enforcement personnel should also consult the Manual "Estimating Costs for the Economic Benefits of RCRA Noncompliance" (September 1997). When using this RCRA Costs Manual, enforcement personnel should ensure that figures set forth in that Manual reflect current figures given the time elapsed since the Manual was first issued.

The economic benefit component should be calculated initially for the maximum period of noncompliance. Enforcement personnel should then determine whether that amount should be reduced for any reasons (*e.g.*, possible application of statute of limitations).[41] However, enforcement personnel should be prepared to support the calculation of economic benefit for the entire period of noncompliance if there is any uncertainty regarding potential reductions that may have been identified.

The economic benefit calculation should also take into account the entire period that a violator enjoys the benefit. In almost all cases, the violator will enjoy the financial benefit until the economic benefit penalty is paid. Therefore, this calculation should be based on a penalty payment date corresponding roughly with the relevant hearing date. At the hearing, Agency personnel should be prepared to argue to the Presiding Officer that the violator will continue to enjoy the economic benefit until the penalty is paid and the relevant time period should include any time periods after the hearing prior to penalty payment.

B. ADDITIONAL INFORMATION ON ECONOMIC BENEFIT

In addition to delayed and avoided costs, an economic benefit may accrue to a violator in the form of an illegal competitive advantage. In this type of economic benefit, the illegal activity results in a financial gain that the violator would not otherwise realize if the violation had not been committed. Illegal competitive advantage cases are fundamentally different from those that routinely rely on BEN-type calculations, and they also arise less frequently. Care should be taken to insure that any calculation of illegal competitive advantage does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation. In most cases, a violating facility will realize either benefits from

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commercial brochures). If it is disputed, the burden will then shift to the respondent to present cost documentation to the contrary to be entered and run in BEN. Data provided by respondent relating to economic benefit should not be run in BEN unless its accuracy and legitimacy have been verified by the Region. Additionally, OSW's Guidance Manual: Cost Estimates for Closure and Post-Closure Plans, November, 1986, provides information regarding cost estimates for input data for BEN.

[41]Statute of limitations considerations may not be relevant for the calculation of economic benefit where, for example, the benefit results from violations that continue to the time the enforcement action is initiated.

delayed/avoided costs or from an illegal competitive advantage; however, where the circumstances support it, any penalty amount based on benefits due to illegal competitive advantage should be added to any other type of economic benefit that has been calculated. For information regarding methodologies for calculating a penalty based on illegal competitive advantage, EPA enforcement personnel should consult with the Multimedia Enforcement Division in OECA. (Note: As of the date of this Policy, financial technical advice for Agency personnel is available from the Helpline at (888) 326-6778. This service and/or telephone number is subject to change without notice.)

IX. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. ADJUSTMENT FACTORS

1. Background

As mentioned in Section VI of this document, the seriousness of the violation is considered in determining the gravity-based penalty component. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered in choosing the appropriate cell from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision. RCRA Section 3008(a)(3) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. EPA's 1984 Civil Penalty Policy sets out several other adjustment factors to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. This RCRA Policy also includes an additional adjustment factor for environmental projects undertaken by the respondent.

2. Recalculation of Penalty Amount

Before EPA considers mitigating the penalty proposed for an administrative hearing and applies the adjustment factors, it may be necessary, under certain circumstances, for enforcement personnel to recalculate the gravity-based or economic benefit component of the penalty figure. If new information becomes available after the issuance of the proposed penalty which makes it clear that the initial calculation of the penalty is in error, enforcement personnel should adjust this figure. Enforcement personnel should document on the Penalty Computation Worksheet or the analogous regional office penalty calculation summary the basis for recalculating the gravity-based or economic benefit component of the penalty.

For example, if after the issuance of the proposed penalty, information is presented which indicates that less waste is involved than was believed when the proposed penalty was issued, it may be appropriate to recalculate the gravity-based penalty component. Thus, if enforcement personnel had originally believed that the violator had improperly stored ten barrels of acutely

hazardous wastes but it was later determined that only a single container of characteristic hazardous waste was improperly stored, it may be appropriate to recalculate the "potential for harm" component of the gravity-based penalty from "major" to "moderate" or "minor."

On the other hand, if enforcement personnel initially believed a violator had fully complied with a specified requirement but subsequently determine that this is not the case, it would be appropriate to amend the complaint as necessary to add a new count, and revise the total penalty amount upward to account for this previously undiscovered violation. Likewise, if new information shows that a previously known violation is more serious than initially thought, an upward revision of the penalty amount may be required.

Furthermore, if the violator presented new information which established that the work performed was technically inadequate or useless (*e.g.*, the violator drilled wells in the wrong spot or did not dig deep enough), it may be more appropriate to keep the gravity-based penalty as originally calculated and evaluate whether it would be appropriate to mitigate the penalty based on the "good faith efforts" adjustment factor.

When information is presented which makes it clear that the gravity-based or economic benefit penalty component is in error, enforcement personnel may, of course, choose to formally amend the complaint to correct the original penalty component. In all instances, any recalculation of the penalty should be carefully documented on the Penalty Computation Worksheet or the analogous regional office penalty calculation summary in the enforcement file.

3. Application of Adjustment Factors

The adjustment factors can increase, decrease or have no effect on the penalty amount sought from the violator. Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a given violation. Note, however, that after all adjustment factors have been applied, the resulting penalty must not exceed the statutory maximum of $27,500 per day of violation. As indicated previously, all supportable upward adjustments of the penalty amount of which EPA is aware ordinarily should be made prior to issuance of the proposed penalty, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on respondent. Enforcement personnel should use whatever reliable information on the violator and violation is readily available at the time of assessment.

Application of the adjustment factors is cumulative, *i.e.*, more than one factor may apply in a case. For example, if the base penalty derived from the gravity-based and multi-day matrices is $109,500, and upward adjustments of 10% will be made for both history of noncompliance and degree of willfulness and/or negligence, the total adjusted penalty would be $131,400 ($109,500 + 20%).

For any given factor (except ability to pay, cooperative attitude and litigative risk) enforcement personnel can, assuming proper documentation, adjust the sum of the gravity-based and multi-day penalty components for any given violation up or down: (1) by as much as 25% of that sum in ordinary circumstances, or (2) from 26% to 40% of the sum, in unusual circumstances. Downward adjustments based on inability to pay or litigative risk will vary in amount depending on the individual facts present in a given case and in certain circumstances may be applied to the economic benefit component. Downward adjustments of up to 10% of the gravity-based and multi-day penalty components can be made based on the cooperative attitude of the respondent.

However, if a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. For these reasons, the Agency should at a minimum, absent the special circumstances enumerated in Section VIII, recover any significant economic benefits resulting from failure to comply with the law. If violators are allowed to settle for a penalty less than their economic benefit of noncompliance, the goal of deterrence is undermined. Except in extraordinary circumstances, which include cases where there are demonstrated limitations on a respondent's ability to pay or very significant litigative risks, the final adjusted penalty should also include a significant gravity-based component beyond the economic benefit component.

Finally, as has been noted above, only Agency enforcement personnel, as distinct from an administrative law judge charged with determining an appropriate RCRA penalty, should consider adjusting the amount of a penalty downward based on the litigative risks confronting the Agency, the cooperative attitude of the respondent or the willingness of a violator to undertake an environmental project in settlement of a penalty claim. This is because these factors are only relevant in the settlement context.

The following discussion of the adjustment factors is consistent with the EPA's Civil Penalty Policy issued in 1984.

a. Good Faith Efforts To Comply/Lack of Good Faith

Under Section 3008(a)(3) of RCRA, good faith efforts to comply with applicable requirements must be considered in assessing a penalty. The violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation. Assuming self-reporting is not required by law and the violations are expeditiously corrected, a violator's admission or correction of a violation prior to detection may provide a basis for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence. Self-reported violations may be eligible for penalty mitigation pursuant to EPA's Policy "Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations" (65 Fed. Reg. 19617 (4/11/00)). Lack

of good faith, on the other hand, can result in an increased penalty.

No downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance. Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent. EPA will also apply a presumption against downward adjustment for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations (failure to undertake such measures may be cause for upward adjustment as well as multi-day penalties), since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation.

If a respondent reasonably relies on written statements by the state or EPA that an activity will satisfy RCRA requirements and it later is determined that the activity does not comply with RCRA, a downward adjustment in the penalty may be warranted if the respondent relied on those assurances in good faith. Such claims of reliance should be substantiated by sworn affidavit or some other form of affirmation. On the other hand, claims by a respondent that "it was not told" by EPA or the State that it was out of compliance should not be cause for any downward adjustment of the penalty.

b. Degree of Willfulness and/or Negligence

While "knowing" violations of RCRA will support criminal penalties pursuant to Section 3008(d), there may be instances of heightened culpability which do not meet the criteria for criminal action. In cases where civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, although RCRA is a strict liability statute, there may be instances where penalty mitigation may be justified based on the lack of willfulness and/or negligence.

In assessing the degree of willfulness, and/or negligence, the following factors should be considered, as well as any others deemed appropriate:

- how much control the violator had over the events constituting the violation;
- the foreseeability of the events constituting the violation;
- whether the violator took reasonable precautions against the events constituting the violation;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known of the legal requirement which was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law.

Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied also is relevant in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and were out of his or her control and the control of his or her agents, the penalty may be reduced.

c. History of Noncompliance (upward adjustment only)

Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the current or previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

Some of the factors that enforcement personnel should consider in making this determination are as follows:

- how similar the previous violation was;
- how recent the previous violation was;
- the number of previous violations; and
- violator's response to previous violation(s) in regard to correction of problem.

A violation generally should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A previous violation of the same RCRA or State requirement would constitute a similar violation.

Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute. Enforcement personnel should examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly.

For the purposes of this section, a "previous violation" includes any act or omission for which a formal or informal enforcement response has occurred (*e.g.*, EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree).[42] The term also

[42]Note that while in the context of this Policy the term "previous violation" may include notices of violation, this Policy does not address the issue of when an enforcement action is initiated in the context addressed in Harmon Industries, Inc., v. Browner, 191 F.3d 894 (8th Cir. 1999). *See* In re: Bil-Dry Corporation, 9 E.A.D. 575 (EAB, 1/18/01).

includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.

In general, enforcement personnel should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, enforcement personnel should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance probably should apply unless the violator can demonstrate that the other violating corporate facilities are independent.

d. Ability to Pay (downward adjustment only)

The Agency generally will not assess penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business. It is unlikely, for example, EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations or where the violations of the law are particularly egregious. A long history of noncompliance or gross violations would demonstrate that less severe measures have been ineffective.

Enforcement personnel should conduct a preliminary inquiry into the financial status of the party against whom a proposed penalty is being assessed. This inquiry may include a review of publicly-available information through services such as Dun & Bradstreet. In some circumstances, enforcement personnel should review the financial viability of related entities as those related entities could provide financial support to the respondent.[43]

[43]*See* In Re New Waterbury, Ltd., 5 E.A.D. 529, 549 (EAB 10/20/94) ("Where, as here, there are several interrelated business entities all involved in the business of the liable party, the Agency may properly look into the assets of those other entities to determine whether a penalty is

Under RCRA, the ability of a violator to pay a proposed penalty is not a factor that the Agency must consider in assessing a penalty. However, because this is a mitigating factor set forth in this Policy, enforcement personnel should be generally aware of the financial status of the respondent in the event that this is raised as an issue in settlement or at a hearing.

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances.[44] Thus, a company's inability to pay usually will be considered only if the issue is raised by the respondent. If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty.

There are several sources available to assist the Regions in determining a regulated entity's ability to pay. Enforcement personnel should consult the Agency's "Guidance on Determining a Violator's Ability to Pay A Civil Penalty," December 16, 1986 (Codified as Policy PT.2-1 in the Revised General Enforcement Policy Compendium). In addition, the Agency now has three computer models it uses in determining whether violators can afford compliance costs, clean-up costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. ABEL analyzes inability to pay claims from corporations and partnerships. INDIPAY analyzes those claims from individual taxpayers. MUNIPAY analyzes inability to pay claims from cities, towns, villages, drinking water authorities and sewer authorities.[45] These models are designed for use in the settlement context. Because of that, the models are biased in favor of the violator. If the models indicate an ability to pay, the user can assume that the violator can in fact afford the full penalty, compliance costs and/or cleanup costs.[46]

When EPA determines that a violator cannot afford the penalty prescribed by this Policy or

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appropriate when the liable party claims that it does not have the resources to pay the penalty on its own.") Agency personnel should be aware that while other entities may be able to assist in paying a penalty, unless those parties are named in the complaint and are found liable, the Agency may not be able to require those parties to pay.

[44]The EAB has agreed that in RCRA enforcement cases, the respondent has the burden of persuasion on its alleged inability to pay. *See* In re: Bil-Dry Corporation, 9 E.A.D. 575 (EAB, 1/18/01).

[45]For training or further information about any of the these models, contact the Agency's Helpline at (888) 326-6778 or (888) ECONSPT. (Note: This service and/or telephone number is subject to change without notice.)

[46]Because the models are dependent upon financial data inputs, the models' results are only as current and reliable as the financial data. Enforcement personnel should seek as much specific information from the violator regarding their claim of inability to pay, including whether the documents that are submitted need to be supplemented or updated.

that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty (*e.g.*, payment of penalty would preclude proper closure / post-closure), the following options should be considered in the order presented:

- consider an installment payment plan with interest;
- consider a delayed payment schedule with interest (for example, such a schedule might even be contingent upon an increase in sales or some other indicator of improved business; or
- consider straight penalty reductions as a last recourse.

As indicated above, the amount of any downward adjustment of the penalty is dependent on the individual facts of the case regarding the financial capability of the respondent and the nature of the violations at issue.

e. Environmental Projects (downward adjustment only)

Under certain circumstances the Agency may consider adjusting the penalty amount downward in return for an agreement by the violator to undertake an appropriate environmentally beneficial project. All proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, Supplemental Environmental Projects Policy and any subsequent amendments to the SEP Policy.[47]

f. Other Unique Factors

This Policy allows an adjustment for factors which may arise on a case-by-case basis. When developing its settlement position, EPA should evaluate every penalty with a view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the court or administrative law judge is likely to award if the case proceeds to hearing or trial. The Agency should take into account, *inter alia*, the inherent strength of the case, considering, for example, the probability of proving violations, the probability that the government's legal arguments will be accepted, the opportunities which exist to establish a useful precedent or send a signal to the regulated community, the availability and potential effectiveness of the government's evidence, including witnesses, and the potential strength of the violator's equitable and legal defenses. Where the Agency determines that significant litigative risks exist, it may also take into account any disproportionate resource outlay involved in litigating a case that it might avoid by entering into a settlement. Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Agency's assessment of these litigation considerations. The extent of the adjustments will depend, of course, on the specific litigation considerations presented in any particular case. The Memorandum signed by James Strock on August 9, 1990,

[47]This Policy can be found on the EPA web site at www.epa.gov.

"Documenting Penalty Calculations and Justifications of EPA Enforcement Actions," discusses further the requirements for legal and factual "litigation risk" analyses.

However, where the magnitude of the resource outlay necessary to litigate is the only significant litigation consideration dictating downward adjustment in the penalty amount, the Agency should still obtain a penalty which not only recoups the economic benefit the violator has enjoyed, but includes an additional amount sufficient to create a strong economic disincentive against violating applicable RCRA requirements.

In addition to litigation risks, enforcement personnel can consider, for the purposes of an expedited settlement, the cooperation of the facility throughout the compliance evaluation and enforcement process. Enforcement personnel may reduce the gravity-based portion of the penalty by as much as 10% considering the degree of cooperation and preparedness during the inspection, provision of access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process. In addition to creating an incentive for cooperative behavior during the activities listed above, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. This adjustment factor should only be considered in settlements agreed to in principle by the parties before the filing of the prehearing exchange of information.

It is important to note the difference between a penalty adjustment for cooperative attitude and for good faith efforts to comply. While self-reporting and correction of violations qualify as good faith efforts, the cooperation and attitude of the violator throughout the investigation and enforcement process should be the focus under this factor. For example, a violator may qualify for this adjustment if it voluntarily provides information prior to the Agency's use of investigative tools such as information requests under RCRA Section 3007. Similarly, if a violator responds completely to an information request well in advance of the due date and otherwise cooperates fully, a downward adjustment may be appropriate. By contrast, this factor should not be applied to those cases where the violator indicates an interest in settlement and enters into negotiations but does not demonstrate other indications of cooperation. Generally, this adjustment factor should apply to those violators who demonstrate and maintain a high degree of willingness to work with EPA regarding the investigation and resolution of violations.

If lengthy settlement negotiations cause the violation(s) to continue significantly longer than initially anticipated, the initial proposed penalty amount should be increased, as appropriate, with a corresponding amendment of the complaint. The revised figure would be calculated in accordance with this Policy, and account for the increasing economic benefit and protracted non-compliance.[48]

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[48]Enforcement personnel may include, for those violations that continue beyond the date the complaint is filed, a specific per day penalty amount. See Section VII.B.

B. EFFECT OF SETTLEMENT

The Consolidated Rules of Practice incorporates the Agency's policy of encouraging settlement of a proceeding at any time as long as the settlement is consistent with the provisions and objectives of RCRA and its regulations. 40 CFR § 22.18(b). If the respondent believes that it is not liable or that the circumstances of its case justify mitigation of the penalty proposed in the complaint, the Consolidated Rules of Practice allow it to request a settlement conference.

In many cases, the fact of a violation will be less of an issue than the amount of the proposed penalty. Once the Agency has established a prima facie case, the burden is always on the violator to justify any mitigation of the proposed penalty. The mitigation, if any, of the proposed penalty should follow the adjustment factors guidelines found in Section IX.A. of this document.

X. APPENDIX

TABLE OF CONTENTS

X. APPENDIX

A. PENALTY COMPUTATION WORKSHEETS

PENALTY AMOUNT FOR HEARING[1]

CompanyName: _____

Address: _____

_____

Requirement Violated: _____

1.	Gravity based penalty from matrix	_____
	(a) Potential for harm	_____
	(b) Extent of Deviation	_____
2.	Select an amount from the appropriate multi-day matrix cell.	_____
3.	Multiply line 2 by number of days of violation minus 1 [or other number, as appropriate (provide narrative explanation)] .	_____
4.	Add line 1 and line 3	_____
5.	Percent increase/decrease for good faith	_____
6.	Percent increase for willfulness/ negligence	_____
7.	Percent increase for history of noncompliance	_____
8.	Total lines 5 thru 7[2] ----------.----------	_____
9.	Multiply line 4 by line 8	_____

[1]In those cases where a specific penalty amount will be set forth in the complaint, the worksheet heading can indicate the penalty calculation is for that purpose. Otherwise, the more generic heading shown here can be used which can cover both complaints and submission of a specific penalty after the prehearing exchange.

[2]Additional downward adjustments, where substantiated by reliable information, may be accounted for here.

10. Calculate economic benefit ..... _____

11. Add lines 4, 9 and 10 for proposed penalty amount to be sought at hearing ..... _____

A-3

SETTLEMENT PENALTY AMOUNT

Company Name: _____

Address: _____

_____

Requirement Violated: _____

1.	Gravity based penalty from matrix	_____
	(a) Potential for harm	_____
	(b) Extent of deviation	_____
2.	Select an amount from the appropriate multi-day matrix cell ..	_____
3.	Multiply line 2 by number of days of violation minus 1 [or other number as appropriate (provide narrative explanation)]	_____
4.	Add line 1 and line 3	_____
5.	Percent increase/decrease for good faith	_____
6.	Percent increase for willfulness/negligence.....	_____
7.	Percent increase for history of noncompliance	_____
8.	Percent increase/decrease for other unique factors (except litigation risk)	_____
9.	Add lines 5, 6, 7, and 8	_____
10.	Multiply line 4 by line 9	_____
11.	Add lines 4 and 10	_____
12	Adjustment amount for environmental project	_____
13.	Subtract line 12 from line 11	_____
14.	Calculate economic benefit	_____
15.	Add lines 13 and 14	_____

16. Adjustment amount for ability-to-pay ..... _____

17. Adjustment amount for litigation risk ..... _____

18. Add lines 16 and 17 ..... _____

19. Subtract line 18 from line 15 for final settlement amount ..... _____

This procedure should be repeated for each violation.

NARRATIVE EXPLANATION[3]

1. Gravity Based Penalty

(a) Potential for Harm: _____

_____ (attach additional sheets if necessary)

(b) Extent of Deviation: _____

_____ (attach additional sheets if necessary)

(c) Multiple/Multi-day: _____

_____ (attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness\negligence, history of compliance, ability to pay, environmental project credits, and other unique factors must be justified, if applied.)

(a) Good Faith: _____

[3] A separate "Narrative Explanation"should be attached to the Penalty Computation Worksheets for both the hearing amount and settlement amount. Where the discussion of a given element of a penalty to be included in the Narrative Explanation supporting the settlement amount will duplicate that appearing in the Narrative Explanation supporting the hearing amount, the earlier discussion may simply be incorporated by reference.

(attach additional sheets if necessary)

(b)willfulness/Negligence:

(attach additional sheets if necessary)

(c) History of Compliance:

(attach additional sheets if necessary)

(d) Ability to pay:

(attach additional sheets if necessary)

(e) Environmental Project:

(attach additional sheets if necessary)

(f) Other Unique Factors (e.g., cooperative attitude): _____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

3. Economic Benefit: _____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information: _____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

BEN WORKSHEET [4]

1. Case Name .....

   Requirement Violated _____

2* Initial Capital Investment/Year Dollars _____
   ___ Check here if costs were avoided, not delayed.

3. One Time Expenditure/Year Dollars _____
   ___ Check here if costs were avoided, not delayed.

   a.. Tax Deductible? YES NO

4. Annual Operating and Maintenance (O&M) Expenses Year Dollars _____

5. Date of Noncompliance _____

6. Date of Compliance _____

7. Anticipated Date of Penalty Payment _____

8.* Useful Life of Pollution Control Equipment _____

9*. Marginal Income Tax Rate _____

10. State Where Facility is Located _____

11.* Inflation Rate _____

12.* Discount Rate _____

13. Economic Benefit Penalty Component _____

* See standard value from BEN model

[4]A separate "BEN Worksheet" should be attached to the Penalty Computation Worksheets for both the amount proposed for hearing and settlement amount.

XL HYPOTHETICAL APPLICATIONS OF THE PENALTY POLICY

A. EXAMPLE 1

(1) Violation

Company A operated a facility at which it was generating one waste and storing a different waste generated by a since discontinued process. These wastes which company A had managed at its facility for years were first listed as hazardous wastes under RCRA in 1997. As a r sult, Company A became subject to regulation under Subtitle C of RCRA on the effective date of the regulation which was November 5, 1997. In a notification timely provided to EPA pursuant to RCRA Section 3010(a), Company A indicated that it only generated hazardous waste, without mentioning storage. This notification was never amended or supplemented. During an inspection on January 10, 1999, an employee revealed that Company A had also been storing another kind of waste in containers, on site for years. RCRA Section 3010 (a) provides that notification of waste management activities must be provided to EPA within 90 days of the promulgation ofregulations listing a substance as a hazardous waste subject to Subtitle C of RCRA. 40 CFR § 262.34 provides that a generator may only store hazardous waste on-site tor 90 days without obtaining a permit or interim status. Thus, beginning on February 3, 1998 (90 days after November 5, 1997), Company A was in violation of (1) the requirement that it notify the Agency pursuant to RCRA Section 3010(a) of its activity as a storer of hazardous waste, and (2) the requirement imposed by RCRA Section 3005 that it obtain interim status or a permit for its storage activity. Failure to notify and operating without a permit or interim status constitute independent or substantially distinguishable violations. Each violation would be assessed separately and the amounts totaled. The inspectors indicated that Company A's storage area was secured and that, in general, the facility was well managed. However, there were a number of violations of the interim status standards. The complaint issued to Company A set forth Part 265 violations as well as the statutory violations. Regional enforcement personnel conducted preliminary research into Company A's financial condition and discovered indications of financial instability. Therefore, the complaint contained the statutory maximum and the Region prepared a proposed penalty to submit after the prehearing exchange. For simplification, this example will discuss the §3005 and §3010 violations only. Below is a discussion of the methodology used to calculate the amount of the penalty proposed for the hearing, followed by a discussion of the methodology used to calculate the amount of the penalty to be accepted in settlement.

(2) Seriousness

(a) Failure to Notify

Potential for Harm: Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risks posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program.

Extent of Deviation: Moderate - Although Company A did notify the EPA it was a generator, it did not notify EPA that it stored hazardous waste, and it did not notify EPA as to all of its activities. Company A significantly deviated from the requirement.

(b) Operating without a permit

Potential for Harm: Major - The fact that the facility generally was well-managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure, and may have a substantial adverse effect on the statutory purposes for implementing the RCRA program.
Extent of Deviation: Major - Substantial noncompliance with the requirement because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(3) Gravity-based Penalty

- Failure to notify: Moderate potential for harm and moderate extent of deviation lead one to the cell with the range of $5,500 to $8,799. Enforcement personnel selected the mid-point, which is $7,150.

- Operating without a permit: Major potential for harm and major extent of deviation lead one to the cell with the range of $22,000 to $27,500. Taking into account case-specific factors, enforcement personnel selected the midpoint, which is $24,750.

- Penalty Subtotal: $7,150 + $24,750 = $31,900

(4) Multi-day Penalty Assessment

(a) Failure to notify: Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. The applicable cell ranges from $275 to $1,760. The mid-point is $1,018. [Based on an assessment ofrelevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation) the midpoint in the range of available multi-day penalty amounts was selected.] EPA was able to document that the violation continued from February 2, 1998, to the date of the inspection on January 10, 1999, for a total of 343 days (minus 1st day). [The inspection prompted the Company to immediately file a Section 3010(a) notification and Part A permit application.] The Region elected not to place a 180 day cap on multi-day penalties. Penalty Subtotal: $1,018 x 342 = $348,156.

(b) Operating without a permit: Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,100 to $5,500. The mid-point is $3,300. [Based on an assessment of such relevant factors as those noted in (4) (a), above, the mid-point in the range of available multi-day penalty amounts was selected.] The violation continued from February 2, 1998, to January 10, 1999, for a total of 343 days (minus 1st day). The Region elected not to place a 180 day cap on multi-day penalties.
Total Penalty Subtotal: $3,300 x 342 = $1,128,600.

(5) Economic Benefit of Noncompliance

The economic benefit obtained by Company A through its failure to notify pursuant to RCRA Section 3010(a) consists of savings on mailing and personnel costs which are negligible. However, the economic benefit the company obtained as a result of its failure to obtain a permit or interim status is not insignificant. This violation allowed the company to avoid or delay the costs of filing a Part A permit application and the costs of complying with regulatory requirements regarding storage of hazardous wastes in containers. In a BEN analysis (copy omitted for purposes of this example) , the Region calculated the economic benefit to Company A at $9,000.[5]

(6) Application of Adjustment Factors for Computation of the Proposed Penalty Amount

(a) Good faith efforts to comply: Prior to issuing the complaint, EPA had only limited discussions with the facility. Since neither these discussions nor the inspector's observations indicated any effort had been made to correct the violations prior to notification of violations by EPA, no downward adjustment for good faith efforts to comply was made. Similarly no evidence of lack of good faith was apparent.

(b) Degree of willfulness and/or negligence: In the absence of any affirmative presentation by the facility warranting downward adjustment (and consistent with the policy of resolving any uncertainty about the application of downward adjustment factors against the violator when computing the complaint amount), the Region only considered information which might support an upward adjustment. Available information did not support an upward adjustment.

(c) History of noncompliance: No evidence has been produced thus far that Company A has had any previous violations at this site. The facility in question is the only facility owned or operated by Company A. Therefore, no upward adjustment shall be made for the violations cited above.

(d) Other adjustment factors: Since this computation was designed to produce a penalty figure to be sought at hearing, the Region did not consider any other downward adjustment factors. No additional basis for upward adjustment was uncovered.

(7) Final Proposed Penalty Amount

Gravity base	+	Multi-day	+	Economic Benefit	=	Penalty
$31,900	+	$1,476,756	+	$9,000	=	$ 1,517,656

(8) Settlement Adjustments

[5] In this case, the Region could have used the "rule of thumb" approach to calculate the BBN given the size of the EBN penalty. Of course, as shown here, BEN can be used for any size BN penalty.

During settlement discussions, Company A presented information which it felt warranted adjustment of the penalty. After issuance of the proposed penalty, no new information came to light which supported recalculation of the gravity-based, multi-day, or economic benefit components of the penalty.

After consideration of the seriousness of the violations and in order to set penalties at a level which would allow it to achieve compliance quickly (but nevertheless deter future similar violations), the Region elected to place a 180 day cap on multi-day penalties. Multi-day Penalty Subtotal: ($1,018 + $3,300) x 179 =$772,922.

(a) Good faith efforts to comply: At settlement negotiations, Company A presented a written but explicitly non-binding opinion dated October 30, 1997, from the Director ofEPA's Office of Solid Waste (OSW) indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1997. Other Information indicated that six months later the Assistant Administrator for Solid Waste and Emergency Response formally renounced the view contained in the Director's opinion, that Company A probably was aware of this action, and that the company had failed to provide EPA with either a Section 3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts - *i.e.*, that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - the Region decided to adjust the penalty for both violations downward by 30%.
($31,900 + $772,922) x 30% = $241,447.

(b) Degree of willfulness and/or negligence: No evidence relative to this factor was presented for consideration.

(c) History of non-compliance: No new information relevant to this adjustment factor came to light after issuance of the proposed penalty.

(d) Ability to pay: Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by both parties as a means of payment. Total penalty remained unchanged.

(e) Environmental Projects: The company did not propose any projects.

(f) Other unique factors: No other unique factors existed in this case.

(9) Final settlement penalty amount:

Gravity base		Multi-day		Downward Adjustment		Economic Benefit	= Total Penalty
$31,900	+	$772,922	-	$241,447	+	$9,000	= $572,375

PENALTY AMOUNT FOR HEARING

Company Name: Company A
Address: 123 Main Street, Anytown, Anystate

Requirement Violated: 42 U.S.C. § 6930(a), Failure to notify of hazardous waste management activities

1.	Gravity based penalty from matrix	$7,150
	(a) Potential for harm	Moderate
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell.	$1,018
3.	Multiply line 2 by number of days of violation minus 1 ($1,018 x 342)	$348,156
4.	Add line 1 and line 3	$355,306
5.	Percent increase/decrease for good faith	NIA
6.	Percent increase for willfulness/negligence	NIA
7.	Percent increase for history of noncompliance	NIA
8.	* Total lines 5 thru 7	NIA
9.	Multiply line 4 by line 8	NIA
10.	Calculate Economic Benefit.	NIA
11.	Add lines 4, 9 and 10 for penalty amount to be proposed for hearing	$355,306

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT HEARING AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risk posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program.

(attach additional sheets if necessary)

(b) Extent of Deviation: Moderate - Although Company A did notify the Agency that it was a generator, it did not notify EPA that it stored hazardous waste. While there was partial compliance, Company A significantly deviated from the requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. There are no case-specific facts which would overcome the presumption. The applicable cell ranges from $275 to $1,760. The midpoint is $1,018. Based on an assessment of relevant factors. *(e.g.*, the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of day of violation), the mid-point in the available range was selected. The violation persisted for 343 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith: Neither discussions with the facility nor the inspector's observations indicated any effort had been made to correct violations prior to notification of violations by EPA. Thus no downward adjustment for good faith efforts to comply was made. Similarly, no evidence of lack of good faith was apparent.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance: No evidence relative to this adjustment factor was presented for consideration. There is no evidence of previous violations at this (the Company's only) facili .

(attach additional sheets if necessary)

(d) Ability to pay: Although the Region initially suspected inability to pay problems (and thus cited only the statutory maximum in the complaint), Company A did not submit any information to support any downward adjustment for this.

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: Although there is some economic benefit gained from the above cited violation (i.e., personnel costs and postage for notification forms), such costs are negligible enough not to include in the calculation.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: -=C=o=m p=a=ny A=----------

Address: 123 Main Street, Anytown, Anystate

Requirement Violated: 40 U.S.C § 6930(a), Failure to notify of waste management activities

	Gravity based penalty from matrix	$7,150
	(a) Potential for harm	Moderate
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell	$1,018
3.	Multiply line 2 by number of days of violation minus **1.** **[$1,018** x **(180-1)]**	$182,222
4.	Add line 1 and line 3	$189,372
5.	Percent increase/decrease for good faith	-30%
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.	Percent increase/decrease for other unique factors	*NIA*
9.	Add lines 5, 6, 7, and 8	-30%
10.	Multiply line 4 by line 9	$56,812
11.	Add lines 4 and **10**	$132,560
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from **11**	$132,560
14.	Calculate economic benefit	0
15.	Add lines 13 and 14	$132,560
16.	Adjustment amount for ability-to-pay	0
17.	Adjustment amount for litigation risk	0

18.	Add lines 16 and 17	0
19.	Subtract line 18 from line 15 for final settlement amount	$132,560

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risk posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program.

(attach additional sheets if necessary)

(b) Extent of Deviation: Moderate - Although Company A did notify the Agency that it was a generator, it did not notify EPA that it stored hazardous waste. While there was partial compliance, Company A significantly deviated from the requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. There are no case-specific facts which would overcome the presumption. The applicable cell ranges from $275 to$ 1,760. The midpoint is $1,018. Based on an assessment ofrelevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation), the midpoint in the available range was selected. The violation persisted for 343 days. The Region determined that the total penalty would have sufficient deterrent impact if multi-day penalties were assessed only for the minimum 180 day period presumed under the penalty policy, rather then for the full 343 (minus **1)** days of violation. (attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith: At settlement negotiations Company A presented a written but explicitly non-binding opinion dated October 30, 1997, from the Director ofEPA's Office of Solid Waste (OSW), indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1999. Other information indicated that 6 months later the Assistant Administrator for Solid Waste and Emergency Response formally renounced the view contained in the Director's opinion, that Company A was probably aware of this action, and that the Company had failed to provide EPA with either a §3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts - *i.e.*, that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - a downward adjustment of 30% in the amount of the penalty is appropriate.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: Evidence that Company A knowingly failed to comply with notification/permitting requirements after the Agency had clarified its regulatory interpretation was not deemed so persuasive as to warrant a finding that the company had acted willfully.

(attach additional sheets if necessary)

(c) History of Compliance: No new information relevant to this adjustment factor came to light after issuance of the complaint. There is no evidence of previous violations at this (the company's only) facility.

(attach additional sheets if necessary)

(d) Ability to pay: Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by the Agency.

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factor:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: Although there is some economic benefit gained from the above cited violation *(i.e.,* personnel costs and postage for notification forms), such costs are negligible enough not to include in the calculation.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: C o=m~p=an=....y-=-A=----------

Address: 101 Water Street, Somecity, Somestate

Requirement Violated: 42 U.S.C. § 6925, Operating without a permit or interim status.

1.	Gravity based penalty from matrix	$24,750
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	$3,300
3.	Multiply line 2 by number of days of violation minus 1 [$3,300 x (343-1)]	$1,128,600
4.	Add line 1 and line 3	$1,153,350
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.*	Total lines 5 thru 7	*NIA*
9.	Multiply line 4 by line 8	*NIA*
10.	Catculate Economic Benefit	$9,000
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$1,162,350

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT PROPOSED PENALTY AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - The fact that the facility generally was well managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure and may have a substantially adverse effect on the statutory purposes for implementing the RCRA Program.

(attach additional sheets if necessary)

(b) Extent of Deviation: Major - Substantial noncompliance with the requirement was found because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,100 to $5,500. The midpoint is $3,300. Based on an assessment of relevant factors *(e.g.,* the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, and the number of days of violation) the mid point in the available range was selected. The violation persisted for 343 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith: Neither discussions with the facility nor the inspector's observations indicate any effort had been made to correct violations prior to notification of violations by EPA. Thus, no downward adjustment for good faith efforts to comply was made. There was also no evidence of a lack of good faith.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance: No evidence has been produced thus far that Company A has had any previous violations at this site. The facility in question is the only facility owned or operated by Company A. Therefore, no upward adjustment shall be made on the basis of past compliance history. (attach additional sheets if necessary)

(d) Ability to pay: No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: By failing to obtain interim status (the least expensive option available to it under the statute) Company A avoided or delayed the costs of filing a Part A permit application and complying with the regulatory requirements relative to storage of hazardous wastes in containers. In a BEN analysis (copy omitted for purposes of this example), the Region found that these costs amounted to $9,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: .:::;C=o=mp=an=yA.,

Address: _____

Requirement Violated: 40 U.S.C. § 6925, Operating with a permit or interim status

1.	Gravity based penalty from matrix	$24,750
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell.	$3,300
3.	Multiply line 2 by number of days of violation minus 1 **[$3,300 x (180-1)].**	$590,700
4.	Add line 1 and line 3	$615,450
5.	Percent increase/decrease for good faith	-30%
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.	Percent increase/decrease for other unique factors ..... (except litigation risk)	*NIA*
9.	Add lines 5, 6, 7, and 8	-30%
10.	Multiply line 4 by line 9	-$184,635
11.	Add lines 4 and 10	$430,815
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from line 11	$430,815
14.	Calculate economic benefit	$9,000
15.	Add lines 13 and 14	$439,815
16.	Adjustment amount for ability-to-pay	0
17.	Adjustment amount for litigation risk	0

18.	Add lines 16 and 17	0
19.	Subtract line 18 from line 15 for final settlement amount	$439,815

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - The fact that the facility generally was well managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure and may have a substantially adverse effect on the statutory purposes for implementing the RCRA Program.

(attach additional sheets if necessary)

(b) Extent of Deviation: Major - Substantial noncompliance with the requirement was found because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,100 to $5,500 The midpoint is $3,300. Based on an assessment ofrelevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, and the number of days of violation) the mid point in the available range was selected. The violation persisted for 342 days. The Region determined that the total penalty would have sufficient deterrent impact if multi-day penalties were assessed only for the minimum 180 day period mandated by the penalty policy rather than the full 343 days of violation.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith: At settlement negotiations Company A presented a written but explicitly non-binding opinion dated October 30, 1997, from the Director ofEPA's Office of Solid Waste (OSW), indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1997. Other information indicated that 6 months later the Assistant Administrator for Solid Waste and Emergency Response formally renounced the view contained in the Director's opinion, that Company A was probably aware of this action, and that the company had failed to provide EPA with either a §3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts -*i.e.* that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - it is appropriate to adjust the penalty for this violation downward by 30%.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance: No new information relevant to this adjustment factor came to light after issuance of the proposed penalty.

(attach additional sheets if necessary)

(d) Ability to Pay: Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by the Agency.

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

.,attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: By failing to obtain interim status *(the* least expensive option available to it under the statute) Company A avoided or delayed the costs of filing a Part A permit application and complying with the regulatory requirements relative to storage of hazardous wastes in containers. In a BEN analysis (copy omitted for pur:poses of this example) the Region found that these costs amounted to $9,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

B. EXAMPLE2

(1) Violation:

Company B failed to prevent entry of persons onto the active portion of its surface impoundment facility located in Seattle, Washington. A portion of the fence surrounding the area had been accidentally knocked down during construction on the new wing of the facility on , October 30, 1998, and had never been replaced. Several children have entered the active portion of the facility. An inspection by EPA on March 15, 1999, revealed that the damaged area of the fence still needed to be replaced. The complaint issued to Company B assessed penalties for the violation of failing to provide adequate security pursuant to 40 CFR §265.14. Below is a discussion of the methodology used to calculate the penalty amount proposed in the complaint, followed by a discussion of the methodology used to calculate the penalty amount to be accepted in settlement.

(2) Seriousness

Potential for Harm: Major - Some children already have entered the area; potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site.

Extent of Deviation: Moderate - There is a fence, but a portion of it has been knocked down. Significant degree of deviation, but part of the requirement was implemented.

(3) Gravity-based Penalty: Major potential for harm and moderate extent of deviation yield the penalty range of $16,500 to $21,999. The midpoint is $19,250

(4) Multi-Day Penalty Assessment

(a) Failure to provide security: Major potential for harm and moderate extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $825 to $4,400. The midpoint is $2,613. [Based on an assessment ofrelevant factors *(e.g.,* the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation) the mid-point in the range of available multi-day penalty amounts was selected.] EPA documented that the violation continued from October 30, 1998, to March 15, 1999, a total of 136 days (minus 1st day).

Penalty Subtotal: $2,613 x 135 = $352,755.

Penalty Total: $19,250 + 352,755 = 372,005

(5) Economic Benefit of noncompliance:

Since Company B reaped an economic benefit by failing to repair the fence, a BEN worksheet should be completed. For purposes of the above violation, the following input data should be furnished:

- (EPA v. Company B). the case name
- ($100,000), the initial capital investment of Replacing the fence (cost estimate from 2/1/2000)
- -0-, there are no one time expenditures
- -0-, no annual operating and maintenance (O&M) expenses have been identified

- 3/1999, the date of the inspection
- 4/2000, the date of compliance
- 6/2000, the anticipated date of penalty payment

The above data was entered into the BEN model which yielded an economic benefit amount of $9,767 (see attached BEN worksheet and printout).

(6) Application of Adjustment Factors For Computation of the Complaint Amount

(a) Good faith efforts to comply: At the time of computation of the amount of the penalty to be proposed in the complaint no information (i) relative to the violator's good faith efforts to comply or (ii) indicative of lack of good faith was available.

(b) Degree of willfulness and/or negligence: Little evidence as to application of this factor was available.

(c) History of non-compliance: Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of this facility. While such previous violations had been corrected, they indicate that Company B had not been adequately deterred by prior notice of violations. The sum of the gravity/multi-day penalty components is adjusted upwards by 15% because of the company's history of noncompliance.

($19,250 + $352,755) x 15% = $55,801

(d) Other adjustment factors: Consistent with the general policy of delaying consideration of downward adjustment factors (other than that relating to good faith effort to comply) until the settlement stage, the Region reviewed available information only to see if it supported further upward adjustment of the penalty amount. No information supporting further upward adjustment was uncovered.

(7) Final Complaint Penalty Amount:

Gravity	+	Multi-day	+	Economic Benefit	+	Upward Adjustment	Total Penalty
$19,250	+	$352,755	+	$9,767	+	$55,801	$437,573

(8) Settlement Adjustments:

During settlement discussions Company B presented information which it felt warranted adjustment of the penalty. After issuance of the complaint no new information came to light which supported recalculation of the gravity-based, multi-day, or economic benefit components of the penalty proposed in the complaint.

(a) Good faith efforts to comply: Company B gave evidence at settlement of labor problems with security officers and reordering and delivery delays for a new fence. After issuance of the complaint, Company B was very cooperative and stated that a new fence would be installed and that security would be provided for by another company in the near future. Even though the company was very cooperative, its efforts to comply were only those required under

theregulations. No justification for mitigation for good faith efforts to comply exists. No change in penalty.

(b) Degree of willfulness and/or negligence: If the evidence presented by Company B with respect to reordering delays had been convincing, it might arguably have served as a basis for finding that the company acted without willful disregard of the regulation (or should not have been charged multi-day penalties at a rate so high as that established during computation of the complaint amount). However, such claims of unavoidable delay are easily made and must be viewed with skepticism. The company's evidence on this point was unconvincing since the security and fencing could have been easily provided by other suppliers.

While the fact that the fence was knocked down accidentally might indicate a lack of willfulness, the company's failure to take remedial action for 136 days argues against a downward adjustment. The: violation may even have become a willful one when left uncorrected. But in the absence of more information about precautionary steps the company took prior to the accident and the extent of the violators knowledge of the regulations, no adjustment was made.

(c) History of non-compliance: The Region was confronted with no reason to rethink the previous upward-adjustment of the penalty based on past violations.

(d) Ability to pay: The Company made no claims regarding ability to pay.

(e) Environmental projects: The company did not propose any environmental projects

(f) Other unigue factors: During EPA's inspection and subsequent settlement discussions, Company B was very cooperative. Company B provided additional documents and other information on several occasions as a result of verbal requests from EPA (thus eliminating the need for the Region to issue a Section 3007 letter). While Company B's efforts to remedy the violation consisted merely of compliance with the requirements (and no downward adjustment was warranted for "good faith efforts to comply"), the Region did decide that Company B's cooperative attitude did warrant a 5% downward adjustment.

(9) Final Settlement Penalty Amount:

Gravity Base	+	Multi-Day	+	Upward Adjustment	+	Downward Adjustment	+	Economic Benefit	Total Penalty
9,250	+	$352,755	+	55,801		$18,600	+	$9,767	$418,973

PENALTY AMOUNT FOR HEARING

CompanyName: C=:o=me:.ip a=n,., y.;B"----------

Address: 1201 Sixth Avenue, Seattle, Washington 98101

Requirement Violated: 40 CFR §265.14, Failure to prevent entry

1.	Gravity based penalty from matrix	$19,250
	(a) Potential for harm	Major
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell.	$2,613
3.	Multiply line 2 by number of days of violation minus **1** **[$2,613 x (136-1)].**	$352,755
4.	Add line 1 and line 3	$372,005
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	*NIA*
7.	Percent increase for history of noncompliance	15%
8.	* Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$55,801
10.	Calculate Economic Benefit	$9,767
11.	Add lines 4, 9 and 10 for penalty amount to be proposed for hearing	$437,573

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - Some children have already entered the area: potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site.

(attach additional sheets if necessary)

(b) Extent of Deviation Moderate: There is a fence, but a substantial portion of it has been knocked down. There is a significant degree of deviation, but part of the requirement has been implemented.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Multi-day penalties are mandatory for major-moderate violations. Based on consideration of relevant factors (e.g., number of days of violation and degree of cooperation evidenced by the facility) the mid-point in the available range in the multi-day matrix was selected. The violation can be shown to have persisted for 135 days.

(attach additional sheets if necessary)

2. Adjustment Factors: (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith: No information indicating a lack of good faith or of good faith efforts by the violator to comply is available.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: *NIA*

(attach additional sheets if necessary)

(c) History of Compliance: Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of the facility. While such previous violations had been corrected, they indicate that Company B has not been adequately deterred by prior notice of similar violations. Hence, the penalty is adjusted upward15%.

(attach additional sheets if necessary)

(d) Ability to pay: NIA

(attach additional sheets if necessary)

(e) Environmental Project: NIA

(attach additional sheets if necessary)

(f) Other Unique Factors: NIA

(attach additional sheets if necessary)

3. Economic Benefit: Company B has gained an economic benefit from failing to install a new fence. See the BEN Worksheet for the data input into the BEN model which calculated an economic benefit of $9,767.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information: N"-'-<....:IA""----------

(attach additional sheets if necessary)

BEN WORKSHEET [6]

1.	Case Name: "Company B"	
	Requirement Violated: 40 CFR §265.94	
2*	Initial Capital Investment/Year Dollars	$100,000
	___ Check here if costs were avoided, not delayed.	
3.	One Time Expenditure/Year Dollars	0
	___ Check here if costs were avoided, not delayed.	
	a.. Tax Deductible? YES NO	
4.	Annual Operating and Maintenance (O&M) Expenses Year Dollars	0
5.	Date of Noncompliance	3/1/1999
6.	Date of Compliance	4/1/2000
7.	Anticipated Date of Penalty Payment	6/1/2000
8.*	Useful Life of Pollution Control Equipment	15 years
9*.	Marginal Income Tax Rate	Washington
10.	State Where Facility is Located	Washington
11.*	Inflation Rate	
12.*	Discount Rate	11.0%
13.	Economic Benefit Penalty Component	

* See standard value from BEN model

[6] A separate "BEN Worksheet" should be attached to the Penalty Computation Worksheets for both the amount proposed for hearing and settlement amount.

BEN RUN PRINTOUT

Run Name=	Initial Run
Present Values as ofNoncom11liance Date (NCD)	01-Mar-1999
A) On-Time Capital & One-Time Costs	$92,817
B) Delay Capital & One-Time Costs	$84,249
C) Avoided Annually Recurring Costs	$0
D) Initial Economic Benefit (A-B+C)	$8,568
E) Final Econ. Ben. at Penalty Payment Date,	
01-Jun-2000	**$9,767**
C- *Corporation wl WA tax rates*	
Discount/Compound Rate	11.0%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-Apr-2000
Ca11ital Investment	
Cost Estimate	$100,000
Cost Estimate Date	01-Feb-2000
Cost Index for Inflation	PCI
# of Replacement Cycles; Useful Life	I; 15
Projected Rate for Future Inflation	*NIA*
One-Time, Nonde11reciable ExQenditure:	
Cost Estimate	$0
Cost Estimate Date	*NIA*
Cost Index for Inflation	*NIA*
Tax Deductible?	*NIA*
Annual Recurring Costs	
Cost Estimate	$0
Cost Estimate Date	*NIA*
Cost Index for Inflation	*NIA*
User-Customized S11ecific Cost Estimates	NIA
On-Time Compliance Capital Investment	
Delay Compliance Capital Investment	
On-Time Compliance Replacement Capital	
Delay Compliance Replacement Capital	
One-Time Compliance Nondepreciable	

Delay Compliance Nondepreciable

SETTLEMENT PENALTY AMOUNT

Company Name: -=C--=-o=m°"'p=an=y--=B'----------

Address: 1201 Sixth Avenue, Seathle, Washington 98101

Requirement Violated: 40 CFR § 265.14, Failure to Prevent Entry

1.	Gravity based penalty from matrix	$19,250
	(a) Potential for harm	Major
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell .	$2,613
3.	Multiply line 2 by number of days of violation minus 1 **[$2,613 x (136-1)].**	$352,755
4.	Add line 1 and line 3	$372,005
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	15%
8.	Percent increase/decrease for other unique factors ..... (except litigation risk)	-5%
9.	Add lines 5, 6, 7, and 8	10%
10.	Multiply line 4 by line 9	$37,200
11.	Add lines 4 and 10	$409,205
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from line 11	$409,205
14.	Calculate economic benefit	$9,767
15.	Add lines 13 and 14	$418,972
16.	Adjustment amount for ability-to-pay	0
17.	Adjustment amount for litigation risk	0

18.	Add lines 16 and 17	0
19.	Subtract line 18 from line 15 for final settlement amount	$418,972

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - Some children have already entered the area; potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site.

.(attach additional sheets if necessary)

(b) Extent of Deviation: Moderate - There is a fence, but a substantial portion of it has been knocked down. There is a significant degree of deviation, but part of the requirement has been implemented.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Multi-day penalties are mandatory for major-moderate violations. Based on consideration of relevant factors *(e.g.*, number of days of violation and degree of cooperation evidenced by the facility) the mid-point in the available range the multi-day matrix was selected. The violation can be shown to have persisted for 135 days.

(attach additional sheets if necessary)

2. Adjustment Factors: (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits and other unique factors must be justified, if applied.)

(a) Good Faith: Company B gave evidence oflabor problems with security officer and reordering and delivery delays in obtaining a new fence. After issuing the complaint, Company B stated that a new fence would be installed and that security would be provided by another company in the near future. Even though the Company was very cooperative, its actions were only those required under the regulations. No justification for mitigation for good faith efforts to comply exists.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: While the fact that the fence was knocked down accidentally might indicate a lack of willfulness, the Company's failure to take remedial action for 136 days argues against a downward adjustment. The violation may even have become a willful one when left uncorrected. But in the absence of more information about precautionary steps the company may have taken prior to the accident and the extent of the violator's knowledge of the regulations, no adjustment was made.

(additional sheets at necessary)

(c) History of Compliance: Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of the facility. While such previous violations had been corrected, they indicate that Company B has not been adequately deterred by prior notice of similar violations. Hence, the penalty is adjusted upward 15%.

(attach additional sheets if necessary)

(d) Ability to pay: *NIA*

(attach additional sheets if necessary)

(e) Environmental Project: N/A

(attach additional sheets if necessary)

(f) Other Unique Factors: During EPA's inspection and subsequent settlement discussions, Company B was very cooperative. Company B provided additional documents and other information on several occasions as a result of verbal requests. While Company B's efforts to remedy the violation consisted merely of compliance with the requirements (and no downward adjustment was warranted for "good faith efforts to comply"), Company B's cooperative attitude did warrant a 5% downward adjustment.

(attach additional sheets if necessary)

3. Economic Benefit: Company B has gained an economic benefit from failing to install a new fence. See the BEN Worksheet for the data input into the BEN model which calculated an economic benefit of $9,767

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

C. EXAMPLE3

(1) Violation

Company C, an owner/operator of several permitted commercial treatment facilities, regularly receives a large volume of diverse types of RCRA hazardous wastes at its Evanston facility. Upon receipt of the wastes, Company C's Evanston facility immediately treats them and sends the treatment residues off-site for land disposal at another company's facility, Company Z.

Between December 16, 1998, and December 18, 1999, Company C's Evanston facility received one shipment per month of liquid F002 spent solvent wastes from various generators. Each shipment consisted of two 55-gallon drums, but the composition and concentration level of hazardous constituents in each drum was different due to the highly variable process that generated the waste. The Evanston facility did not test the wastes before or after treating them, and its existing waste analysis plan did not require any such testing or other analysis to determine if wastes are restricted. The Evanston facility properly manifested the 12 monthly shipments of wastes sent off-site to Company Z, but it did not know until June 18, 1999, that it was required by 40 C.F.R. § 268.7 to send a land disposal restrictions (LDR) notification and certification with each shipment of waste. At that time, it began sending§ 268.7 forms routinely stating that the treatment residues were eligible for land disposal.

On October 30, 1999, an EPA inspector at Company Z found that 24 drums of Company C's F002 solvents were unlawfully disposed in Company Z's landfill. EPA determined that the unlawfully disposed wastes had been sent to Company Z in 1989 from the Evanston facility. Company Z's landfill did not meet minimum technological requirements and was leaking hazardous constituents into the ground water, the only source of drinking water for the area. The unlawfully disposed drums contained concentration of F002 solvents in excess of the applicable Part 268 LDR treatment standards.

Although four separate violations are identified in (a) through (d) below, only the first two violations (in (2) (a) and (b) below) are discussed for purposes of this Example. Below is a discussion of the methodology used to calculate the penalty amount for the complaint followed by a discussion of the methodology used to calculate the settlement amount.

(2) Seriousness:

(a) Failure to Send Accurate§ 268.7(b) Notifications and Certifications:

Potential for Harm: Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the waste were required to be further treated before land disposal. The violation may have a substantial adverse effect on the purposes or procedures for implementing the RCRA program. The violation may also pose a substantial risk of exposure to hazardous waste.

Extent of Deviation: Major - Initially, Company C did not merely prepare and send deficient§ 268.7 notifications/certifications. Rather, it completely failed to prepare and send such forms for the first six months. During the next six months, Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable requirement.

(b) Failure to Test Restricted Wastes as Required by§§ 268.7(b) and 264.13(a):
Potential for Harm: Major - Company C's complete failure to test the wastes prevented it from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important. The violation may also pose a substantial risk of exposure to hazardous waste.

Extent of Deviation: Major - Company C's waste analysis plan is deficient in not explicitly requiring any testing to determine if wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify the waste as restricted. Such deficiency is particularly significant where the wastes are very diverse, as is the case here, because in the absence of reliable test results it is very difficult, if not impossible, for Company C to comply with the § 264.13 requirement that the operator obtain "all the information which must be known to [manage] the waste in accordance with ... Part 268."

(c) Treating Hazardous Waste Prior to Obtaining Adequate Waste Analysis Data as Required by 40 CFR § 264.13(a):

Potential for Harm: Major
Extent of Deviation: Major

(d) Failure to Maintain§ 268.7 Paperwork in Operating Record as Required by 40 CFR § 264.73(b):

Potential for Harm: Moderate
Extent of Deviation: Major.

3 Gravity-based Penalty

(a) Failure to Send Accurate 40 CFR § 268.7(b) Notifications and Certifications: Major potential for harm and major extent of deviation leads one to the cell with the range of $22,000 to $27,500. The mid-point is $24,750.

(b) Failure to Test Restricted Wastes as Required by§§ 268.7(b) and 264.13(a): Major potential for harm and major extent of deviation leads one to the cell with the range of $22,000 to $27,500. The mid-point is $24,750.

Total Penalty Per Shipment: $24,750 + $24,750 = $49,500.

Since these violations were repeated once every month for 12 months, the above penalty figure should be multiplied by 12, to yield a total penalty (prior to application of adjustment factors, addition of multi-day component, and addition of economic benefit component) as follows:

Penalty Subtotal: $49,500 x 12 = $594,000

(4.) Multi-day Penalty Assessment: Because each violation is viewed as independent and noncontinuous, no multi-day assessment was made.

(5) Economic Benefit of Noncompliance: Company C avoided a number of costs in committing the violations noted in (2)(a) and (b) above. These included (i) the costs of forms and labor necessary to complete the forms notifying and certifying to Company Z that the wastes were or were not appropriate for land disposal, and (ii) the costs of waste analysis necessary to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) of these avoided costs was performed and indicated that Company C reaped an economic benefit of $12,500 from its failure to comply with the two requirements in question ($2,500 for the violations specified in (2) (a) and $10,000 for the violations noted in (2)(b)).[7]

(6) Application of Adjustment Factors for Computation of the Complaint Amount

(a) Good faith efforts to comply: As soon as company C's Evanston facility learned of its obligation to submit 40 CFR § 268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions . Even if such submissions had been accurate, Company C's actions would have been only those required by the regulations. No justification for mitigation for good faith efforts to comply exists. No change in the $594,000 penalty.

(b) Degree of wilfulness and/or negligence: The prior knowledge of the 40 CFR § 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of the penalty of 10% is justified.

$594,000 $\times$ 10% = $59,400

(c) History of noncompliance: No evidence demonstrating that Company Chas had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in (6)(b) above, such adjustment will not be duplicated here.

In addition, there was evidence that Company C's Evanston facility received one year earlier a notice of violation from the State Environmental Protection Department regarding violations of the State's authorized Clean Air Act program. The violations related to units used to treat the waste involved in this RCRA action. Based on this prior notice, an upward adjustment of 5% is justified. $594,000 x 5% = $29,700

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[7] Company C was not itself under a legal obligation to treat the wastes in question to the BDAT levels mandated by the land disposal restrictions, but it nevertheless reaped an economic benefit by misrepresenting to Company Z that these wastes were eligible for land disposal when they were not. Had Company C accurately represented to Company Z the truth - that the wastes needed to be treated before being landfilled - Company Z would undoubtedly have imposed a higher disposal fee on Company C. Enforcement personnel should give serious consideration to the inclusion in the economic benefit calculation those amounts Company C saved in reduced disposal fees as a result of the violations specified in 2(a) and 2(b).

(d) Other adjustment factors: Since this computation was for purposes of determining the amount of the penalty to propose in the complaint, no further consideration was given to possible down adjustments. At the same time no reason to adjust the penalty amount upward based on the remaining adjustment factors was evident.

(7) Final Complaint Penalty Amount:

Gravity Base	+ Upward Adjustment	+ Upward Adjustment	+	Economic Benefit	Total Penalty
$594,000	+ $59,400	+ $29,700	+	$12,500	$695,600

Since a penalty of $695,600 would exceed the statutory maximum for 24 violations (24 x 27,500 = 660,000), the penalty amount to be sought in the complaint was adjusted downward to $660,000.

(8) Settlement Adjustments:

After issuance of the complaint the Region uncovered no basis for recalculating the gravity-based, multi-day, or economic benefit components of the penalty sought in the complaint. However, based on information available to it (including that provided by Company C) the Region did consider certain downward adjustments in the penalty amount.

(a) Good faith efforts to comply: The company did not present and the Region did not find any grounds for reconsidering its initial conclusion that downward adjustment based on the company's good faith efforts at compliance was not justified.

(b) Degree of willfulness and/or negligence: Although the company argued that its lack of knowledge regarding land ban requirements indicated a lack of willfulness during the first 6 months the violations continued, the Region declined to adjust the penalty downward because to do so would encourage or reward ignorance of the law.

(c) History of non-compliance: No reason was presented to address this issue differently than it had been in computing the complaint amount of the penalty.

(d) Ability to pay: Company C made no claims regarding ability to pay.

(e) Environmental projects: Company C did not propose any environmental projects.

(f) Other Unique Factors: In reviewing its liability case against Company C the Region determined that there were major weaknesses in its ability (i) to the tie a number of the 24 drums discovered at Company Z's landfill to Company C, and (ii) to show that all the drums contained F002 solvent. The Region concluded that in light of these evidentiary weaknesses it was unlikely that it would be able to obtain through litigation the amount of the penalty it had sought in the complaint. Since these evidentiary difficulties adversely affected the Region's ability to prove violations related to 4 of the 12 (or one-third of the) monthly shipments, the Region decided that for settlement purposes it was willing to forego roughly one-third of the total proposed penalty amount. Accordingly, the Region decided to adjust the amount of the penalties sought for the violations identified in 2(a) and (b) above downward by $110,000 each based on litigative risk.

(9) Final Settlement Penalty amount:

Gravity Base	+ Upward Adjustment	+ Upward Adjustment	+ Economic Benefit	- Downward Adjustment	=	Total Penalty
$594,000	+ $59,400	+$29,700	+ $12,500	- $220,000	=	$475,600

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: ..::C=o=m p=a=n.t-y....::C"----------

Address: 101 Yourstreet, Evanston, Illinois

Requirement Violated: 42 CFR § 268.7(b) Failure to send accurate notification and certification.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	*NIA*
3.	Multiply line 2 by number of days of violation minus 1 [$3,300 x (343-1)]	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	10%
7.	Percent increase for history of noncompliance	5%
8.*	Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$44,550
10.	Calculate Economic Benefit	$2,500
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$344,050

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the wastes were required to be further treated before land disposal. The violation may have a substantial adverse affect on the purposes or procedures for implementing the RCRA program. In addition, the violation creates a potential for harm because it hinders Company Z's ability to adequately characterize the waste in order to assure that it is properly managed. (Note, however, that Company Z has an independent regulatory obligation to characterize and properly manage wastes it receives. Thus, Company C's violation is one factor contributing to the potential for harm, rather than the sole factor creating such risks.)

(attach additional sheets if necessary)

(b) Extent of Deviation: Major - Initially, Company C did not merely prepare and send deficient 40 CFR § 268.7 notifications/certifications. Rather, it completely failed to prepare and send such forms for the first six months. During the next six months Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith: As soon as Company C's Evanston facility learned of its obligation to submit 40 CFR § 268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions. Even if such submissions had been accurate, Company C's actions would have been only those required by the regulations. No justification for mitigation for good faith efforts to comply exists.

{attach additional sheets if necessary)

(b) Willfulness/Negligence: No evidence of willfulness has been presented but the prior knowledge of the 40 CFR § 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the Company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of 10% is ·ustified.

(c) History of Compliance: No evidence demonstrating that Company Chas had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here. The Evanston facility did, however, recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.
(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: Company C has reaped an economic benefit by avoiding the costs of materials and labor necessary to send proper notifications/certifications to Company Z. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit of this violations amounted to $2,500.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Infomiation:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: Company C - Evanston Facility

Address: 1001 Yourstreet, Evanston, Illinois 12345

Requirement Violated: 40 CFR § 268.7(b): Failure to send accurate notification and certification.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm.....	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell .	N/A
3.	Multiply line 2 by number of days of violation minus 1	N/A
4.	Add line 1 and line 3.....	$297,000
5.	Percent increase/decrease for good faith.....	N/A
6.	Percent increase/decrease for willfulness/negligence.	10%
7.	Percent increase for history of noncompliance	5%
8.	Percent increase/decrease for other unique factors	N/A
9.	Add lines 5, 6, 7, and 8.....	15%
10.	Multiply line 4 by line 9	$44,500
11.	Add lines 4 and 10.....	$341,550
12.	Adjustment amount for environmental project.....	N/A
13.	Subtract line 12 from line 11	$341,550
14.	Calculate economic benefit.	$2,500
15.	Add lines 13 and 14.....	$344,050
16.	Adjustment amount for ability-to-pay	N/A
17.	Adjustment amount for litigation risk.	-$110,000
18.	Add lines 16 and 17.....	-$110,000
19.	Subtract line 18 from line 15 for final settlement amount	$234,050

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the wastes were required to be further treated before land disposal. The violation may have a substantial adverse affect on the purposes or procedures for implementing the RCRA program. In addition, the violation creates a potential for harm because it hinders Company Z's ability to adequately characterize the waste in order to assure that it is properly managed. (Note, however, that Company Z has an independent regulatory obligation to characterize and properly manage wastes it receives. Thus, Company C's violation is one factor contributing to the potential for harm, rather than the sole factor creating such risks.)

(attach additional sheets if necessary)

(b) Extent of Deviation: Major -Initially, Company C did not merely prepare and send deficient §268.7 notifications/certifications. Rather it completely failed to prepare and send such forms for the first six months. During the next six months Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable reguirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith: As soon as Company C's Evanston facility learned of its obligation to submit §268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions. Even if such submissions had been accurate, Company C's actions would have been only those required by the regulations. No justification for mitigation for good faith efforts to comply exists.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: As indicated above, lack of knowledge of the legal requirement is not a basis for reducing the penalty. To do so would encourage ignorance of the law. No evidence of willfulness has been presented but the prior knowledge of the §268.7 requirements by Company e's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the Company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of 10% is justified.

(c) History of Compliance: No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here. The Evanston facility did however recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.
(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors: Based on the litigation risk posed by (1) the Agency's inability to show (i) that all 24 drums were Company C's and (ii) that all drums contained F002 solvent, the Region decided to accept in settlement a smaller penalty than that proposed in the complaint. Since the aforementioned evidentiary weaknesses adversely affected one third of the 12 counts in the complaint, the Region reduced the proposed penalty amount by roughly one third or $110,000

(attach additional sheets if necessary)

3. Economic Benefit: Company C has reaped an economic benefit by avoiding the costs of materials and labor necessary to send proper notifications/certifications to Company Z. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit of this violation amounted to $2,500.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: -=C-=o=m:.p=an=y,J.-.:::.C'----------

Address: 101 Yourstreet, Evanston, Illinois

Requirement Violated: 42 CFR § 264.13(a). Failure to test restricted wastes.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	*NIA*
3.	Multiply line 2 by number of days of violation minus **1** **[$3,300 x (343-1)]**	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	10%
7.	Percent increase for history of noncompliance	5%
8.*	Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$44,550
10.	Calculate Economic Benefit	$10,000
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$351,550

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm: Major - Company C's complete failure to test the wastes prevented Company Z from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important.

(attach additional sheets if necessary)

(b) Extent of Deviation: Major - Company C's waste analysis plan is substantially deficient in not explicitly requiring any testing to determine wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify their waste as restricted. Such deficiency is particularly significant where the wastes are very diverse as is the case here, because it is very difficult, if not impossible, to comply with the 40 CFR § 264.13 requirement that the operation obtain "all of the information which must be known to [manage] the waste in accordance with... Part 268."

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith: No good faith efforts to comply have been made.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: No evidence of willfulness has been presented, but the prior knowledge of the 40 CFR § 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these factors, an upward adjustment in the amount of 10% is ·ustified.

(c) History of Compliance: No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violation. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here. The Evanston facility did, however, recently receive a notice of violation

from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.
(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(attach additional sheets if necessary)

3. Economic Benefit: Company C reaped an economic benefit by avoiding the costs of waste analysis needed to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit attributable to these violations is $10,000.
(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: Company C - Evanston Facility

Address: 1001 Yourstreet, Evanston. Illinois 12345

Requirement Violated: 40 CFR § 264. l 3(a): Failure to test restricted waste.

1.	Gravity based penalty from matrix ($24,750 X 12).....	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell.	*NIA*
3.	Multiply line 2 by number of days of violation minus 1	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase/decrease for willfulness/negligence	10%
7.	Percent increase for history of noncompliance	5%
8.	Percent increase/decrease for other unique factors	*NIA*
9.	Add lines 5, 6, 7, and 8	15%
10.	Multiply line 4 by line 9	$44,550
11.	Add lines 4 and 10	$341,550
12.	Adjustment amount for environmental project	*NIA*
13.	Subtract line 12 from line 11	$341,550
14.	Calculate economic benefit	$10,000
15.	Add lines 13 and 14	$351,550
16.	Adjustment amount for ability-to-pay	*NIA*
17.	Adjustment amount for litigation risk	-$110,000
18.	Add lines 16 and 17	-$110,000
19.	Subtract line 18 from line 15 for final settlement amount	$241,550

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

I. Gravity Based Penalty

(a) Potential for Harm: Major - Company C's complete failure to test the wastes prevented Company Z from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important.

(attach additional sheets if necessary)

(b) Extent of Deviation Major: Company C's waste analysis plan is substantially deficient in not explicitly requiring any testing to determine wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify their waste as restricted. Such deficiency is particularly significant where the wastes are very diverse as is the case here, because it is very difficult, if not impossible, to comply with the §264.13(a) requirement that the operation obtain "all of the information which must be known to [manage] the waste in accordance with ... Part 268."

(attach additional sheets if necessary)

(c) Multiple/Multi-day: Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors: (good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith: No good faith efforts to comply have been made.

(attach additional sheets if necessary)

(b) Willfulness/Negligence: As indicated above, lack of knowledge of the legal requirement is not a basis for reducing the penalty. To do so would encourage ignorance of the law. No evidence of willfulness has been presented, but the prior knowledge of the 40 CFR § 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these factors, an upward adjustment in the amount of 10% is justified.

(attach additional sheets if necessary)

(c) History of Compliance: No evidence demonstrating that Company Chas had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified.

However, because the upward adjustment is accounted for in 2(b) above, we will not duplicate such adjustment here. The Evanston facility did, however, recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.

(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors: Based on the litigation risk posed by the Agency's inability to show (i) that all 24 drums were Company C's and (ii) that all drums contained F002 solvent, the Region decided to accept in settlement a smaller penalty than had been proposed in the complaint. Since the aforementioned evidentiary weaknesses adversely affected the Agency's ability to prove one third of the 12 counts in our complaint, the Region reduced the proposed penalty by roughly one third or $110,000

(attach additional sheets if necessary)

3. Economic Benefit: Company C reaped an economic benefit by avoiding the costs of waste analysis needed to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit attributable to these violations is $10,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

Exhibit CX54

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

DEC 29 2008

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)

FROM: Granta Y. Nakayama
Assistant Administrator

TO: Regional Administrators

The purpose of this memorandum is to amend all of EPA's existing civil penalty policies to conform to the recently promulgated 2008 Civil Monetary Penalty Inflation Adjustment Rule (2008 Penalty Inflation Rule or Rule). The Rule amends 40 CFR Part 19 to adjust statutory civil penalties to account for inflation. (A copy of the Rule, as published at 73 Fed. Reg. 75340-46 (Dec. 11, 2008), is attached.) These amendments are effective on the same date as the final rule – January 12, 2009. This memorandum also provides guidance on how to plead penalties and how to determine the new maximum civil penalty amounts that may be sought in EPA administrative enforcement actions.

On December 11, 2008, the Agency promulgated the 2008 Penalty Inflation Rule pursuant to Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996 (DCIA or the Act), 31 U.S.C. § 3701 note. The DCIA requires each federal agency to issue regulations adjusting for inflation the statutory civil penalties that can be imposed under the laws administered by that agency. Because the 2008 Penalty Inflation Rule will be effective on January 12, 2009, all violations occurring after January 12, 2009 are subject to the new statutory penalties that have been adjusted for inflation.[1]

The Rule also amends the Program Fraud Civil Remedies Rule, 40 CFR Part 27, to adjust the statutory maximum penalty that may be imposed pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812.

[1] Section 6 of the DCIA provides that "[a]ny increase under this Act in a civil monetary penalty shall apply only to violations that occur ***after*** the date the increase takes effect." [Emphasis added.]

I. Overview

The primary purpose of the DCIA is to preserve the deterrent effect of civil statutory penalty provisions by adjusting them for inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty provisions and to issue a regulation adjusting them for inflation, and thereafter to periodically review and adjust the penalty provisions at least once every four years.

The first penalty inflation adjustment rule, effective on January 30, 1997, was limited by the DCIA to 10 percent above the statutory penalty amounts, as enacted. For EPA, this meant that all the civil penalty amounts, with the exception of a few new penalty provisions added by the 1996 Safe Drinking Water Act (SDWA) amendments (which did not require any adjustment), were adjusted upward by 10 percent. By memorandum dated May 9, 1997 (1997 Memorandum), EPA modified all penalty policies to conform to the DCIA and the 1997 rule.

The second penalty inflation adjustment rule became effective March 15, 2004. These increases in civil penalty amounts apply only to violations which occurred after the date the increases took effect, *i.e.*, violations which occurred after March 15, 2004. (See 69 Fed. Reg. 7121 (Feb. 13, 2004).) By memorandum dated September 21, 2004 (2004 Memorandum), EPA modified all penalty policies to conform to the DCIA and the 2004 rule.

The third and latest penalty inflation adjustment rule – the 2008 Penalty Inflation Rule -- will be effective January 12, 2009. The statutory penalty provisions and the new maximum penalty amounts are found in the attached Table 1 of 40 CFR 19.4. For example, Clean Water Act (CWA) Section 309 previously authorized judicial penalties of up to $32,500 per day per violation for violations occurring after March 15, 2004. After the effective date of the 2008 Rule, the new maximum penalty amount is $37,500. Therefore, if a violation subject to CWA Section 309(d) began on January 1, 2009, and lasted through January 20, 2009, the maximum statutory penalty liability would consist of 12 days of violations at $32,500 per day, plus 8 days of violation at $37,500 per day.

II. Amendments to EPA's Civil Penalty Policies

By this memorandum, the Office of Enforcement and Compliance Assurance (OECA) is amending all of EPA's existing civil penalty policies to increase the initial gravity component of the penalty calculation by 9.83 percent for those violations subject to the new rule, *i.e.*, violations occurring after January 12, 2009. The inflation adjustment for the penalty provisions set forth in the rule was calculated by comparing the Consumer Price Index-Urban (CPI-U) for June 2004 with the CPI-U for June 2007, resulting in an inflation adjustment factor of 9.83 percent.[2] While

[2] For a detailed discussion of the four-step process and the formula provided by the DCIA for determining the cost-of-living adjustment to the civil monetary penalties, see 73 Fed. Reg. at 75340.

not required specifically by the Act, we believe revising our civil penalty policies is consistent with the Congressional intent in passing the Act and is necessary to implement effectively the mandated penalty increases set forth in 40 CFR Part 19. Accordingly, each civil penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to all penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or for determining a bottom-line settlement amount. A complete list of all of our existing penalty policies is provided at the end of this memorandum. Subsequent to this issuance of this memorandum, the division directors in the Office of Civil Enforcement (OCE) and the Office of Site Remediation Enforcement (OSRE) may issue revised penalty matrices under program-specific penalty policies to reflect the following guidelines.

A. If all of the violations in a particular case occurred on or before the effective date of the 2008 Rule, penalty policy calculations should be consistent with the 2004 Memorandum.[3]

B. For those judicial and administrative cases in which some or all of the violations occurred after the effective date of the 2008 Rule, the penalty policy calculations are modified by following these four steps:

1. Perform the economic benefit calculation for the entire period of the violation. Do not apply any mitigation for ability to pay or litigation considerations at this point.

2. Apply the gravity component of the penalty policy in the standard way for all violations according to the provisions of subparagraph 3 below.[4] Do not apply any mitigation or adjustment factors at this point.

3. (a) For those penalty policies that were issued prior to January 31, 1997: Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997, through March 15, 2004, multiply the gravity component by 1.1, reflecting the 10% increase. For violations that occurred after March 15, 2004, through January 12, 2009, multiply the gravity component by 1.2895, reflecting both the 10% increase and the 17.23% increase [1.10 x 1.1723 = 1.2895]. For violations that occur after January 12, 2009, multiply the gravity component by 1.4163, reflecting the 10% increase, the 17.23% increase, and the 9.83% increase [1.10 x 1.1723 x 1.0983 = 1.4163]. Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If the violations occurred for a total of 10 days during the period after January 30, 1997, through March 15, 2004, the gravity

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[3] Memorandum dated September 21, 2004, from Thomas V. Skinner, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance, entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996), Effective October 1, 2004."

[4] The instructions for calculating the gravity component are also set out in a chart on page 5.

inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.1 = $11,000. If the violations occurred for 10 days during the period after March 15, 2004, through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.2895 = $12,895. If 10 days of the violations occurred after January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.4163= $ 14,163.

(b) For those penalty policies that were issued or revised after January 30, 1997, through March 15, 2004: Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997, through March 15, 2004, use the gravity component set forth in the penalty policy, as the 10% increase is reflected in those policies. For violations that occurred after March 15, 2004, through January 12, 2009, multiply the gravity component by 1.1723, reflecting the 17.23% increase. For violations occurring after January 12, 2009, multiply the gravity component by 1.2875, reflecting both the 17.23% increase and the 9.83% increase [1.1723 x 1.0983 = 1.2875]. Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If the violations occurred for 10 days during the period after March 15, 2004, through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.1723 = $11,723. If 10 days of the violations occurred after January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.2875 = $ 12,875.

(c) For those penalty policies that were issued or revised after March 15, 2004, through January 12, 2009: Calculate the gravity component according to the penalty policy. For violations that occurred after March 15, 2004, through January 12, 2009, use the gravity component set forth in the penalty policy, as the 10% increase and 17.23% increase are reflected in those policies. For violations occurring after January 12, 2009, multiply the gravity component by 1.0983, reflecting the 9.83% increase. Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If 10 days of the violations occurred after January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.0983 = $ 10,983.

Chart Reflecting Inflation Adjustment Multipliers	
Penalty Policy Issued Prior to January 31, 1997	
Date(s) of violation	**Inflation Adjustment Multiplier**
January 31, 1997 through March 15, 2004	**1.1**
March 16, 2004 through January 12, 2009	**1.2895**
After January 12, 2009	**1.4163**
Penalty Policy Issued or Revised after January 30, 1997 through March 15, 2004	
Date(s) of violation	**Inflation Adjustment Multiplier**
January 31, 1997 through March 15, 2004	**None - use gravity component in penalty policy**
March 16, 2004 through January 12, 2009	**1.1723**
After January 12, 2009	**1.2875**
Penalty Policy Issued or Revised after March 15, 2004 through January 12, 2009	
Date(s) of violation	**Inflation Adjustment Multiplier**
March 16, 2004 through January 12, 2009	**None - use gravity component in penalty policy**
After January 12, 2009	**1.0983**
All Violations Occurred after January 12, 2009	
Date of Penalty Policy Revision or Issuance	**Inflation Adjustment Multiplier**
Issued Prior to January 31, 1997	**1.4163**
January 31, 1997 through March 15, 2004	**1.2875**
March 16, 2004 through January 12, 2009	**1.0983**

4. Take the total applicable gravity component (the gravity-based penalty should be rounded to the nearest unit of 100) from above and adjust the total, as appropriate, pursuant to the mitigation factors in the applicable penalty policy. The economic benefit calculation should be added to the adjusted total gravity amount. The combined total of the gravity and economic benefit components may then be adjusted based on litigation considerations and/or defendant's/respondent's ability to pay, as appropriate.

III. Penalty Pleading

If all of the violations in a particular case occurred on or before the effective date of the 2008 Rule, the pleading practices set forth in the 2004 Memorandum should be applied. If some of the violations in a particular case occurred after the effective date of the 2008 Rule, then any penalty amount pled should use the newly adjusted civil penalty amounts for those violations. For example, in a civil judicial complaint alleging violations of Section 301 of the CWA, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [*name of Defendant*] up to $32,500 per day for each violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), that occurred after March 15, 2004 through January 12, 2009; and $37,500 per day for each violation of Section 301 of the CWA, 33 U.S.C. § 1311, that occurred after January 12, 2009, up to the date of judgment herein.

If all of the violations in a particular case occurred after the effective date of the 2008 Rule, then any penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of Section 301 of the CWA, the prayer for relief would be written as follows:

> Pursuant to Section 309(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [*name of Defendant*] up to $37,500 per day for each violation of Section 301 of the CWA, 33 U.S.C. § 1311, up to the date of judgment herein.

IV. Administrative Penalty Caps for the CWA, SDWA, Clean Air Act (CAA), and the Certain Alaskan Cruise Ship Operations Act[5]

The DCIA and 40 CFR Part 19 increased the statutory penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in one administrative enforcement action. This increase is particularly relevant for administrative enforcement actions under the CWA, SDWA, CAA and CACSOA, which are limited by maximum penalty amounts that may be sought in a single administrative enforcement action (commonly called "penalty caps").[6] For example, prior to the 2008 Rule, CWA Class II administrative penalties were authorized up to $11,000 per violation

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[5] The Certain Alaskan Cruise Ships Operations Act (CACSOA) was passed on December 21, 2000, as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106-554, 33 U.S.C. § 1901 note.

[6] See CWA Section 309(g)(2)(A)-(B), 33 U.S.C. § 1319(g)(2)(A)-(B); CWA Section 311(b)(6)(B)(i)-(ii), 33 U.S.C. § 1321(b)(6)(B)(i)-(ii); SDWA, 42 U.S.C. § 300h-2(c)(1)-(2); CAA, 42 U.S.C. § 7413(d)(1); CAA, 42 U.S.C. § 7524(c)(1); CACSOA, 33 U.S.C. § 1901 note.

and not to exceed $157,500 in one administrative action; after the effective date of the 2008 Rule, the new maximum penalty amounts are now $16,000 and $177,500, respectively. Similarly, Part 19 also raised the total penalty amounts that may be sought in a single administrative enforcement action under the CAA from $270,000 to $295,000 (although higher amounts may still be pursued with the joint approval of the EPA Administrator and U.S. Attorney General). Note that the adjusted penalty caps apply if an action is filed or a complaint is amended after January 12, 2009, even if some or all of the violations occurred on or before January 12, 2009.

V. Challenges in the Course of Enforcement Proceedings

If a respondent/defendant challenges the validity of applying the adjusted penalty provisions on the grounds that EPA did not have the authority to promulgate the rule which adjusted the penalty maximums, please notify the Special Litigation and Projects Division of the challenge, so that OECA, the Region and the Department of Justice (DOJ), as appropriate, can coordinate our response before it is filed.

VI. Further Information

Any questions concerning the 2008 Rule and its implementation can be directed to David Abdalla of OCE's Special Litigation and Projects Division at (202) 564-2413 or by email at abdalla.david@epa.gov.

List of Existing Civil Penalty Policies Modified by this Memorandum

General

- Policy on Civil Penalties (2/14/84)
- A Framework for Statute-Specific Approaches to Penalty Assessments (2/14/84)
- Guidance on Use of Penalty Policies in Administrative Litigation (12/15/95)

Clean Air Act - Stationary Sources

- Clean Air Act Stationary Source Civil Penalty Policy (7/23/95) (This is a generic policy for stationary sources.)
- Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)
- Combined Enforcement Policy for Section 112(r) of the Clean Air Act [Risk Management Plan] (8/15/01)
- National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements (11/08/07)

There are a series of appendices that address certain specific subprograms within the stationary source program.

- Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Revised 3/25/87)
- Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy (7/13/95)
- Appendix II - Vinyl Chloride Civil Penalty Policy (Revised 2/8/85)
- Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)
- Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Revised 3/25/87)
- Appendix V - Air Civil Penalty Worksheet
- Appendix VI - Volatile Hazardous Air Pollutant Civil Penalty Policy (Revised 3/2/88)
- Appendix VII - Residential Wood Heaters (9/14/89)
- Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under Protection of Stratospheric Ozone (11/24/89)
- Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 CFR Part 82, Protection of Stratospheric Ozone, Subpart B (7/19/93)
- Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)

- Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

Clean Air Act - Mobile Sources

- Volatility Civil Penalty Policy (12/1/89)
- Civil Penalty Policy for Administrative Hearings (1/14/93)
- Manufacturers Programs Branch Interim Penalty Policy (3/31/93)
- Interim Diesel Civil Penalty Policy (2/8/94)
- Tampering and Defeat Device Civil Penalty Policy for Notices of Violation (2/28/94)
- Draft Reformulated Gasoline and Anti-Dumping Settlement Policy (6/3/96)

Clean Water Act

- Revised Interim Clean Water Act Settlement Penalty Policy (3/3/98)
- Clean Water Act Section 404 Civil Administrative Penalty Actions Guidance on Calculating Settlement Amounts (12/21/01)
- Civil Penalty Policy for Section 311(b)(3) and Section 311 (j) of the Clean Water Act (8/98)
- Pilot Enforcement Approach for MOM [Management, Operation and Maintenance] Cases in Region IV (1/23/03)

Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA)

- Interim Policy on Settlement of CERCLA Section 106 (b)(1) and Section 107 (c)(3) -- Punitive Damage Claims for Noncompliance with Administrative Orders (9/30/97)

- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right to Know Act/Enforcement Response Policy for Section 103 of the Comprehensive Enforcement Response, Compensation, and Liability Act (9/30/99)

Emergency Planning and Community Right-to-Know Act (EPCRA)

- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right to Know Act/Enforcement Response Policy for Section 103 of the Comprehensive Enforcement Response, Compensation, and Liability Act (9/30/99)

- Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) (Amended)(4/12/01)

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

- General FIFRA Enforcement Response Policy (7/2/90)
- FIFRA Section 7(c) ERP (6/22/07)
- Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act: Good Laboratory Practice (GLP) Regulations (9/30/91)
- FIFRA Worker Protection Standard Penalty Policy, Interim Final (9/97)

Resource Conservation and Recovery Act (RCRA), Subtitle C

- RCRA Civil Penalty Policy (6/23/03)
- Guidance on the Use of Section 7003 of RCRA (10/97)

RCRA, Subtitle I – UST

- U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990)

Safe Drinking Water Act - UIC

- Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy
- Underground Injection Control Guidance No. 79 (9/27/93)

Safe Drinking Water Act - PWS

- New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

Toxic Substances Control Act (TSCA)

- Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in Federal Register of 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.) This is a generic policy for TSCA sources.

There are a series of policies that address certain specific subprograms within TSCA. They are as follows:

- Record keeping and Reporting Rules TSCA Sections 8, 12, and 13 (3/31/99)
- PCB Penalty Policy (4/9/90)
- TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1/93)
- TSCA Good Laboratory Practices Regulations Enforcement Policy (4/9/85)
- TSCA Section 4 Test Rules (5/28/86)
- TSCA Title II - Asbestos Hazard Emergency Response Act (AHERA)
- Interim Final ERP for the Asbestos Hazard Emergency Response Act (1/31/89)
- ERP for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)

- Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act - Disclosure Rule Enforcement Response Policy (12/20/07)

Attachment (2008 Penalty Inflation Rule)

cc: (w/attachment)
Regional Counsel, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Office of Enforcement, Compliance, and Environmental Justice, Region III
Director, Office of Enforcement and Compliance Assurance, Region V
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Director, Office of Civil Rights, Enforcement and Environmental Justice, Region X
Regional Media Division Directors
Regional Enforcement Coordinators, Regions I - X
OECA Office Directors
OCE Division Directors
OSRE Division Directors
David Coursen, OGC-CCID
Grant MacIntyre, OGC-CCID
Bruce Gelber, Chief, EES, DOJ
Deputy and Assistant Chiefs, EES, DOJ

option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

§ 912.9 [Amended]

■ 4. Amend § 912.9 as follows:

■ a. In paragraph (b), remove the address "P.O. Box 66640, St. Louis, MO 63166–6640" and add "P.O. Box 66640, St. Louis, MO 63141–0640" in its place.

■ b. In paragraph (c), remove the address "P.O. Box 66640, St. Louis, MO 63166–6640" and add "P.O. Box 66640, St. Louis, MO 63141–0640" in its place.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. E8–29299 Filed 12–10–08; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 19 and 27

[FRL–8750–4]

RIN 2020–AA46

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is issuing this final Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996 (DCIA), to adjust for inflation the statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula specified in the DCIA. Table 1 of the regulations, which appears near the end of this rule, contains a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation.

DATES: *Effective Date:* January 12, 2009.

FOR FURTHER INFORMATION CONTACT: David Abdalla, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2413.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties [1] ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997. EPA's second and most recent adjustment to each civil penalty amount was published in the **Federal Register** on February 13, 2004 (69 FR 7121) and became effective on March 15, 2004 ("the 2004 Rule").

This rule, specifically Table 1 in 40 CFR 19.4, adjusts in accordance with the DCIA the maximum and, in some cases, the minimum amount of each statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision. This rule also clarifies that the adjusted penalty amounts in 40 CFR 19.4 are applicable to violations that occur after the effective date of this rule.

The formula provided by the DCIA for determining the cost-of-living adjustment to statutory civil penalties consists of a four-step process. The first step entails determining the inflation adjustment factor. This is done by calculating the percentage increase by which the Consumer Price Index [2] for all urban consumers (CPI–U) for the month of June of the calendar year preceding the adjustment exceeds the CPI–U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted.[3] Accordingly, the inflation adjustment factor for the present adjustment equals the CPI–U for June 2007 (*i.e.*, June of the year preceding this year), divided by the CPI–U for June 2004. Given that the last adjustment was made and published on February 13, 2004, the inflation adjustment for most civil penalties set forth in this rule was calculated by comparing the CPI–U for June 2004 (189.7) with the CPI–U for June 2007 (208.352), resulting in an inflation adjustment factor of 9.83 percent. Certain civil penalties that had not been adjusted since the initial 1996 adjustment were adjusted by an inflation adjustment of 32.96 percent calculated comparing the CPI–U for June 1996 (156.7) with the CPI–U for June 2007 (208.352).

Once the inflation adjustment factor is determined, the second step is to multiply the inflation adjustment factor by the current civil penalty amount to calculate the raw inflation increase. The third step is to round this raw inflation increase according to the section 5(a) of the DCIA. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: $10 in the case of penalties less than or equal to $100; $100 in the case of penalties greater than $100 but less than or equal to $1,000; $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000; $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000; $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and $25,000 in the case of penalties greater than $200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount.

For most civil penalties, the amount of the last adjusted civil penalty reflected in Table 1 of the 2004 Rule

[1] Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that—(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law * * *."

[2] Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[3] Section 5(b) of the DCIA requires that statutory civil penalties be adjusted to reflect "the percentage (if any) for each civil monetary penalty by which—(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

was multiplied by 9.83 percent (the inflation adjustment) and the resulting increase amount was rounded up or down according to the rounding requirements of the statute. In the case of statutory civil penalty amounts that are being adjusted for the first time, such inflation adjustments are capped at a 10 percent increase in accordance with section 31001(s)(2) of the DCIA. For example, because this rule adjusts for the first time the administrative and civil judicial penalty amounts provided pursuant to "Title XIV—Certain Alaskan Cruise Ship Operations" of the Consolidated Appropriations Act of 2001, 33 U.S.C. 1901 note, these civil penalties, once adjusted for inflation, are capped at 110 percent of the original penalty amounts, as enacted. Further, certain civil penalties that had not been adjusted since the initial 1996 adjustment were adjusted by an inflation adjustment of 32.96 percent calculated by comparing the CPI–U for June 1996 (156.7) with the CPI–U for June 2007 (208.352). The last column of Table 1 below reflects the inflation-adjusted civil penalties as of the effective date of this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to readjust these amounts in the year 2012 and every four years thereafter.

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

II. Technical Revisions to 40 CFR Part 19—Adjustment to Civil Monetary Penalties for Inflation

After publication of the 2004 Rule, EPA identified errors in certain sections of the regulatory language. Many of these errors also occurred in EPA's initial adjustment on December 31, 1996 (61 FR 69360). Because these errors may prove misleading and are in need of clarification, with this rulemaking EPA is correcting the errors described below. The changes made through these corrections are all technical in nature and do not affect the substance of the rule.

A. Technical Revisions to Sections 19.1 and 19.4

EPA is revising Table 1 of section 19.4 to shorten the penalty description to refer only to the title of the statute. In addition, the Agency has added for clarity a column that delineates the statutory penalties, as enacted, before any inflation adjustments were made. Further, EPA is revising Table 1 to clarify that the penalties are effective "after January 30, 1997 through March 15, 2004" rather than using the term "between January 31, 1997 and March 15, 2004."

In addition, because a few of the statutory civil penalty amounts pursuant to statutes implemented by EPA are framed as the minimum penalty as opposed to the statutory maximum penalty that can be assessed for a particular violation, this rule revises sections 19.1 and 19.4 to remove references to a "maximum" civil monetary penalty.[4] Specifically, with this rule, EPA is revising section 19.1 to make clear that 40 CFR Part 19 applies to "each statutory provision under the laws administered by [EPA] concerning the civil monetary penalties which may be assessed in either civil judicial or administrative proceedings."[5] Similarly, the rule revises the introductory text to Table 1 of section 19.4 to remove references to "maximum" penalty amounts to read as follows: "[t]he adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts." Finally, this rule revises the headings under Table 1 of section 19.4 to refer to "penalties effective" rather than "new maximum penalty amount."

B. Technical Correction of Statutory Maximum Penalty Amount Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

The row of Table 1 of 19.4, which lists the statutory maximum penalty figures for section 14 of FIFRA, 7 U.S.C. 136l.(a)(2), incorrectly reflected a statutory maximum penalty of $1,000 for violations after January 30, 1997 through March 15, 2004, and $1,200 for violations after March 15, 2004 for subsequent offenses or violations. Although EPA should have adjusted the maximum civil penalty in the 1996 rule from $1,000 to $1,100 for violations after January 30, 1997 through March 15, 2004, this rule does not adjust the penalty amount from $1,000 to $1,100 for violations that occurred during that time period because to do so would be to increase penalties retroactively without fair notice to the public. With this rule, EPA is correcting the row of Table 1 related to the maximum statutory penalty amount under FIFRA section 14 from the amount of $1,200 to $1,100 for violations after March 15, 2004 through January 12, 2009 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for that time period. The correct penalty amount of $1,100 for violations occurring after the effective date of this rule has also been listed. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory maximum amount of $1,100 pursuant to section 14 of FIFRA.

C. Technical Correction of Statutory Maximum Penalty Amount Under the Toxic Substances Control Act (TSCA)

The row of Table 1 of 19.4, which lists the statutory maximum penalty figures for section 207 of TSCA, 15 U.S.C. 2647(g), incorrectly reflected a statutory maximum penalty of $5,000 for violations after January 30, 1997 through March 15, 2004, and $5,500 for violations after March 15, 2004 for subsequent offenses or violations. EPA should have adjusted TSCA section 207's the maximum civil penalty from $5,000 to $5,500 for violations after January 30, 1997 through March 15, 2004, and from $5,500 to $6,500 for violations after March 15, 2004 through January 12, 2009. In this rule, EPA has not revised Table 1 to increase the section 207 penalties for violations that may have occurred in the past to prevent retroactive application of the higher penalty without the public having received fair notice of the penalty increases. With this rule, EPA is adjusting the civil penalty to reflect the correct penalty amount of $7,500 for violations occurring after the effective date of this rule.

D. Technical Correction Related to Civil Penalty Authorities Under the Clean Water Act (CWA)

EPA discovered an error in Table 1 of 40 CFR 19.4 (hereinafter 19.4), in which section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. 1321(b)(6)(B)(i), was cited incorrectly as 33 U.S.C. 1321(b)(6)(B)(I). To correct this error, the Agency is revising Table 1 of 19.4 to reflect the correct citation.

[4] For example, section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), provides for both a minimum and maximum civil penalty that can be assessed for the discharge of oil or hazardous substances where the violation was the result of gross negligence or willful misconduct.

[5] The term "civil monetary penalty" is defined under the DCIA to include both "a specific monetary amount" as well as a "maximum amount" provided by federal law. *See* section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.

E. Technical Revision Related to Civil Penalty Authorities Under the Marine Protection, Research, and Sanctuaries Act (MPRSA)

The row of Table 1 of 19.4 related to section 104B(d) of the MPRSA, 33 U.S.C. 1414b(d), is being revised to add a footnote that reads "[n]ote that 33 U.S.C. 1414b(d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table 1. The amount set forth in this Table reflects an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year."

F. Technical Correction Related to Civil Penalty Authorities Under the Safe Drinking Water Act (SDWA)

The row of Table 1 of 19.4 related to section 1414(c) of the SDWA, 42 U.S.C. 300g–3(c), is being deleted because the enforcement of the public notice requirements under this subsection is accomplished under section 1414(b) of the SDWA, 42 U.S.C. 300g–3(b), or SDWA section 1414(g)(3)(A), 42 U.S.C. 300g–3(g)(3)(A).

G. Technical Correction of Statutory Maximum Penalty Amounts Under the Clean Air Act (CAA)

In the 2004 Rule, the row of Table 1 of 19.4, which listed the statutory maximum civil penalty figures for 42 U.S.C. 7524(a), incorrectly reflected a statutory maximum civil penalty of $32,500 for "manufacturers or dealers" for the manufacture or sale of defeat devices in violation of CAA section 203(a)(3)(B), 42 U.S.C. 7522(a)(3)(B). The correct penalty amount of $2,750 for that violation should have been listed as the same for any person, regardless of whether the violator is a manufacturer or dealer. With this rule, EPA is correcting Table 1 to reflect that the statutory maximum penalty for the manufacture or sale of defeat devices, in violation of CAA section 203(a)(3)(B), 42 U.S.C. 7522(a)(3)(B), is $2,750 for violations occurring after January 30, 1997 through March 15, 2004 and after March 15, 2004 through January 12, 2009. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory amount of $2,750.

H. Clarification of the Effective Date

The DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Accordingly, inflation-adjusted civil penalties may be applied only to violations that occur after the effective date of a rule implementing penalty adjustments pursuant to the DCIA. Today's rule clarifies the top of the fifth column of Table 1 of 19.4 to reflect that the maximum penalty amounts apply for violations occurring after March 15, 2004 (*i.e.*, after the March 15, 2004 effective date of the 2004 Rule), through January 12, 2009.

III. Technical Revisions to 40 CFR 27.3, Regulations Implementing the Program Fraud Civil Remedies Act

A. Technical Revisions to 40 CFR 27.3(a)(1)(iv)

EPA is amending 40 CFR 27.3(a)(1)(iv) to refer to the operative maximum civil penalty amount, as provided in 40 CFR 19.4, that may be imposed by EPA pursuant to section 3802(a)(1) of the Program Fraud Civil Remedies Act (Program Fraud Act), 31 U.S.C. 3802(a)(1). Through this technical amendment, 40 CFR 27.3(a)(1)(iv) will hereafter be revised to conform to the maximum civil penalty amount that can be assessed pursuant to the Program Fraud Act, as adjusted for inflation in accordance with the DCIA under 40 CFR 19.4. Because this technical revision affects only a change to conform 40 CFR 27.3(a)(1)(iv) to be consistent with 40 CFR 19.4, this change does not require notice and comment.

B. Technical Revisions to 40 CFR 27.3(b)(1)(ii)

EPA is amending 40 CFR 27.3(b)(1)(ii) to refer to the operative maximum civil penalty amount, as provided in 40 CFR 19.4, that may be imposed by EPA pursuant to section 3802(a)(2) of the Program Fraud Act, 31 U.S.C. 3802(a)(1). Through this technical amendment, 40 CFR 27.3(b)(1)(ii) will hereafter be revised to conform to the maximum civil penalty amount that can be assessed pursuant to the Program Fraud Act, as adjusted for inflation in accordance with the DCIA under 40 CFR 19.4. Because this technical revision affects only a change to conform 40 CFR 27.3(b)(1)(ii) to be consistent with 40 CFR 19.4, this change does not require notice and comment.

IV. Good Cause

Under 5 U.S.C. 553(b)(B), EPA finds that there is good cause to promulgate this rule without providing for further public comment. In its proposed rule published in the **Federal Register** on July 3, 2003 (68 FR 39882), EPA provided an opportunity for public comment on the inflation adjustment calculations and rounding rules that EPA has used in this final rule. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA, as amended, to make periodic increases in civil penalty amounts by applying the adjustment formula established by the statute. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable civil monetary penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the correct figure, and EPA cannot vary the amount of the adjustment to reflect any views or suggestions provided by commenters, it would serve no purpose to provide an opportunity for public comment on this adjustment. Thus, further notice and public comment is unnecessary.

Further, EPA is making the technical revisions discussed above without notice and public comment. With regard to Table 1 of section 19.4, EPA is making technical revisions that do not change the substance of the rule but make Table 1 easier to read and amend in the future. For example, EPA is revising Table 1 to shorten the penalty description to refer only to the name of the statute. We have also added for clarity a column that delineates the statutory penalties, as enacted, before any inflation adjustments were made. In addition, this rule clarifies that that the penalties are effective "after January 30, 1997 through March 15, 2004" rather than using the term "between January 31, 1997 and March 15, 2004." Finally, in sections 19.1 and 19.4, this rule removes references to "maximum" penalties because, in a few instances, EPA-administered statutes provide for both minimum as well as maximum civil penalty amounts. These are technical revisions that more accurately reflect the statutory provisions and do not constitute substantive revisions to the rule.

Similarly, the technical correction adjusting the penalty amount of section 14 of FIFRA, 7 U.S.C. 136*l*.(a)(2), to $1,100, does not require notice and public comment because this is the adjusted penalty amount that is required by the DCIA. The statute prescribes a formula that must be followed to determine the allowable statutory civil penalty amounts. The $1,000 and $1,200 figures included in the 2004 Rule did not comply with the statute. The incorrect penalty amount of $1,000 for

violations after January 30, 1997 through March 15, 2004 was not changed to prevent the assessment of penalties above the statutory maximum amount that was in effect during that time period. The incorrect penalty of $1,200 for violations after March 15, 2004 through January 12, 2009 was changed in Table 1 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for that time period. The Agency is not aware of any case in which EPA assessed a civil penalty in excess of the correct statutory maximum civil penalty of $1,100 pursuant to section 14 of FIFRA.

With regard to the technical correction adjusting the penalty amount for section 207 of TSCA, 15 U.S.C. 2647(g), to $7,500, that adjustment can be made without notice and public comment because $7,500 is the adjusted penalty amount that is required by the DCIA. The statute prescribes a formula that must be followed to determine the statutory civil penalty amounts. The $5,000 and $5,500 figures included in the 2004 Rule did not comply with the DCIA. The incorrect penalty amounts have not been changed in the revised Table 1 to prevent the assessment of penalties above the statutory maximums that were in effect during those time periods. The correct statutory maximum penalties of $5,500 for violations after January 30, 1997 through March 15, 2004, and $6,500 for violations after March 15, 2004 through January 12, 2009 have not been listed in the revised Table 1 to prevent retroactive application of a higher penalty without the regulated community receiving fair notice of the increases. EPA's correction to the maximum penalties that can be imposed under the CAA section 205, 42 U.S.C. 7524(a), is also technical and not substantive in nature. By revising the penalty amount from $32,500 to $2,750, EPA is correcting the maximum penalty to be consistent with the adjusted penalty amount that is required by the DCIA. Notice and public comment on this technical correction is not necessary given that the DCIA prescribes a formula that must be followed to determine the civil penalty amounts and the $32,500 figure included in the 2004 Rule did not comply with the statute. Furthermore, EPA is not aware of any case in which the Agency assessed a civil penalty in excess of the correct statutory maximum penalty of $2,750 per violation of for violations of CAA section 203(a)(3)(B). In this rule, the correct penalty amount of $2,750 has been listed in Table 1 for violations occurring during both time periods after January 30, 1997 through March 15, 2004 and after March 15, 2004 through January 12, 2009 to prevent the assessment of penalties above the correct statutory maximum amount that should have been listed in Table 1 for those time periods.

EPA's revisions and corrections to Table 1 of section 19.4 related to the CWA, the MPRSA and the SDWA are also technical rather than substantive in nature and, hence, do not require notice and public comment. In the case of the CWA, this rule corrects an erroneous statutory citation. With regard to the MPRSA, this rule adds a footnote directing the public to the fact that section 104B(d) contains a penalty escalation provision that must be applied to the penalty amounts set forth in Table 1. In addition, this rule corrects Table 1 to delete a reference to section 1414(c) of the SDWA, 42 U.S.C. 300g–3(c), because this subsection governs public notice requirements for public water systems rather than civil penalty authorities under the SDWA. These changes either correct errors in prior rules or, in the case of the MPRSA, refer back to the provisions of that statute. Accordingly, these changes do not require notice and comment.

EPA is amending the regulations implementing the Program Fraud Act, 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii), to refer to 40 CFR 19.4 so that hereafter 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii) will conform to the civil penalty inflation adjustments made in accordance with the DCIA to the maximum civil penalty amounts that can be assessed by EPA pursuant to the Program Fraud Act, 31 U.S.C. 3802(a). Because these technical revisions affect only changes to conform 40 CFR 27.3(a)(1)(iv) and 40 CFR 27.3(b)(1)(ii) to be consistent with 40 CFR 19.4, these changes do not require notice and comment.

As required by the DCIA, this rule addresses only inflation adjustments to statutory civil penalty amounts under the statutes identified in Table 1 of 40 CFR 19.4. The technical corrections ensure consistency with the language of the statutes administered by EPA and correct errors in certain formula-driven civil penalty amounts, in accordance with the DCIA. This rule does not address the discretion to impose or not to impose a penalty, nor the procedures that must be followed in initiating an administrative or civil judicial enforcement action involving the assessment of civil penalties. Thus, EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and, therefore, is not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* "Burden" is defined at 5 CFR 1320.3(b). Because this rule does not contain a collection of information, no control number is necessary.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. Although this rule is subject to the APA, the Agency has made a "good cause" finding that this rule is not subject to the APA's notice and comment requirements (*see* Section IV of this notice). Because this rule is not subject to notice and comment rulemaking requirements under the APA or any other statute, this rule is not subject to the regulatory flexibility provisions of the RFA.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, establishes the requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This action contains no federal mandates under the provisions of Title II of UMRA for state, local, or tribal governments or the private sector. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA, in an administrative enforcement action, or by the U.S Attorney General, in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the

calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*see* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled *Federalism*, 64 FR 43255 (August 10, 1999), requires EPA to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The term "policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments*, 65 FR 67249 (November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." As this final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*, 66 FR 28355 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 ("NTTAA"), Public Law 104–113, 12(d), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, 59 FR 7629 (February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

40 CFR Part 27

Administrative practice and procedure, Assessments, False Claims, False Statements, Penalties.

Dated: December 4, 2008.

Stephen L. Johnson,

Administrator, Environmental Protection Agency.

■ For the reasons set out in the preamble, title 40, chapter I of the Code

of Federal Regulations is amended as follows:

■ 1. Revise part 19 to read as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

Sec.
19.1 Applicability.
19.2 Effective date.
19.3 [Reserved].
19.4 Penalty adjustment and table.

Authority: Public Law 101–410, 28 U.S.C. 2461 note; Public Law 104–134, 31 U.S.C. 3701 note.

§ 19.1 Applicability.

This part applies to each statutory provision under the laws administered by the Environmental Protection Agency concerning the civil monetary penalties which may be assessed in either civil judicial or administrative proceedings.

§ 19.2 Effective date.

The increased penalty amounts set forth in the last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after January 12, 2009. The penalty amounts that were adjusted in EPA's initial adjustment to each statutory civil penalty amount that was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997, apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004. The penalty amounts that were adjusted in EPA's second adjustment to each statutory civil penalty amount that was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004, apply to all violations under the applicable statutes and regulations which occurred after March 15, 2004, through January 12, 2009.

§ 19.3 [Reserved]

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
7 U.S.C. 136*l*.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT CIVIL (FIFRA).	$5,000	$5,500	$6,500	$7,500
7 U.S.C. 136*l*.(a)(2)	FIFRA	$500/1,000	$550/1,000	$650/1,100	$750/1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	$25,000	$27,500	$32,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,000	$5,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	$5,000	$5,500	$6,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	$25,000	$27,500	$32,500	$37,500
33 U.S.C. 1319(g)(2)(A)	CWA	$10,000/25,000	$11,000/27,500	$11,000/32,500	$16,000/37,500
33 U.S.C. 1319(g)(2)(B)	CWA	$10,000/125,000	$11,000/137,500	$11,000/157,500	$16,000/177,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	$10,000/25,000	$11,000/27,500	$11,000/32,500	$16,000/37,500
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	$10,000/125,000	$11,000/137,500	$11,000/157,500	$16,000/177,500
33 U.S.C. 1321(b)(7)(A)	CWA	$25,000/1,000	$27,500/1,100	$32,500/1,100	$37,500/1,100
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$37,500
33 U.S.C. 1321(b)(7)(D)	CWA	$100,000/3,000	$110,000/3,300	$130,000/4,300	$140,000/4,300
33 U.S.C. 1415(a)	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	$50,000/125,000	$55,000/137,500	$65,000/157,500	$70,000/177,500
33 U.S.C. 1414b(d)(1)[1]	MPRSA	$600	$660	$760	$860
33 U.S.C. 1901 note (*see* 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	$10,000/25,000	$10,000/25,000[2]	$10,000/25,000	$11,000/27,500
33 U.S.C. 1901 note (*see* 1409(a)(2)(B)).	CACSO	$10,000/125,000	$10,000/125,000	$10,000/125,000	$11,000/137,500
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	$25,000	$25,000	$25,000	$27,500
42 U.S.C. 300h–2(b)(1)	SDWA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 300h–2(c)(1)	SDWA	$10,000/125,000	$11,000/137,500	$11,000/157,500	$16,000/177,500
42 U.S.C. 300h–2(c)(2)	SDWA	$5,000/125,000	$5,500/137,500	$6,500/157,500	$7,500/177,500
42 U.S.C. 300h–3(c)	SDWA	$5,000/10,000	$5,500/11,000	$6,500/11,000	$7,500/16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500
42 U.S.C. 300i–1(c)	SDWA	$20,000/50,000	$22,000/55,000[3]	$100,000/1,000,000	$110,000/1,100,000
42 U.S.C. 300j(e)(2)	SDWA	$2,500	$2,750	$2,750	$3,750
42 U.S.C. 300j–4(c)	SDWA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 300j–6(b)(2)	SDWA	$25,000	$25,000	$27,500	$32,500
42 U.S.C. 300j–23(d)	SDWA	$5,000/50,000	$5,500/55,000	$6,500/65,000	$7,500/70,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD–BASED PAINT HAZARD REDUCTION ACT OF 1992.	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(c)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. code citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 7413(d)(1)	CAA	$25,000/200,000	$27,500/220,000	$32,500/270,000	$37,500/295,000
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$7,500
42 U.S.C. 7524(a)	CAA	$2,500/25,000	$2,750/27,500	$2,750/32,500	$3,750/37,500
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 9609(a)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 9609(b)	CERCLA	$25,000/75,000	$27,500/82,500	$32,500/97,500	$37,500/107,500
42 U.S.C. 9609(c)	CERCLA	$25,000/75,000	$27,500/82,500	$32,500/97,500	$37,500/107,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT–TO–KNOW ACT (EPCRA).	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 11045(b)	EPCRA	$25,000/75,000	$27,500/82,500	$32,500/97,500	$37,500/107,500
42 U.S.C. 11045(c)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 11045(c)(2)	EPCRA	$10,000	$11,000	$11,000	$16,000
42 U.S.C. 11045(d)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500
42 U.S.C. 14304(a)(1)	MERCURY–CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	$10,000	$10,000	$11,000	$16,000
42 U.S.C. 14304(g)	BATTERY ACT	$10,000	$10,000	$11,000	$16,000

[1] Note that 33 U.S.C. 1414b(d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table 1. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Public Law 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of 20,000 and 50,000 under section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188 (June 12, 2002), to 100,000 and 1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

PART 27—[AMENDED]

■ 2. The authority citation for Part 27 continues to read as follows:

Authority: 31 U.S.C. 3801–3812; Public Law 101–410, 104 Stat. 890, 28 U.S.C. 2461 note; Public Law 104–134, 110 Stat. 1321, 31 U.S.C. 3701 note.

■ 3. Section 27.3 is amended by revising paragraphs (a)(1)(iv) and (b)(1)(ii) to read as follows:

§ 27.3 Basis for civil penalties and assessments.

(a) * * *

(1) * * *

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the operative effective statutory maximum amount, as provided in 40 CFR 19.4,[1] for each such claim.

* * * * *

(b) * * *

(1) * * *

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than the operative effective statutory maximum amount, as provided in 40 CFR 19.4,[2] for each such statement.

* * * * *

[FR Doc. E8–29380 Filed 12–10–08; 8:45 am]

BILLING CODE 6560–50–P

[1] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

[2] As adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[EPA–HQ–OPA–2008–0569 FRL–8750–5]

RIN 2050–AG48

Oil Pollution Prevention; Spill Prevention, Control and Countermeasures Rule; Revisions to the Regulatory Definition of "Navigable Waters"

AGENCY: Environmental Protection Agency.

ACTION: Correction.

SUMMARY: This document makes a correction to the Preamble of the final rule amending the Oil Pollution Prevention regulation published on November 26, 2008 (73 FR 71941). The final rule announced the vacatur of the July 17, 2002 revisions to the Clean Water Act section 311 regulatory definition of "navigable waters" in accordance with an order, issued by the United States District Court for the District of Columbia (D.D.C.) in

Exhibit CX55

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

APR 6 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009

FROM: Rosemarie A. Kelley, Director Rosemarie A Kelley
Waste and Chemical Enforcement Division
Office of Civil Enforcement

TO: Regional Counsels
Regional Division Directors
Regional Enforcement Directors

On November 16, 2009, the Waste and Chemical Enforcement Division issued adjusted penalty policy matrices based on the 2008 Civil Monetary Penalty Inflation Adjustment Rule. That package did not contain penalty policy matrices for enforcement under RCRA Subtitle I (Underground Storage Tanks or "USTs"). Attached for your use is a revised version of the November 16, 2009 package with adjusted penalty matrices for RCRA Subtitle I. Those matrices are found in Attachments C and D. Attachment C amends "U.S. EPA Penalty Guidance for Violations of UST Regulations: OSWER Directive 9610.12" (November 14, 1990). Attachment D amends "Guidance of Federal Field Citation Enforcement: OSWER Directive 9610.16" (October 6, 1993). Attachments A and B were changed to include RCRA Subtitle I penalty policies in effect and instructions for amending each policy.

These matrices were updated to reflect the changes made to all penalty policies by the memorandum from Granta Y. Nakayama entitled, "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule" (December 29, 2008). That memorandum implemented the Civil Monetary Penalty Inflation Adjustment Rule (73 Fed. Reg. 75,340), which became effective on January 12, 2009. Both documents are available online at: http:// www.epa.gov/compliance/resources/policies/civil/penalty/.

Attachment C contains matrices applicable to UST violations occurring from March 15, 2004 though January 12, 2009, and after January 12, 2009. Attachment D applies to violations occurring after January 12, 2009. For questions regarding these matrices please contact Tom Charlton by phone at (202) 564-6960 or by email at charlton.tom@epa.gov.

Attachments:
- Transmittal Memorandum (originally issued on 16 November 2009)
- Attachment A (revised)
- Attachment B (revised)
- Attachment C (revised)
- Attachment D (revised)

cc: Regional Branch Chiefs

bcc: OCE/SLPD Division Director
OC/CASPD Division Director
OC/CAMPD Division Director
Craig Matthiessen, U.S. EPA OSWER/OEM
Nancy Barmakian, U.S. EPA Region 1
Deborah Brown, U.S. EPA Region 1
Sharon Hayes, U.S. EPA Region 1
Ken Stoller, U.S. EPA Region 2
Adrian Enache, U.S. EPA Region 2
Daniel Kraft, U.S. EPA Region 2
John Higgins, U.S. EPA Region 2
Ken Eng, U.S. EPA Region 2
William Sawyer, U.S. EPA Region 2
Harry Daw, U.S. EPA Region 3
Aquanetta Dickens, U.S. EPA Region 3
Fatima El Abdaoui, U.S EPA Region 3
Mary Coe, U.S. EPA Region 3
Jeaneanne Gettle, U.S. EPA Region 4
Anthony Toney, U.S. EPA Region 4
Joanne Benante, U.S. EPA Region 4
Robert Kaplan, U.S. EPA Region 4
Bill Anderson, U.S. EPA Region 4
Mardi Klevs, U.S. EPA Region 5
Thomas Crosetto, U.S. EPA Region 5
Tony Martig, U.S. EPA Region 5
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Richard Albright, U.S. EPA Region 10
Christine Colt, U.S. EPA Region 10
Scott Downey, U.S. EPA Region 10
David Allnut, U.S. EPA Region 10

ATTACHMENT A

RESOURCE CONSERVATION AND RECOVERY ACT

RCRA Civil Penalty Policy (2003)

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Enforcement Response Policy for FIFRA Section 7(c): Pesticide Producing Establishment Reporting Requirement (2007)

Worker Protection Standard Penalty Policy - Interim Final (1997)

Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act -- Good Laboratory Practice (GLP) Regulations (1991)

Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (1990)

TOXIC SUBSTANCES CONTROL ACT

Section 1018 - Disclosure Rule Enforcement Response Policy (2007)

Reporting and Recordkeeping Rules and Requirements: TSCA SECTIONS 8, 12 AND 13 (1999)

Polychlorinated Biphenyls (PCBs) Penalty Policy (1990)

Interim Final Enforcement Response Policy - Asbestos Abatement Projects: Worker Protection: Final Rule (1989)

Amended TSCA Section 5 Enforcement Response Policy (1989)

Asbestos Hazard Emergency Response Act (AHERA) Enforcement Response Policy (1989)

Enforcement Response Policy for TSCA Section 4 Test Rules (1986)

Final TSCA GLP Enforcement Response Policy (1985)

EMERGENCY PLANNING COMMUNITY RIGHT-TO-KNOW ACT

Enforcement Response Policy for Section 313 of the Emergency Planning Community Right-To-Know Act and Section 6607 of the Pollution Prevention Act, Amended (2001)

Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act

(1999)

CLEAN AIR ACT

Combined Enforcement Policy for CAA Section 112(r) Risk Management Program (2001)

RESOURCE CONSERVATION AND RECOVERY ACT – SUBTITLE I

U.S. EPA Penalty Guidance for Violations of UST Regulations: OSWER Directive 9610.12 (1990)

Guidance of Federal Field Citation Enforcement: OSWER Directive 9610.16 (1993)

ATTACHMENT B – REVISED April 6, 2010

PENALTY POLICY	DIRECTION
RCRA	
RCRA: RCRA Civil Penalty Policy (June 2003)	Insert behind pages 18-A and 26-A as indicated.
FIFRA	
FIFRA: Worker Protection Standard Penalty Policy - Interim Final (09/01/97)	Insert table (p. 4-B) behind page 4-A.
Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act – Good Laboratory Practice (GLP) Regulations (09/30/91)	No insert. When proposing penalty amounts under the Enforcement Response Policy for GLP Regulations, dated September 30, 1991, actual dollar amounts are determined by using the ERP for FIFRA (07/02/90). See directions below for FIFRA ERP.
Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (07/02/90)	Insert after page 19-B in the policy and page C-1-A in the appendix.
FIFRA Section 7(c) Enforcement Response Policy (02/10/86)	Insert table (p. 13-A) after page 13 in the policy.
TSCA	
Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy (December 2007)	Insert matrix (Appendix B p.30-A) behind Appendix B p.30
Reporting and Recordkeeping Rules and Requirements: TSCA SECTIONS 8, 12, AND 13 (03/31/99)	Insert matrix (p.8-B) behind page 8-A.
Polychlorinated Biphenyls Penalty Policy (04/09/90)	Insert matrix (p.9-C) behind page 9-B.
Enforcement Response Policy for TSCA Section 4 Test Rules (05/28/86)	Insert matrix (p2-C) behind page 2-B.
Amendment to the TSCA Section 5 Enforcement Response Policy (06/08/89)	Insert matrix (p.16-C) behind page 16-B.
Asbestos Hazard Emergency Response Act (AHERA) Enforcement Response Policy (01/31/89)	Insert matrix (p.11-C) behind page 11-B. Insert matrix (p.17-C) behind page 17-B.
Interim Final Enforcement Response Policy – Asbestos Abatement Projects: Worker Protection: Final Rule (11/14/89)	Insert matrix (p. 6-C) behind page 6-B.
Final TSCA GLP Enforcement Response Policy (04/09/85)	Insert matrix (p.4-C) behind page 4-B.
EPCRA	
Enforcement Response Policy for Section 313 of the Emergency Planning Community Right-To-Know Act (1989) and Section 6607 of the Pollution Prevention Act (1990), Amended (04/12/01)	Insert matrix (p11-C) behind page 11-B.
Final Enforcement Response Policy for Sections 304, 311, 312 of EPCRA and Section 103 of CERCLA (09/30/99)	Insert matrix (pp. 20D & 20E) behind page 20C.
CAA 112 (r)	
Combined Enforcement Policy for CAA Section 112(r) Risk Management Program (08/15/01)	Insert matrix behind page 8.

RCRA – Subtitle I	
U.S. EPA Penalty Guidance for Violations of UST Regulations: OSWER Directive 9610.12 (11/14/90)	Use matrices in Attachment C in place of Exhibit 4 in OSWER Directive 9610.12 (Exhibit 4 is a link on an HTML Document).
Guidance of Federal Field Citation Enforcement: OSWER Directive 9610.16 (10/6/93)	Insert matrices in Attachment D in OSWER Directive 9610.16 as Subparts B through H.

Insert behind page 18.

Gravity-based penalty matrix
to supplement the RCRA Civil Penalty Policy
for violations that occur after January 12, 2009

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$37,500 to $28,330	$28,330 to $21,250	$21,250 to $15,580
MODERATE	$15,580 to $11,330	$11,330 to $7,090	$7,090 to $4,250
MINOR	$4,250 to $2,130	$2,130 to $710	$710 to $150

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 26.

Multi-Day Matrix of Minimum Daily Penalties To Supplement the RCRA Civil Penalty Policy For Violations That Occur After January 12, 2009

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$7,090 to $1,420	$5,670 to $1,070	$4,250 to $780
MODERATE	$3,120 to $570	$2,230 to $360	$1,420 to $220
MINOR	$850 to $150	$430 to $150	$150

~~Note: After calculating the gravity-based penalty for each count, the total applicable~~ gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 4-A.

Gravity-Based Penalty Table
To Supplement the Worker Protection Standard Penalty Policy - Interim Final For Violations That Occur After January 12, 2009

Determining the Appropriate Enforcement Response

In conclusion, the following chart summaries when issuance of a NOW or a Civil Administrative Complaint is the appropriate enforcement response:

PERSON	FIRST VIOLATION	SECOND VIOLATION WITHIN FIVE (5) YEARS
Registrant OR Commercial applicator[1] OR Wholesaler OR Dealer OR Retailer OR Distributor[1]	If gravity adjustment factor is 3 or below (minor violations)-->NOW under § 9(c)(3) If gravity adjustment factor is 4 or greater--> Civil Administrative Complaint for a §14(a)(1) violator category with a penalty amount up to $5,000/violation if committed through 1/30/97; or up to $5,500/violation if committed after 1/30/97; or up to $6,500/violation if committed after March 15, 2004[2]; or up to $7,500/violation if committed after January 12, 2009.	Civil Administrative Complaint for a §14(a)(1) violator category with a penalty amount up to $5,000/violation if committed through 1/30/97; or up to $5,500/violation if committed after 1/30/97; or up to $6,500/violation if committed after March 15, 2004[2]; or up to $7,500/violation if committed after January 12, 2009.

1 Also see FIFRA ERP ASSESSING ADMINISTRATIVE CIVIL PENALTIES (pg. 17) and footnotes (pg. 10), regarding further discussions on distributors, and commercial, "for-hire" and private applicators.

2 Even if the total gravity adjustment level is 4 or greater, and if the violation occurs despite the "exercise of due care," and no "significant harm" occurs, a NOW under §14(a)(4) may be issued at any time.

PERSON	FIRST VIOLATION	SECOND VIOLATION WITHIN FIVE (5) YEARS
Private applicator[1]	NOW for a § 14(a)(2) violator category	Civil Administrative Complaint for a §14(a)(2) violator category with a penalty amount up to $1,000/violation if committed through March 15, 2004; or up to $1,100/violation if committed after March 15, 2004.[2, 3, 4].
"For hire" applicator	Civil Administrative Complaint for a § 14(a)(2) violator category with a penalty amount up to $500/violation if committed through 1/30/97; or up to $550/violation if committed after 1/30/97; or up to $650/violation if committed after March 15, 2004.[1]; or up to $750/violation if committed after January 12, 2009.	Civil Administrative Complaint for a §14(a)(2) violator category for a penalty amount up to $1,000/violation if committed through March 15, 2004; or up to $1,100/violation if committed after March 15, 2004[2, 3, 4].

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

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3 Prior written warning or citation will be considered for any FIFRA violation.

4 The maximum penalty amount of $1,100 did not increase after January 12, 2009.

Insert behind page 19-B.

Gravity-Based Penalty Matrix
To Supplement the Enforcement Response Policy For Federal Insecticide, Fungicide, And Rodenticide Act Section 14(A)(1)
For Violations That Occur After January 12, 2009

CIVIL PENALTY MATRIX FOR FIFRA SECTION 14(a)(1)

SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$7,500	$7,150	$7,150
LEVEL 2	$7,150	$5,670	$4,250
LEVEL 3	$5,670	$4,250	$2,830
LEVEL 4	$4,250	$2,830	$1,420

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 19-C.

Gravity-Based Penalty Matrix
To Supplement the Enforcement Response Policy For Federal Insecticide, Fungicide, And Rodenticide Act Section 14(A)(2)
For Violations That Occur After January 12, 2009

CIVIL PENALTY MATRIX FOR FIFRA SECTION 14(a)(2)†

SIZE OF BUSINESS

LEVEL	I	II	III
LEVEL 1	$1,100[1]	$1,100[1]	$1,100[1]
LEVEL 2	$1,100[1]	$1,030	$770
LEVEL 3	$1,030	$770	$650

† This §14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a civil penalty of $650.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

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1 **In the matter of Petrocco Farms**, the Administrative Law Judge identified a typographical error in the December 31, 1996, Civil Monetary Penalty Inflation Adjustment Rule published at 40 C.F.R. §19.4 which incorrectly listed the statutory maximum penalty for FIFRA § 14(a)(2) as $1,000. The statutory maximum amount for FIFRA § 14(a)(2) should have been adjusted by the 10% inflation factor to $1,100 in the codified table in the 1996 publication. The correct amount was published in the preamble but not in the table.

Insert behind page 13.

Gravity-based penalty matrix
to supplement the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for Section 7(c)
for violations that occur after January 12, 2009

E. FIFRA Section 7(c) Civil Penalty Matrix

Type of Violations	First Time Violator	Second Time Violator*	Third and Subsequent*
Late Reporting	NOW	C-I - $3,300 C-II - $1,650 C-III - $1,100	$7,500
Non-Reporting	NOW If no response: C-I - $3,300 C-II - $1,650 C-III - $1,100	C-I - $4,950 C-II - $3,300 C-III - $1,650	$7,500
Incomplete Report - Minor	Informal Response/NOW	NOW	NOW or C-I - $3,300 C-II - $1,650 C-III - $1,100
Incomplete Report - Major	NOW	C-I - $3,300 C-II - $1,650 C-III - $1,100	$7,500
False Reporting	$7,500	$7,500	$7,500

*Repeat violations refer to violations that occurred within a three year span.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind Appendix B Page 30.

Gravity-based penalty matrix to supplement Section 1018-Disclosure Rule Enforcement Response Policy for violations that occur after January 12, 2009

EXTENT CATEGORY MATRIX			
Occupant of the target housing is:	**A child under 6 year of age or a pregnant woman**	**A child 6 years of age or older but less than 18 years of age or age not provided**	**18 years of age or older**
EXTENT	***Major***	***Significant***	***Minor***

GRAVITY-BASED PENALTY (GBP) MATRIX

The GBP, a function of the nature, circumstances and extent of each violation, is determined by using the following matrix:

CIRCUMSTANCE	MAJOR	SIGNIFICANT	MINOR
	EXTENT	EXTENT	EXTENT
HIGH Level 1	$16,000	$8,500	$2,840
Level 2	$11,340	$7,090	$1,710
MEDIUM Level 3	$8,500	$5,670	$850
Level 4	$5,670	$3,540	$580
LOW Level 5	$2,840	$1,850	$290
Level 6	$1,420	$710	$150

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 8-A.

Gravity based penalty matrix
to supplement Recordkeeping and Reporting Rules and Requirements for TSCA Sections 8, 12 and 13 for violations that occur after January 12, 2009

TSCA §§ 8, 12, & 13
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES	EXTENT A Major	 B Significant	 C Minor
LEVELS **1** **High Range** **2**	$37,500 $28,330	$24,080 $18,420	$7,090 $4,250
3 **Mid Range** **4**	$21,250 $14,170	$14,170 $8,500	$2,130 $1,420
5 **Low Range** **6**	$7,090 $2,840	$4,250 $1,850	$710 $290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 9-B.

Gravity Based Penalty Matrix
to supplement PCB Penalty Policy
for violations that occur after January 12, 2009

TSCA § 6 (PCB)
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES (probability of damages)	EXTENT A Major	B Significant	C Minor
LEVELS			
1	$37,500	$24,080	$7,090
High Range			
2	$28,330	$18,420	$4,250
3	$21,250	$14,170	$2,130
Mid Range			
4	$14,170	$8,500	$1,420
5	$7,090	$4,250	$710
Low Range			
6	$2,840	$1,850	$290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 2-B.

Gravity Based Penalty Matrix
to supplement TSCA Section 4 Test Rule Enforcement Response Policy
for violations that occur after January 12, 2009

TSCA § 4
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES (probability of damages)	EXTENT A Major	 B Significant	 C Minor
LEVELS **1** **High Range** **2**	$37,500 --	$24,080 --	$7,090 --
3 **Mid Range** **4**	$21,250 $14,170	$14,170 $8,500	$2,130 $1,420
5 **Low Range** **6**	$7,090 $2,840	$4,250 $1,850	$710 $290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 16-B.

Gravity Based Penalty Matrix
to supplement TSCA Section 5 Enforcement Response Policy
for violations that occur after January 12, 2009

TSCA § 5
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES	EXTENT A Major	 B Significant	 C Minor
LEVELS **1** **High Range** **2**	$37,500 $28,330	$24,080 $18,420	$7,090 $4,250
3 **Mid Range** **4**	$21,250 $14,170	$14,170 $8,500	$2,130 $1,420
5 **Low Range** **6**	$7,090 $2,840	$4,250 $1,820	$710 $290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 11-B.

Gravity Based Penalty Matrix
to supplement Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act
for violations that occur after January 12, 2009.

Base Penalty for LEA's

CIRCUMSTANCES (Levels)	Extent LEVEL A MAJOR (>3,000 sq. ft. or 1,000 linear ft.)	Extent LEVEL B SIGNIFICANT (>160 sq. ft. or 260 linear ft. but <3,000 sq. ft. or 1,000 linear ft.)	Extent LEVEL C MINOR (<or = 160 sq. ft. or 260 linear ft.)
LEVEL 1	$7,500	$5,700	$1,680
LEVEL 2	$6,700	$4,020	$1,010
LEVEL 3	$5,030	$3,350	$510
LEVEL 4	$3,350	$2,010	$340
LEVEL 5	$1,680	$1,010	$170
LEVEL 6	$670	$490	$70

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 17-B.

Gravity based penalty matrix
to supplement Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act
for violations that occur after January 12, 2009

AHERA -"Other Persons"

CIRCUMSTANCES (Levels)	Extent LEVEL A MAJOR	Extent LEVEL B SIGNIFICANT	Extent LEVEL C MINOR
LEVEL 1 **LEVEL 2**	$7,500 $4,800	$4,080 $3,120	$1,200 $720
LEVEL 3 **LEVEL 4**	$3,600 $2,400	$2,400 $1,440	$360 $240
LEVEL 5 **LEVEL 6**	$1,200 $480	$720 $320	$120 $50

Note: > = greater than; < = less than.

~~**Note: After calculating the gravity-based penalty for each count, the total applicable**~~ **gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.**

Insert behind page 6-B.

Gravity based penalty matrix
to supplement Interim Final Enforcement Response Policy – Asbestos Abatement Projects: Worker Protection: Final Rule
for violations that occur after January 12, 2009

Asbestos Worker Protection

CIRCUMSTANCES (Levels)	Extent LEVEL A MAJOR	Extent LEVEL B SIGNIFICANT	Extent LEVEL C MINOR
LEVEL 1	$37,500	$24,080	$7,090
LEVEL 2	$28,330	$18,420	$4,250
LEVEL 3	$21,250	$14,170	$2,130
LEVEL 4	$14,170	$8,500	$1,420
LEVEL 5	$7,090	$4,250	$710
LEVEL 6	$2,840	$1,850	$290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 4-B.

Gravity Based Penalty Matrix
to supplement TSCA Good Laboratory Practices Regulations Enforcement Policy for violations that occur after January 12, 2009.

TSCA GLP
GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES (probability of damages)	EXTENT A Major	 B Significant	 C Minor
LEVELS **1** **High Range** **2**	$37,500 --	$24,080 --	$7090 --
3 **Mid Range** **4**	$21,250 --	$14,170 --	$2,130 --
5 **Low Range** **6**	$7,090 --	$4,250 --	$710 --

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 11-B.

Gravity-based penalty matrix
to supplement Enforcement Response Policy for Section 313 of the Emergency Planning Community Right-To-Know Act (1989) and Section 6607 of the Pollution Prevention Act (1990) for violations that occur after January 12, 2009.

GRAVITY-BASED PENALTY MATRIX FOR EPCRA SECTION 313

CIRCUMSTANCE LEVEL	EXTENT		
	A Major	B Significant	C Minor
LEVEL 1	$37,500	$24,080	$7,090
LEVEL 2	$28,330	$18,420	$4,250
LEVEL 3	$21,250	$14,170	$2,130
LEVEL 4	$14,170	$8,500	$1,420
LEVEL 5	$7,090	$4,250	$710
LEVEL 6	$2,840	$1,850	$290

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 20-C.

Gravity-based penalty matrix to supplement Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act for violations that occur after January 12, 2009.

Table II

CIVIL PENALTY MATRIX FOR CERCLA SECTION 103, EPCRA SECTION 304†, AND EPCRA SECTION 312

GRAVITY (Quantity Released/Stored)

EXTENT (timeliness of notification/timeliness of inventory submission)	LEVEL A (greater than 10 times the RQ/MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the RQ/MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the RQ/MTL)
LEVEL 1 (more than 2 hours/30 days)	$37,500 $26,560	$26,560 $17,710	$17,710 $8,860
LEVEL 2 (between 1 and 2 hours/after 20 but within 30 days)	$26,560 $17,710	$17,710 $8,860	$8,860 $4,430
LEVEL 3 (within 1 hour, but after 15 minutes/after 10 but within 20 days)	$17,710 $8,860	$8,860 $4,430	$4,430 $2,220

† While the penalty amounts in this matrix apply to EPCRA § 304(c), the criteria associated with the levels do not apply. To determine the appropriate extent level for violations of § 304, *see* pp. 12-13, *supra*.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 20-D.

Gravity-based penalty matrix to supplement Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-To-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act for violations that occur after January 12, 2009.

Table II (continued)

CIVIL PENALTY MATRIX FOR EPCRA SECTION 311

GRAVITY (Quantity Stored)

EXTENT (timeliness of MSDS submission)	LEVEL A (greater than 10 times the MTL)	LEVEL B (greater than 5 but less than or equal to 10 times the MTL)	LEVEL C (greater than 1 but less than or equal to 5 times the MTL)
LEVEL 1 (more than 30 days)	$16,000 $12,460	$12,460 $8,310	$8,310 $4,150
LEVEL 2 (after 20 but within 30 days)	$12,460 $8,310	$8,310 $4,160	$4,150 $2,080
LEVEL 3 (after 10 but within 20 days)	$8,310 $1,450	$4,160 $2,080	$2,080 $1,150

The dollar values in the matrix were increased by 28.75% to reflect the first increase in the statutory maximum penalty amount since 2004.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

Insert behind page 8.

Gravity-based penalty matrix
to supplement Combined Enforcement Policy for CAA Section 112(r) Risk Management Program for violations that occur after January 12, 2009

GRAVITY MATRIX

Table I
Penalty Assessment Matrix
for violations that occurred after January 12, 2009

		Type of Facility[5]		
		Program 3	**Program 2**	**Program 1**
Extent of Deviation	**Major**	Not less than $38,500	$76,900 $32,010	$107,800 $44,010
	Moderate	$44,000 $23,010	$32,000 $15,410	$18,700 $ 7,700
	Minor	$23,000 $9,900	$15,400 $ 6,600	$7,700 $2,500

Regions should understand that the statutory maximum for penalty under the Clean Air Act after January 12, 2009, is $37,500 per day per violation. Some of the penalty amounts in the matrix above exceed the statutory maximum. Penalties in excess of the statutory maximum may only be used if the Agency alleges that more than one violation has occurred.

Note: After calculating the gravity-based penalty for each count, the total applicable gravity-based penalty for all counts in a particular case/matter should be rounded to the nearest unit of $100 as required by the memorandum from Granta Nakayama, dated December 29, 2008.

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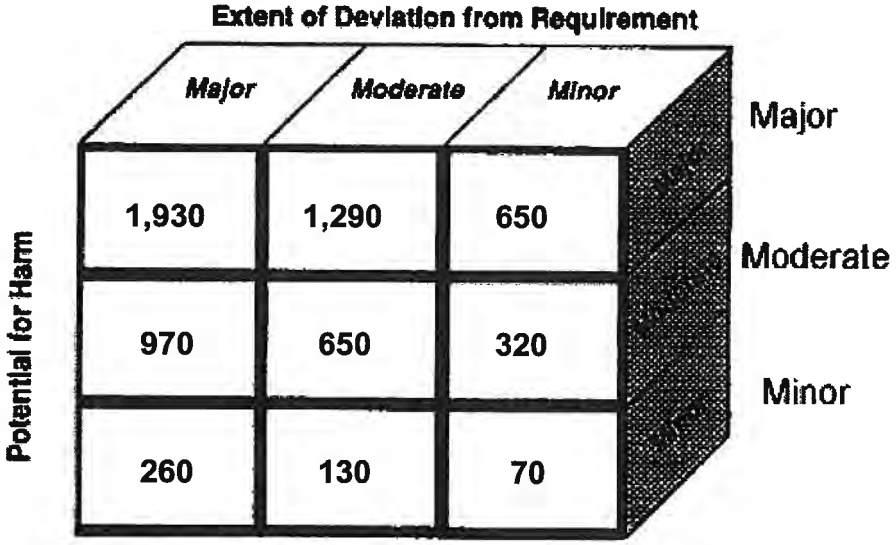
[5] The facilities subject to part 68 fall into one of three categories: Program 1, 2 or 3. The program levels are defined in the RMP regulations based upon the level of risk posed by processes subject to the risk management program.

Exhibit 4.A.

Matrix Values for Determining the Gravity–Based Component of A Penalty

(Use for Violations that Occurred After March 15, 2004 Through January 12, 2009)



NOTE: These amounts constitute the matrix value only. They are not the initial penalty target figure. The initial penalty target figure is calculated as follows:

$$\text{Initial Penalty Target Figure} = \text{Economic Benefit Component} + \left(\text{MATRIX VALUE} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}\right)$$

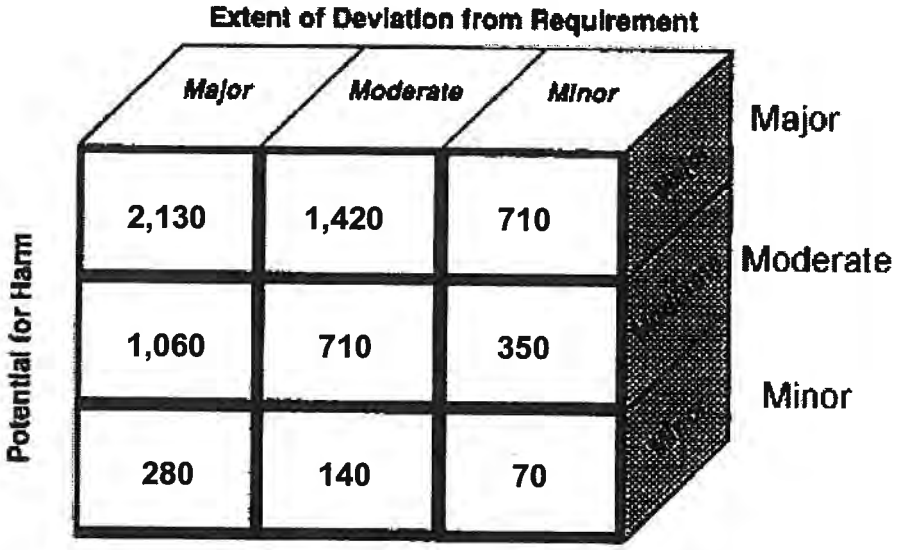
Note: Original values provided in Directive 9610.12, November 14, 1990 have been adjusted for inflation by multiplying By 1.2895, reflecting the 10% increase, and the 17.23% increase [1.10 x 1.1723 = 1.2895] in accordance with December 29, 2008 Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest whole number then rounded to the nearest 10.

[Directive 9610.12]

Exhibit 4.B.

Matrix Values for Determining the Gravity–Based Component of A Penalty

(Use for Violations that Occurred After January 12, 2009)



NOTE: These amounts constitute the matrix value only. They are not the initial penalty target figure. The initial penalty target figure is calculated as follows:

$$\text{Initial Penalty Target Figure} = \text{Economic Benefit Component} + \left(\text{MATRIX VALUE} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}\right)$$

Note: Original values provided in Directive 9610.12, November 14, 1990 have been adjusted for inflation by multiplying By 1.4163, reflecting the 10% increase, the 17.23% increase, and the 9.83% increase [1.10 x 1.1723 x 1.0983 = 1.4163] in accordance with December 29, 2008 Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest whole number then rounded to nearest 10.

[Directive 9610.12]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart B--UST Systems: Design, Construction, Installation, and Notification OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART B -- UST SYSTEMS: DESIGN, CONSTRUCTION, INSTALLATION, AND NOTIFICATION

§280.20 Performance standards for new UST systems		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.20(a)(1)	Installation of an improperly constructed fiberglass-reinforced plastic tank	$420
§280.20(a)(2)	Installation of an improperly designed and constructed metal tank that fails to meet corrosion protection standards	$420
§280.20(a)(2)(i)	Installation of a metal tank with unsuitable dielectric coating	$210
§280.20(a)(2)(ii)	Installation of an improperly designed cathodic protection system for a metal tank	$420
§280.20(a)(2)(iii)	Improper Installation of cathodic protection system for a metal tank	$210
§280.20(a)(2)(iv)	Improper operation and maintenance of tank cathodic protection system	$210
§280.20(a)(3)	Installation of an Improperly constructed steel-fiberglass-reinforced-plastic tank	$420
§280.20(b)(1)	Installation of Improperly constructed fiberglass-reinforced plastic piping	$420
§280.20(b)(2)	Failure to provide any cathodic protection for metal piping	$420

§280.20(b)(2)(i)	Installation of piping with unsuitable dielectric coating	$210
§280.20(b)(2)(ii)	Installation of improperly designed cathodic protection for metal piping	$420
§280.20(b)(2)(iii)	Improper Installation of cathodic protection system for piping	$210
§280.20(b)(2)(iv)	Improper operation and maintenance of cathodic protection system for metal piping	$210
§280.20(c)	Failure to use a spill prevention system and an overfill prevention system	$420
§280.20(c)(1)(i)	Installation of inadequate spill prevention equipment In a new tank	$210
§280.20(c)(1)(ii)	Installation of inadequate overfill prevention equipment in a new tank	$210
§280.20(d)	Failure to install tank in accordance with accepted codes and standards	$210
§280.20(d)	Failure to install piping in accordance with accepted codes and standards	$210
§280.20(e)	Failure to provide any certification of UST installation	$210

§280.21 Upgrading of existing UST systems

Regulatory Citation	Violation	Violations Appropriate for Regulatory Field Citations (Penalty Amount)
§280.21(a)	Failure to perform replacement, upgrade, or closure for existing substandard tank systems	*$1,300
§280.21(b)	Failure to meet all tank upgrade standards	$420
§280.21(b)(1)(i)	Improper Installation of interior lining for tank upgrade requirements	$210
§280.21(b)(1)(ii)	Failure to meet Interior lining Inspection	$210

	requirements for tank upgrade	
§280.21(b)(2)(i)	Failure to ensure that tank is structurally sound before installing cathodic protection	$210
§280.21(b)(2)(ii)	Failure to conduct monthly release detection monitoring for upgraded tank under 10 years of age	$420
§280.21(b)(2)(iii)	Failure to meet tightness test requirements for a tank upgraded with cathodic protection	$210
§280.21(b)(2)(iv)	Failure to meet requirements for testing for corrosion holes for a tank upgraded with cathodic protection	$210
§280.21(c)	Failure to Install any cathodic protection for metal piping upgrade requirements	$420
§280.21(c)	Failure to meet piping tightness test requirements for metal piping after upgrade with cathodic protection	$210
§280.21(d)	Failure to provide spill or overfill prevention system for an existing tank	$420
§280.22 Notification requirements		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.22(a) or	Failure to notify state or local agency within 30 days of bringing an UST system into use	$420
§280.22(b)	Failure to notify designated state or local agency of existing tank	$420
§280.22(c)	Failure to submit a separate notification form identifying all known tanks for each site where tanks are located	$210
§280.22(e)	Failure to certify on notification form UST system requirements of proper installation, cathodic protection, financial responsibility, and release detection	$210

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

§280.22(f)	Failure to provide installer certification of compliance with installation requirements on notification form	$210
§280.22(g)	Failure to inform tank purchaser of notification requirements	

Notes: *The penalty amount for the 280.21(a) "Catch-all" violation was previously changed to $900 (on March 16, 1999); and further adjusted to $1,300 in accordance with the March 3, 2000 Use of Field Citations for Failure to Comply with 40 C.F.R. § 280.21 Upgrade, Replacement or Closure Requirements at UST Facilities in order to recover economic benefit. This amount exceeds the adjustment for inflation using the December 29, 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). (i.e., $420). This penalty amount remains unchanged beyond the previous increase applied on March 3, 2000.

Original penalty amounts were adjusted for inflation. Current amounts are reflected in the table. Original penalty amounts were multiplied by 1.4163. [Reflecting the 10% increase for the period Jan 31, 1997 through Mar 15, 2004; a 17.23% increase (1.10 x 1.1723 = 1.2895) from March 16, 2004 through January 11, 2009; and a 9.83% increase for violations occurring on or after January 12, 2009 (1.10 x 1.1723 x 1.0983 = 1.4163)]. This is in accordance with the December 29, 2008, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest $10.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart C--General Operating Requirements OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations

SUBPART C -- GENERAL OPERATING REQUIREMENTS

280.30 Spill and overfill control		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.30(a)	Failure to lake necessary precautions to prevent overfill/spillage during the transfer of product	$420
§280.30(b)	Failure to report a spill/overfill	
§280.30(b)	Failure to Investigate and clean up a spill/overfill	
280.31 Operation and maintenance of corrosion protection		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.31(a)	Failure to operate and maintain corrosion protection system continuously	$210
§280.31(b)	Failure to ensure proper operation of cathodic protection system	$210
§280.31(c)	Failure to inspect impressed current systems every 60 days	$210
§280.31(d)	Failure to maintain records of cathodic protection inspections	$70
280.32 Compatibility		

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Regulatory Citation	Violation	Violations Appropriate for Regulatory Field Citations (Penalty Amount)
§280.32	Failure to ensure that UST system is made of or lined with materials compatible with substance stored	$210
280.33 Repairs allowed		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.33(a)	Failure to repair UST system in accordance with accepted codes and standards	$210
§280.33(b)	Failure to repair fiberglass-reinforced UST in accordance with accepted codes and standards	$210
§280.33(c)	Failure to replace metal piping that has released product	$210
§280.33(c)	Failure to repair fiberglass-reinforced piping in accordance with manufacturers specifications	$210
§280.33(d)	Failure to ensure that repaired tank systems are tightness tested within 30 days of completion of repair	$420
§280.33(e)	Failure to test cathodic protection system within 6 months of repair of an UST system	$210
§280.33(f)	Failure to maintain records of each repair to an UST system	$70
280.34 Reporting and recordkeeping		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
For violations of reporting and recordkeeping, see appropriate regulatory section (*e.g.*, reporting of releases will be under Subpart D).		

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

§280.34(a)(1) or	Failure to submit notification for UST system	$420
§280.34(a)(1)	Failure to submit certification of a new installation with notification form	$420
§280.34(b)(1)	Failure to maintain analysis of site corrosion potential if corrosion protection equipment is not used	$70
§280.34(b)(2)	Failure to maintain corrosion protection equipment operation documentation	$70
§280.34(b)(3)	Failure to maintain documentation of UST system repairs	$70
§280.34(b)(4)	Failure to maintain documentation of compliance with release detection requirements	$70
§280.34(c)(1) or	Failure to maintain records at UST site and immediately available for inspection	$70
§280.34(c)(2)	Failure to maintain records at a readily available alternative site	$70

Note: Original penalty amounts were adjusted for inflation. Current amounts are reflected in the table. Original penalty amounts were multiplied by 1.4163. [Reflecting the 10% increase for the period Jan 31, 1997 through Mar 15, 2004; a 17.23% increase (1.10 x 1.1723 = 1.2895) from March 16, 2004 through January 11, 2009; and a 9.83% increase for violations occurring on or after January 12, 2009 (1.10 x 1.1723 x 1.0983 = 1.4163)]. This is in accordance with the December 29, 2008, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest $10.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart D--Release Detection OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART D -- RELEASE DETECTION

280.40 General requirements for all UST systems (Applies only to petroleum tanks)		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.40(a)	Failure to provide adequate release detection method	$420
§280.40(b)	Failure to notify implementing agency when release detection indicates release	
§280.40(c)	Failure to provide any release detection method by phase-in date	$210
§280.40(d)	Failure to close any UST system that cannot meet release detection requirements	$420

280.41 Requirements for petroleum UST systems		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§ 280.41(a) or	Failure to monitor tanks at least every 30 days, if appropriate	$420
§280.41(a)(1) or	Failure to conduct tank tightness testing every 5 years, if appropriate	$420
§ 280.41(a)(2)	Failure to conduct annual tank tightness testing, if appropriate	$420
§280.41(b)(1)(i)	Failure to equip pressurized piping with automatic line leak detector	$420

§280.41(b)(1)(ii)	Failure to have annual tank tightness test or perform monthly monitoring on pressurized piping	$420
§ 280.41(b)(2)	Failure to conduct line lightness test or use monthly monitoring on suction piping	$420

280.42 Requirements for hazardous substance UST systems		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.42(a)	Failure to provide release detection for an existing hazardous substance tank system	$420
§280.42(b)	Failure to provide adequate release detection for a new hazardous substance UST system	$420
§280.42(b)(1)	Failure to provide adequate secondary containment of tank for a hazardous substance UST	$420
§280.42(b)(2)	Failure to provide adequate double-walled tank/adequate lining for a hazardous substance UST	$420
§280.42(b)(3)	Failure to provide adequate external liners for a hazardous substance UST	$420
§280.42(b)(4)	Failure to provide adequate secondary containment of piping for a hazardous substance UST	$420

280.43 Methods of release detection for tanks		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.43(a)	Inadequate operation or maintenance of inventory control	$420
§280.43(a)(1)-(6)		$70 each
§280.43(b)	Inadequate operation or maintenance of manual tank gauging	$420

§280.43(b)(1)-(4)*		$70 each
§280.43(c)	Inadequate operation or maintenance of tank tightness testing	$210
§280.43(d)	Inadequate operation or maintenance of automatic tank gauging	$420
§280.43(d)(1)-(2)		$210 each
§280.43(e)	Inadequate operation or maintenance of vapor monitoring	$420
§280.43(e)(1)-(7)#		$210 each
§280.43(f)	Inadequate operation or maintenance of ground-water monitoring	$420
§280.43(f)(1)-(8)@		$210 each
§280.43(g)	Inadequate operation or maintenance of interstitial monitoring	$420
280.44 Methods of release detection for piping		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.44	Failure to provide any release detection for underground piping	$420
§280.44(a) or	Failure to provide adequate line leak detector system for underground piping	$210
§280.44(b)	Failure to provide adequate line tightness testing system for underground piping system	$210
§260.44(c)	Inadequate use of applicable tank release detection methods	$210
280.45 Release detection recordkeeping		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

§280.45	Failure to maintain records of release detection monitoring	$210
§280.45(a)	Failure to document all release detection performance claims for 5 years after installation	$70
§280.45(b)	Failure to maintain results of sampling, testing or monitoring for release detection for at least 1 year or failure to retain results of tightness testing until next test is conducted	$70
§280.45(c)	Failure to document calibration, maintenance, and repair of release detection	$70

* If citing more than 3 subsections, cite instead §280.43(b) or §280.41 (a)

If citing more than 1 subsection, cite instead §280.43(e)

@ If citing more than 1 subsection, cite instead §280.43(f)

Note: Original penalty amounts were adjusted for inflation. Current amounts are reflected in the table. Original penalty amounts were multiplied by 1.4163. [Reflecting the 10% increase for the period Jan 31, 1997 through Mar 15, 2004; a 17.23% increase (1.10 x 1.1723 = 1.2895) from March 16, 2004 through January 11, 2009; and a 9.83% increase for violations occurring on or after January 12, 2009 (1.10 x 1.1723 x 1.0983 = 1.4163)]. This is in accordance with the December 29, 2008, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest $10.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart E--Release Reporting, Investigation, and Confirmation OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART E -- RELEASE REPORTING, INVESTIGATION, AND CONFIRMATION

280.50 Reporting of suspected release		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.50(a)-(c)	Failure to report a suspected release within 24 hours to the implementing agency	
280.52 Release investigation and confirmation steps		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.52(a)-(b)	Failure to investigate and confirm a release (if appropriate) using accepted procedures	
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.53(a)	Failure to report a spill/overfill (if appropriate) to implementing agency within 24 hours (or other specified time period)	
§280.53(b)	Failure to contain and immediately clean up a spill/overfill of less than 25 gallons	
§280.53(b)	Failure to contain and immediately clean	

	up a hazardous substance spill/overfill	

Note: No penalty amounts were originally established. This table remains unchanged.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart F--Release Response and Corrective Action OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART F -- RELEASE RESPONSE AND CORRECTIVE ACTION

280.61 Initial Response		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.61	Failure to take initial response actions within specified time period after a release is confirmed	
280.62 Initial abatement measures and site check		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.62	Failure to perform initial abatement measures and submit report within 20 days (or other specified time) of release confirmation	
280.63 Initial site characterization		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.63	Failure to submit report on initial site characterization within 45 days (or other specified time) of release confirmation	
280.64 Free product removal		
Regulatory	**Violation**	**Violations Appropriate for**

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Citation		Regulatory Field Citations (Penalty Amount)
§280.64	Failure to perform free product removal and submit report within 45 days (or other specified time) of release confirmation	

Note: No penalty amounts were originally established. This table remains unchanged.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart G--Out-of-Service UST Systems and Closure OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART G OUT-OF-SERVICE UST SYSTEMS AND CLOSURE

280.70 Temporary closure		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.70(a)	Failure to continue operation and maintenance of corrosion protection system in a temporarily closed tank system	$210
§280.70(a)	Failure to continue operation and maintenance of release defection in a temporarily closed tank system	$420
§280.70(b)	Failure to comply with temporary closure requirements for a tank system for 3 or more months	$420
§280.70(b)(1)-(2)		$210 each
§280.70(c)	Failure to permanently close or upgrade a temporarily closed tank system after 12 months	$420

280.71 Permanent closure and changes-in-service		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.71(a)	Failure to notify implementing agency of a closure or change-in-service	$420
§280.71(b)	Failure to remove all liquids and sludges for tank closure	$420

§280.71(b)	Failure to remove closed tank from the ground or fill tank with an inert solid for tank closure	$420
§280.71(c)	Failure to empty and clean tank system and conduct a site assessment prior to a change-in-service	
280.72 Assessing the site at closure or change-in-service		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.72(a)	Failure to measure (if required) for the presence of a release before a permanent closure	
§280.72(b)	If contaminated soil, contaminated ground water, or free product is discovered, failure to begin corrective action	
280.74 Closure records		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.74	Failure to maintain closure records for at least 3 years	$420
§280.74	Failure to maintain change-in-service records for at least 3 years	$420

Note: Original penalty amounts were adjusted for inflation. Current amounts are reflected in the table. Original penalty amounts were multiplied by 1.4163. [Reflecting the 10% increase for the period Jan 31, 1997 through Mar 15, 2004; a 17.23% increase (1.10 x 1.1723 = 1.2895) from March 16, 2004 through January 11, 2009; and a 9.83% increase for violations occurring on or after January 12, 2009 (1.10 x 1.1723 x 1.0983 = 1.4163)]. This is in accordance with the December 29, 2008, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest $10.

[Directive 9610.16]

Attachment D: Clarification to OSWER Directive 9610.16 to reflect penalty amounts for violations occurring after January 12, 2009. This replaces Subparts B through H.

Selected Violations Of Federal Underground Storage Tank Regulations Subpart H--Financial Responsibility OSWER Directive 9610.16 Guidance On Federal Field Citation Enforcement October 6, 1993

Selected Violations of Federal Underground Storage Tank Regulations
SUBPART H -- FINANCIAL RESPONSIBILITY

280.93 Amount and scope of required Financial Responsibility		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.93(a)	Failure to comply with financial responsibility requirements by the required phase-in time	$210
§280.93(a)(1)-(2)	Failure to meet the requirement for per-occurrence coverage of insurance.	$210
§280.93(b)(1)-(2)	Failure to meet the requirement for annual aggregate coverage of Insurance.	$210
§280.93(f)	Failure to review and adjust financial assurance after acquiring new or additional USTs	$210
280.94 Allowable mechanisms and combinations of mechanisms		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.94	Use of an unapproved mechanism or combination of mechanisms to demonstrate financial responsibility	$210
280.95 Financial test of self-insurance		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**

§280.95	Use of falsified financial documents to pass financial test of self-insurance	
280.106 Reporting by owner or operator		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.106(a)(1)	Failure to report evidence of financial responsibility to the implementing agency within 30 days of detecting a known or suspected release	$210
§280.106(a)2	Failure to report evidence of financial responsibility to the implementing agency if the provider becomes incapable of providing financial assurance and the owner or operator Is unable to obtain alternate coverage within 30 days.	$210
§280.106(b)	Failure to report evidence of financial responsibility to the implementing agency when new tanks are installed	$210
280.107 Recordkeeping		
Regulatory Citation	**Violation**	**Violations Appropriate for Regulatory Field Citations (Penalty Amount)**
§280.107	Failure to maintain copies of the financial assurance mechanism(s) used to comply with financial responsibility rule and certification that the mechanism is in compliance with the requirements of the rule at the UST site or place of business	$210

Note: Original penalty amounts were adjusted for inflation. Current amounts are reflected in the table. Original penalty amounts were multiplied by 1.4163. [Reflecting the 10% increase for the period Jan 31, 1997 through Mar 15, 2004; a 17.23% increase (1.10 x 1.1723 = 1.2895) from March 16, 2004 through January 11, 2009; and a 9.83% increase for violations occurring on or after January 12, 2009 (1.10 x 1.1723 x 1.0983 = 1.4163)]. This is in accordance with the December 29, 2008, Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009). Resulting values were rounded to the nearest $10.

[Directive 9610.16]

Exhibit CX56

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

JAN 15 2020

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule

FROM: Susan Parker Bodine

TO: Regional Administrators
Deputy Regional Administrators
Director, Office of Civil Enforcement

The purpose of this memorandum is twofold: (1) to amend all existing civil penalty policies to account for inflation; and (2) to transmit the recently promulgated 2020 Civil Monetary Penalty Adjustment Rule (2020 Rule).[1] The 2020 Rule amends 40 C.F.R. § 19.4 to adjust the statutory civil penalties under the various environmental laws implemented by the EPA to account for inflation. The 2020 Rule was published on January 13, 2020, is effective on January 13, 2020, and is attached to this memorandum. The amendments to the EPA's penalty policies are effective on January 15, 2020. This memorandum also clarifies the differences between the EPA's statutory maximum and minimum civil penalties and the EPA's penalty policies.

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvement Act (2015 Act)[2] was signed into law on November 2, 2015, to improve the effectiveness of statutory maximum and minimum civil monetary penalties and to maintain their deterrent effect, thereby promoting compliance with the law. The 2015 Act instructed the EPA and other federal agencies to: (1) adjust the level of statutory maximum and minimum civil penalties with an initial "catch-up" rule; and (2) make subsequent annual adjustments for inflation beginning in January 2017. The 2015 Act also prescribed the formula that federal agencies must follow in making these adjustments.

[1] 85 Fed. Reg. 1751 (Jan. 13, 2020).
[2] 28 U.S.C. § 2461 note, Pub. L.114-74 (*see* https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf).

To fulfill the initial catch-up requirement, the EPA published the 2016 Civil Monetary Penalty Inflation Adjustment Rule on July 1, 2016, and it became effective on August 1, 2016.[3,4] To fulfill the second requirement of the 2015 Act requiring annual adjustments, the EPA made its first annual adjustment in January 2017,[5] its second annual adjustment in January 2018,[6] and its third annual adjustment in February 2019.[7] The 2020 Rule, effective January 13, 2020, and transmitted as an attachment to this memorandum, makes the fourth annual adjustment.

Although not required by the 2015 Act, the EPA decided to amend its penalty policies every two years and did so in 2016 and 2018 to better account for inflation going forward. While consistent with the purposes of the 2015 Act, these penalty policy amendments and the methodology used in making these amendments are not governed by, and are distinct from, the 2015 Act and the 2020 Rule. Furthermore, the 2020 Rule does not necessarily revise the penalty amounts that the EPA chooses to seek pursuant to its civil penalty policies in a particular case. The EPA's civil penalty policies, which guide enforcement personnel on how to exercise the EPA's statutory penalty authorities, take into account a number of fact-specific considerations, e.g., the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator's ability to pay.

To make the 2016 policy amendments, the EPA's Office of Enforcement and Compliance Assurance (OECA) issued a memorandum on July 27, 2016, that amended the EPA's penalty policies to account for inflation.[8] That memorandum was effective on August 1, 2016. On January 11, 2018, OECA issued a memorandum amending the EPA's penalty policies to account for inflation, effective on January 15, 2018.[9] This memorandum thus amends the EPA's penalty policies to account for inflation to date. Looking ahead, the EPA plans to amend its penalty policies to account for inflation again in January 2022, barring any significant changes in inflation.

II. Applicability of this Memorandum

This memorandum supersedes the inflation-based amendments to the EPA's penalty policies made in the 2018 memorandum, but is not intended to change the methodology used in that memorandum. This memorandum partially supersedes the EPA's 2013 inflation amendments memorandum because the

[3] The 2016 Rule was published on July 1, 2016, and became effective on August 1, 2016. 81 Fed. Reg. 43,091.
[4] Past inflation adjustment rules and past amendments to the EPA's penalty policies to account for inflation can be found here: https://www.epa.gov/enforcement/enforcement-policy-guidance-publications.
[5] The 2017 Rule was published on January 12, 2017, and became effective on January 15, 2017. 82 Fed. Reg. 3633.
[6] The 2018 Rule was published on January 10, 2018, and became effective on January 15, 2018. 83 Fed. Reg. 1190.
[7] The EPA did not meet the January 15 deadline because the Office of Federal Register was unable to publish the rule due to the lapse in appropriations from December 22, 2018, to January 25, 2019. The 2019 Rule was published on February 6, 2019, and became effective the same day. 84 Fed. Reg. 2056. A technical correction was published on February 25, 2019. 84 Fed. Reg. 5955 (February 25, 2019).
[8] The July 27, 2016 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective August 1, 2016)*.
[9] The January 11, 2018 memorandum is titled *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule*.

multipliers contained in the 2013 memorandum should still be used for violations that occurred on or before November 2, 2015.

This memorandum does not modify the EPA's Expedited Settlement Agreement penalty policies, economic benefit of noncompliance, nor does it modify the non-penalty dollar amounts in civil penalty policies, such as the amounts deemed "insignificant" or "de minimis" that apply when calculating economic benefit of noncompliance.

The penalty policies listed in Table A are the most recent narrative versions of each policy. The "narrative version" is the applicable media-specific penalty policy that comprehensively explains how the EPA enforcement practitioners should calculate penalties for purposes of administrative actions or settlements. This memorandum does not change or alter the narrative version of the media-specific penalty policies; this memorandum only alters the numerical gravity-based penalty amounts that are calculated under those policies to account for inflation.

Media enforcement programs may modify their penalty policies individually, and any such modifications may supersede application of this memorandum for that program. Practitioners should rely on the multipliers in Table A until the applicable penalty policy is modified or civil penalty policy amounts are adjusted by subsequent memorandum in accordance with inflation.

III. Amendments to the EPA's Civil Penalty Policies

Consistent with the methodology used in the January 11, 2018 penalty policy inflation amendments memorandum, the EPA is amending its penalty policies through the use of multipliers listed in Table A of this memorandum. Please note that the multipliers listed in Table A should be used for violations occurring after November 2, 2015. **For violations occurring on or before November 2, 2015, use the multipliers listed in the December 6, 2013, inflation adjustment memorandum titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*.**[10]

A. Application of Inflation Multiplier to Gravity-Based Portion of Penalty

For each violation occurring after November 2, 2015, find the applicable penalty policy in Table A and use the policy to determine the initial calculated gravity-based penalty for your case.[11] This initial gravity-based penalty will not be adjusted for inflation to reflect present value of the dollar. To adjust

[10] The December 6, 2013 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*.

[11] Most media specific penalty policies define "gravity" as the "seriousness of the violation." Each media specific penalty policy uses specific factors to calculate the gravity component. Many of these factors are taken from their respective statutes and some factors are unique to that specific penalty policy. Therefore, it is important for case teams to review each specific penalty policy to understand how the gravity component is defined and how it is calculated. The media-specific penalty policies are listed in Table A of this memorandum.

the penalty figure into present value, multiply the initial calculated gravity-based portion of the penalty by the multiplier associated with the applicable penalty policy listed in Table A. Next, round the inflation-adjusted gravity-based portion of the penalty amount to the nearest dollar.[12] Then, if applicable, calculate the gravity-based portion of the penalty for each violation occurring on or before November 2, 2015, using the applicable inflation multiplier from the guidance memorandum dated December 6, 2013. Add the gravity-based portion of the penalty for pre-November 3, 2015 violations to the gravity-based portion of the penalty for post-November 2, 2015 violations to calculate the total gravity-based penalty. Once the total gravity-based penalty has been calculated, incorporate economic benefit[13] and any other factors (e.g., ability to pay, litigation considerations, etc.) that apply as instructed by the penalty policy to arrive at the total penalty.[14]

Enforcement practitioners should apply the multipliers in Table A only to the penalty amounts adopted within the "narrative" penalty policies listed in Table A. The multipliers in Table A should not be applied to penalty policies issued after the date of this memorandum unless expressly stated in the subsequent narrative penalty policy.

B. Derivation of the Inflation Multipliers

Because the purpose of amending the EPA's penalty policies is to account for inflation since the penalty policies were last amended for inflation in the January 11, 2018 memorandum, the majority of multipliers listed in Table A were calculated by multiplying the multipliers listed in the January 11, 2018 memorandum by the inflation increase that has occurred since the January 11, 2018 memorandum.[15]

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[12] We are instructing case teams to round to the nearest dollar because this was the approach taken in the 2015 Act, the EPA's penalty inflation memoranda from July 27, 2016, and January 11, 2018, and the Office of Management and Budget's (OMB) February 24, 2016, December 15, 2017, and December 14, 2018 memoranda that instructed federal agencies how to implement the 2016 Rule, 2018 Rule, and 2019 Rule, respectively.

[13] We are not modifying the long-standing approach of calculating economic benefit separately from the gravity-based amount, because economic benefit calculations already take inflation into account. The inflation adjustments in this guidance only apply to the gravity-based portion of the penalty.

[14] If the total penalty amount calculated is greater than the statutory maximum amount, then the statutory maximum amount would apply. Similarly, the entire penalty sought (including economic benefit) in an administrative enforcement action cannot exceed any applicable administrative penalty caps. Note that penalty amounts greater than those calculated using the EPA penalty policies and this memorandum may be appropriate in limited circumstances. For example, in a formal administrative enforcement context, the EPA may seek, and presiding officers or the Environmental Appeals Board may assess, higher penalties provided such amounts do not exceed the statutory maximum, are in accordance with statutory civil penalty factors, and consider applicable civil penalty guidelines, and provided that any deviations from applicable penalty policies are persuasively and convincingly explained. *See, e.g.*, 40 C.F.R. § 22.27(b) and *In Re Morton L. Friedman & Schmitt Construction Company*, 11 E.A.D. 302 (EAB 2004).

[15] In the January 11, 2018 memorandum, most of the multipliers were calculated using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U) from the date the penalty policy was issued through October 2017. Consistent with that methodology, the multipliers listed in Table A of this memorandum were calculated by multiplying the multipliers from the January 11, 2018 memorandum by the CPI-U increase from October 2017 to October 2019. We used the October 2019 CPI-U because this CPI-U was used to calculate the statutory increases in the 2020 Rule. The October 2019 CPI-U was 257.346 and the October 2017 CPI-U was 246.663, yielding an increase of 1.04331. However, several multipliers in Table A do not follow this general calculation framework, such as CWA section 311 (*see infra* note 20), CAA Stationary

IV. 2020 Rule and the Newly Adjusted Statutory Maximum and Minimum Amounts

The 2020 Rule was promulgated to fulfill the annual statutory maximum and minimum inflation adjustment requirement in the 2015 Act. As instructed by the 2015 Act and as explained in the 2020 Rule, the EPA calculated the new penalty amounts by multiplying the cost-of-living multiplier[16] by the previous statutory penalty amount as adjusted by the 2019 Rule. The result is the amount listed in the third column in Table 1 of 40 C.F.R. § 19.4 and the 2020 Rule. This amount applies to violations occurring after November 2, 2015, and assessed on or after January 13, 2020.

A. Penalty Pleading in Administrative Litigation

Where the EPA decides to cite the statutory maximum and/or minimum penalty amount in an administrative pleading (such as in an administrative complaint), the applicable statutory maximum and/or minimum penalty amount in effect for the violations should be used.[17] The EPA should cite the statutory maximum and minimum penalty provisions and 40 C.F.R. § 19.4, along with the applicable inflation-adjusted penalty maximum levels set forth in 40 C.F.R. § 19.4. Multiple penalty-adjustment cycles should only be used when violations occurred on or before November 2, 2015 and after November 2, 2015. If this arises, the EPA should cite each applicable penalty-adjustment cycle and the corresponding penalty amount. Particularly where violations have occurred both after November 2, 2015, and before such date, case teams also may find it helpful to state that the statutory maximum and minimum civil penalty level has been adjusted over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996, and most recently, by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L.114-74, Section 701).

B. Statutory Administrative Penalty Caps

Note that, effective January 13, 2020, where the EPA seeks administrative penalties in a complaint, amended complaint, or through a settlement under 40 C.F.R. § 22.18, the increased administrative penalty caps in Table 1 of § 19.4 in the attached 2020 Rule apply if *some or all* of the violations occurred after November 2, 2015. The lower administrative penalty caps in Table 2 of § 19.4 apply if *all* violations occurred on or before November 2, 2015.

Source Appendix IV (*see infra* note 22), RCRA section 7003(b) (*see infra* note 23), Underground Storage Tanks (*see infra* note 24), CERCLA section 106(b) (*see infra* note 25), and TSCA Section 1018 Disclosure Rule (*see infra* note 31).

[16] The statutory cost-of-living adjustment multiplier is the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2019 exceeds the CPI-U for the month of October 2018. The October 2019 CPI-U was 257.346 and the October 2018 CPI-U was 252.885 yielding an increase of 1.01764.

[17] If a respondent/defendant challenges the validity of any statutory maximum penalty amount, as adjusted in 40 C.F.R. Part 19, please notify the Office of Civil Enforcement of the challenge, so that OECA, the Region and the U.S. Department of Justice, as appropriate, can coordinate our response before it is filed.

V. Multiple Penalty Cycles – Case Team Discretion

If the time period between seeking a penalty (through settlement or litigation) and the final penalty assessment[18] covers more than one penalty-adjustment cycle (for example, where a complaint is filed on December 15, 2018, but the final penalty order is not filed with the Hearing Clerk until April 1, 2020), the case team would have discretion to modify the penalty amount sought (for example, to be consistent with the penalty amounts in the most recent annual inflation adjustment rule or guidance). But such modifications would *not* be expected where doing so would be:

a. unnecessary to achieve sufficient deterrence; and

b. *either* inappropriately disruptive[19] *or* contrary to principles of judicial economy (for example, where the case has already gone to hearing based on previous penalty amounts).

In a settlement context, if defendants or respondents have signed a consent decree or consent agreement, the EPA would not expect the case team to renegotiate the penalty amount due to subsequent inflation adjustments. Prior to any such formal written settlement commitment (for example, where the parties may have reached an agreement in principle), case teams have discretion to decide whether to modify their penalty demand due to subsequent inflation adjustments (for example, depending on how far along the negotiations have progressed, the likely impact of an increased penalty on negotiations, the case team's evaluation of the likelihood that any informal agreements will not be consummated, and/or other factors).

VI. Further Information

Our goal in issuing this guidance is to make these penalty policy modifications easy to implement, but if you have any questions concerning this memorandum, please contact David Smith-Watts of the Office of Civil Enforcement at (202) 564-4083 or by email at smith-watts.david@epa.gov.

cc: Lawrence Starfield, Principal Deputy Assistant Administrator, OECA
John Irving, Deputy Assistant Administrator, OECA
Regional Counsel and Deputies
ECAD Directors and Deputies
Enforcement Coordinators
All OECA Employees

[18] Note that enforcement personnel can only *seek* penalties. *Assessment* of penalties is effective in a formal administrative action once a final penalty order is filed with the Hearing Clerk, 40 C.F.R. §§ 22.31 and 22.6, or in civil judicial cases once the court enters a consent decree or issues a judgment awarding penalties.

[19] Such disruptive impacts could be to settlement negotiations, or to other case-related enforcement efforts such as by creating an additional burden on the EPA's resources. If the EPA has not made a penalty demand or offer, a disruptive impact on negotiations is less likely where the penalty is recalculated to be consistent with the most recent inflation-adjustment amounts. It is possible, however, that a recalculation would be unduly burdensome and disruptive to the case team's efforts where, for example, there are an extremely large number of violations, the penalty calculation is complex, and/or where contractor resources are needed to perform such a calculation. In such circumstances, the case team would have discretion to determine that recalculating the penalty is not warranted even though the EPA has not yet made a penalty demand or offer.

Tom Mariani, Chief, DOJ-EES
Deputy and Assistant Chiefs, DOJ-EES
Environmental Appeals Board Judges
Susan Biro, Chief Administrative Law Judge
Regional Judicial Officers

Attachments (2)

1. Table A: Chart Reflecting Inflation Adjustment Multipliers
2. Rule promulgated in the *Federal Register* on January 13, 2020

Table A: Chart Reflecting Penalty Policy Inflation Adjustment Multipliers

Applicable Penalty Policy	Year Issued	Inflation Adjustment Multiplier as of January 15, 2020
CWA		
Interim Clean Water Act Settlement Penalty Policy	1995	1.67435
Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act	1998	1.56919 [20]
CWA Section 404 Settlement Penalty Policy	2001	1.44821
Supplemental Guidance to the Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) for Violations of the Construction Stormwater Requirements	2008	1.18827
Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of the Industrial Stormwater Requirements	2016	1.08203 [21]
SDWA		
UIC Program Judicial and Administrative Order Settlement Penalty Policy	1993	1.76628

[20] Case teams should apply the 1990 CPI multiplier of 1.92769 to the per-barrel discharge penalty amounts in the last column of the penalty matrix on page 11. This is an appropriate multiplier because such civil penalties under CWA § 311(b)(7)(A) & (D) concern environmental exposure (*i.e.*, the discharge of oil and hazardous substances), and because the per-barrel penalty matrix column contained in the 1998 penalty policy reflects the statutory maximum penalty amounts in effect when this penalty authority was enacted in 1990. It is important for the penalty matrix to retain a maximum per-barrel penalty policy amount that equals the current statutory maximum and to increase the other penalty policy matrix cells proportionally by the same inflation adjustment multiplier.

[21] Case teams should apply this multiplier to this 2016 penalty policy and also to the 2018 Supplemental Amendment, which applies to industrial stormwater cases. The narrative contained in the 2018 Supplemental Amendment continues to be applicable, but the 1.02168 multiplier referenced throughout is no longer applicable because it has been superseded by the 1.08203 multiplier.

New Public Water System Supervision Program Settlement Penalty Policy	1994	1.72139
CAA – Accidental Release Prevention/Risk Management Program		
Final Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68	2012	1.11253
CAA – Stationary Source		
Clean Air Act Stationary Source Civil Penalty Policy	1991	1.87298
Appendix I – Penalty Policy for Violation of Permit Requirements	1987	2.23198
Appendix II - Vinyl Chloride Civil Penalty Policy	1985	2.36750
Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy	1992	1.81486
Appendix IV - Clean Air Act Penalty Policy as Applied to Stationary Sources of Volatile Organic Compounds (VOC) Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance	1987	1.87298 [22]
Appendix VI - Leak Detection and Repair Penalty Policy	2012	1.11253
Appendix VII – Penalty Policy for New Residential Wood Heaters	1989	2.04894

[22] For violations governed by Appendix IV, the EPA is using the same multiplier that applies to the 1991 "*Clean Air Act Stationary Source Civil Penalty Policy*" because the gravity-based component of such violations is calculated using the 1991 policy.

Appendix VIII - Clean Air Act Civil Penalty Policy Applicable to Persons Who Manufacture or Import Controlled Substances in Amounts Exceeding Allowances Properly Held Under 40 C.F.R. Part 82: Protection of Stratospheric Ozone	1990	1.92770
Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners	1993	1.76628
Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant	1994	1.72139
Appendix XI - National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements	2007	1.23170
EPA Region 10's Civil Penalty Guidelines for the Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington. 40 C.F.R. Part 49	2008	1.18827
CAA – Mobile Source		
Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements	2009	1.19045
Clean Air Act Mobile Source Fuels Civil Penalty Policy Title II of the Clean Air Act --40 C.F.R. Part 80 Fuels Standards Requirements	2016	1.08203

North American and U.S. Caribbean Sea Emissions Control Areas Penalty Policy for Violations by Ships of the Sulfur in Fuel Standard and Related Provisions	2015	1.08203
Civil Penalty Policy for Administrative Hearings	1993	1.76628
RCRA		
RCRA Civil Penalty Policy	2003	1.60451
Guidance on the Use of Section 7003 of RCRA	1997	2.75873 [23]
Interim Consolidated Enforcement Penalty Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA Pilot	2018	1.01764 [24]
CERCLA		
Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders	1997	2.12102 [25]

[23] For RCRA section 7003(b) penalties, the EPA calculated this multiplier by dividing the 2020 statutory maximum of $15,173 by $5,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

[24] Case teams should calculate the gravity-based portion of the penalty using the penalty amounts in the 2018 Interim Consolidated Penalty Policy. For narrative instructions only, case teams should use the 1990 U.S. EPA Penalty Guidance for Violations for UST Regulations when calculating standard UST penalties and use the 1993 Guidance on Field Citations Enforcement narrative guidance on issuing field citations. The EPA calculated the multiplier of 1.01764 by dividing the October 2019 CPI-U of 257.346 by the October 2018 CPI-U of 252.885, because the penalty values in the 2018 Interim Consolidated Penalty Policy were last updated in October 2018. Please note that the inflation multiplier of 1.01764 should not be applied to the Expedited Settlement Agreement (ESA) penalty amounts in the 2018 Policy. As stated in Section II. of this memorandum, this memorandum does not modify ESA penalty policies.

[25] For CERCLA section 106(b)(1) penalties, the EPA calculated this multiplier by dividing the 2020 statutory maximum of $58,328 by $27,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

CERCLA & EPCRA		
Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act	1999	1.53001
EPCRA		
Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), February 24, 2017 (Amended)	2017	1.08203 [26]
FIFRA		
FIFRA Enforcement Response Policy (FIFRA ERP)	2009	1.19045
Appendix E to FIFRA ERP - Enforcement Response Policy for FIFRA Section 7(c): Establishment Reporting Requirements	2010	Use the 2009 FIFRA ERP and the 1.19045 multiplier
Appendix F to FIFRA ERP - Interim Final Penalty Policy for the Worker Protection Standard	1997	Use the 2009 FIFRA ERP and the 1.19045 multiplier
Appendix G to FIFRA ERP - Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act Good Laboratory Practice (GLP) Regulations	1991	Use the 2009 FIFRA ERP and the 1.19045 multiplier
Appendix H to the FIFRA ERP - Enforcement Response Policy for the FIFRA Pesticide Container/Containment Regulations	2012	Use the 2009 FIFRA ERP and the 1.19045 multiplier

[26] Case teams should apply the multiplier of 1.08203 to the second matrix on page 11 of the Policy. This multiplier should not be applied to the first matrix on page 11 of the Policy.

TSCA		
Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substance Control Act	1980	1.62304
Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12, and 13	1999	1.62304 [27]
Amendment to the TSCA Section 5 Enforcement Response Policy – Penalty Limit for Untimely NOC Submissions	1993	1.62304 [28]
Enforcement Response Policy for TSCA §4 Test Rules	1986	1.62304
Final TSCA GLP Enforcement Response Policy	1985	1.62304
TSCA – Asbestos		
Enforcement Response Policy for the Asbestos Model Accreditation Plan (MAP) – Addendum to the AHERA ERP	1998	1.56919
Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act	1989	2.04894
Enforcement Response Policy for Asbestos Abatement Projects: Worker Protection Rule	1989	1.62304

[27] The "Penalty Matrix For Violations Occurring After January 30, 1997" on page 8 of this policy should be ignored. For all violations governed by this policy, the multiplier should be applied to the penalty amounts in the "Penalty Matrix For Violations Occurring On or Before January 30, 1997" found on the same page.
[28] Note that this Amendment from July 1, 1993 amends the June 8, 1989 policy titled "Amendment TSCA Section 5 Enforcement Response Policy." The multiplier of 1.62304 applies to both the 1993 amendment and 1989 policy.

TSCA – Lead-Based Paint		
Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education (PRE) Rule; Renovation, Repair and Painting (RRP) Rule; and Lead-Based Paint Activities (LBPA) Rule	2013 [29]	1.08203 [30]
Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy	2007	1.64990 [31]
TSCA – PCBs		
Polychlorinated Biphenyls (PCB) Penalty Policy	1990	1.62304

[29] Appendix B-2 was updated in April 2013 within the April 2010 Policy.

[30] The 2010 *"Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule"* and the 2007 *"Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy"* both penalize violators who fail to provide and document receipt of certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for essentially the same type of deficiency, we have adopted the penalty matrix from the 2007 Section 1018 Disclosure Rule penalty policy in the Pre-Renovation Education Rule component of the 2010 Consolidated Lead-Based Paint penalty policy. Therefore, Level "a" penalties apply to violations of the Lead-Based Paint Renovation, Repair and Painting Rule and the Lead-Based Paint Activities (Abatement) Rule. Level "b" penalties are derived from the current Section 1018 Lead-Based Paint Disclosure Rule matrix because the major activities of the Disclosure Rule and Pre-renovation Education Rule are very similar. Therefore, under this Policy, Level "b" penalties apply to violations of the Pre-Renovation Education Rule.

[31] For TSCA section 1018 penalties, the EPA calculated this multiplier by dividing the 2020 statutory maximum of $18,149 by $11,000, which is the maximum amount set forth in the 2007 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

* * * Payment of this fee does not apply to mailers who present only qualified full-service flat-size mailings (under 705.23.3.1a).

* * * * *

500 Additional Services

* * * * *

508 Recipient Services

* * * * *

4.0 Post Office Box Service

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4.4 Basis of Fees and Payment

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4.4.2 Fee Changes

[Revise the second sentence of 4.4.2; to read as follows:]

* * * In addition, the USPS may assign a fee group to a new ZIP Code, may reassign one or more 5-digit ZIP Codes to the next higher or lower fee group based on the ZIP Codes' cost and market characteristics, or may regroup 5-digit ZIP Codes.* * *

* * * * *

5.0 Caller Service

* * * * *

5.5 Basis of Fees and Payment

* * * * *

5.5.3 Fee Changes

[Revise the text of 5.5.3 by adding new last sentence; to read as follows:]

* * * In addition, the USPS may assign a fee group to a new ZIP Code, may reassign one or more 5-digit ZIP Codes to the next higher or lower fee group based on the ZIP Codes' cost and market characteristics, or may regroup 5-digit ZIP Codes.

* * * * *

700 Special Standards

* * * * *

705 Advanced Preparation and Special Postage Payment Systems

* * * * *

22.0 Seamless Acceptance Program

* * * * *

22.3 Basic Standards

[Revise the introductory text of 22.3, by adding new second and third sentences to read as follows:]

* * * Any permits used in a Seamless acceptance mailing will not prevent that mailing from being finalized regardless of if an annual fee is due on that permit. However, the first time the permit is used for a non-seamless mailing the mailer will have to pay the permit fee if they do not meet the requirements for a fee waiver.* * *

* * * * *

23.0 Full-Service Automation Option

* * * * *

23.2 General Eligibility Standards

[Revise the first sentence of the introductory text of 23.2; to read as follows:]

First-Class Mail (FCM), Periodicals, and USPS Marketing Mail, cards (FCM only), letters (except letters using simplified address format) and flats meeting eligibility requirements for automation or carrier route prices (except for USPS Marketing Mail ECR saturation flats), and Bound Printed Matter presorted or carrier route barcoded flats, are potentially eligible for full-service incentives.* * *

23.3 Fees

[Revise the title of 23.3.1; to read as follows:]

23.3.1 Eligibility for Exception to Payment of Annual Fees and Waiver of Deposit of Permit Imprint Mail Restrictions

[Revise the introductory text of 23.3.1; to read as follows:]

Mailers who present automation or presort mailings (of First-Class Mail cards, letters, and flats, USPS Marketing Mail letters and flats, or Bound Printed Matter flats) that contain 90 percent or more full-service eligible mail as full-service, and 75 percent of their total mail is eligible for full-service incentives, are eligible for the following exception to standards:

[Revise the text of item 23.3.1a; to read as follows:]

a. Annual presort mailing or destination entry fees, as applicable, do not apply to mailings entered by mailers who meet both the 90 percent and 75 percent full-service thresholds, for qualified full-service mailings, as specified in 23.3.1.* * *

* * * * *

Notice 123 (Price List)

[Revise prices as applicable.]

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Joshua J. Hofer,

Attorney, Federal Compliance.

[FR Doc. 2019–28488 Filed 1–10–20; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–10003–77–OECA]

Civil Monetary Penalty Inflation Adjustment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating this final rule to adjust the level of the maximum (and minimum) statutory civil monetary penalty amounts under the statutes the EPA administers. This action is mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (''the 2015 Act''). The 2015 Act prescribes a formula for annually adjusting the statutory maximum (and minimum) amount of civil penalties to reflect inflation, maintain the deterrent effect of statutory civil penalties, and promote compliance with the law. The rule does not necessarily revise the penalty amounts that the EPA chooses to seek pursuant to its civil penalty policies in a particular case. The EPA's civil penalty policies, which guide enforcement personnel on how to exercise the EPA's statutory penalty authorities, take into account a number of fact-specific considerations, *e.g.,* the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator's ability to pay.

DATES: This final rule is effective January 13, 2020.

FOR FURTHER INFORMATION CONTACT: David Smith-Watts, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, Mail Code 2241A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, telephone number: (202) 564–4083; *smith-watts.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Since 1996, Federal agencies have been required to issue regulations adjusting for inflation the statutory civil penalties [1] that can be imposed under

[1] The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461 note, defines ''civil monetary penalty'' as any penalty, fine, or other sanction that—(1)(i) is for a

Continued

the laws administered by that agency. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (DCIA), required agencies to review their statutory civil penalties every 4 years, and to adjust the statutory civil penalty amounts for inflation if the increase met the DCIA's adjustment methodology. In accordance with the DCIA, the EPA reviewed and, as appropriate, adjusted the civil penalty levels under each of the statutes the agency implements in 1996 (61 FR 69360), 2004 (69 FR 7121), 2008 (73 FR 75340), and 2013 (78 FR 66643).

The 2015 Act[2] required each Federal agency to adjust the level of statutory civil penalties under the laws implemented by that agency with an initial ''catch-up'' adjustment through an interim final rulemaking. The 2015 Act also required Federal agencies, beginning on January 15, 2017, to make subsequent annual adjustments for inflation. Section 4 of the 2015 Act requires each Federal agency to publish these annual adjustments by January 15 of each year. The purpose of the 2015 Act is to maintain the deterrent effect of civil penalties by translating originally enacted statutory civil penalty amounts to today's dollars and rounding statutory civil penalties to the nearest dollar.

As required by the 2015 Act, the EPA issued a catch-up rule on July 1, 2016, which was effective August 1, 2016 (81 FR 43091). The EPA made its first annual adjustment on January 12, 2017, which was effective on January 15, 2017 (82 FR 3633). The EPA made its second annual adjustment on January 10, 2018, which was effective on January 15, 2018 (83 FR 1190). The EPA made its third annual adjustment on February 6, 2019 (84 FR 2056) and issued a subsequent correction on February 25, 2019 (84 FR 5955). This rule implements the fourth annual adjustment mandated by the 2015 Act.

The 2015 Act provides a formula for calculating the adjustments. Each statutory maximum and minimum[3] civil monetary penalty as currently adjusted is multiplied by the cost-of-living adjustment multiplier, which is the percentage by which the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October 2019 exceeds the CPI–U for the month of October 2018.[4]

With this rule, the new statutory maximum and minimum penalty levels listed in the third column of Table 1 of 40 CFR 19.4 will apply to all civil penalties assessed on or after January 13, 2020, for violations that occurred after November 2, 2015, the date the 2015 Act was enacted. The former maximum and minimum statutory civil penalty levels, which are in the fourth column of Table 1 to 40 CFR 19.4, will now apply only to violations that occurred after November 2, 2015, where the penalties were assessed on or after February 6, 2019, but before January 13, 2020. The statutory civil penalty levels that apply to violations that occurred on or before November 2, 2015, are codified at Table 2 to 40 CFR 19.4.[5] The fifth column of Table 1 and the seventh column of Table 2 display the statutory civil penalty levels as originally enacted.

The formula for determining the cost-of-living or inflation adjustment to statutory civil penalties consists of the following steps:

Step 1: The cost-of-living adjustment multiplier for 2020 is the percentage by which the CPI–U of October 2019 (257.346) exceeds the CPI–U for the month of October 2018 (252.885), which is 1.01764.[6] Multiply 1.01764 by the current penalty amount. This is the raw adjusted penalty value.

Step 2: Round the raw adjusted penalty value. Section 5 of the 2015 Act states that any adjustment shall be rounded to the nearest multiple of $1. The result is the final penalty value for the year.

II. The 2015 Act Requires Federal Agencies To Publish Annual Penalty Inflation Adjustments Notwithstanding Section 553 of the Administrative Procedures Act

Pursuant to section 4 of the 2015 Act, each Federal agency is required to publish annual adjustments no later than January 15 each year. In accordance with section 553 of the Administrative Procedures Act (APA), most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the **Federal Register**. However, Section 4(b)(2) of the 2015 Act provides that each agency shall make the annual inflation adjustments ''notwithstanding section 553'' of the APA. Consistent with the language of the 2015 Act, this rule is not subject to notice and an opportunity for public comment and will be effective on January 13, 2020.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to OMB for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule merely increases the level of statutory civil penalties that can be imposed in the context of a Federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

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specific monetary amount as provided by Federal law; or (ii) has a maximum amount provided for by Federal law; and (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

[2] The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74) was signed into law on Nov. 2, 2015, and further amended the Federal Civil Penalties Inflation Adjustment Act of 1990.

[3] Under Section 3(2)(A) of the 2015 Act, ''civil monetary penalty'' means ''a specific monetary amount as provided by Federal law''; or ''has a maximum amount provided for by Federal law.'' EPA-administered statutes generally refer to statutory maximum penalties, with the following exceptions: Section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), refers to a minimum penalty of ''not less than $100,000 . . .''; Section 104B(d)(1) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1414b(d)(1), refers to an exact penalty of $600 ''[f]or each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in calendar year 1992 . . .''; and Section 325(d)(1) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11045(d)(1), refers to an exact civil penalty of $25,000 for each frivolous trade secret claim.

[4] Current and historical CPI–U's can be found on the Bureau of Labor Statistics' website here: *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201910.pdf.*

[5] With this rule, for ease of reference, the order of the Tables and the columns within each Table are now presented in reverse chronological order.

[6] Section 5(b) of the 2015 Act provides that the term ''cost-of-living adjustment'' means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

(2) the Consumer Price Index for the month of October 1 year before the month of October referred to in paragraph (2).

Because the CPI–U for October 2019 is 257.346 and the CPI–U for October 2018 is 252.885, the cost-of-living multiplier is 1.01764 (257.346 divided by 252.885).

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. Because the 2015 Act directs Federal agencies to publish this rule notwithstanding section 553 of the APA, this rule is not subject to notice and comment requirements or the RFA.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action is required by the 2015 Act, without the exercise of any policy discretion by the EPA. This action also imposes no enforceable duty on any state, local or tribal governments or the private sector. Because the calculation of any increase is formula-driven pursuant to the 2015 Act, the EPA has no policy discretion to vary the amount of the adjustment.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have a substantial direct effect on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175.

This rule merely reconciles the real value of current statutory civil penalty levels to reflect and keep pace with the levels originally set by Congress when the statutes were enacted. The calculation of the increases is formula-driven and prescribed by statute, and the EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, this rule will not have a substantial direct effect on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

The rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. Rather, this action is mandated by the 2015 Act, which prescribes a formula for adjusting statutory civil penalties on an annual basis to reflect inflation.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA finds that the APA's notice and comment rulemaking procedures are unnecessary because the 2015 Act directs Federal agencies to publish their annual penalty inflation adjustments ''notwithstanding section 553 [of the APA].''

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: December 19, 2019.

Andrew R. Wheeler,

Administrator.

For the reasons set out in the preamble, the EPA amends title 40, chapter I, part 19 of the Code of Federal Regulations as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104–134, title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub. L. 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

(a) The statutory civil penalty levels set forth in the third column of Table 1 of § 19.4 apply to all violations which occur or occurred after November 2, 2015, where the penalties are assessed on or after January 13, 2020. The statutory civil penalty levels set forth in the fourth column of Table 1 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after February 6, 2019 but before January 13, 2020.

(b) The statutory penalty levels in the third column of Table 2 to § 19.4 apply to all violations which occurred after December 6, 2013 through November 2, 2015, and to violations occurring after November 2, 2015, where penalties were assessed before August 1, 2016. The statutory civil penalty levels set forth in the fourth column of Table 2 of § 19.4 apply to all violations which occurred after January 12, 2009 through December 6, 2013. The statutory civil penalty levels set forth in the fifth column of Table 2 of § 19.4 apply to all violations which occurred after March 15, 2004 through January 12, 2009. The statutory civil penalty levels set forth in the sixth column of Table 2 of § 19.4 apply to all violations which occurred after January 30, 1997 through March 15, 2004.

■ 3. Revise § 19.4 to read as follows:

§ 19.4 Statutory civil penalties, as adjusted for inflation, and tables.

Table 1 of this section sets out the statutory civil penalty provisions of statutes administered by the EPA, with the third column setting out the latest operative statutory civil penalty levels for violations that occur or occurred after November 2, 2015, where penalties

are assessed on or after January 13, 2020. The fourth column displays the operative statutory civil penalty levels where penalties were assessed on or after February 6, 2019, but before January 13, 2020. Table 2 of this section sets out the statutory civil penalty provision of statutes administered by the EPA, with the operative statutory civil penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015, and for violations that occurred after November 2, 2015, where penalties were assessed before August 1, 2016.

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Environmental statute	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after February 6, 2019 but before January 13, 2020	Statutory civil penalties, as enacted
7 U.S.C. 136*l*(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$20,288	$19,936	$5,000
7 U.S.C. 136*l*(a)(2) [1]	FIFRA	2,976/1,917/2,976	2,924/1,884/2,924	1,000/500/1,000
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	40,576	39,873	25,000
15 U.S.C. 2647(a)	TSCA	11,665	11,463	5,000
15 U.S.C. 2647(g)	TSCA	9,639	9,472	5,000
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	11,665	11,463	5,000
31 U.S.C. 3802(a)(2)	PFCRA	11,665	11,463	5,000
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	55,800	54,833	25,000
33 U.S.C. 1319(g)(2)(A)	CWA	22,320/55,800	21,933/54,833	10,000/25,000
33 U.S.C. 1319(g)(2)(B)	CWA	22,320/278,995	21,933/274,159	10,000/125,000
33 U.S.C. 1321(b)(6)(B)(i)	CWA	19,277/48,192	18,943/47,357	10,000/25,000
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	19,277/240,960	18,943/236,783	10,000/125,000
33 U.S.C. 1321(b)(7)(A)	CWA	48,192/1,928	47,357/1,895	25,000/1,000
33 U.S.C. 1321(b)(7)(B)	CWA	48,192	47,357	25,000
33 U.S.C. 1321(b)(7)(C)	CWA	48,192	47,357	25,000
33 U.S.C. 1321(b)(7)(D)	CWA	192,768/5,783	189,427/5,683	100,000/3,000
33 U.S.C. 1414b(d)(1)	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	1,284	1,262	600
33 U.S.C. 1415(a)	MPRSA	202,878/267,621	199,361/262,982	50,000/125,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	14,791/36,975	14,535/36,334	10,000/25,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(B)).	CACSO	14,791/184,874	14,535/181,669	10,000/125,000
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	36,975	36,334	25,000
33 U.S.C. 1908(b)(1)	ACT TO PREVENT POLLUTION FROM SHIPS (APPS).	75,867	74,552	25,000
33 U.S.C. 1908(b)(2)	APPS	15,173	14,910	5,000
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA).	58,328	57,317	25,000
42 U.S.C. 300g–3(g)(3)(A)	SDWA	58,328	57,317	25,000
42 U.S.C. 300g–3(g)(3)(B)	SDWA	11,665/40,640	11,463/39,936	5,000/25,000
42 U.S.C. 300g–3(g)(3)(C)	SDWA	40,640	39,936	25,000
42 U.S.C. 300h–2(b)(1)	SDWA	58,328	57,317	25,000
42 U.S.C. 300h–2(c)(1)	SDWA	23,331/291,641	22,927/286,586	10,000/125,000
42 U.S.C. 300h–2(c)(2)	SDWA	11,665/291,641	11,463/286,586	5,000/125,000
42 U.S.C. 300h–3(c)	SDWA	20,288/43,280	19,936/42,530	5,000/10,000
42 U.S.C. 300i(b)	SDWA	24,386	23,963	15,000
42 U.S.C. 300i–1(c)	SDWA	141,943/1,419,442	139,483/1,394,837	100,000/1,000,000
42 U.S.C. 300j(e)(2)	SDWA	10,143	9,967	2,500
42 U.S.C. 300j–4(c)	SDWA	58,328	57,317	25,000
42 U.S.C. 300j–6(b)(2)	SDWA	40,640	39,936	25,000
42 U.S.C. 300j–23(d)	SDWA	10,705/107,050	10,519/105,194	5,000/50,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	18,149	17,834	10,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972.	38,352	37,687	10,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	101,439	99,681	25,000

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020	Statutory civil penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after February 6, 2019 but before January 13, 2020	Statutory civil penalties, as enacted
42 U.S.C. 6928(c)	RCRA	61,098	60,039	25,000
42 U.S.C. 6928(g)	RCRA	75,867	74,552	25,000
42 U.S.C. 6928(h)(2)	RCRA	61,098	60,039	25,000
42 U.S.C. 6934(e)	RCRA	15,173	14,910	5,000
42 U.S.C. 6973(b)	RCRA	15,173	14,910	5,000
42 U.S.C. 6991e(a)(3)	RCRA	61,098	60,039	25,000
42 U.S.C. 6991e(d)(1)	RCRA	24,441	24,017	10,000
42 U.S.C. 6991e(d)(2)	RCRA	24,441	24,017	10,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	101,439	99,681	25,000
42 U.S.C. 7413(d)(1)	CAA	48,192/385,535	47,357/378,852	25,000/200,000
42 U.S.C. 7413(d)(3)	CAA	9,639	9,472	5,000
42 U.S.C. 7524(a)	CAA	48,192/4,819	47,357/4,735	25,000/2,500
42 U.S.C. 7524(c)(1)	CAA	385,535	378,852	200,000
42 U.S.C. 7545(d)(1)	CAA	48,192	47,357	25,000
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	58,328	57,317	25,000
42 U.S.C. 9606(b)(1)	CERCLA	58,328	57,317	25,000
42 U.S.C. 9609(a)(1)	CERCLA	58,328	57,317	25,000
42 U.S.C. 9609(b)	CERCLA	58,328/174,985	57,317/171,952	25,000/75,000
42 U.S.C. 9609(c)	CERCLA	58,328/174,985	57,317/171,952	25,000/75,000
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).	58,328	57,317	25,000
42 U.S.C. 11045(b)(1)(A)	EPCRA	58,328	57,317	25,000
42 U.S.C. 11045(b)(2)	EPCRA	58,328/174,985	57,317/171,952	25,000/75,000
42 U.S.C. 11045(b)(3)	EPCRA	58,328/174,985	57,317/171,952	25,000/75,000
42 U.S.C. 11045(c)(1)	EPCRA	58,328	57,317	25,000
42 U.S.C. 11045(c)(2)	EPCRA	23,331	22,927	10,000
42 U.S.C. 11045(d)(1)	EPCRA	58,328	57,317	25,000
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	16,258	15,976	10,000
42 U.S.C. 14304(g)	BATTERY ACT	16,258	15,976	10,000

[1] Note that 7 U.S.C. 136*l*(a)(2) contains three separate statutory maximum civil penalty provisions. The first mention of $1,000 and the $500 statutory maximum civil penalty amount were originally enacted in 1978 (Pub. L. 95–396), and the second mention of $1,000 was enacted in 1972 (Pub. L. 92–516).

TABLE 2 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Environmental statute	Statutory civil penalties for violations after December 6, 2013 through November 2, 2015, or assessed before August 1, 2016	Statutory civil penalties for violations after January 12, 2009 through December 6, 2013	Statutory civil penalties for violations after March 15, 2004 through January 12, 2009	Statutory civil penalties for violations after January 30, 1997 through March 15, 2004	Statutory civil penalties, as enacted
7 U.S.C. 136*l*(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$7,500	$7,500	$6,500	$5,500	$5,000
7 U.S.C. 136*l*(a)(2)	FIFRA	750/1,100	750/1,100	650/1,100	550/1,000	500/1,000
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	37,500	37,500	32,500	27,500	25,000
15 U.S.C. 2647(a)	TSCA	7,500	7,500	6,500	5,500	5,000
15 U.S.C. 2647(g)	TSCA	7,500	7,500	5,500	5,000	5,000
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	7,500	7,500	6,500	5,500	5,000

TABLE 2 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil penalties for violations after December 6, 2013 through November 2, 2015, or assessed before August 1, 2016	Statutory civil penalties for violations after January 12, 2009 through December 6, 2013	Statutory civil penalties for violations after March 15, 2004 through January 12, 2009	Statutory civil penalties for violations after January 30, 1997 through March 15, 2004	Statutory civil penalties, as enacted
31 U.S.C. 3802(a)(2)	PFCRA	7,500	7,500	6,500	5,500	5,000
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA).	37,500	37,500	32,500	27,500	25,000
33 U.S.C. 1319(g)(2)(A)	CWA	16,000/37,500	16,000/37,500	11,000/32,500	11,000/27,500	10,000/25,000
33 U.S.C. 1319(g)(2)(B)	CWA	16,000/187,500	16,000/177,500	11,000/157,500	11,000/137,500	10,000/125,000
33 U.S.C. 1321(b)(6)(B)(i)	CWA	16,000/37,500	16,000/37,500	11,000/32,500	11,000/27,500	10,000/25,000
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	16,000/187,500	16,000/177,500	11,000/157,500	11,000/137,500	10,000/125,000
33 U.S.C. 1321(b)(7)(A)	CWA	37,500/2,100	37,500/1,100	32,500/1,100	27,500/1,100	25,000/1,000
33 U.S.C. 1321(b)(7)(B)	CWA	37,500	37,500	32,500	27,500	25,000
33 U.S.C. 1321(b)(7)(C)	CWA	37,500	37,500	32,500	27,500	25,000
33 U.S.C. 1321(b)(7)(D)	CWA	150,000/5,300	140,000/4,300	130,000/4,300	110,000/3,300	100,000/3,000
33 U.S.C. 1414b(d)(1) [1]	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	860	860	760	660	600
33 U.S.C. 1415(a)	MPRSA	75,000/187,500	70,000/177,500	65,000/157,500	55,000/137,500	50,000/125,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	11,000/27,500	11,000/27,500	10,000/25,000	10,000/[2] 25,000	10,000/25,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(B)).	CACSO	11,000/147,500	11,000/137,500	10,000/125,000	10,000/125,000	10,000/125,000
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	27,500	27,500	25,000	25,000	25,000
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA).	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 300g–3(g)(3)(A)	SDWA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 300g–3(g)(3)(B)	SDWA	7,000/32,500	7,000/32,500	6,000/27,500	5,000/25,000	5,000/25,000
42 U.S.C. 300g–3(g)(3)(C)	SDWA	32,500	32,500	27,500	25,000	25,000
42 U.S.C. 300h–2(b)(1)	SDWA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 300h–2(c)(1)	SDWA	16,000/187,500	16,000/177,500	11,000/157,500	11,000/137,500	10,000/125,000
42 U.S.C. 300h–2(c)(2)	SDWA	7,500/187,500	7,500/177,500	6,500/157,500	5,500/137,500	5,000/125,000
42 U.S.C. 300h–3(c)	SDWA	7,500/16,000	7,500/16,000	6,500/11,000	5,500/11,000	5,000/10,000
42 U.S.C. 300i(b)	SDWA	21,500	16,500	16,500	15,000	15,000
42 U.S.C. 300i–1(c)	SDWA	120,000/1,150,000	110,000/1,100,000	100,000/1,000,000	22,000/[3] 55,000	20,000/50,000
42 U.S.C. 300j(e)(2)	SDWA	3,750	3,750	2,750	2,750	2,500
42 U.S.C. 300j–4(c)	SDWA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 300j–6(b)(2)	SDWA	32,500	32,500	27,500	25,000	25,000
42 U.S.C. 300j–23(d)	SDWA	7,500/75,000	7,500/70,000	6,500/65,000	5,500/55,000	5,000/50,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD–BASED PAINT HAZARD REDUCTION ACT OF 1992.	16,000	16,000	11,000	11,000	10,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972.	16,000	16,000	11,000	11,000	10,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 6928(c)	RCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 6928(g)	RCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 6928(h)(2)	RCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 6934(e)	RCRA	7,500	7,500	6,500	5,500	5,000
42 U.S.C. 6973(b)	RCRA	7,500	7,500	6,500	5,500	5,000
42 U.S.C. 6991e(a)(3)	RCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 6991e(d)(1)	RCRA	16,000	16,000	11,000	11,000	10,000
42 U.S.C. 6991e(d)(2)	RCRA	16,000	16,000	11,000	11,000	10,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 7413(d)(1)	CAA	37,500/320,000	37,500/295,000	32,500/270,000	27,500/220,000	25,000/200,000
42 U.S.C. 7413(d)(3)	CAA	7,500	7,500	6,500	5,500	5,000

TABLE 2 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil penalties for violations after December 6, 2013 through November 2, 2015, or assessed before August 1, 2016	Statutory civil penalties for violations after January 12, 2009 through December 6, 2013	Statutory civil penalties for violations after March 15, 2004 through January 12, 2009	Statutory civil penalties for violations after January 30, 1997 through March 15, 2004	Statutory civil penalties, as enacted
42 U.S.C. 7524(a)	CAA	3,750/37,500	3,750/37,500	2,750/32,500	2,750/27,500	2,500/25,000
42 U.S.C. 7524(c)(1)	CAA	320,000	295,000	270,000	220,000	200,000
42 U.S.C. 7545(d)(1)	CAA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 9606(b)(1)	CERCLA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 9609(a)(1)	CERCLA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 9609(b)	CERCLA	37,500/117,500	37,500/107,500	32,500/97,500	27,500/82,500	25,000/75,000
42 U.S.C. 9609(c)	CERCLA	37,500/117,500	37,500/107,500	32,500/97,500	27,500/82,500	25,000/75,000
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT–TO–KNOW ACT (EPCRA).	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 11045(b)(1)(A)[4]	EPCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 11045(b)(2)	EPCRA	37,500/117,500	37,500/107,500	32,500/97,500	27,500/82,500	25,000/75,000
42 U.S.C. 11045(b)(3)	EPCRA	37,500/117,500	37,500/107,500	32,500/97,500	27,500/82,500	25,000/75,000
42 U.S.C. 11045(c)(1)	EPCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 11045(c)(2)	EPCRA	16,000	16,000	11,000	11,000	10,000
42 U.S.C. 11045(d)(1)	EPCRA	37,500	37,500	32,500	27,500	25,000
42 U.S.C. 14304(a)(1)	MERCURY–CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	16,000	16,000	11,000	10,000	10,000
42 U.S.C. 14304(g)	BATTERY ACT	16,000	16,000	11,000	10,000	10,000

[1] Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table 2. The amounts set forth in this Table 2 reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Public Law 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of $20,000 and $50,000 under section 1432(c) of the SDWA, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188 (June 12, 2002), to $100,000 and $1,000,000, respectively. The EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule (“2004 Rule”), published on February 13, 2004, because they had gone into effect less than two years prior to the 2004 Rule.

[4] Consistent with how the EPA’s other penalty authorities are displayed under this section, this Table 2 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.,* 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

[FR Doc. 2019–28019 Filed 1–10–20; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR Parts 1149 and 1158

RIN 3135–AA33

Civil Penalties Adjustment for 2020

AGENCY: National Endowment for the Arts, National Foundation on the Arts and the Humanities.

ACTION: Final rule.

SUMMARY: The National Endowment for the Arts (NEA) is adjusting the maximum civil monetary penalties (CMPs) that may be imposed for violations of the Program Fraud Civil Remedies Act (PFCRA) and the NEA’s Restrictions on Lobbying to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The 2015 Act further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) to improve the

Exhibit CX57

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

January 12, 2022

MEMORANDUM

SUBJECT: Amendments to EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2022) and Transmittal of the 2022 Civil Monetary Penalty Inflation Adjustment Rule

FROM: Lawrence E. Starfield
Acting Assistant Administrator

TO: Regional Enforcement and Compliance Assurance Division Directors and Deputies
Regional Counsels and Deputies
Director, Office of Civil Enforcement

The purpose of this memorandum is twofold: (1) to amend all existing civil penalty policies to account for inflation; and (2) to transmit the recently promulgated 2022 Civil Monetary Penalty Adjustment Rule (2022 Rule).[1] The 2022 Rule amends 40 C.F.R. § 19.4 to adjust the statutory maximum and minimum civil penalties under the various environmental laws implemented by EPA to account for inflation. The 2022 Rule was published on January 12, 2022, is effective the same day, and is attached to this memorandum. The amendments to EPA's penalty policies are effective on January 15, 2022. This memorandum also clarifies the differences between EPA's statutory maximum and minimum civil penalties and EPA's penalty policies.

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvement Act (2015 Act)[2] was signed into law on November 2, 2015, to improve the effectiveness of statutory maximum and minimum civil monetary penalties and to maintain their deterrent effect, thereby promoting compliance with the law. The 2015 Act instructed EPA and other federal agencies to: (1) adjust the level of statutory maximum and minimum civil penalties with an initial "catch-up" rule, and (2) make subsequent annual adjustments for inflation beginning in January 2017. The 2015 Act also prescribed the formula that federal agencies must follow in making these adjustments.

To fulfill the initial catch-up requirement, EPA published the 2016 Civil Monetary Penalty Inflation Adjustment Rule on July 1, 2016, and it became effective on August 1, 2016.[3,4] To fulfill the second

[1] 87 Fed. Reg. 1676 (Jan. 12, 2022).
[2] 28 U.S.C. § 2461 note, Pub. L.114-74 (*see* https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf).
[3] The 2016 Rule was published on July 1, 2016, and became effective on August 1, 2016. 81 Fed. Reg. 43,091.
[4] Past inflation adjustment rules and past amendments to EPA's penalty policies to account for inflation can be found here: https://www.epa.gov/enforcement/enforcement-policy-guidance-publications.

requirement of the 2015 Act requiring annual adjustments, EPA made its first annual adjustment in January 2017,[5] its second annual adjustment in January 2018,[6] its third annual adjustment in February 2019,[7] its fourth annual adjustment in January 2020,[8] and its fifth annual adjustment in December 2020.[9] The 2022 Rule, effective January 12, 2022, and transmitted as an attachment to this memorandum, makes the sixth annual adjustment.

Although not required by the 2015 Act, EPA decided to amend its penalty policies every two years and did so in 2016,[10] 2018,[11] and 2020,[12] to better account for inflation going forward. While consistent with the purposes of the 2015 Act, these penalty policy amendments and the methodology used in making these amendments are not governed by, and are distinct from, the 2015 Act and the 2022 Rule. Furthermore, the 2022 Rule does not necessarily revise the penalty amounts that EPA chooses to seek pursuant to its civil penalty policies in a particular case. EPA's civil penalty policies, which guide enforcement personnel on how to exercise EPA's statutory penalty authorities, take into account a number of fact-specific considerations, e.g., the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator's ability to pay.

This memorandum amends EPA's penalty policies to account for inflation to date. Looking ahead, EPA plans to amend its penalty policies to account for inflation again in January 2024, barring any significant changes in inflation.

II. Applicability of this Memorandum

This memorandum supersedes the inflation-based amendments to EPA's penalty policies made in the 2020 memorandum, but it is not intended to change the methodology used in that memorandum. This memorandum partially supersedes EPA's 2013 inflation amendments memorandum because the multipliers contained in the 2013 memorandum should still be used for violations that occurred on or before November 2, 2015.

This memorandum does not modify EPA's Expedited Settlement Agreement penalty policies, its policy or guidance on economic benefit of noncompliance, nor the non-penalty dollar amounts within such civil penalty policies (e.g., those amounts deemed "insignificant" or "de minimis" that apply when calculating economic benefit of noncompliance).

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[5] The 2017 Rule was published on January 12, 2017, and became effective on January 15, 2017. 82 Fed. Reg. 3633.
[6] The 2018 Rule was published on January 10, 2018, and became effective on January 15, 2018. 83 Fed. Reg. 1190.
[7] EPA did not meet the January 15 deadline because the Office of Federal Register was unable to publish the rule due to the lapse in appropriations from December 22, 2018, to January 25, 2019. The 2019 Rule was published on February 6, 2019, and became effective the same day. 84 Fed. Reg. 2056. A technical correction was published on February 25, 2019. 84 Fed. Reg. 5955 (February 25, 2019).
[8] The 2020 Rule was published on January 13, 2020, and became effective the same day. 85 Fed. Reg. 1751.
[9] The 2021 Rule was actually published on December 23, 2020, and became effective the same day. 85 Fed. Reg. 83818.
[10] The July 27, 2016 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective August 1, 2016)*.
[11] The January 11, 2018 memorandum is titled *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule*.
[12] The January 15, 2020 memorandum is titled *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule*.

The penalty policies listed in Table A are the most recent narrative versions of each policy. The "narrative version" is the applicable media-specific penalty policy that comprehensively explains how EPA enforcement practitioners should calculate penalties for purposes of administrative actions or settlements. This memorandum does not change or alter the narrative version of the media-specific penalty policies; this memorandum only alters the numerical gravity-based penalty amounts that are calculated under those policies to account for inflation.

Media enforcement programs may modify their penalty policies individually, and any such modifications may supersede application of this memorandum for that program. Practitioners should rely on the multipliers in Table A until the applicable penalty policy is modified or civil penalty policy amounts are adjusted by subsequent program-specific memorandum in accordance with inflation.

III. Amendments to EPA's Civil Penalty Policies

Consistent with the methodology used in the January 15, 2020 penalty policy inflation amendments memorandum, EPA is amending its penalty policies through the use of multipliers listed in Table A of this memorandum. Please note that the multipliers listed in Table A should be used for violations occurring after November 2, 2015. **For violations occurring on or before November 2, 2015, use the multipliers listed in the December 6, 2013 inflation adjustment memorandum titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*.**[13]

A. Application of Inflation Multiplier to Gravity-Based Portion of Penalty

For each violation occurring after November 2, 2015, find the applicable penalty policy in Table A and use the policy to determine the initial calculated gravity-based penalty for your case.[14] This initial gravity-based penalty will not be adjusted for inflation to reflect present value of the dollar. To adjust the penalty figure into present value, multiply the initial calculated gravity-based portion of the penalty by the multiplier associated with the applicable penalty policy listed in Table A. Next, round the inflation-adjusted gravity-based portion of the penalty amount to the nearest dollar.[15] Then, if applicable, calculate the gravity-based portion of the penalty for each violation occurring on or before November 2, 2015, using the applicable inflation multiplier from the guidance memorandum dated December 6, 2013. Add the gravity-based portion of the penalty for pre-November 3, 2015 violations to the gravity-based portion of the penalty for post-November 2, 2015 violations to calculate the total gravity-based penalty. Once the total gravity-based penalty has been calculated, incorporate economic

[13] The December 6, 2013 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*.

[14] Most media-specific penalty policies define "gravity" as the "seriousness of the violation." Each media-specific penalty policy uses specific factors to calculate the gravity component. Many of these factors are taken from their respective statutes and some factors are unique to that specific penalty policy. Therefore, it is important for case teams to review each specific penalty policy to understand how the gravity component is defined and how it is calculated. The media-specific penalty policies are listed in Table A of this memorandum.

[15] We are instructing case teams to round to the nearest dollar because this was the approach taken in the 2015 Act, EPA's penalty inflation memoranda from July 27, 2016, January 11, 2018, and January 15, 2020, and the Office of Management and Budget's (OMB) February 24, 2016, December 15, 2017, December 14, 2018, December 16, 2019, and December 23, 2020 memoranda that instructed federal agencies how to implement the 2016 through 2021 Rules, respectively.

benefit[16] and any other factors (e.g., ability to pay, litigation considerations, etc.) that apply as instructed by the penalty policy to arrive at the total penalty.[17]

Enforcement practitioners should apply the multipliers in Table A only to the penalty amounts adopted within the "narrative" penalty policies listed in Table A. The multipliers in Table A should not be applied to penalty policies issued after the date of this memorandum unless expressly stated in the subsequent narrative penalty policy.

B. Derivation of the Inflation Multipliers

Because the purpose of amending EPA's penalty policies is to account for inflation since the penalty policies were last amended for inflation in the January 15, 2020 memorandum, the majority of multipliers listed in Table A were calculated by multiplying the multipliers listed in the January 15, 2020 memorandum by the inflation increase that has occurred since the January 15, 2020 memorandum.[18]

IV. 2022 Rule and the Newly Adjusted Statutory Maximum and Minimum Amounts

The 2022 Rule was promulgated to fulfill the annual statutory maximum and minimum inflation adjustment requirement in the 2015 Act. As instructed by the 2015 Act and as explained in the 2022 Rule, EPA calculated the new penalty amounts by multiplying the cost-of-living multiplier[19] by the previous statutory penalty amount as adjusted by the December 23, 2020 Rule. The result is the amount listed in the third column in Table 1 of 40 C.F.R. § 19.4 and the 2022 Rule. This amount applies to violations occurring after November 2, 2015, and assessed on or after January 12, 2022.

A. Penalty Pleading in Administrative Litigation

[16] We are not modifying the long-standing approach of calculating economic benefit separately from the gravity-based amount, because economic benefit calculations already take inflation into account. The inflation adjustments in this guidance only apply to the gravity-based portion of the penalty.

[17] If the total penalty amount calculated is greater than the statutory maximum amount, then the statutory maximum amount would apply. Similarly, the entire penalty sought (including economic benefit) in an administrative enforcement action cannot exceed any applicable administrative penalty caps. Note that penalty amounts greater than those calculated using the EPA penalty policies and this memorandum may be appropriate in limited circumstances. For example, in a formal administrative enforcement context, EPA may seek, and presiding officers or the Environmental Appeals Board may assess, higher penalties provided such amounts do not exceed the statutory maximum, are in accordance with statutory civil penalty factors, and consider applicable civil penalty guidelines, and provided that any deviations from applicable penalty policies are persuasively and convincingly explained. *See*, *e.g.,* 40 C.F.R. § 22.27(b) and *In Re Morton L. Friedman & Schmitt Construction Company*, 11 E.A.D. 302 (EAB 2004).

[18] In the January 15, 2020 memorandum, most of the multipliers were calculated using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U) from the date the penalty policy was issued through October 2019. Consistent with that methodology, the multipliers listed in Table A of this memorandum were calculated by multiplying the multipliers from the January 15, 2020 memorandum by the CPI-U increase from October 2019 to October 2021. We used the October 2021 CPI-U because this CPI-U was used to calculate the statutory increases in the 2022 Rule. The October 2021 CPI-U was 276.589 and the October 2019 CPI-U was 257.346, yielding an increase of 1.07477. However, several multipliers in Table A do not follow this general calculation framework, such as CWA section 311 (*see infra* note 23), CAA Stationary Source Appendix IV (*see infra* note 25), CAA Title II (*see infra* note 26), RCRA section 7003(b) (*see infra* note 27), CERCLA section 106(b) (*see infra* note 29), and Lead-Based Paint Disclosure Rule (*see infra* note 36).

[19] The statutory cost-of-living adjustment multiplier is the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2021 exceeds the CPI-U for the month of October 2020. The October 2021 CPI-U was 276.589 and the October 2020 CPI-U was 260.388 yielding an increase of 1.06222.

Where EPA decides to cite the statutory maximum and/or minimum penalty amount in an administrative pleading (such as in an administrative complaint), the applicable statutory maximum and/or minimum penalty amount in effect for each violation should be used.[20] EPA should cite the statutory maximum and minimum penalty provisions and 40 C.F.R. § 19.4 along with the applicable inflation-adjusted penalty maximum levels set forth in 40 C.F.R. § 19.4. Multiple penalty-adjustment cycles should only be used when violations occurred on or before November 2, 2015, and after November 2, 2015. If this arises, EPA should cite each applicable penalty-adjustment cycle and the corresponding penalty amount. Particularly where violations have occurred both after November 2, 2015, and before such date, case teams also may find it helpful to state that the statutory maximum and minimum civil penalty level has been adjusted over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996, and, most recently, by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L.114-74, Section 701).

B. Statutory Administrative Penalty Caps

Note that, effective January 12, 2022, where EPA seeks administrative penalties in a complaint, amended complaint, or through a settlement under 40 C.F.R. § 22.18, the increased administrative penalty caps in Table 1 of § 19.4 in the attached 2022 Rule apply if *some or all* of the violations occurred after November 2, 2015. The lower administrative penalty caps in Table 2 of § 19.4 apply if *all* violations occurred on or before November 2, 2015.

V. Multiple Penalty Cycles – Case Team Discretion

If the time period between seeking a penalty (through settlement or litigation) and the final penalty assessment[21] covers more than one penalty-adjustment cycle (for example, where a complaint is filed on December 15, 2020, but the final penalty order is not filed with the Hearing Clerk until April 1, 2022), the case team would have discretion to modify the penalty amount sought (for example, to be consistent with the penalty amounts in the most recent annual inflation adjustment rule or guidance). But such modifications would *not* be expected where doing so would be:

a. unnecessary to achieve sufficient deterrence; and
b. *either* inappropriately disruptive[22] *or* contrary to principles of judicial economy (for example, where the case has already gone to hearing based on previous penalty amounts).

[20] If a respondent/defendant challenges the validity of any statutory maximum penalty amount, as adjusted in 40 C.F.R. Part 19, please notify the Office of Civil Enforcement of the challenge so that OECA, the Region, and the U.S. Department of Justice, as appropriate, can coordinate our response before it is filed.

[21] Note that enforcement personnel can only *seek* penalties. *Assessment* of penalties is effective in a formal administrative action once a final penalty order is filed with the Hearing Clerk, 40 C.F.R. §§ 22.31 and 22.6, or in civil judicial cases once the court enters a consent decree or issues a judgment awarding penalties.

[22] Such disruptive impacts could be to settlement negotiations or to other case-related enforcement efforts such as by creating an additional burden on EPA's resources. If EPA has not made a penalty demand or offer, a disruptive impact on negotiations is less likely where the penalty is recalculated to be consistent with the most recent inflation-adjustment amounts. It is possible, however, that a recalculation would be unduly burdensome and disruptive to the case team's efforts where, for example, there are an extremely large number of violations, the penalty calculation is complex, and/or where contractor resources are needed to perform such a calculation. In such circumstances, the case team would have discretion to determine that recalculating the penalty is not warranted even though EPA has not yet made a penalty demand or offer.

In a settlement context, if defendants or respondents have signed a consent decree or consent agreement, EPA would not expect the case team to renegotiate the penalty amount due to subsequent inflation adjustments. Prior to any such formal written settlement commitment (for example, where the parties may have reached an agreement in principle), case teams have discretion to decide whether to modify their penalty demand due to subsequent inflation adjustments (for example, depending on how far along the negotiations have progressed, the likely impact of an increased penalty on negotiations, the case team's evaluation of the likelihood that any informal agreements will not be consummated, and/or other factors).

VI. Further Information

Our goal in issuing this guidance is to make these penalty policy modifications easy to implement, but if you have any questions concerning this memorandum, please contact David Smith-Watts of the Office of Civil Enforcement at (202) 564-4083 or by email at smith-watts.david@epa.gov.

cc: Regional Administrators
Deputy Regional Administrators
Enforcement Coordinators
All OECA Employees
Tom Mariani, Chief, DOJ-EES
Deputy and Assistant Chiefs, DOJ-EES
Environmental Appeals Board Judges
Susan Biro, Chief Administrative Law Judge
Regional Judicial Officers

Attachments (2)

1. Table A: Chart Reflecting Inflation Adjustment Multipliers
2. Rule promulgated in the *Federal Register* on January 12, 2022

Table A: Chart Reflecting Penalty Policy Inflation Adjustment Multipliers

Applicable Penalty Policy	Year Issued	Inflation Adjustment Multiplier as of January 15, 2022
CWA		
Interim Clean Water Act Settlement Penalty Policy	1995	1.79954
Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act	1998	1.68652 [23]
CWA Section 404 Settlement Penalty Policy	2001	1.55649
Supplemental Guidance to the Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) for Violations of the Construction Stormwater Requirements	2008	1.27712
Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of the Industrial Stormwater Requirements	2016	1.16293 [24]
SDWA		
UIC Program Judicial and Administrative Order Settlement Penalty Policy	1993	1.89834

[23] Case teams should apply the 1990 CPI multiplier of 2.07183 to the per-barrel discharge penalty amounts in the last column of the penalty matrix on page 11. This is an appropriate multiplier because such civil penalties under CWA § 311(b)(7)(A) & (D) concern environmental exposure (i.e., the discharge of oil and hazardous substances), and because the per-barrel penalty matrix column contained in the 1998 penalty policy reflects the statutory maximum penalty amounts in effect when this penalty authority was enacted in 1990. It is important for the penalty matrix to retain a maximum per-barrel penalty policy amount that equals the current statutory maximum and to increase the other penalty policy matrix cells proportionally by the same inflation adjustment multiplier.

[24] Case teams should apply this multiplier to this 2016 penalty policy and also to the 2018 Supplemental Amendment, which applies to industrial stormwater cases. The narrative contained in the 2018 Supplemental Amendment continues to be applicable, but the 1.02168 multiplier referenced throughout is no longer applicable because it has been superseded by the 1.16293 multiplier.

New Public Water System Supervision Program Settlement Penalty Policy	1994	1.85009
CAA – Accidental Release Prevention/Risk Management Program		
Final Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68	2012	1.19571
CAA – Stationary Source		
Clean Air Act Stationary Source Civil Penalty Policy	1991	2.01302
Appendix I – Penalty Policy for Violation of Permit Requirements	1987	2.39887
Appendix II - Vinyl Chloride Civil Penalty Policy	1985	2.54451
Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy	1992	1.95056
Appendix IV - Clean Air Act Penalty Policy as Applied to Stationary Sources of Volatile Organic Compounds (VOC) Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance	1987	2.01302 [25]
Appendix VI - Leak Detection and Repair Penalty Policy	2012	1.19571
Appendix VII – Penalty Policy for New Residential Wood Heaters	1989	2.20214
Appendix VIII - Clean Air Act Civil Penalty Policy Applicable to Persons Who Manufacture or Import Controlled Substances in Amounts Exceeding Allowances Properly Held Under 40 C.F.R. Part 82: Protection of Stratospheric Ozone	1990	2.07183

[25] For violations governed by Appendix IV, EPA is using the same multiplier that applies to the 1991 "*Clean Air Act Stationary Source Civil Penalty Policy*" because the gravity-based component of such violations is calculated using the 1991 policy.

Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners	1993	1.89834
Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant	1994	1.85009
Appendix XI - National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements	2007	1.32380
EPA Region 10's Civil Penalty Guidelines for the Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington. 40 C.F.R. Part 49	2008	1.27712
CAA – Mobile Source		
Clean Air Act Title II Vehicle & Engine Civil Penalty Policy	2021	1.05737 [26]
Clean Air Act Mobile Source Fuels Civil Penalty Policy Title II of the Clean Air Act --40 C.F.R. Part 80 Fuels Standards Requirements	2016	1.16293
North American and U.S. Caribbean Sea Emissions Control Areas Penalty Policy for Violations by Ships of the Sulfur in Fuel Standard and Related Provisions	2015	1.16293
Civil Penalty Policy for Administrative Hearings	1993	1.89834
RCRA		
RCRA Civil Penalty Policy	2003	1.72447

[26] Because the Clean Air Act Title II Vehicle & Engine Civil Penalty Policy was issued in January 2021, EPA calculated this multiplier by using inflation adjustment from January 2021 to October 2021. The January 2021 CPI-U is 261.582 and the October 2021 CPI-U is 276.589. 276.589 divided by 261.582 equals 1.05737.

Guidance on the Use of Section 7003 of RCRA	1997	2.96491 [27]
Interim Consolidated Enforcement Penalty Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA Pilot	2018	1.09373 [28]
CERCLA		
Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders	1997	2.27960 [29]
CERCLA & EPCRA		
Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act	1999	1.64441
EPCRA		
Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), February 24, 2017 (Amended)	2017	1.16293 [30]
FIFRA		
FIFRA Enforcement Response Policy (FIFRA ERP)	2009	1.27946
Appendix E to FIFRA ERP - Enforcement Response Policy for	2010	

[27] For RCRA section 7003(b) penalties, EPA calculated this multiplier by dividing the 2022 statutory maximum of $16,307 by $5,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

[28] Case teams should calculate the gravity-based portion of the penalty using the penalty amounts in the 2018 Interim Consolidated Penalty Policy. For narrative instructions only, case teams should use the 1990 U.S. EPA Penalty Guidance for Violations for UST Regulations when calculating standard UST penalties and use the 1993 Guidance on Field Citations Enforcement narrative guidance on issuing field citations. Please note that the multiplier of 1.09373 applies to field citations. However, this multiplier should not be applied to the Expedited Settlement Agreement (ESA) penalty amounts in the 2018 Policy. As stated in Section II of this memorandum, this memorandum does not modify ESA penalty policies.

[29] For CERCLA section 106(b)(1) penalties, EPA calculated this multiplier by dividing the 2022 statutory maximum of $62,689 by $27,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

[30] Case teams should apply the multiplier of 1.16293 to the second matrix on page 11 of the Policy. This multiplier should not be applied to the first matrix on page 11 of the Policy.

FIFRA Section 7(c): Establishment Reporting Requirements		Use the 2009 FIFRA ERP and the 1.27946 multiplier
Appendix F to FIFRA ERP - Interim Final Penalty Policy for the Worker Protection Standard (WPS) (edited May 2018)	2018	Use the 2009 FIFRA ERP and the 1.27946 multiplier [31]
Appendix G to FIFRA ERP - Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act Good Laboratory Practice (GLP) Regulations	1991	Use the 2009 FIFRA ERP and the 1.27946 multiplier
Appendix H to the FIFRA ERP - Enforcement Response Policy for the FIFRA Pesticide Container/Containment Regulations	2012	Use the 2009 FIFRA ERP and the 1.27946 multiplier
TSCA		
Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substance Control Act	1980	1.74440
Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12, and 13	1999	1.74440 [32]
Amendment to the TSCA Section 5 Enforcement Response Policy – Penalty Limit for Untimely NOC Submissions	1993	1.74440 [33]
Enforcement Response Policy for TSCA §4 Test Rules	1986	1.74440
Final TSCA GLP Enforcement Response Policy	1985	1.74440
TSCA – Asbestos		
Enforcement Response Policy for the Asbestos Model Accreditation Plan (MAP) – Addendum to the AHERA ERP	1998	1.68652

[31] When EPA updated Appendix F to the FIFRA ERP in May 2018, EPA did not update or alter the penalty amounts from the 1997 version. Therefore, EPA case teams should use the penalty amounts listed in the 2018 version and apply the 1.27946 multiplier.

[32] The "Penalty Matrix for Violations Occurring after January 30, 1997" on page 8 of this policy should be ignored. For all violations governed by this policy, the multiplier should be applied to the penalty amounts in the "Penalty Matrix for Violations Occurring on or before January 30, 1997" found on the same page.

[33] Note that this Amendment from July 1, 1993, amends the June 8, 1989 policy titled "Amendment TSCA Section 5 Enforcement Response Policy." The multiplier of 1.74440 applies to both the 1993 amendment and 1989 policy.

Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act	1989	2.20214
Enforcement Response Policy for Asbestos Abatement Projects: Worker Protection Rule	1989	1.74440
TSCA – Lead-Based Paint		
Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education (PRE) Rule; Renovation, Repair and Painting (RRP) Rule; and Lead-Based Paint Activities (LBPA) Rule	2013 [34]	1.16293 [35]
TSCA – PCBs		
Polychlorinated Biphenyls (PCB) Penalty Policy	1990	1.74440
Residential Lead-Based Paint Hazard Reduction Act of 1992 Lead-Based Paint		
Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy	2007	1.77336 [36]

[34] Appendix B-2 was updated in April 2013 within the April 2010 Policy.

[35] The 2010 *"Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule"* and the 2007 *"Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy"* both penalize violators who fail to provide and document receipt of certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for essentially the same type of deficiency, we have adopted the penalty matrix from the 2007 Section 1018 Disclosure Rule penalty policy in the Pre-Renovation Education Rule component of the 2010 Consolidated Lead-Based Paint penalty policy. Therefore, Level "a" penalties apply to violations of the Lead-Based Paint Renovation, Repair and Painting Rule and the Lead-Based Paint Activities (Abatement) Rule. Level "b" penalties are derived from the current Section 1018 Lead-Based Paint Disclosure Rule matrix because the major activities of the Disclosure Rule and Pre-renovation Education Rule are very similar. Therefore, under this Policy, Level "b" penalties apply to violations of the Pre-Renovation Education Rule.

[36] For the Residential Lead-Based Paint Hazard Reduction Act section 1018 penalties, EPA calculated this multiplier by dividing the 2022 statutory maximum of $19,507 by $11,000, which is the maximum amount set forth in the 2007 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

Exhibit CX58

ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE ASSURANCE
WASHINGTON, D.C. 20460

January 10, 2024

MEMORANDUM

SUBJECT: Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2024)

FROM: David M. Uhlmann
Original signed by David M. Uhlmann

TO:
Regional Administrators
Deputy Regional Administrators
Director, Office of Civil Enforcement

This memorandum amends the EPA's existing civil penalty policies to account for inflation, consistent with the recently promulgated Civil Monetary Penalty Inflation Adjustment Rule (Penalty Inflation Rule).[1] The Penalty Inflation Rule amended 40 C.F.R. § 19.4 to adjust the statutory maximum and minimum civil penalties under the various environmental laws implemented by the EPA to account for inflation. The Penalty Inflation Rule was published on December 27, 2023, became effective the same day, and is attached to this memorandum. The amendments to the EPA's penalty policies are effective on January 15, 2024. This memorandum also clarifies the differences between the EPA's statutory maximum and minimum civil penalties and the EPA's penalty policies.

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvement Act (2015 Act)[2] was signed into law on November 2, 2015, to improve the effectiveness of statutory maximum and minimum civil monetary penalties and to maintain their deterrent effect, thereby promoting compliance with the law. The 2015 Act instructed the EPA and other federal agencies to annually adjust statutory maximum and minimum civil penalties for inflation beginning in January 2017. The 2015 Act prescribed a formula

[1] 88 Fed. Reg. 89,309 (Dec. 27, 2023).
[2] 28 U.S.C. § 2461 note, Pub. L.114-74 (*see* https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf).

that federal agencies must follow in making these adjustments. Since January 2017, the EPA has published eight annual adjustments, which includes the Penalty Inflation Rule.[3]

Although not required by the 2015 Act, the EPA decided to amend its penalty policies every two years and did so in 2016,[4] 2018,[5] 2020,[6] and 2022[7] to better account for inflation when calculating civil penalties. While consistent with the purposes of the 2015 Act, these penalty policy amendments and the methodology used in making these amendments are not governed by, and are distinct from, the 2015 Act and the Penalty Inflation Rule. Furthermore, the Penalty Inflation Rule does not necessarily revise the penalty amounts that the EPA chooses to seek pursuant to its civil penalty policies in a particular case. The EPA's civil penalty policies, which guide enforcement personnel on how to exercise the EPA's statutory penalty authorities, take into account a number of fact-specific considerations, e.g., the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and a violator's ability to pay.

This memorandum amends the EPA's penalty policies to account for inflation to date. Barring any significant changes to inflation in the next two years, the EPA plans to amend its penalty policies to account for inflation again in January 2026.

II. Applicability of this Memorandum

This memorandum supersedes the inflation-based amendments to the EPA's penalty policies made in the 2022 memorandum, but it is not intended to change the methodology used in that memorandum. This memorandum only partially supersedes the EPA's 2013 inflation amendments memorandum because the multipliers contained in the 2013 memorandum should still be used for violations that occurred on or before November 2, 2015.

This memorandum does not modify the EPA's Expedited Settlement Agreement penalty policies, the policy or guidance on economic benefit of noncompliance, nor the non-penalty dollar amounts within such civil penalty policies (e.g., those amounts deemed "insignificant" or "de minimis" that apply when calculating economic benefit of noncompliance).

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[3] Past inflation adjustment rules and past amendments to the EPA's penalty policies to account for inflation can be found here: https://www.epa.gov/enforcement/enforcement-policy-guidance-publications.

[4] The July 27, 2016 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective August 1, 2016)*.

[5] The January 11, 2018 memorandum is titled *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule*.

[6] The January 15, 2020 memorandum is titled *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule*.

[7] The January 12, 2022 memorandum is titled *Amendments to EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2022) and Transmittal of the 2022 Civil Monetary Penalty Inflation Adjustment Rule*.

The penalty policies listed in Table A are the most recent narrative versions of each policy. The "narrative version" is the applicable media-specific penalty policy that comprehensively explains how the EPA enforcement practitioners should calculate penalties for purposes of administrative actions or settlements. This memorandum does not change or alter the narrative version of the media-specific penalty policies; this memorandum alters only the numerical gravity-based penalty amounts that are calculated under those policies to account for inflation.

The EPA media enforcement programs may modify their penalty policies individually, and any such modifications may supersede application of this memorandum for that program. Practitioners should rely on the multipliers in Table A until the applicable penalty policy is modified or civil penalty policy amounts are adjusted by subsequent program-specific memorandum in accordance with inflation.

III. Amendments to the EPA's Civil Penalty Policies

Consistent with the methodology used in the January 12, 2022, penalty policy inflation amendments memorandum, the EPA is amending its penalty policies through the use of multipliers listed in Table A of this memorandum. Please note that the multipliers listed in Table A should be used for violations occurring after November 2, 2015. **For violations occurring on or before November 2, 2015, use the multipliers listed in the December 6, 2013, inflation adjustment memorandum.**[8]

A. Application of Inflation Multiplier to Gravity-Based Portion of Penalty

For each violation occurring after November 2, 2015, find the applicable penalty policy in Table A and use the policy to determine the initial calculated gravity-based penalty for your case.[9] This initial gravity-based penalty is not yet adjusted for inflation to reflect the present value of the dollar. To adjust the penalty figure to reflect present value, multiply the initial calculated gravity-based portion of the penalty by the multiplier associated with the applicable penalty policy listed in Table A. Next, round the inflation-adjusted gravity-based portion of the penalty amount to the nearest dollar.[10] Then, if applicable, calculate the gravity-based portion of the penalty for each violation occurring on or before November 2, 2015, using the applicable inflation multiplier from the guidance memorandum dated

[8] The December 6, 2013 memorandum is titled *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*.

[9] Most media specific penalty policies define "gravity" as the "seriousness of the violation." Each media-specific penalty policy uses specific factors to calculate the gravity component. Many of these factors are taken from their respective statutes and some factors are unique to that specific penalty policy. Therefore, it is important for case teams to review each specific penalty policy to understand how the gravity component is defined and how it is calculated. The media-specific penalty policies are listed in Table A of this memorandum.

[10] Case teams are instructed to round to the nearest dollar because this was the approach taken in the 2015 Act, the EPA's penalty inflation memoranda from July 27, 2016, January 11, 2018, and January 15, 2020, and the Office of Management and Budget's (OMB) February 24, 2016, December 15, 2017, December 14, 2018, December 16, 2019, December 23, 2020, December 15, 2021, and December 15, 2022 memoranda that instructed federal agencies how to implement the 2016 through 2023 Rules, respectively.

December 6, 2013. Add the inflation-adjusted gravity-based portion of the penalty for pre-November 3, 2015 violations to the inflation-adjusted gravity-based portion of the penalty for post-November 2, 2015 violations to calculate the total inflation-adjusted gravity-based penalty. Once the total gravity-based penalty has been calculated, incorporate economic benefit[11] and any other factors (e.g., ability to pay, litigation considerations, etc.) that apply as instructed by the penalty policy to arrive at the total penalty.[12]

Enforcement practitioners should apply the multipliers in Table A only to the penalty amounts adopted within the "narrative" penalty policies listed in Table A. The multipliers in Table A should not be applied to penalty policies issued after the date of this memorandum unless expressly stated in the subsequent narrative penalty policy.

B. Derivation of the Inflation Multipliers

The purpose of amending the EPA's penalty policies is to account for inflation since the penalty policies were last amended for inflation in the January 12, 2022, memorandum. Thus, the majority of multipliers listed in Table A were calculated by multiplying the multipliers listed in the January 12, 2022, memorandum by the inflation increase that has occurred since then.[13]

IV. Penalty Inflation Rule and the Newly Adjusted Statutory Maximum and Minimum Amounts

The EPA promulgated the Penalty Inflation Rule to fulfill the annual statutory maximum and minimum civil penalty inflation adjustment requirement in the 2015 Act. As instructed by the 2015 Act and as

[11] We are not modifying the long-standing approach of calculating economic benefit separately from the gravity-based amount, because economic benefit calculations, including calculations performed using the EPA's BEN computer model, already take inflation into account. The inflation adjustments in this memorandum apply only to the gravity-based portion of the penalty.

[12] If the total penalty amount calculated is greater than the statutory maximum amount, then the penalty is capped at the statutory maximum amount. Similarly, the entire penalty sought (including economic benefit) in an administrative enforcement action cannot exceed any applicable administrative penalty caps. Note that penalty amounts greater than those calculated using the EPA penalty policies and this memorandum may be appropriate in limited circumstances. For example, in a formal administrative enforcement context, the EPA may seek, and presiding officers or the Environmental Appeals Board may assess, higher penalties provided such amounts do not exceed the statutory maximum, are in accordance with statutory civil penalty factors, and consider applicable civil penalty guidelines, and provided that any deviations from applicable penalty policies are persuasively and convincingly explained. *See*, *e.g.,* 40 C.F.R. § 22.27(b) and *In Re Morton L. Friedman & Schmitt Construction Company*, 11 E.A.D. 302 (EAB 2004).

[13] In the January 12, 2022 memorandum, most of the multipliers were calculated using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U) from the date the penalty policy was issued through October 2021. Consistent with that methodology, the multipliers listed in Table A of this memorandum were calculated by multiplying the multipliers from the January 12, 2022, memorandum by the CPI-U increase from October 2021 to October 2023. We used the October 2023 CPI-U because this CPI-U was used to calculate the statutory increases in the Penalty Inflation Rule. The October 2023 CPI-U was 307.671 and the October 2021 CPI-U was 276.589, yielding an increase of 1.11238. However, several multipliers in Table A do not follow this general calculation framework, such as CWA section 311 (*see infra* note 19), CAA Stationary Source Appendix IV (*see infra* note 21), RCRA section 7003(b) (*see infra* note 23), CERCLA section 106(b) (*see infra* note 25), and Lead-Based Paint Disclosure Rule (*see infra* note 31).

explained in the Penalty Inflation Rule, the EPA calculated the new penalty amounts by multiplying the cost-of-living multiplier[14] by the previous statutory penalty amount as adjusted by the Penalty Inflation Rule. The result is the amount listed in the third column in Table 1 of 40 C.F.R. § 19.4 and the Penalty Inflation Rule. This amount applies to violations occurring after November 2, 2015, and assessed on or after December 27, 2023.

A. Penalty Pleading in Administrative Litigation

Where the EPA decides to cite the statutory maximum and/or minimum penalty amount in an administrative pleading (such as in an administrative complaint), the applicable statutory maximum and/or minimum penalty amount in effect for each violation should be used.[15] The EPA should cite the statutory maximum and minimum penalty provisions and 40 C.F.R. § 19.4, along with the applicable inflation-adjusted penalty maximum levels set forth in 40 C.F.R. § 19.4. Multiple penalty-adjustment cycles should be used only when violations occurred on or before November 2, 2015, and after November 2, 2015.[16] If this arises, the EPA should cite each applicable penalty-adjustment cycle and the corresponding penalty amount. Particularly where violations have occurred both before and after November 2, 2015, case teams may also find it helpful to state that the statutory maximum and minimum civil penalty level has been adjusted over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996, and most recently, by the 2015 Act.

B. Statutory Administrative Penalty Caps

Note that, effective December 27, 2023, where the EPA seeks administrative penalties in a complaint, amended complaint, or through a settlement under 40 C.F.R. § 22.18, the increased administrative penalty caps in Table 1 of § 19.4 in the attached Penalty Inflation Rule apply if *some or all* of the violations occurred after November 2, 2015. The lower administrative penalty caps in Table 2 of § 19.4 apply if *all* violations occurred on or before November 2, 2015.

[14] The statutory cost-of-living adjustment multiplier is the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2023 exceeds the CPI-U for the month of October 2022. The October 2023 CPI-U was 307.671 and the October 2022 CPI-U was 298.012 yielding an increase of 1.03241.

[15] If a respondent or defendant challenges the validity of any statutory maximum penalty amount, as adjusted in 40 C.F.R. Part 19, please notify the Office of Civil Enforcement of the challenge, so that OECA, the Region and the U.S. Department of Justice, as appropriate, can coordinate our response before it is filed.

[16] For cases where the five-year statute of limitations (28 U.S.C. § 2462) applies, there will not be many future cases that have violations on or before November 2, 2015. However, these violations may arise in particular circumstances, such as when the alleged violator and the EPA agreed to a tolling agreement or where the EPA filed a timely enforcement action before a court, but the court has not yet assessed a penalty.

V. Multiple Penalty Cycles – Case Team Discretion

If the time period between seeking a penalty (through settlement or litigation) and the final penalty assessment[17] covers more than one penalty-adjustment cycle (for example, where a complaint is filed on December 15, 2022, but the final penalty order is not filed with the Hearing Clerk until April 1, 2024), the case team would have discretion to modify the penalty amount sought (for example, to be consistent with the penalty amounts in the most recent annual inflation adjustment rule or guidance). But such modifications would *not* be expected where doing so would be:

a. unnecessary to achieve sufficient deterrence; and

b. *either* inappropriately disruptive[18] *or* contrary to principles of judicial economy (for example, where the case has already gone to hearing based on previous penalty amounts).

In a settlement context, if defendants or respondents have signed a consent decree or consent agreement, the EPA would not expect the case team to renegotiate the penalty amount due to subsequent inflation adjustments. Prior to any such formal written settlement commitment (for example, where the parties may have reached an agreement in principle), case teams have discretion to decide whether to modify their penalty demand due to subsequent inflation adjustments (for example, depending on how far along the negotiations have progressed, the likely impact of an increased penalty on negotiations, the case team's evaluation of the likelihood that any informal agreements will not be consummated, and/or other factors).

VI. Further Information

Our goal in issuing this memorandum is to make these penalty policy modifications easy to implement, but if you have any questions concerning this memorandum, please contact David Smith-Watts of the Office of Civil Enforcement at (202) 564-4083 or by email at smith-watts.david@epa.gov.

cc: Cecil Rodrigues, Acting Principal Deputy Assistant Administrator, OECA
Regional Counsel and Deputies
ECAD Directors and Deputies

[17] Note that enforcement personnel can only *seek* penalties. *Assessment* of penalties is effective in a formal administrative action once a final penalty order is filed with the Hearing Clerk, 40 C.F.R. §§ 22.31 and 22.6, or in civil judicial cases once the court enters a consent decree or issues a judgment awarding penalties.

[18] Such disruptive impacts could be to settlement negotiations, or to other case-related enforcement efforts such as by creating an additional burden on the EPA's resources. If the EPA has not made a penalty demand or offer, a disruptive impact on negotiations is less likely where the penalty is recalculated to be consistent with the most recent inflation-adjustment amounts. It is possible, however, that a recalculation would be unduly burdensome and disruptive to the case team's efforts where, for example, there are an extremely large number of violations, the penalty calculation is complex, or where contractor resources are needed to perform such a calculation. In such circumstances, the case team would have discretion to determine that recalculating the penalty is not warranted even though the EPA has not yet made a penalty demand or offer.

All OECA Employees
Tom Mariani, Chief, DOJ-EES
Deputy and Assistant Chiefs, DOJ-EES
Environmental Appeals Board Judges
Susan Biro, Chief Administrative Law Judge
Regional Judicial Officers
Regional Hearing Clerks

Attachments (2)

1. Table A: Chart Reflecting Inflation Adjustment Multipliers
2. Rule promulgated in the *Federal Register* on December 27, 2023

Table A: Chart Reflecting Penalty Policy Inflation Adjustment Multipliers

Applicable Penalty Policy	Year Issued	Inflation Adjustment Multiplier as of January 15, 2024
CWA		
Interim Clean Water Act Settlement Penalty Policy	1995	2.00177
Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act	1998	1.87605 [1]
CWA Section 404 Settlement Penalty Policy	2001	1.73141
Supplemental Guidance to the Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) for Violations of the Construction Stormwater Requirements	2008	1.42064
Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Penalty Policy for Violations of the Industrial Stormwater Requirements	2016	1.29362 [2]

[1] Case teams should apply the 1990 CPI multiplier of 2.30465 to the per-barrel/RQ discharge penalty amounts in the last column of the penalty matrix on page 11 (discharges over 125 barrels/RQ). This is an appropriate multiplier because such civil penalties under CWA § 311(b)(7)(A) & (D) concern environmental exposure (*i.e.,* the discharge of oil and hazardous substances), and because the per-barrel/RQ penalty matrix column contained in the 1998 penalty policy reflects the statutory maximum penalty amounts in effect when this penalty authority was enacted in 1990. It is important for the penalty matrix to retain a maximum per-barrel/RQ penalty policy amount that equals the current statutory maximum and to increase the other penalty policy matrix cells proportionally by the same inflation adjustment multiplier.

[2] Case teams should apply this multiplier to this 2016 penalty policy and also to the 2018 Supplemental Amendment, which applies to industrial stormwater cases. The 2018 Supplemental Amendment narrative continues to be applicable, but the 1.02168 multiplier referenced throughout is no longer applicable because it has been superseded by the 1.29362 multiplier.

SDWA		
UIC Program Judicial and Administrative Order Settlement Penalty Policy	1993	2.11168
New Public Water System Supervision Program Settlement Penalty Policy	1994	2.05801
CAA – Accidental Release Prevention/Risk Management Program		
Final Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68	2012	1.33009
CAA – Stationary Source		
Clean Air Act Stationary Source Civil Penalty Policy	1991	2.23924
Appendix I – Penalty Policy for Violation of Permit Requirements	1987	2.66845
Appendix II - Vinyl Chloride Civil Penalty Policy	1985	2.83047
Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy	1992	2.16976
Appendix IV - Clean Air Act Penalty Policy as Applied to Stationary Sources of Volatile Organic Compounds (VOC) Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance	1987	2.23924 [3]

[3] For violations governed by Appendix IV, the EPA uses the same multiplier that applies to the 1991 "*Clean Air Act Stationary Source Civil Penalty Policy*" because the gravity-based component of such violations is calculated using the 1991 policy.

Appendix VI - Leak Detection and Repair Penalty Policy	2012	1.33009
Appendix VII – Penalty Policy for New Residential Wood Heaters	1989	2.44961
Appendix VIII - Clean Air Act Civil Penalty Policy Applicable to Persons Who Manufacture or Import Controlled Substances in Amounts Exceeding Allowances Properly Held Under 40 C.F.R. Part 82: Protection of Stratospheric Ozone	1990	2.30466
Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners	1993	2.11168
Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant	1994	2.05801
Appendix XI - National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements	2007	1.47257

Appendix XII - Interim Penalty Policy Applicable To Certain Illegal Imports of Bulk Regulated Substances Under 40 C.F.R. Part 84: Phasedown of Hydrofluorocarbons, Appendix XII to the October 25, 1991 Clean Air Act Stationary Source Penalty Policy	2023	1.01933 [4]
EPA Region 10's Civil Penalty Guidelines for the Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington. 40 C.F.R. Part 49	2008	1.42064
CAA – Mobile Source		
Clean Air Act Title II Vehicle & Engine Civil Penalty Policy	2021	1.17620
Clean Air Act Mobile Source Fuels Civil Penalty Policy Title II of the Clean Air Act --40 C.F.R. Part 80 Fuels Standards Requirements	2016	1.29362
North American and U.S. Caribbean Sea Emissions Control Areas Penalty Policy for Violations by Ships of the Sulfur in Fuel Standard and Related Provisions	2015	1.29362
Civil Penalty Policy for Administrative Hearings	1993	2.11168
RCRA		
RCRA Civil Penalty Policy	2003	1.91827

[4] Because the EPA issued this penalty policy in March 2023, the EPA calculated this multiplier by using inflation accrued from March 2023 to October 2023. The March 2023 CPI-U is 301.836 and the October 2023 CPI-U is 307.671. 307.671 divided by 301.836 equals 1.01933.

Guidance on the Use of Section 7003 of RCRA	1997	3.29800 [5]
Revised Consolidated Enforcement Penalty Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA	2023	1.21664 [6]
CERCLA		
Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders	1997	2.53575 [7]
CERCLA & EPCRA		
Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act	1999	1.82921
EPCRA		
Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990), February 24, 2017 (Amended)	2017	1.29362 [8]

[5] For RCRA section 7003(b) penalties, the EPA calculated this multiplier by dividing the new statutory maximum of $18,139 by $5,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

[6] Case teams should calculate the gravity-based portion of the penalty using the penalty amounts in the 2023 Revised Consolidated Penalty Policy for UST Regulations and Revised Field Citation Program and ESA. For narrative instructions only, case teams should use the 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations when calculating standard UST penalties and use the 1993 Guidance on Field Citation Enforcement narrative guidance on issuing field citations. Please note that the multiplier of 1.21664 applies to field citations. As stated in Section II. of this memorandum, this memorandum does not modify Expedited Settlement Agreement (ESA) penalty policies and this multiplier should not be applied for ESAs.

[7] For CERCLA section 106(b)(1) penalties, the EPA calculated this multiplier by dividing the new statutory maximum of $69,733 by $27,500, which is the maximum amount set forth in the 1997 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

[8] Case teams should apply the multiplier of 1.29362 to the second matrix on page 11 of the Policy. This multiplier should not be applied to the first matrix on page 11 of the Policy.

FIFRA		
FIFRA Enforcement Response Policy (FIFRA ERP)	2009	1.42324
Appendix E to FIFRA ERP - Enforcement Response Policy for FIFRA Section 7(c): Establishment Reporting Requirements	2010	Use the 2009 FIFRA ERP and the 1.42324 multiplier
Appendix F to FIFRA ERP - Interim Final Penalty Policy for the Worker Protection Standard (WPS) (edited May 2018)	2018	Use the 2009 FIFRA ERP and the 1.42324 multiplier [9]
Appendix G to FIFRA ERP - Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act Good Laboratory Practice (GLP) Regulations	1991	Use the 2009 FIFRA ERP and the 1.42324 multiplier
Appendix H to the FIFRA ERP - Enforcement Response Policy for the FIFRA Pesticide Container/Containment Regulations	2012	Use the 2009 FIFRA ERP and the 1.42324 multiplier
TSCA		
Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substance Control Act	1980	1.94043
Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12, and 13	1999	1.94043 [10]

[9] When the EPA updated Appendix F to the FIFRA ERP in May 2018, the EPA did not update or alter the penalty amounts from the 1997 version. Therefore, the EPA case teams should use the penalty amounts listed in the 2018 version and apply the 1.42324 multiplier.

[10] The "Penalty Matrix For Violations Occurring After January 30, 1997" on page 8 of this policy should be ignored. For all violations governed by this policy, the multiplier should be applied to the penalty amounts in the "Penalty Matrix For Violations Occurring On or Before January 30, 1997" found on the same page.

Amendment to the TSCA Section 5 Enforcement Response Policy – Penalty Limit for Untimely NOC Submissions	1993	1.94043 [11]
Enforcement Response Policy for TSCA §4 Test Rules	1986	1.94043
Final TSCA GLP Enforcement Response Policy	1985	1.94043
TSCA – Asbestos		
Enforcement Response Policy for the Asbestos Model Accreditation Plan (MAP) – Addendum to the AHERA ERP	1998	1.87605
Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act	1989	2.44961
Enforcement Response Policy for Asbestos Abatement Projects: Worker Protection Rule	1989	1.94043
TSCA – Lead-Based Paint		
Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education (PRE) Rule; Renovation, Repair and Painting (RRP) Rule; and Lead-Based Paint Activities (LBPA) Rule	2013 [12]	1.29362 [13]

[11] Note that this Amendment from July 1, 1993, amends the June 8, 1989, policy titled "Amendment TSCA Section 5 Enforcement Response Policy." The multiplier of 1.94043 applies to both the 1993 amendment and 1989 policy.

[12] Appendix B-2 was updated in April 2013 within the April 2010 Policy.

[13] The 2010 *"Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule"* and the 2007 *"Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy"* both penalize violators who fail to provide and document receipt of certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for essentially the same type of deficiency, the penalty matrix in the Pre-Renovation Education Rule component of the 2010 Consolidated Lead-Based Paint penalty policy was adopted from the 2007 Section 1018 Disclosure Rule penalty policy. Therefore, Level "a" penalties apply to violations of the Lead-Based Paint Renovation, Repair and Painting Rule and the Lead-Based Paint Activities (Abatement) Rule. Level "b" penalties are derived from the current Section 1018 Lead-Based Paint Disclosure Rule matrix because the major activities of the Disclosure Rule and Pre-renovation Education Rule are very similar. Therefore, under this Policy, Level "b" penalties apply to violations of the Pre-Renovation Education Rule.

TSCA – PCBs		
Polychlorinated Biphenyls (PCB) Penalty Policy	1990	1.94043
Residential Lead-Based Paint Hazard Reduction Act of 1992 Lead-Based Paint		
Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy	2007	1.97264 [14]

[14] For the Residential Lead-Based Paint Hazard Reduction Act Section 1018 penalties, the EPA calculated this multiplier by dividing the new statutory maximum of $21,699 by $11,000, which is the maximum amount set forth in the 2007 narrative policy's matrix. This multiplier maintains the penalty policy's deterrent effect for all violations, including the most serious violations.

benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 of September 30, 1993 (Regulatory Planning and Review), and E.O. 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under E.O. 12866, as amended by E.O. 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act, 5 U.S.C. 601–612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act (PRA)

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 4

Disability benefits.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on December 18, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

■ For the reasons stated in the preamble, VA adopts as final the interim final rule published on April 14, 2023, at 88 FR 22914.

[FR Doc. 2023–28241 Filed 12–26–23; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–5906.8–01–OECA]

Civil Monetary Penalty Inflation Adjustment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating this final rule to adjust the level of the maximum (and minimum) statutory civil monetary penalty amounts under the statutes the EPA administers. This action is mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (''the 2015 Act''). The 2015 Act prescribes a formula for annually adjusting the statutory maximum (and minimum) amount of civil monetary penalties to reflect inflation, maintain the deterrent effect of statutory civil monetary penalties, and promote compliance with the law. The rule does not establish specific civil monetary penalty amounts the EPA may seek in particular cases. The EPA calculates those amounts, as appropriate, based on the facts of particular cases and applicable agency penalty policies. The EPA's civil penalty policies, which guide enforcement personnel on how to exercise the EPA's discretion within statutory penalty authorities, take into account a number of fact-specific considerations, *e.g.,* the seriousness of the violation, the violator's good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and the violator's ability to pay.

DATES: This final rule is effective December 27, 2023.

FOR FURTHER INFORMATION CONTACT: David Smith-Watts, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, Mail Code 2241A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, telephone number: (202) 564–4083; *smith-watts.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The 2015 Act [1] requires each Federal agency to adjust the statutory civil monetary penalties under the laws implemented by that agency annually, to account for inflation. Section 4 of the 2015 Act requires each Federal agency to publish these adjustments by January 15 of each year. The purpose of the 2015 Act is to maintain the deterrent effect of civil monetary penalties by translating originally enacted statutory civil penalty amounts to today's dollars and rounding statutory civil penalties to the nearest dollar.

Since January 15, 2017, the EPA has made seven annual adjustments: (1) on January 12, 2017, effective on January 15, 2017 (82 FR 3633); (2) on January 10, 2018, effective on January 15, 2018 (83 FR 1190); (3) on February 6, 2019, effective the same day (84 FR 2056), with a subsequent correction on February 25, 2019 (84 FR 5955); (4) on January 13, 2020, effective the same day (85 FR 1751); (5) on December 23, 2020, effective the same day (85 FR 83818); (6) on January 12, 2022, effective the same day (87 FR 1676); and (7) on January 6, 2023, effective the same day (88 FR 986). This rule implements the eighth annual adjustment mandated by the 2015 Act.

[1] The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L.114–74) was signed into law on November 2, 2015, and amended the Federal Civil Penalties Inflation Adjustment Act of 1990.

The 2015 Act provides a formula for calculating the adjustments. Each statutory maximum and minimum [2] civil monetary penalty, as currently adjusted, is multiplied by the cost-of-living adjustment multiplier, which is the percentage by which the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October 2023 exceeds the CPI–U for the month of October 2022.[3]

With this rule, the new statutory maximum and minimum penalty levels listed in the third column of Table 1 of 40 CFR 19.4 will apply to all civil monetary penalties assessed on or after December 27, 2023, for violations that occurred after November 2, 2015, the date the 2015 Act was enacted. The former maximum and minimum statutory civil monetary penalty levels, which are in the fourth column of Table 1 to 40 CFR 19.4, will now apply only to violations that occurred after November 2, 2015, where the penalties were assessed on or after January 6, 2023, but before December 27, 2023. The statutory civil monetary penalty levels that apply to violations that occurred on or before November 2, 2015, are codified at Table 2 to 40 CFR 19.4. The fifth column of Table 1 and the seventh column of Table 2 display the statutory civil monetary penalty levels as originally enacted.

The formula for determining the cost-of-living or inflation adjustment to statutory civil monetary penalties consists of the following steps:

Step 1: The cost-of-living adjustment multiplier for 2024 is the percentage by which the CPI–U of October 2023 (307.671) exceeds the CPI–U for the month of October 2022 (298.012), which is 1.03241.[4] Multiply 1.03241 by the current penalty amount. This is the raw adjusted penalty value.

Step 2: Round the raw adjusted penalty value. Section 5 of the 2015 Act states that any adjustment shall be rounded to the nearest multiple of $1. The result is the final penalty value for the year.

II. The 2015 Act Requires Federal Agencies To Publish Annual Penalty Inflation Adjustments Notwithstanding Section 553 of the Administrative Procedure Act

Pursuant to section 4 of the 2015 Act, each Federal agency is required to publish adjustments no later than January 15 each year. In accordance with section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the **Federal Register**. However, section 4(b)(2) of the 2015 Act provides that each agency shall make the annual inflation adjustments ''notwithstanding section 553'' of the APA. Consistent with the language of the 2015 Act, this rule is not subject to notice and an opportunity for public comment and will be effective on December 27, 2023.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule merely increases the level of statutory civil monetary penalties that can be imposed in the context of a Federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. Because the 2015 Act directs Federal agencies to publish this rule notwithstanding section 553 of the APA, this rule is not subject to notice and comment requirements or the RFA.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action is required by the 2015 Act, without the exercise of any policy discretion by the EPA. This action also imposes no enforceable duty on any state, local or tribal governments or the private sector. Because the calculation of any increase is formula-driven pursuant to the 2015 Act, the EPA has no policy discretion to vary the amount of the adjustment.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175. This rule merely reconciles the real value of current statutory civil monetary penalty levels to reflect and keep pace with the levels originally set by Congress when the statutes were enacted or amended. The calculation of the increases is formula-driven and prescribed by statute, and the EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, this rule will not have a substantial direct effect on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

[2] Under Section 3(2)(A) of the 2015 Act, a '''civil monetary penalty' [is] any penalty, fine or other sanction that is for a specific monetary amount as provided by Federal law; or has a maximum amount provided for by Federal law.'' EPA-administered statutes generally refer to statutory maximum penalties, with the following exceptions: Section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), refers to a minimum penalty of ''not less than $100,000. . .''; Section 104b(d)(1)(A) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1414b(d)(1)(A), refers to an exact penalty of $600 ''[f]or each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in calendar year 1992. . .''; and Section 325(d)(1) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11045(d)(1), refers to an exact civil penalty of $25,000 for each frivolous trade secret claim.

[3] Current and historical CPI–U's can be found on the Bureau of Labor Statistics' websites here: *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202309.pdf* and *https://www.bls.gov/news.release/pdf/cpi.pdf.*

[4] Section 5(b) of the 2015 Act provides that the term ''cost-of-living adjustment'' means the percentage (if any) for each civil monetary penalty by which—

(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).

Because the CPI–U for October 2023 is 307.671 and the CPI–U for October 2022 is 298.012, the cost-of-living multiplier is 1.03241 (307.671 divided by 298.012).

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

The rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on communities with environmental justice concerns. As mandated by the 2015 Act, this rule adjusts for inflation the statutory civil monetary penalty amounts of the statutes administered by the EPA.

EPA acknowledges that the annual mandatory increase in civil penalty amounts to account for inflation may result in further deterrents of environmental violations that may trigger civil penalties. Deterring violations has the benefit of promoting the overarching purpose of environmental enforcement and may have a positive impact on the human health or environment of all populations including communities with environmental justice concerns.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA finds that the APA's notice and comment rulemaking procedures are unnecessary because the 2015 Act directs Federal agencies to publish their annual penalty inflation adjustments ''notwithstanding section 553 [of the APA].''

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Michael S. Regan,

Administrator.

For the reasons set out in the preamble, the EPA amends title 40, chapter I, part 19 of the Code of Federal Regulations as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104–134, title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub. L. 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

(a) The statutory civil monetary penalty levels set forth in the third column of Table 1 of § 19.4 apply to all violations which occur or occurred after November 2, 2015, where the penalties are assessed on or after December 27, 2023. The statutory civil monetary penalty levels set forth in the fourth column of Table 1 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after January 6, 2023, but before December 27, 2023.

(b) The statutory monetary penalty levels in the third column of Table 2 to § 19.4 apply to all violations which occurred after December 6, 2013, through November 2, 2015, and to violations occurring after November 2, 2015, where penalties were assessed before August 1, 2016. The statutory civil monetary penalty levels set forth in the fourth column of Table 2 of § 19.4 apply to all violations which occurred after January 12, 2009, through December 6, 2013. The statutory civil monetary penalty levels set forth in the fifth column of Table 2 of § 19.4 apply to all violations which occurred after March 15, 2004, through January 12, 2009. The statutory civil monetary penalty levels set forth in the sixth column of Table 2 of § 19.4 apply to all violations which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise the section heading, introductory text, and Table 1 of § 19.4 to read as follows:

§ 19.4 Statutory civil monetary penalties, as adjusted for inflation, and tables.

Table 1 of this section sets out the statutory civil monetary penalty provisions of statutes administered by the EPA, with the third column setting out the latest operative statutory civil monetary penalty levels for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023. The fourth column displays the operative statutory civil monetary penalty levels where penalties were assessed on or after January 6, 2023, but before December 27, 2023. Table 2 of this section sets out the statutory civil monetary penalty provision of statutes administered by the EPA, with the operative statutory civil monetary penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015, and for violations that occurred after November 2, 2015, where penalties were assessed before August 1, 2016.

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Environmental statute	Statutory civil monetary penalties for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023	Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 6, 2023, but before December 27, 2023	Statutory civil monetary penalties, as enacted
7 U.S.C. 136*l*(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$24,255	$23,494	$5,000
7 U.S.C. 136*l*(a)(2) [1]	FIFRA	3,558/2,293/3,558	3,446/2,221/3,446	1,000/500/1,000
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	48,512	46,989	25,000
15 U.S.C. 2647(a)	TSCA	13,946	13,508	5,000
15 U.S.C. 2647(g)	TSCA	11,524	11,162	5,000
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	13,946	13,508	5,000
31 U.S.C. 3802(a)(2)	PFCRA	13,946	13,508	5,000
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	66,712	64,618	25,000
33 U.S.C. 1319(g)(2)(A)	CWA	26,685/66,712	25,847/64,618	10,000/25,000
33 U.S.C. 1319(g)(2)(B)	CWA	26,685/333,552	25,847/323,081	10,000/125,000
33 U.S.C. 1321(b)(6)(B)(i)	CWA	23,048/57,617	22,324/55,808	10,000/25,000
33 U.S.C. 1321(b)(6)(B)(ii)	CWA	23,048/288,080	22,324/279,036	10,000/125,000
33 U.S.C. 1321(b)(7)(A)	CWA	57,617/2,304	55,808/2,232	25,000/1,000
33 U.S.C. 1321(b)(7)(B)	CWA	57,617	55,808	25,000
33 U.S.C. 1321(b)(7)(C)	CWA	57,617	55,808	25,000
33 U.S.C. 1321(b)(7)(D)	CWA	230,464/6,913	223,229/6,696	100,000/3,000
33 U.S.C. 1414b(d)(1)(A)	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	1,535	1,487	600
33 U.S.C. 1415(a)	MPRSA	242,550/319,953	234,936/309,909	50,000/125,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	17,683/44,206	17,128/42,818	10,000/25,000
33 U.S.C. 1901 note (*see* 1409(a)(2)(B)).	CACSO	17,683/221,026	17,128/214,087	10,000/125,000
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	44,206	42,818	25,000
33 U.S.C. 1908(b)(1)	ACT TO PREVENT POLLUTION FROM SHIPS (APPS).	90,702	87,855	25,000
33 U.S.C. 1908(b)(2)	APPS	18,139	17,570	5,000
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA)	69,733	67,544	25,000
42 U.S.C. 300g–3(g)(3)(A)	SDWA	69,733	67,544	25,000
42 U.S.C. 300g–3(g)(3)(B)	SDWA	13,946/48,586	13,508/47,061	5,000/25,000
42 U.S.C. 300g–3(g)(3)(C)	SDWA	48,586	47,061	25,000
42 U.S.C. 300h–2(b)(1)	SDWA	69,733	67,544	25,000
42 U.S.C. 300h–2(c)(1)	SDWA	27,894/348,671	27,018/337,725	10,000/125,000
42 U.S.C. 300h–2(c)(2)	SDWA	13,946/348,671	13,508/337,725	5,000/125,000
42 U.S.C. 300h–3(c)	SDWA	24,255/51,744	23,494/50,120	5,000/10,000
42 U.S.C. 300i(b)	SDWA	29,154	28,239	15,000
42 U.S.C. 300i–1(c)	SDWA	169,700/1,697,012	164,373/1,643,738	100,000/1,000,000
42 U.S.C. 300j(e)(2)	SDWA	12,127	11,746	2,500
42 U.S.C. 300j–4(c)	SDWA	69,733	67,544	25,000
42 U.S.C. 300j–6(b)(2)	SDWA	48,586	47,061	25,000
42 U.S.C. 300j–23(d)	SDWA	12,799/127,983	12,397/123,965	5,000/50,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD–BASED PAINT HAZARD REDUCTION ACT OF 1992.	21,699	21,018	10,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	45,850	44,411	10,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	121,275	117,468	25,000
42 U.S.C. 6928(c)	RCRA	73,045	70,752	25,000
42 U.S.C. 6928(g)	RCRA	90,702	87,855	25,000
42 U.S.C. 6928(h)(2)	RCRA	73,045	70,752	25,000
42 U.S.C. 6934(e)	RCRA	18,139	17,570	5,000
42 U.S.C. 6973(b)	RCRA	18,139	17,570	5,000
42 U.S.C. 6991e(a)(3)	RCRA	73,045	70,752	25,000
42 U.S.C. 6991e(d)(1)	RCRA	29,221	28,304	10,000
42 U.S.C. 6991e(d)(2)	RCRA	29,221	28,304	10,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	121,275	117,468	25,000
42 U.S.C. 7413(d)(1)	CAA	57,617/460,926	55,808/446,456	25,000/200,000
42 U.S.C. 7413(d)(3)	CAA	11,524	11,162	5,000
42 U.S.C. 7524(a)	CAA	57,617/5,761	55,808/5,580	25,000/2,500
42 U.S.C. 7524(c)(1)	CAA	460,926	446,456	200,000
42 U.S.C. 7545(d)(1)	CAA	57,617	55,808	25,000
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	69,733	67,544	25,000
42 U.S.C. 9606(b)(1)	CERCLA	69,733	67,544	25,000
42 U.S.C. 9609(a)(1)	CERCLA	69,733	67,544	25,000
42 U.S.C. 9609(b)	CERCLA	69,733/209,202	67,544/202,635	25,000/75,000
42 U.S.C. 9609(c)	CERCLA	69,733/209,202	67,544/202,635	25,000/75,000
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT–TO–KNOW ACT (EPCRA).	69,733	67,544	25,000
42 U.S.C. 11045(b)(1)(A)	EPCRA	69,733	67,544	25,000

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code citation	Environmental statute	Statutory civil monetary penalties for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023	Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 6, 2023, but before December 27, 2023	Statutory civil monetary penalties, as enacted
42 U.S.C. 11045(b)(2)	EPCRA	69,733/209,202	67,544/202,635	25,000/75,000
42 U.S.C. 11045(b)(3)	EPCRA	69,733/209,202	67,544/202,635	25,000/75,000
42 U.S.C. 11045(c)(1)	EPCRA	69,733	67,544	25,000
42 U.S.C. 11045(c)(2)	EPCRA	27,894	27,018	10,000
42 U.S.C. 11045(d)(1)	EPCRA	69,733	67,544	25,000
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	19,437	18,827	10,000
42 U.S.C. 14304(g)	BATTERY ACT	19,437	18,827	10,000

[1] Note that 7 U.S.C. 136*l*(a)(2) contains three separate statutory maximum civil penalty provisions. The first mention of $1,000 and the $500 statutory maximum civil penalty amount were originally enacted in 1978 (Pub. L. 95–396), and the second mention of $1,000 was enacted in 1972 (Pub. L. 92–516).

* * * * *

[FR Doc. 2023–28555 Filed 12–26–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 231219–0311]

RIN 0648–BM60

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Coast Groundfish Fishery Management Plan; 2024 Specifications and Management Measures Corrections

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This rule corrects 2024 harvest specifications for several species of groundfish where the numerical values were mathematically calculated incorrectly and do not accurately reflect the harvest policy recommendations of the Pacific Fishery Management Council (Council). These harvest specifications are for groundfish caught in the U.S. exclusive economic zone seaward of Washington, Oregon, and California, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). This rule revises harvest limits or allocations that were previously calculated based on incorrect annual catch limits (ACLs). This action implements corrected numerical values that align with the Council's intended harvest policy decisions and considers the most recent fishery information available at the time those policies were recommended.

DATES: This final rule is effective December 27, 2023.

ADDRESSES: This rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov/*. Background information and documents including an analysis for the policy decisions underpinning this action (Analysis), which addresses the statutory requirements of the Magnuson-Stevens Act are available from the Council's website at *https://www.pcouncil.org.* The final 2022 Stock Assessment and Fishery Evaluation (SAFE) report for Pacific Coast groundfish, as well as the SAFE reports for previous years, are available from the Council's website at *https://www.pcouncil.org.* The final Environmental Assessment (EA) and Regulatory Impact Review from the 2023–2024 harvest specifications is available from the NMFS website at *https://www.fisheries.noaa.gov/region/west-coast.*

FOR FURTHER INFORMATION CONTACT: Gretchen Hanshew, Fishery Management Specialist, at 206–526–6147 or g*retchen.hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

This final rule corrects the numerical values of harvest specifications and resulting harvest target management measures for six species or stock complexes for 2024. The harvest policies by which these numerical values are derived were recommended by the Council at its April and June 2022 meetings and published in a proposed rule on October 14, 2022 (87 FR 62676) and final rule on December 16, 2022 (87 FR 77007). Hereafter, these proposed and final rules for the 2023–2024 harvest specifications and management measures will be referred to as the ''original'' proposed and final rules. In the original proposed and final rules, numerical values were miscalculated for a small subset (six species or stock complexes) of those harvest specifications and harvest target management measures regulations for 127 groundfish stocks or management units. Numerical values were either too high (increasing risk of overfishing) or too low (increasing risk of not achieving optimum yield). Specific details on the errors and corrected values for each species or stock complex are discussed in detail in the proposed rule for this action (88 FR 73810, October 27, 2023).

The harvest policies used to calculate the numerical values of the corrected harvest specifications and harvest target management measures in this rule are not revised from those described in the original proposed and final rules for the 2023–2024 harvest specifications and management measures. The Council recommended these corrections at its September 2023 meeting.

Corrections to Harvest Specifications and Harvest Targets

As described in the proposed rule (88 FR 73810, October 27, 2023) a few species and stock complex harvest specifications, which are numerical values of the harvestable surplus and include overfishing limits (OFLs), annual biological catch (ABCs), and ACLs, were calculated in error. Subsequent harvest target calculations that stem from the ACLs were also erroneous. This final rule corrects the numerical values of harvest specifications and applies the same sharing agreements to corrected ACLs to recalculate harvest targets. The OFLs,

Exhibit CX59

STATE OF ALABAMA
FOREIGN LIMITED LIABILITY COMPANY (LLC)
AMENDMENT TO REGISTRATION

PURPOSE: In order to amend the registration of a foreign entity (any entity formed outside of Alabama), the entity must deliver to the Secretary of State for filing an Amendment to Registration pursuant to Section 10A-1-7.06, Code of Alabama 1975.

INSTRUCTIONS: Mail two (2) copies of this completed Amendment to Registration, and the filing fee of $25.00 (credit card, check, or money order) to the **Secretary of State, Business Services, P.O. Box 5616, Montgomery, Alabama, 36103-5616** or you may email the filing to foreign.entities@sos.alabama.gov **If you are submitting this filing via email and paying the standard $25.00 fee you many purchase a copy of the filing on our website after the filing has been processed or mark $4.00 copy fee on the credit card payment form** – www.sos.alabama.gov Business Services, Business Entity Record Copies. If you elect expedited processing (completed within twenty four hours (24hrs.) after receipt by SOS), you may have the stamped copy emailed to you. Expedited processing is $125.00 (a $100.00 expedite fee plus the $25.00 filing fee). If you are mailing/couriering the application and would like an acknowledgement include a copy and postage paid self-addressed envelope. The Amendment will not be processed if the credit card does not authorize and will be removed from the index if the check is dishonored ($30 fee). **All processing instructions are complete in the form and Payment Option Sheet & Filing Instructions; cover letters are not necessary and will not be reviewed.**

Alabama
Sec. Of State

Entity Change FLL
351-486
Date 10/04/2019
Time 13:50
191004 3 Pg

File	$25.00
Ackn	$.00
Exp	$.00
Total	$25.00
02/034	

(For SOS Office Use Only)

This form must be typed or laser printed.

1. Alabama Entity ID Number (Format: 000-000): 351 - 486

INSTRUCTION TO OBTAIN ID NUMBER TO COMPLETE FORM: If you do not have this number immediately available (it is on the face of your original registration filing), you may obtain it on our website at www.sos.alabama.gov Business Services (below picture), Business Entity Search, click on Entity Name, enter the registered name of the entity in the appropriate box, and enter. The six (6) digit number containing a dash to the left of the name is the entity ID number. If you click on that number, you can check the details page to make certain that you have the correct entity – this verification step is strongly recommended.

2. The legal name of the foreign entity as currently registered with the Alabama Secretary of State:

   ERP Compliant COKE, LLC

3. **If amending the name of the foreign entity for use in Alabama, a copy of the name reservation certificate from the Office of the Alabama Secretary of State must be attached (must be acquired prior to submitting Amendment).**

4. The name of the foreign entity has been legally changed to (insert "no change" if not applicable) :

   Bluestone Coke, LLC

RECEIVED DATE
OCT 04 2019
SECRETARY OF STATE
OF ALABAMA

FOREIGN LIMITED LIABILITY COMPANY (LLC)
AMENDMENT TO REGISTRATION

5. The name of the foreign entity for use in Alabama only if different from the legal name* :

*A fictitious name may be used **only** if the legal name is not available for use in Alabama or the name does not contain the words "Limited Liability Company" or the abbreviation "L.L.C." or "LLC" (10A-1-5.06).

6. If a fictitious name is used the undersigned certifies the resolution of the LLC's governing authority to adopt the fictitious name for use in Alabama and affirms the authority to make such a certification under 10A-1-7.07.

7. The undersigned certifies that the foreign entity exists as a valid Limited Liability Company under the laws of the entity's jurisdiction of formation.

8. Change Street (**No PO Boxes**) Address of principal office to: 3500 35th Avenue North, Birmingham, Al 35207

Change Mailing Address of principal office to (if different from street address): P.O. Box 5327, Birmingham, Al 35207

9. Change state/country of formation to: Delaware

10. Attach copies of any other amendments. ☑ Copies attached.

10, 4, 2019
Date

Stephen Ball, Esq., General Counsel for Bluestone Coke, LLC
Typed Name and Title of Signature Below

Signature of Person Authorized to Sign per 10A-1-4.01, *Alabama Code*

In order to review the sections of the *Code of Alabama 1975* referred to in this filing form you may access www.sos.alabama.gov and go to Records. Choose the Code of Alabama link to review.

Alabama Secretary of State

Bluestone Coke, LLC	
Entity ID Number	000 - 351 - 486
Entity Type	Foreign Limited Liability Company
Principal Address	3500 35TH AVENUE NORTH BIRMINGHAM, AL 35207
Principal Mailing Address	PO BOX 5327 BIRMINGHAM, AL 35207
Status	Exists
Place of Formation	Delaware
Formation Date	02/02/2016
Qualify Date	02/04/2016
Registered Agent Name	WIGGINS, DON
Registered Office Street Address	3500 35TH AVENUE NORTH BIRMINGHAM, AL 35207
Registered Office Mailing Address	3500 35TH AVENUE NORTH BIRMINGHAM, AL 35207
Nature of Business	
Doing Business in AL Since	02/05/2016

Annual Reports

Annual Report information is filed and maintained by the Alabama Department of Revenue.
If you have questions about any of these filings, please contact Revenue's Business Privilege Tax Division at 334-242-1170 or www.revenue.alabama.gov. The Secretary of State's Office cannot answer questions about or make changes to these reports.

Report Year	2017 2018

Transactions

Transaction Date	04/14/2017
Registered Agent Changed From	Corporation Service CompanyCSC-Lawye 150 South Perry Street Montgomery, AL 36104
Transaction Date	10/04/2019
Legal Name Changed From	ERP Compliant COKE, LLC
Transaction Date	10/04/2019
Principal Mailing Address Changed From	15 Appledore Lane Natural Bridge, VA 24578
Transaction Date	10/04/2019
Principal Office Changed From	15 Appledore Lane Natural Bridge, VA 24578

Bluestone Coke, LLC	
Transaction Date	10/23/2019
Agent Mailing Address Changed From	CORPORATION SERVICE COMPANY INC 641 SOUTH LAWRENCE STREET MONTGOMERY, AL 36104
Transaction Date	10/23/2019
Registered Agent Changed From	CORPORATION SERVICE COMPANY INC 641 SOUTH LAWRENCE STREET MONTGOMERY, AL 36104
Transaction Date	08/30/2021
Agent Mailing Address Changed From	WALKER, RAY P.O. BOX 5327 BIRMINGHAM, AL 35207
Transaction Date	08/30/2021
Registered Agent Changed From	WALKER, RAY 3500 35TH AVENUE NORTH BIRMINGHAM, AL 35207

Scanned Documents

Purchase Document Copies

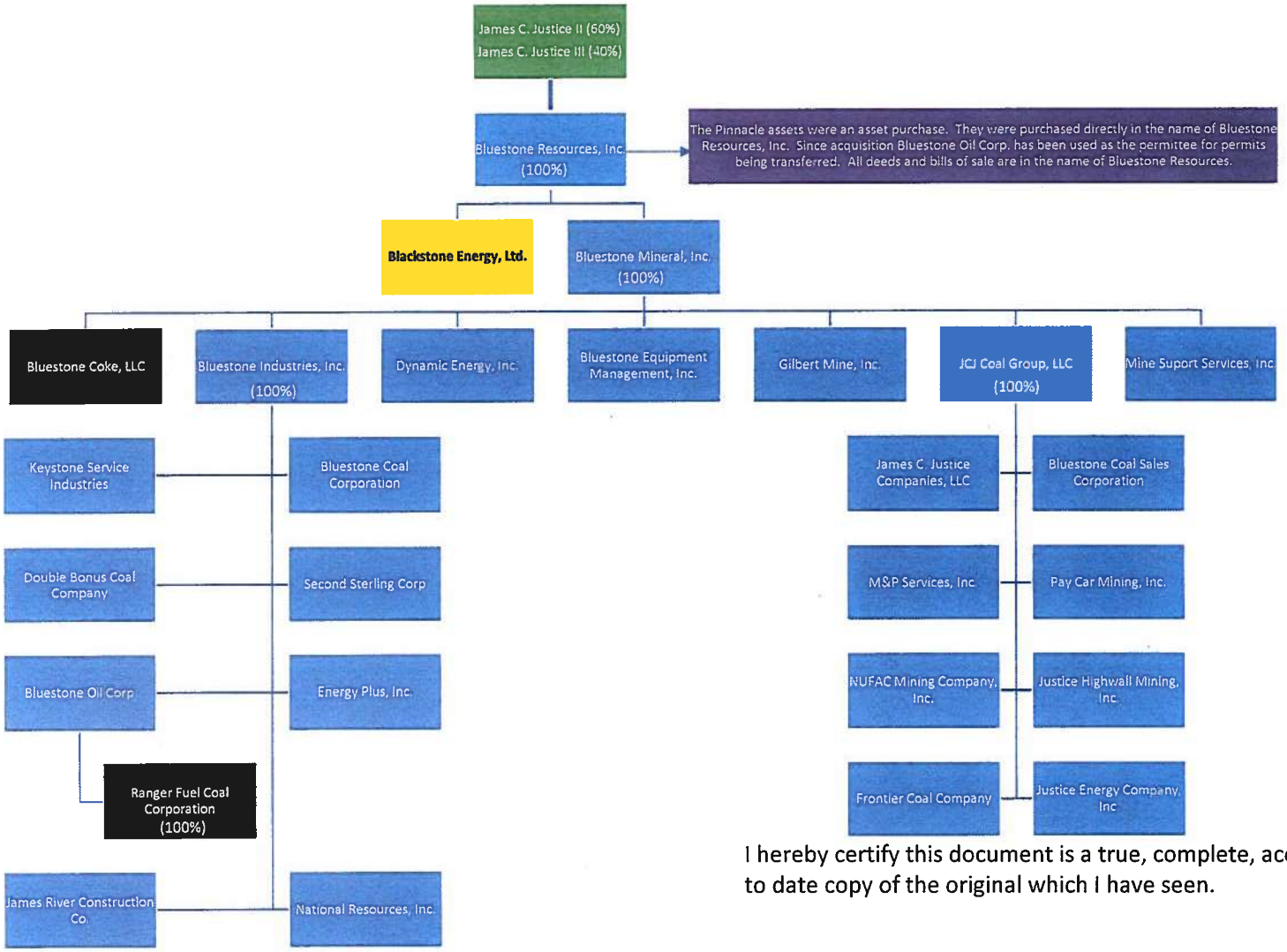
Document Date / Type / Pages	02/04/2016 Certificate of Formation 2 pgs.
Document Date / Type / Pages	04/14/2017 Registered Agent Change 1 pg.
Document Date / Type / Pages	10/04/2019 Articles of Amendment 3 pgs.
Document Date / Type / Pages	10/23/2019 Registered Agent Change 2 pgs.
Document Date / Type / Pages	08/30/2021 Registered Agent Change 2 pgs.

Browse Results New Search

Exhibit CX60

Exhibit B

(Bluestone Organizational Chart)



Percentages indicate the ownership percentage in all entities below that specific entity and directly connected by a blue line.

I hereby certify this document is a true, complete, accurate and up to date copy of the original which I have seen.

Stephen W. Ball, Vice President & General Counsel
January 8, 2020.

DEF_001145

Exhibit CX61

Bluestone Coke, LLC
3500 35th Avenue North
Birmingham, AL 35207
(205) 808-7803

October 10, 2019

Wes Hardegree, Project Manager
RCRA Programs and Cleanup Branch
United States Environmental Protection Agency
Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960

Dear Mr. Hardegree:

Previously I notified your office via letter that ownership of ERP Compliant Coke, LLC had transferred. It was announced on August 1, 2019 through a press release. Shortly afterwards, we had a conference call to discuss this and other business.

At that time ERP Compliant Coke was not expecting a name change to take place. After consideration, executive management has made the decision to change our name to Bluestone Coke, LLC. I am, via this letter, notifying you so that if there is any impact toward our RCRA Order, any and all necessary changes can be addressed.

After you have had time to evaluate this change, please don't hesitate to contact me toward any necessary steps that may need to be initiated. My contact information remains the same at this time.

Sincerely,

Don Wiggins
Manager of Technical Services
Bluestone Coke, LLC

Exhibit CX62

copy

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 11, 2019

Certified Mail
Return Receipt Requested

Don Wiggins, Manager of Technical Services
Bluestone Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

RE: Comments on Financial Assurance Mechanism
SMA 5 - Former Pig Iron Foundry
EPA ID Number: ALD 000 828 848
RCRA Docket Number: RCRA-04-2016-4250

Dear Mr. Wiggins:

The United States Environmental Protection Agency has reviewed the October 31, 2019, letter supplying the Financial Assurance (FA) mechanism for the Former Pig Iron Foundry. Review by the Region 4 FA Coordinator found a few comments that need to be addressed.

1. The insurance certificate provided is identical to the required language as set out in 264.151(e). That stated, in this situation we would rather the language to be "substantially equivalent" to the requirements in 264.151(e), not "identical" because this is for a corrective action, not closure/post closure as it currently states. Therefore, references to "closure/post-closure care" should be replaced with "corrective action" in the insurance certificate.

2. The EPA requires a duplicate original of the insurance policy, including all endorsements and attachments so that the EPA can ensure the policy conforms to the regulations.

Please provide a revised/updated FA mechanism within thirty (30) calendar days from receipt of this letter.

If you have any questions concerning this matter, please contact me at (404) 562-9629 or hardegree.wes@epa.gov.

Sincerely,

Wesley Hardegree, Project Manager
RCRA Corrective Action Section
RCRA Programs and Cleanup Branch

Cc: Corey Hendrix, FA Coordinator, US EPA (via email)
Terry Rippstein, Terracon (via email)
Thomas Garrett, ADEM (via email)

Certified Mail Form

US Environmental Protection Agency

EPA HELLO GASTON, WILLIE Date: 12/11/2019

New Certified Mail Record

Certified No.: 70171450000079733714

Express No.:

To: Don Wiggins Manager of Technical Services Bluestone Coke, LLC

Street: 3500 35th Avenue North

City: Birmingham State: AL Zip: 35207

Sender: Wes Hardegree Extension: 29629 Floor: 10

Sender Location: RCRA CORRECTIVE ACTION SECTION

Building: AFC Tower Unit:

Alternate Sender: Alternate Sender Extension:

Site Name: Site ID:

Save Record

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Don Wiggins, Manager of Technical Services
Bluestone Coke, LLC
3500 35th Avenue North
Birmingham, AL 35207

9590 9402 4175 8092 1108 97

2. Article Number (Transfer from service label)
7017 1450 0000 7973 3714

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery
12/13/19

nt from item 1? ☐ Yes
dress below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery
Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053
Domestic Return Receipt

Exhibit CX63

From:	Hardegree, Wesley
To:	Hendrix, Corey; York, Brooke; Redleaf-Durbin, Joan
Subject:	FW: Bluestone Coke Financial Assurance Mechanism
Date:	Thursday, December 10, 2020 7:19:21 AM
Attachments:	EPA Confidentiality Agreement.pdf

FYI: See below.

Interesting development.

Wes

From: Hunter Naff <hunter.naff@bluestone-coal.com>
Sent: Wednesday, December 9, 2020 5:50 PM
To: Hardegree, Wesley <Hardegree.Wes@epa.gov>
Cc: Steve Ball <steve.ball@bluestone-coal.com>
Subject: Bluestone Coke Financial Assurance Mechanism

Mr. Hardegree:

I hope this message finds you well. Since the conference call, Bluestone Coke, LLC ("Bluestone") has been unable to secure the corrective action/closure insurance as its financial assurance mechanism for SMA 4 and SMA 5. Bluestone continues to pursue insurance as an option for corrective action/closure care. However, as was discussed previously between the parties, if difficulties persisted in Bluestone securing said insurance, it would at the same time consider other viable alternatives.

The alternatives Bluestone currently seeks is the corporate/parent guarantee for which Bluestone's parent company, Bluestone Resources, Inc., ("BRI'") may be able to provide. In doing so, BRI would need to furnish the EPA with confidential business and financial records for the EPA's evaluation, among other requirements. As that is the case, BRI would ask that the EPA review and execute the attached "Agreement Regarding the Exchange of Financial Information". If the EPA has any objections to entering into the Agreement, please let us know the basis for the objection so that the parties can agree on certain measures that prevent public dissemination and disclosure of the information BRI provides.

Thank you in advance for your attention to this matter. Please let me know if you have any questions.

Best regards,

Hunter

Hunter Naff
(540) 613-5795

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Exhibit CX64

From: Hendrix, Corey (she/her/hers)
To: Hunter Naff
Cc: York, Brooke; Redleaf-Durbin, Joan (she/her/hers)
Subject: Review of Financial Test- Bluestone Resources, Inc
Date: Thursday, January 28, 2021 4:52:10 PM
Attachments: 2021 1 28 EPA Review of Bluestone FT CG signed.pdf

---

Hello Mr. Naff,

Please see the attached letter. Please let us know if you have any questions.

Sincerely,

Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

January 28, 2021

ELECTRONIC MAIL

Bluestone Coke, LLC
Attn: Hunter Naff, Associate General Counsel
3500 35th Avenue North
Birmingham, AL 35207
hunter.naff@bluestone-coal.com

SUBJ: Bluestone Coke, LLC, Birmingham, AL
EPA ID ALD000828848
Resource Conservation and Recovery Act Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250
SMA 5 and SMA 4 Financial Assurance
Financial Test and Corporate Guarantee Review

Dear Mr. Naff,

EPA has reviewed the information submitted in December 2020 by Bluestone Resources, Inc. to support use of the Financial Test and Corporate Guarantee for financial assurance coverage related to the Bluestone Coke, LLC (Respondent) facility located at 3500 35th Avenue North, Birmingham, Alabama. In order to use the Financial Test and Corporate Guarantee to meet Bluestone Coke, LLC's financial assurance obligation set forth in the Resource Conservation and Recovery Act (RCRA) Section 3008(h) Administrative Order on Consent, Docket No. RCRA-04-2016-4250 (AOC), the following deficiencies and comments need to be addressed.

1. No written Corporate Guarantee was provided as required by the AOC Attachment C: Financial Assurance, Paragraph 6 and 40 C.F.R. § 264.143(f)(10). Specific wording for the corporate guarantee is available in 40 C.F.R. § 264.151(h)(1). References to regulatory requirements for "closure and/or post-closure care" shall be replaced with the phrase "corrective action." The certification statement at the end of the Corporate Guarantee can be amended to state that the wording is "substantially equivalent" instead of "identical" to the wording specified in the regulations.

2. In accordance with AOC Attachment C: Financial Assurance, Paragraph 7, confirm that the "sum of current closure and post-closure costs" listed in Line 1 of the CFO Letter means "the sum of all environmental remediation obligations" (including obligations under CERCLA, RCRA, Underground Injection Control (UIC), TSCA and any other state or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the cost of the work to be performed in accordance with the AOC. If the

value currently listed in Line 1 does not include all environmental obligations as required by the AOC, update Line 1 accordingly.

3. The submitted Financial Test letter (dated December 11, 2020) does not account for the required annual inflationary adjustments to the cost estimates of Solid Waste Management Unit (SWMU) Management Area (SMA) 5 (Former Pig Iron Foundry) and SMA 4 (Former Chemical Plant) as required by AOC Attachment C: Financial Assurance, Paragraph 1.b. To date, the cost estimates have not been adjusted for inflation. For your convenience, attached is a copy of the Implicit Price Deflators (IDP) for Gross Domestic Product published by the Bureau of Economic Analysis. To account for inflation, divide the latest published annual Deflator by the Deflator for the previous year, then multiply that factor by the cost estimate. The following inflationary adjustments are suggested for inclusion in this submittal.

    a. SMA 5 Cost Estimate dated 10/29/2018, approved 7/11/2019 for $121,294.80

        - Inflationary adjustment for 2019, IDP= 1.024, Inflation adjusted costs $124,207
        - Inflationary adjustment for 2020, IDP= 1.018, Inflation adjusted costs $126,424
        - **Coverage now required for SMA 5 is $126,424**

    b. SMA 4 Cost Estimate dated 9/16/2019, approved on 12/18/2019 for $4,043,516.41

        - Inflationary adjustment for 2020, IDP= 1.018, Inflation adjusted costs $4,115,701
        - **Coverage now required for SMA 4 is $4,115,701**

    If the Financial Test and Corporate Guarantee continue to be utilized for financial assurance coverage, the annual inflation adjustment for SMA 5 and SMA 4 will be due within thirty (30) days after the close of Respondent's fiscal year.

4. In the Financial Test letter dated December 11, 2020, Bluestone Resources, Inc., stated that it is the "direct or higher-tier parent corporation of the owner or operator. Bluestone Coke, LLC is wholly owned by Bluestone Mineral Inc. which is in turn wholly owned by the undersigned firm, Bluestone Resources, Inc.."

    In Bluestone Coke, LLC's Request for Information response dated June 18, 2020, when asked to identify all parents of Bluestone Coke, LLC, Bluestone Coke, LLC, responded that "**Bluestone [Coke, LLC] has no** branches, subsidiaries, or **parents.**" When asked in that same letter to describe the corporate relationship between Bluestone Coke, LLC and Bluestone Mineral, Inc., Bluestone Coke, LLC stated "There is no per se corporate relationship between Bluestone Coke, LLV [C] and Bluestone Mineral Inc. Notwithstanding, the relationship between the two entities is such that Bluestone Mineral, Inc. is the sole member with 100 percent interest in Bluestone Coke, LCC."

    Clarify what the relationship is between Bluestone Coke, LLC, and Bluestone Resources, Inc. As required by 40 C.F.R. § 264.143(f)(10), the guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator.

5. To date, EPA has still not received a supplemental response nor a signed certification statement to the June 3, 2020 Request for Information. In light of Bluestone Resources, Inc.'s recent provision of an alternative financial assurance mechanism related to the Bluestone Coke, LLC facility for EPA's review, EPA may no longer require the supplemental response from Bluestone Coke, LLC if Bluestone Coke, LLC no longer intends to pursue the previously-made inability to pay claim.

Submit the required documents addressing the deficiencies and comments identified above within fourteen (14) days of receipt of this letter. Once all of the above deficiencies and comments are addressed, original, signed and witnessed/ notarized documents must be sent to:

U.S. EPA Region 4
Attn: Corey Hendrix, RCRA Financial Assurance
61 Forsyth Street SW
Atlanta, GA 30338

If Bluestone Resources, Inc. would like EPA to review versions of the documents prior to final execution, the electronic documents can be shared in a password protected pdf, with a separate email containing the password, to York.Brooke@epa.gov. As a reminder, Bluestone Resources, Inc. may continue to assert a business confidentiality claim covering part or all the information requested, in the manner described in 40 C.F.R. § 2.203(b), by attaching to such information, at the time it is submitted, a suitable notice employing language such as trade secret or proprietary or company confidential.

Should you have any questions on this matter, please contact myself at (404) 562-8738 or by email at Hendrix.Corey@epa.gov or Joan Redleaf Durbin, Senior Attorney, at (404) 562-9544 or at Redleaf-Durbin.Joan@epa.gov.

Sincerely,

COREY HENDRIX

Digitally signed by COREY HENDRIX
Date: 2021.01.28 16:48:04 -05'00'

Corey D. Hendrix
Financial Assurance Specialist

Exhibit CX65

From:	Hunter Naff
To:	Hendrix, Corey (she/her/hers)
Cc:	York, Brooke; Redleaf-Durbin, Joan (she/her/hers)
Subject:	RE: Review of Financial Test- Bluestone Resources, Inc
Date:	Friday, January 29, 2021 9:44:04 AM

Good Morning Corey:
Letter is received. We'll make the corrections and clarifications and get the revised version back you.
Thanks and best regards,
Hunter

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Thursday, January 28, 2021 4:52 PM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: York, Brooke <York.Brooke@epa.gov>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Review of Financial Test- Bluestone Resources, Inc
Hello Mr. Naff,
Please see the attached letter. Please let us know if you have any questions.
Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

Exhibit CX66

From: Hunter Naff
To: Hendrix, Corey (she/her/hers)
Cc: York, Brooke; Redleaf-Durbin, Joan (she/her/hers)
Subject: RE: Review of Financial Test- Bluestone Resources, Inc
Date: Monday, February 15, 2021 8:43:37 AM

Good Morning All:
Bluestone is continuing to address the requested revisions and guidance set forth in your letter dated January 28th. I suspect that a response to the letter, along with a complete, revised Corporate Guarantee submission will be provided to you by COB this Wednesday. Thank you in advance for your patience.
Regards,
Hunter

From: Hendrix, Corey <Hendrix.Corey@epa.gov>
Sent: Thursday, January 28, 2021 4:52 PM
To: Hunter Naff <hunter.naff@bluestone-coal.com>
Cc: York, Brooke <York.Brooke@epa.gov>; Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Subject: Review of Financial Test- Bluestone Resources, Inc
Hello Mr. Naff,
Please see the attached letter. Please let us know if you have any questions.
Sincerely,
Corey D. Hendrix
RCRA/PCB Financial Assurance
U.S. Environmental Protection Agency- Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
Hendrix.corey@epa.gov
404-562-8738

Exhibit CX67

From: Polly Hansen
To: Hendrix, Corey
Cc: Steve Ball
Subject: EPA ID ALD000828848
Date: Friday, August 27, 2021 4:59:06 PM

On behalf of Mr. Ball, please find attached documents related to the above EPA ID number. These documents have also been sent via UPS.

Should you have any questions or concerns, please do not hesitate to contact our office at any time.

Thank you.

Polly Hansen
Paralegal
Bluestone Resources, Inc.
Office: 540-613-1460

Bluestone

August 27, 2021

VIA ELECTRONIC MAIL

Hendrix.corey@epa.gov

Corey Hendrix, Financial Specialist
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St, SW
10th floor
Atlanta, GA 30303

SUBJ: Bluestone Coke, LLC, Birmingham, EPA ID ALD000828848
SMA-4 and SMA-5 Financial Assurance Mechanism
Confidential Business Information provided to evaluate viability of corporate guarantee under C.F.R. § 264.143(f) (10) and 40 C.F.R. § 265.143(e) (10)

CONFIDENTIAL BUSINESS INFORMATION UNDER 40 C.F.R. § 2.201 ET. SEQ.

Mr. Hendrix:

I am writing in response to your email of August 11, 2021. The information you are provided will be managed as CBI.

Pursuant to these instructions, and in reliance upon these representations, Bluestone Resources, Inc. ("BRI') provides under this cover letter the information needed to evaluate its financial ability to act as a Corporate Guarantor for the financial assurance required of Bluestone Coke, LLC, for SMA-4 and SMA-5.

As this information is subject to revisions by your office and BRI, and pursuant to Section 3007(b) of RCRA, 42 U.S.C. Section 6927(b), Sections 104(e)(7)(E) and (F) of CERCLA, 42 U.S.C. Sections 9604(e)(7)(E) and (F), and 40 C.F.R. Section 2.203(b), BRI hereby asserts a confidentiality claim to cover every document submitted herein marked "Company Confidential". Aside from existing publicly available information produced, Bluestone considers each response to contain either proprietary, business confidential, or employee's personally identifiable information which collectively shall remain confidential and limited to the purpose of EPA's request to evaluate Bluestone's ability to secure financial assurance as required by the subject Administrative Order on Consent.

Specifically in response to the items contained in your above-described email, Bluestone offers the following response:

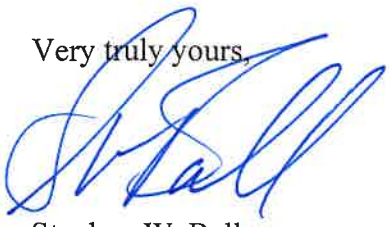
- Bluestone provided a written guarantee dated March 22, 2021, that includes wording as specified in 264.151(h) (the "Guarantee"). A copy of the Guarantee is attached hereto for your reference. Per the terms of the Guarantee, the Guarantee remains in effect today. We believe this satisfies the first item from the email.

- As for items 2, 3 and 4 from your email, the 2020 year-end financial audit of Bluestone Resources, Inc. has not yet been completed. Immediately upon completion the audit and the referenced independent certified public accounting reports will be immediately provided to your office.

- Item 5, I have corrected line one of Alternative I under the CFO letter to include the total amount as outlined in AOC Attachment C as well as changing the description of line one to address "all environmental remediation obligations. The updated letter is attached hereto.

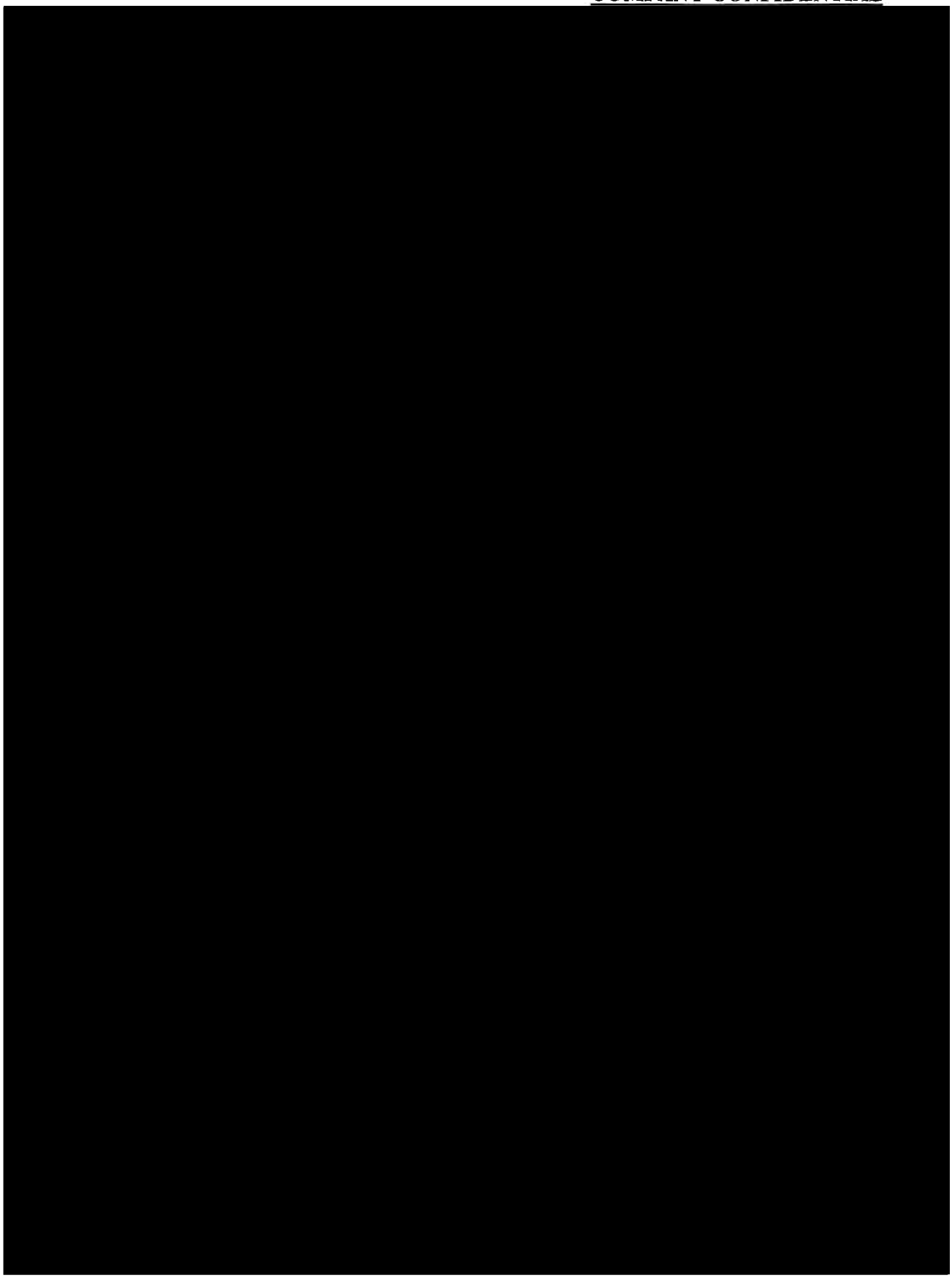
Thank you in advance for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

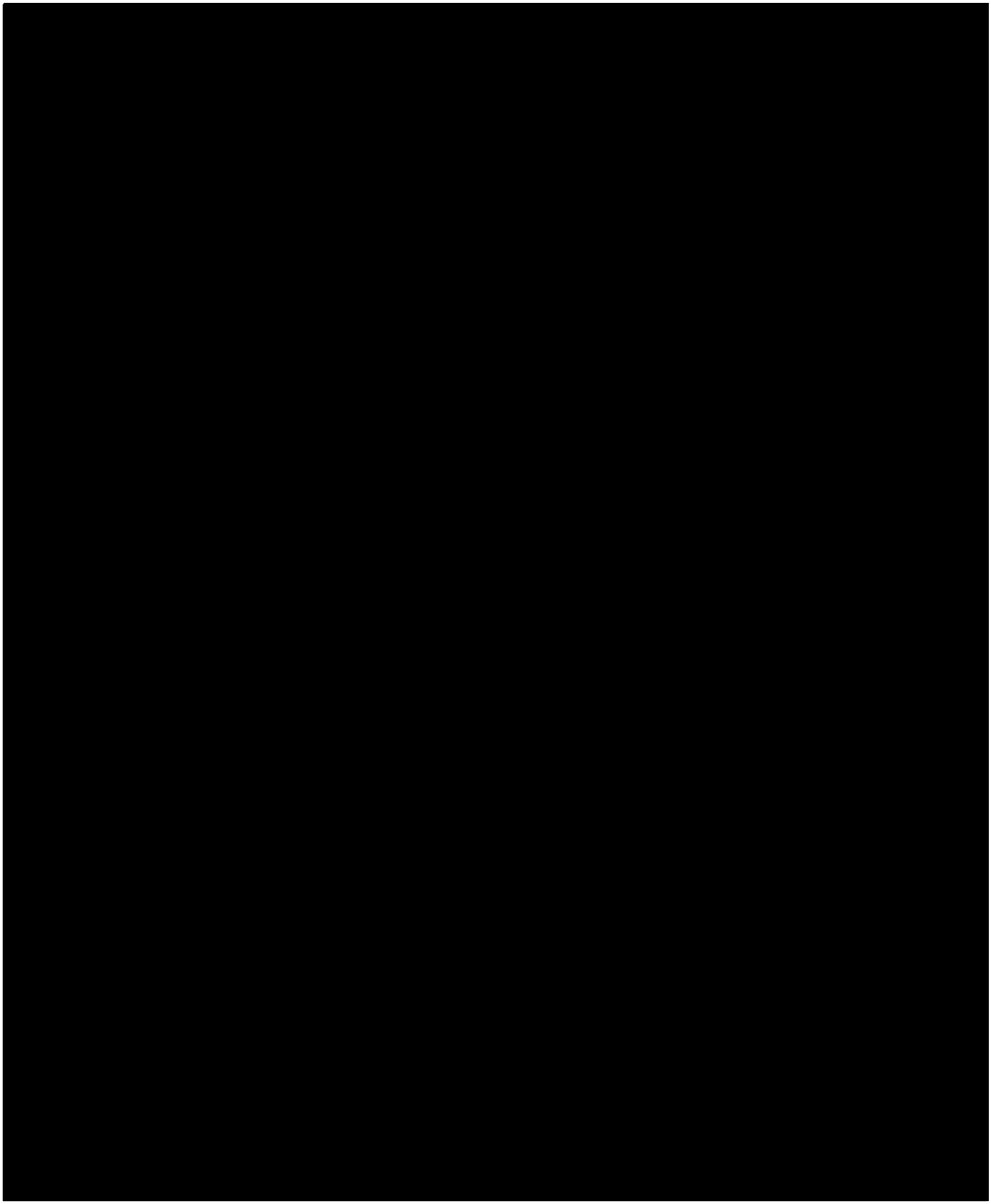
Very truly yours,



Stephen W. Ball

Encl/





Bluestone

August 27, 2021

VIA ELECTRONIC MAIL
Redleaf-Durbin.Joan@epa.gov
Hendrix.corey@epa.gov

Joan Redleaf-Durbin, Senior Attorney
Corey Hendrix, Financial Specialist
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St, SW
10th floor
Atlanta, GA 30303

Re: Financial Test Letter

Facility: Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

I am the Executive Vice President of Bluestone Resources, Inc.[1] This letter is in support of this firm's use of the financial test to demonstrate financial assurance for closure and/or post-closure costs, as specified in subpart H of 40 CFR parts 264 and 265.

1. This firm is the owner or operator of the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in subpart H of 40 CFR parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility:

Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

- SMA 4 $ 4,115,701.00
- SMA 5 $ 126,424.00
- UIC Injection Pilot Study [redacted]

2. This firm guarantees, through the guarantee specified in subpart H of 40 CFR parts 264 and 265, the closure or post-closure care of the following facilities owned or operated by the guaranteed party. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility:

[1] Bluestone Resources, Inc. does not employ the title Chief Financial Officer. As Executive Vice President the undersigned is the most senior officer responsible for the financial functions of the firm.

*3. Tangible net worth [redacted]

*4. Net worth

*5. Current assets

*6. Current liabilities

7. Net working capital [line 5 minus line 6] [redacted]

*8. The sum of net income plus depreciation, depletion, and amortization [redacted]

*9. Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) [redacted]

10. Is line 3 at least $10 million? (Yes/No) [redacted]

11. Is line 3 at least 6 times line 1? (Yes/No)

12. Is line 7 at least 6 times line 1? (Yes/No)

*13. Are at least 90% of firm's assets located in the U.S.? If not, complete line 14 (Yes/No) [redacted]

14. Is line 9 at least 6 times line 1? (Yes/No) [redacted]

15. Is line 2 divided by line 4 less than 2.0? (Yes/No)

16. Is line 8 divided by line 2 greater than 0.1? (Yes/No) [redacted]

17. Is line 5 divided by line 6 greater than 1.5? (Yes/No) [redacted]

I hereby certify that the wording of this letter, except for as modified by footnote 2, is substantially similar to the wording specified in 40 CFR 264.151(f) as such regulations were constituted on the date shown immediately below.

Respectfully, [redacted]

Stephen W. Ball
Executive Vice President
August 9, 2021

Witness: [redacted]

Exhibit CX68

From:	Redleaf-Durbin, Joan (she/her/hers)
To:	Hendrix, Corey (she/her/hers)
Subject:	FW: Bluestone Resources, Inc.
Date:	Monday, August 19, 2024 8:22:31 PM
Attachments:	2302_001.pdf

Joan Redleaf Durbin (she/her)
Senior Attorney
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
404/562-9544

From: Steve Ball <steve.ball@bluestone-coal.com>
Sent: Thursday, April 7, 2022 8:07 PM
To: Redleaf-Durbin, Joan <Redleaf-Durbin.Joan@epa.gov>
Cc: Ron Hatfield <ron.hatfield@bluestone-coal.com>; Polly Hansen <polly.hansen@bluestone-coal.com>
Subject: Bluestone Resources, Inc.

Ms. Redleaf-Durbin,

Please see attached communication on behalf of Bluestone Resources, Inc.

Regards,

Steve

Stephen W. Ball
Executive Vice President & General Counsel
302 S. Jefferson Street
Roanoke, VA 24011

******** CONFIDENTIALITY NOTICE AND WARNINGS *********

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****

Bluestone

April 7, 2022

VIA ELECTRONIC MAIL
Redleaf-Durbin.Joan@epa.gov

Joan Redleaf-Durbin, Senior Attorney
Corey Hendrix, Financial Specialist
RCRA/FIFRA/TSCA Law Office
US EPA, Region 4
61 Forsyth St, SW
10th floor
Atlanta, GA 30303

Re: Facility- Bluestone Coke, LLC f/k/a ERP Compliant Coke, LLC
3500 35th Avenue North
Birmingham, Alabama 35207

Dear Ms. Redleaf-Durbin:

Bluestone Resources, Inc. is in receipt of your letter dated March 24, 2022. Unfortunately, Bluestone continues to deal with the devastating effects of the bankruptcy of Greensill Capital (UK) Ltd. Greensill was Bluestone's primary lender and source of credit and as such Bluestone has pledged nearly all of its assets to Greensill as part of the credit relationship.

Greensill filed bankruptcy in March 2021. Since that time Bluestone has had no ability to borrow money because of its assets being pledged to Greensill and at the same time Bluestone has had no access to working capital. Additionally, Bluestone has not been able to complete its annual audit because of the Greensill bankruptcy. As an update, Credit-Suisse Asset Management has stepped into the shoes of Greensill through the bankruptcy process and Bluestone has been actively working with Credit Suisse to resolve this situation.

Great progress has been made over the last several weeks and we believe once the Credit Suisse/Greensill situation is resolved Bluestone will be able to complete its audit, but more importantly will once again have access to working capital which will allow Bluestone to potentially obtain alternate sources of financial assurance, i.e. surety bond, insurance, etc. Currently the uncertainty caused by the Greensill bankruptcy prevents Bluestone from effectively obtaining any alternate financial assurance.

Given these circumstances beyond our control, we respectfully request that we be allowed more time to obtain these alternate financial assurances. We will continue to provide you with updates as the Credit Suisse negotiations continue.

Respectfully submitted,

Stephen W. Ball
Executive Vice President & General Counsel

Exhibit CX69

United States
Environmental Protection
Agency

Office of Solid Waste
and Emergency Response

May 1982
SW - 955

Solid Waste

EPA

Financial Assurance for Closure and Post-Closure Care:

Requirements for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities

A Guidance Manual

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 document (SW-955) was prepared for the Office of Solid Waste under contact no. 68-01-6491

U.S. Environmental Protection Agency
1982

PREFACE

This manual was prepared by ICF, Inc., 1850 K Street, N.W., Suite 950, Washington, DC 20006, under EPA Contract No. 68-01-6491. The EPA project officer was Carole J. Ansheles.

This document was compiled in order to provide guidance to owners and operators in complying with the requirements for financial assurance of closure and post-closure care; and to EPA Regional staff in implementing the requirements.

This document has received Information Clearance No. 2000-0445 from the Office of Management and Budget, for use through December 31, 1983.

SUMMARY TABLE OF CONTENTS

DETAILED TABLE OF CONTENTS

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DETAILED TABLE OF CONTENTS (continued)

DETAILED TABLE OF CONTENTS (continued)

DETAILED TABLE OF CONTENTS (continued)

DETAILED TABLE OF CONTENTS (continued)

DETAILED TABLE OF CONTENTS (continued)

LIST OF EXHIBITS

LIST OF EXHIBITS (continued)

I. INTRODUCTION

A. ORGANIZATION OF MANUAL

This manual is organized to communicate information necessary to ensure that adequate financial responsibility is provided for the proper closure and post-closure care of hazardous waste facilities. This introduction provides a general background for understanding the financial requirements and how the manual is organized. It is followed by an overview of the requirements themselves in Chapter II. The overview outlines general responsibilities applicable to all financial assurance mechanisms. The following chapters focus on the specific mechanisms in the order of their appearance in EPA regulations:

Chapter III	Trust Funds
Chapter IV	Surety Bonds
Chapter V	Letters of Credit
Chapter VI	Insurance
Chapter VII	Financial Test and Corporate Guarantee
Chapter VIII	State-Required Mechanisms and State Assumption of Responsibility

In each of the chapters, the discussion is organized as follows:

A. Overview--Introduces the financial assurance mechanism, highlights key terms and special considerations, and presents the applicable regulations.

B. Requirements of the Mechanism--Explains what must be done by owners or operators and the financial community for EPA to approve use of the mechanism.

C. Regional Office Responsibilities--Describes the activities and functions which EPA Regional Offices will perform.

D. Sources of Further Information--Provides references to useful documents or other sources of information.

E. Attachments--Includes checklists and required wording of instruments.

The manual focuses on the interim status financial requirements of 40 CFR 265 (Subpart H) and includes separate sections which discuss any special requirements for permitted facilities (40 CFR 264).

The appendix to the manual contains a glossary of key terms. Terms included in the glossary will be identified by the use of CAPITAL LETTERS in the first use of the term within each chapter.

B. BACKGROUND

As part of the "cradle to grave" regulation of hazardous wastes under the Resource Conservation and Recovery Act of 1976 (RCRA), EPA has developed standards for:

- proper closure of hazardous waste treatment, storage, and disposal facilities;
- post-closure care and monitoring of disposal facilities such as landfills and surface impoundments; and
- assuring the availability of funds for closure and/or post-closure activities.

These standards require the owner or operator of a hazardous waste facility to develop plans for closure and (if applicable) post-closure, to prepare cost estimates based on those plans, and finally, to demonstrate the ability to pay for closure and/or post-closure. This demonstration must be accomplished by using one or more financial assurance mechanisms specified by EPA. This manual describes how these mechanisms may be used. Other EPA guidance addresses closure and post-closure plans and cost estimates.

The specific requirements which are applicable to an owner or operator depend on:

(1) The type of facility involved, because not all facilities have post-closure obligations and different types of facilities may have different closure requirements;

(2) The status of the facility involved, because the rules distinguish between existing facilities with "interim status" (40 CFR 265) and facilities which are operating under a RCRA permit (40 CFR 264) and

(3) The state where the facility is located, because many states are in the process of being authorized to administer their own hazardous waste programs and may be promulgating rules that are not identical to federal EPA requirements.

"Sources of Further Information" (included at the end of this chapter) outlines how these rules appear in the Code of Federal Regulations (CFR), the dates of publication in the Federal Register, and the appropriate EPA Guidance Manuals on RCRA closure and post-closure requirements (See Exhibits I-3 through I-5). This introduction includes a discussion of owner or

operator responsibilities as well as an explanation of the relationship between state and federal requirements.

C. PURPOSE

This manual has three primary purposes:

(1) To assist owners, operators, and the financial community in understanding their responsibilities and fulfilling requirements in a timely fashion;

(2) To assist Regional Administrators in developing effective procedures to implement the requirements; and

(3) To promote uniform and coordinated implementation within and among Regions to ease the burden on owners or operators, the financial community, and EPA personnel.

To accomplish these goals, the manual describes the responsibilities of the regulated community, the tasks that must be performed, and the future contingencies that may arise. Similarly, the manual outlines the functions which Regional Offices must perform and future problems they may encounter. Checklists and sample submissions are provided as well as sources of further information.

D. OWNER OR OPERATOR RESPONSIBILITIES

All hazardous waste management facilities are subject to closure requirements (except for facilities that only store wastes for 90 days or less). However, only disposal facilities where hazardous wastes are to remain after closure are subject to post-closure requirements. (See 40 CFR 265.110.) To satisfy closure and post-closure requirements, owners and operators of hazardous waste facilities must prepare closure and post-closure plans, as applicable, and cost estimates based on those plans. States and the federal government only are exempt from the standards for cost estimates and financial assurance; all other owners and operators must satisfy those requirements as well.

The RCRA financial requirements regulations apply to both the owner and the operator of a hazardous waste management facility. The actual provision of financial assurance, however, may be offered by either the owner or operator. EPA will consider both parties responsible for carrying out the requirements, and leaves it up to the parties themselves to undertake, share, or divide the actual provision of financial assurance.

Owners or operators should be sure to provide their financial institutions with the name and telephone number of the EPA Regional contact, the required wording of instruments included in this manual, as well as copies of the

regulations cited in Exhibit II-3. The regulations themselves may be obtained by contacting the RCRA Hotline (800) 424-9346 (toll free) or (202) 382-3000, or the Superintendent of Documents, Washington, D.C. 20402. If financial institutions have questions about specific procedures or issues not covered in the regulations, they may contact the RCRA financial specialist in each EPA Region. See Appendix A.

Until permits have been issued under RCRA, EXISTING FACILITIES are subject to the INTERIM STATUS rules. When a facility receives a RCRA permit, the rules for PERMITTED FACILITIES will apply (See Exhibit I-3). In contrast to other RCRA standards, the financial requirements for interim status and permitted facilities are quite similar. Therefore, the chapters describing the individual financial mechanisms are based on the interim status requirements; however, each chapter includes subsections which detail any provisions unique to permitted facilities.

This guidance document is based on the revised interim final rules on financial requirements for closure and post-closure care published in the Federal Register on April 7, 1982 and effective as of July 6, 1982. These rules have been designed and revised to facilitate the goal of assuring that funds will be available for proper closure and post-closure care of hazardous waste management facilities. EPA Regional Offices have designated personnel to answer questions and provide materials. (See Appendix A-1.) EPA Headquarters may also be consulted through the RCRA HOTLINE (800-424-9346 toll free or 202-382-3000). Appended to each chapter of this manual are other useful sources of further information.

E. EPA HEADQUARTERS ROLE

Because this is a new program, problems may arise that either must be resolved case-by-case or had not been anticipated by the regulations (or this guidance). To assure uniformity of implementation, EPA Regional Offices should communicate with EPA Headquarters to determine if such problems have arisen elsewhere and to discuss options for resolving the questions. Further guidance or memoranda will be distributed by Headquarters as additional issues are resolved. Owners or operators and financial community representatives are also free to contact Headquarters but should initially discuss all questions with the Regional Office staff (see Appendix A) or appropriate state agency (see Appendix B) who have primary responsibility for implementing the requirements and overseeing compliance. (See Section F below.)

As administrative experience with the financial assurance standards accumulates, allocation of responsibility between Headquarters and the Regional Offices for review of compliance may shift in certain circumstances to exploit potential efficiencies. For example, the feasibility of centralizing and automating annual review of financial test data is under investigation. Headquarters currently envisions that the Regional Offices will play the lead role in determining compliance with financial assurance

standards. Headquarters will act as a clearinghouse of information and source of technical assistance.

In order to foster unified implementation of the financial requirements, Headquarters will be available to provide guidance on review of financial assurance demonstrations which apply to more than one EPA Region; procedures for coordination with Enforcement; and responses to bankruptcies of owners or operators, their corporate guarantors, and financial institutions.

F. RELATIONSHIP BETWEEN STATE AND FEDERAL REQUIREMENTS

The Resource Conservation and Recovery Act (RCRA) does not prevent states from independently enacting closure or post-closure financial requirements, and a number of states have done so. Moreover, under RCRA, states may apply to EPA for the authority to administer a state hazardous waste management program in lieu of federal implementation of such a program; these states must have financial requirements equivalent to the federal rules to obtain such authorization. Thus, hazardous waste facilities may be subject to state financial requirements and must satisfy applicable rules, whether promulgated as part of an EPA-authorized state program or independently.

In addition to determining what state financial requirements exist (if any), owners or operators must also determine whether facilities are located in states that have received EPA authorization to administer hazardous waste programs in lieu of RCRA. State program authorization typically proceeds in "Phases," prior to final authorization. Thus, as of May 10, 1982, twenty-nine states had received PHASE I INTERIM AUTHORIZATION, including three states which have also received PHASE II INTERIM AUTHORIZATION. See Exhibit I-1. Once a state has received either Phase I or II interim authorization, owners or operators need comply only with whatever state financial assurance requirements exist, if any.

Owners or operators should be aware of how the phases of the state authorization process relate to the RCRA financial requirements. First, to receive Phase I interim authorization, a state need not have established financial assurance requirements. However, such requirements must be established and substantially equivalent to RCRA standards for a state to receive Phase II interim authorization. In either case, interim status facilities are not subject to federal RCRA financial requirements, only such state requirements as exist will apply. Owners or operators should note that Phase II authorization may well establish some additional financial requirements for interim status facilities.

Beyond this, facilities need comply only with permit requirements, whether a permit is State or Federally-issued. If a RCRA permit is issued to a facility in a state that does not have Phase II authorization, federal requirements (40 CFR 264) apply in addition to any independent state permit requirements. States with Phase II authorization may issue permits in lieu of RCRA permits for one or more categories of hazardous waste facilities; federal

EXHIBIT I-1

STATES WITH INTERIM AUTHORIZATION AS OF MAY 10, 1982

Alabama	Louisiana	Oregon
*Arkansas	Maine	Pennsylvania
California	Maryland	Rhode Island
Connecticut	Massachusetts	South Carolina
Delaware	Mississippi	Tennessee
Florida	Montana	*Texas
Georgia	New Hampshire	Utah
Iowa	*North Carolina	Vermont
Kansas	North Dakota	Virginia
Kentucky	Oklahoma	Wisconsin

* These states have received Phase II interim authorization in addition to Phase I.

requirements do not apply to permits issued by a state under Phase II authorization. Of course, such a state must have financial assurance requirements that are substantially equivalent to federal standards.

Exhibit I-1 lists the states with interim authorization as of May 10, 1982. Since some "Phase I" and non-authorized states do have financial requirements, owners and operators should contact the appropriate state agency (see Appendix B) or the EPA Regional Office for more specific information. To the extent that state requirements are similar to RCRA rules, Chapters II through VII of this manual can be used to supplement materials available from state agencies. However, no submissions to EPA Regional Offices are required, and reference to Chapter VIII will not be necessary.

State and/or federal officials may and/or need to review the financial assurance offered by the owner or operator to determine if it satisfies applicable requirements. Whether it is a state and/or Federal agency that is responsible for that determination depends on the authorization status of the state program, and on whether the state has financial responsibility requirements of its own. Exhibit I-2 shows the appropriate authority for review. The owner or operator should therefore ascertain which agency is responsible for review, and submit all documents for review to that agency.

EXHIBIT I-2

WHERE TO SEND FINANCIAL REQUIREMENTS DOCUMENTS FOR FACILITIES WITH INTERIM STATUS

Status of State Program Authorization	Does State Have Its Own Requirements? Yes	No
No Authorization	Send to state and EPA. (Case 1)	Send financial information to EPA only. (Case 2)
Phase I Interim Authorization	Send to state only. (Case 3)	No submission necessary. (Case 4)
Phase II Interim Authorization	Send to state only. (Case 3)	Not applicable

In states with financial requirements but neither Phase I nor Phase II authorization (Case 1), the owner or operator must comply with state financial assurance requirements and submit the assurance for review to the EPA Regional Administrator by the effective date to determine whether the RCRA requirements are satisfied. This is discussed in detail in Chapter VIII.

In states with no financial requirements and no state program authorization (Case 2) the owner or operator need only submit documents to EPA which satisfy federal RCRA requirements, as described in this manual.

In states with closure or post-closure financial requirements and either Phase I or Phase II authorization (Case 3), owners or operators should submit all required financial assurance information to the state program officials only.

In a Phase I state without its own financial requirements (Case 4) owners or operators are not required to submit any financial assurance information. Any information that is required, however, would be submitted to the state. A facility in a Phase I state that applies for a RCRA permit, however, must comply with federal requirements.

In a state which has not received authorization but has financial requirements the satisfaction of state financial requirements may not always satisfy the requirements of federal EPA rules. For example, a state may establish financial requirements based on only ten-to-fifteen years of post-closure care as opposed to the up-to-thirty years (or more) which can be required under the federal system. In these cases, owners or operators may have to provide additional assurance to satisfy federal financial requirements. Where state rules are stricter than federal EPA provisions, no additional financial assurance demonstrations will ordinarily be required. This situation is discussed in Chapter VIII.

G. SOURCES OF FURTHER INFORMATION

EXHIBIT I-3

CLOSURE AND POST-CLOSURE REGULATIONS
40 CFR Parts 264 and 265, Subparts G and H

Facility Status & Type		Closure Plans	Post-Closure Plans	Cost Estimates	Financial Requirements
Storage Treatment and Disposal Facilities	Interim Status	40 CFR 265.112	N/A	40 CFR 265.142	40 CFR 265.143
	Permitted Facility	40 CFR 264.112	N/A	40 CFR 264.142	40 CFR 264.143
Disposal Facilities Only	Interim Status	40 CFR 265.112	40 CFR 265.118	40 CFR 265.144	40 CFR 265.145
	Permitted Facility	40 CFR 264.112	40 CFR 264.118	40 CFR 264.144	40 CFR 264.145

Source: Title 40, Code of Federal Regulations (CFR).

EXHIBIT I-4

FEDERAL REGISTER CITATIONS FOR LATEST CLOSURE AND POST-CLOSURE REGULATIONS

Topic	Regulatory Status	Federal Register
(1) Closure and Post-Closure Plans		
(a) Permitted Facilities	Interim Final	46 FR 2849-2851 January 12, 1981
	Amendment (Minor)	46 FR 7678 January 23, 1981
(b) Interim Status	Revised Interim Final	46 FR 2875-2877 January 12, 1981
(2) Cost Estimates		
(a) Permitted Facilities	Interim Final	46 FR 2802-2847 (Preamble) 46 FR 2851-2852, 2856 (Regulations) January 12, 1981
	Amendment (Minor)	46 FR 7666-7678 (Preamble) 46 FR 7678 (Regulations) January 23, 1981
	Amendment (Minor)	47 FR 15044 (Preamble) 47 FR 15047, 15052 (Regulations) April 7, 1982
(b) Interim Status	Final	45 FR 33154-33220 (Preamble) 45 FR 33243-33244 (Regulations) May 19, 1980
	Amendment/Extension of Time Period	45 FR 72039-72040 October 30, 1980

EXHIBIT I-4 (continued)

FEDERAL REGISTER CITATIONS FOR LATEST CLOSURE AND POST-CLOSURE REGULATIONS

Topic	Regulatory Status	Federal Register
(2) Cost Estimates (b) Interim Status (continued)	Restated	46 FR 2802-2847 (Preamble) 46 FR 2877-2878, 2880-2881 (Regulations) January 12, 1981
	Amendment (Minor)	47 FR 15044 (Preamble) 47 FR 15064, 15069 (Regulations) April 7, 1982
(3) Financial Responsibility Requirements		
(Permitted Facilities and Interim Status)	Revised Interim Final	47 FR 15032-47 (Preamble) 47 FR 15047-74 (Regulations) April 7, 1982
	Corrections to Trust Agreement Wording	47 FR 19995 May 10, 1982

EXHIBIT I-5

CURRENT BACKGROUND DOCUMENTS OR GUIDANCE
40 CFR Parts 264 and 265, Subparts G and H

(1) Closure and Post-Closure Plans	Background Document, Interim Status Standards and General Status Standards for Closure and Post-Closure Care (EPA, December 31, 1980).
	Closure and Post-Closure: Interim Status Standards (FINAL DRAFT GUIDANCE, November 1981, General Research Corp.).
(2) Cost Estimates	Final Draft Guidance for Subpart H of the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities (FINAL DRAFT GUIDANCE, November 1981, General Research Corporation).
(3) Financial Assurance for Closure and Post-Closure Care	Background Document, Parts 264 and 265, Subpart H, Financial Requirements, Final Regulations (EPA, December 31, 1980).
	Background Document for the Financial Test and Municipal Revenue Test (EPA, November 30, 1981).
	Financial Assurance for Closure and Post-Closure Care: Requirements for Owners or Operators of Hazardous Waste Treatment, Storage and Disposal Facilities (GUIDANCE, 1982, ICF Incorporated).
	See also documents cited in Chapter VII.

II. OVERVIEW OF FINANCIAL REQUIREMENTS

This chapter presents an overview of the RCRA financial assurance requirements, including responsibilities common to all the mechanisms acceptable for compliance. More detailed information about each mechanism is contained in the chapter on that mechanism.

A. OVERVIEW OF RESPONSIBILITIES

This section briefly reviews the major responsibilities of the three parties to most financial assurance mechanisms, the owner or operator, the Regional Office, and the financial institution or parent guarantor. Each of the steps described here is discussed in greater detail in the rest of this chapter. Summary checklists are provided as Attachments II-1 and II-2 at the end of this chapter.

1. Owner or Operator Responsibilities

To select a mechanism for complying with closure and post-closure financial assurance requirements, owners or operators will want to consider such factors as the cost and availability of alternative mechanisms, tax treatment of payments, and effects on balance sheets. Many owners or operators would benefit from an initial discussion with their own bank, accountant, or financial advisor regarding the relative advantages of the different mechanisms for complying with the regulations.

Once the owner or operator decides upon a mechanism for complying with the RCRA financial assurance regulations, it must approach a qualified financial institution or parent and negotiate the terms of the assurance. The financial institution may request detailed information from the owner or operator before the financial assurance deal will be consummated. The owner or operator will have to make sure that the financial assurance mechanism is in the amount and form required by EPA, is signed as required, is in effect at the appropriate time, and is submitted to the Regional Office when required.

During the operating life of the facility and while the financial assurance mechanism is in force, the owner or operator will have to increase the amount of the assurance to take into account cost estimate increases due to inflation or any changes in closure or post-closure plans. The owner or operator may also request from the Regional Administrator a reduction in assurance when cost estimates decrease.

When the financial institution enters bankruptcy or otherwise loses its qualifications to provide assurance under the regulations, the owner or operator must obtain alternative means of financial assurance. When ownership or operating responsibility for the facility is transferred, or a change in the method of assurance is sought, termination of the existing assurance

mechanism will only be permitted once substitute financial assurance has otherwise been obtained. When the financial institution or parent guarantor exercises its right to cancel assurance, the owner or operator may have only 90 days to obtain replacement assurance.

When closure begins, the owner or operator may begin submitting itemized bills to the Regional Administrator for reimbursement. When closure is complete and again when post-closure care is complete, the owner or operator will want to apply to the Regional Administrator to be released from financial assurance requirements.

The responsibilities of the owner or operator are summarized in Attachment II-1.

2. Regional Office Responsibilities

The Regional Administrator has the lead responsibility for assisting the owner or operator to understand and comply with the RCRA financial responsibility requirements. The Regional Office must institute procedures for reviewing and administering the financial assurance information submitted by the owners and operators in its region. First, the Regional Office must be certain that the financial institution qualifies to provide assurance under the regulations. Second, the assurance must be provided in the proper amount and form, it must be signed by both the owner or operator and the financial institution (or someone properly acting on their behalf), and it must be in effect and submitted to the Regional Administrator by the required dates.

While financial assurance is in effect, the Regional Office will have to make certain that the assurance mechanism is updated during the operating life of the facility to reflect adjustments to cost estimates due to inflation and changes in cost estimates resulting from new plans. Increases in cost estimates must be covered by additional assurance, while owners or operators may request reduction in assurance when cost estimates decrease.

The Regional Office must also be sure that assurance is maintained in the event of bankruptcy of the financial institution or if the institution or parent guarantor ceases to remain qualified. The Regional Office must also permit the owner or operator to terminate assurance only when alternate assurance is being provided by the present or a new owner or operator. If the financial institution or parent guarantor sends notice of cancellation, the Regional Office must assure that either alternate financial assurance is provided within 90 days or the mechanism is used to fund closure and/or post-closure care.

The Regional Office should authorize reimbursement of closure and/or post-closure care expenses only after itemized bills are submitted and it is determined that the expenses are in accordance with the plan or otherwie justifiable. When payment for closure is being made from a TRUST FUND or pursuant to INSURANCE, the Regional Administrator may withhold reimbursement

until closure is completed if he believes that the cost of closure will be significantly greater than the amount of assurance provided. Finally, the Regional Office will need to release owners and operators from financial assurance requirements once closure is complete and later, when post-closure care is complete.

The responsibilities of the Regional Office are summarized in Attachment II-2.

3. Financial Institution or Parent Guarantor

The financial institution or PARENT GUARANTOR becomes involved in the RCRA Subpart H requirements only because of the agreement it enters into with the owner or operator. As a result, the responsibilities of the financial institution or parent guarantor are prescribed by the instrument itself and its accompanying documentation and applicable state and federal regulations. In all cases, the financial institution and the owner or operator are responsible for ensuring that the wording of the instrument is identical to the regulations. Most of the other major obligations of the financial institution vary from mechanism to mechanism and are specified in the instrument.

One important feature is common to most methods of financial assurance involving a financial institution or a corporate guarantor -- cancellation. Notice must be given to both the owner or operator and the Regional Administrator 120 days before cancellation. If alternate assurance is not provided by the owner or operator within 90 days, the financial institution or parent guarantor will remain responsible according to the terms of the mechanism. The Regional Administrator is authorized to draw upon or enforce financial assurances prior to the effective date of their cancellation.

B. FINANCIAL ASSURANCE OPTIONS

This section is divided into two parts. The first describes the individual financial assurance mechanisms that are available to owners and operators under the RCRA financial assurance regulations. The second part describes how and when several different financial assurance mechanisms can be used together. Exhibit II-1 lists the financial assurance regulations by mechanism, while Exhibit II-2 gives an overview of these regulations by subject area.

1. Summary of Different Mechanisms

TRUST FUNDS assure payment of closure or post-closure costs from a fund held in trust by a bank or other qualified entity. The owner or operator deposits money over time into the fund, which is invested by the financial institution. Payments into the fund are generally made annually; the size of the payments required depends on the value of the trust fund at that time, the amount of cost estimates being assured, and the period over which payments are

EXHIBIT II-1

FINANCIAL ASSURANCE MECHANISMS REGULATIONS

Mechanism	Interim Status	Permitted Facility
Trust Funds		
Closure	40 CFR 265.143(a)	40 CFR 264.143(a)
Post-Closure	40 CFR 265.145(a)	40 CFR 264.145(a)
Financial Guarantee Bonds		
Closure	40 CFR 265.143(b)	40 CFR 264.143(b)
Post-Closure	40 CFR 265.145(b)	40 CFR 264.145(b)
Performance Bonds		
Closure	Not applicable	40 CFR 264.143(c)
Post-Closure	Not applicable	40 CFR 264.145(c)
Letters of Credit		
Closure	40 CFR 265.143(c)	40 CFR 264.143(d)
Post-Closure	40 CFR 265.145(c)	40 CFR 264.145(d)
Insurance		
Closure	40 CFR 265.143(d)	40 CFR 264.143(e)
Post-Closure	40 CFR 265.145(d)	40 CFR 264.145(e)
Financial Test and Corporate Guarantee		
Closure	40 CFR 265.143(e)	40 CFR 264.143(f)
Post-Closure	40 CFR 265.145(e)	40 CFR 264.145(f)
State-Required Mechanisms	40 CFR 265.149	40 CFR 264.149
State Assumption of Responsibility	40 CFR 265.150	40 CFR 264.150

Source: Title 40, Code of Federal Regulations (CFR).

EXHIBIT II-2

OVERVIEW OF FINANCIAL REQUIREMENTS REGULATIONS

Topic	Interim Status	Permitted Facilities
Definitions	40 CFR 265.141	40 CFR 264.141
Adjusting cost estimates for inflation	40 CFR 265.142(b)	40 CFR 264.142(b)
Use of multiple financial mechanisms; Use of one mechanism for multiple facilities	40 CFR 265.143(f),(g) (closure) 40 CFR 265.145(f),(g) (post-closure)	40 CFR 264.143(g),(h) (closure) 40 CFR 264.145(g),(h) (post-closure)
Release from Requirements	40 CFR 265.143(h) (closure) 40 CFR 265.145(h) (post-closure)	40 CFR 264.143(i) (closure) 40 CFR 264.145(i) (post-closure)
Combination of mechanisms (closure and post-closure)	40 CFR 265.146	40 CFR 264.146
Incapacity of owner, operator, guarantor, or financial institution	40 CFR 265.148	40 CFR 264.148
Wording of Instruments	40 CFR 265.151	40 CFR 264.151

Source: Title 40, Code of Federal Regulations (CFR).

to be made. A fee is usually charged for the institution's services. Through the payments into the fund and the income received on the investments, the trust fund is expected to grow until it is large enough to cover the estimated expenditures for closure and/or post-closure care. As these expenditures are made, EPA authorizes reimbursement from the trust fund. See Chapter III for details.

SURETY BONDS under RCRA are of two types: FINANCIAL GUARANTEE BONDS (which are allowed at both interim status facilities and permitted facilities) and PERFORMANCE BONDS (allowed only at permitted facilities). In a financial guarantee bond, a SURETY guarantees that a specific amount of money will be available for closure and/or post-closure care if the owner or operator fails to fulfill its obligations. A PREMIUM is charged to the owner or operator for this guarantee. In a performance bond, the surety may either perform closure and/or post-closure care or pay the PENAL SUM of the bond, if the owner or operator fails to fulfill its obligations. Under either type of bond, the owner or operator establishes a STANDBY TRUST FUND, into which any payments from the surety will be made. If the surety is required to pay or perform under the terms of the surety bond, the surety would probably seek to recover its expenses from the owner or operator. See Chapter IV for details.

LETTERS OF CREDIT provide assurance of the availability of funds for closure and/or post-closure expenses from a bank or other financial institution. Firms with a good credit history with a financial institution may find this mechanism desirable, since the bank's fee and interest rate are negotiable and are based on the firm's credit-worthiness. Under this arrangement, EPA can direct the deposit of the funds into a STANDBY TRUST FUND, to be used for closure and/or post-closure payments in case of nonpayment or nonperformance by the owner or operator or if the letter were being cancelled without the substitution of alternate assurance. The bank would then require repayment from the owner or operator including an interest charge. The owner or operator cannot draw upon the letter of credit to finance actual closure and/or post-closure activities (it must use other funds or credit lines to pay for these activities). See Chapter V for details.

INSURANCE assures payment of closure or post-closure expenses whenever needed by an insurance company regardless of the owner or operator's ability to pay these costs. The insurer agrees to reimburse providers of closure and/or post-closure care at the direction of the EPA. PREMIUMS must be paid by the owner or operator. The owner or operator is essentially paying the insurer to assume the liability of providing for closure and/or post-closure expenses up to the FACE AMOUNT of the policy. This may be a desirable option for firms with a good relationship with an insurer, or for use by small firms for which after-tax trust fund payments may be relatively high compared to insurance premiums. This type of insurance should not be confused with liability insurance for sudden and non-sudden events. See Chapter VI for details.

THE FINANCIAL TEST and CORPORATE GUARANTEE provide assurance to EPA that an owner or operator or its PARENT CORPORATION is financially strong enough to be able to pay the estimated costs for closure and/or post-closure care. The specific requirements of two sets of financial test criteria are described in detail in Chapter VII; at least one of these sets of criteria must be met. In general, firms must have adequate NET INCOME, NET WORKING CAPITAL, ASSETS, or NET WORTH relative to the total estimated closure and/or post-closure expenses, or have ready access to capital. A high bond rating may be used to satisfy some of the test criteria. This option will be attractive for many large domestic firms in strong financial condition. The cost to the firm or its parent company will almost certainly be less than the costs of payments to financial institutions under the other alternatives, since the firm is neither building a fund nor paying a (risk) premium.

STATE MECHANISMS are any financial assurance mechanism required or offered by a state government that offers assurance of payment of closure or post-closure care expenses equivalent to the federal RCRA assurance mechanisms. EPA must approve the use of these mechanisms, in whole or part, in satisfaction of federal requirements. Some states have established provisions or funds which assume responsibility for closure and/or post-closure care. While not necessarily relieving the owner or operator from ultimate liability, a state's assumption of responsibility provides assurance to EPA that closure and/or post-closure expenses will be met. Use of these financial assurance options for facilities in states without INTERIM AUTHORIZATION is discussed in Chapter VIII.

2. Using Combinations of Mechanisms and Covering Multiple Facilities

One financial mechanism may be used for both closure and post-closure care of a facility. Owners or operators may also use one or more financial mechanisms to cover multiple facilities, or combine different mechanisms to cover one facility. For example, when coverage must be increased due to inflation or changes in plans, adding a different mechanism could be less expensive or burdensome than increasing the coverage of existing mechanisms. Combinations of mechanisms may be used for: (1) closure only, (2) post-closure only, or (3) closure and post-closure.

Not all mechanisms may be used in combination. Combinations of trust funds, financial gurantee bonds, letters of credit, and insurance are permissible. Firms using the financial test, corporate parent guarantee, or performance bond to provide assurance of closure and/or post-closure care at a facility may not use other financial mechanisms to cover some of the costs of the same facility, even if the cost estimate increases. The financial test, parent guarantee, and performance bond may only be used to cover the entire closure cost estimate and/or post-closure cost estimate of a facility. A single facility could, however, utilize the financial test, corporate guarantee, or performance bond for closure only and one of the other mechanisms for post-closure care, or vice versa.

If an owner or operator wishes to use a trust fund in combination with a financial guarantee bond or letter of credit, it need not establish a separate standby trust fund, since the role of the standby trust fund is fulfilled by the trust fund itself. Similarly, it need only establish one standby trust fund for combinations of financial guarantee bonds and letters of credit.

Owners or operators must submit specific documentation of facilities and amounts covered by each mechanism when assurance is being provided for multiple facilities. If the facilities are located in more than one EPA region, identical evidence of financial assurance must be submitted to the Regional Administrator of each region. In any case, the total financial assurance must equal at least the amount of the total cost estimates. This assists EPA in verifying the adequacy of coverage for each site and coordinating this verification process among regions.

When the Regional Administrator authorizes use of funds for closure or post-closure care of a facility, he may direct payments from any or all mechanisms used in combination to provide coverage for that facility. The choice of which mechanism to draw upon first rests with the Regional Administrator. For example, if a letter of credit and an insurance policy cover a facility, the Regional Administrator may authorize withdrawal from either instrument. In the case of multiple facilities covered by a single mechanism, he may use only the amount of funds designated for that facility; unless the owner or operator agrees to the use of additional funds available under the mechanism. For example, if a trust fund covers three facilities and the Regional Administrator must authorize funds for only one, he may continue to draw upon the trust fund only up to the amount stipulated for that facility.

C. QUALIFICATIONS FOR FINANCIAL INSTITUTIONS AND PARENT GUARANTORS

All of the financial assurance mechanisms except the financial test require that a third party assure the payment of closure and post-closure expenses. Exhibit II-3 shows the minimum qualifications for financial institutions acting as trustees, or issuing letters of credit, surety bonds, and insurance policies, and the minimum qualifications for a parent corporation to act as a corporate guarantor.

D. INITIAL SUBMISSIONS

All documents and correspondence to be submitted to the Regional Administrator regarding financial assurance requirements should be marked "Attention: RCRA Financial Requirements" as part of the address.

Use of certified mail is only required when financial institutions or corporate guarantors submit notices of intent to cancel or terminate mechanisms and when the owner or operator or corporate guarantor submit notices of commencement of bankruptcy proceedings.

EXHIBIT II-3

QUALIFICATIONS FOR FINANCIAL INSTITUTIONS
AND PARENT GUARANTORS

INSTITUTION	MECHANISM	QUALIFICATIONS
Banks, savings and loans, other financial institutions	Trust Fund	Authority to act as a trustee; trust operations regulated and examined by a Federal or State Agency
Surety companies	Surety Bond	Listed as an acceptable surety in Circular 570 of the U.S. Department of Treasury and licensed in the state where the surety bond is executed
Banks, savings & loans, mutual savings banks, credit unions	Letters of credit	Authority to issue letters of credit; letter of credit operations regulated and examined by a Federal or State Agency
Insurance companies	Insurance	Licensed to transact the business of insurance in one or more states; or eligible to provide insurance as an excess or surplus lines insurer, in one or more states
Parent Corporation	Corporate Guarantee	Directly own at least 50 percent of the voting stock of the owner or operator; must also satisfy financial test

1. Form and Amount of Financial Assurance

The precise wording required for each mechanism is specified in the regulations. Copies of the required wording for individual mechanisms are included in the later chapters of this manual as Attachments. Both the owner or operator and the financial institution or parent guarantor must assure that the wording of financial mechanisms conforms to the regulations.

The required documents will always include a list or letter identifying the facilities covered. The information must include:

- The facility's EPA Identification Number
- The name and address of the facility
- Identifying information on the financial instrument, if any, including the name and address of the issuing institution, and identification number of the instrument itself.
- Amount of funds for closure or post-closure assured by each mechanism for each facility.

The owner or operator must be sure that the signatories are authorized to act as representatives of the firm in transactions of that type. If the owner or operator is a division of corporation, for example, an officer of the corporation must usually sign on the division's behalf. If the owner or operator is a partnership, the signatory must indicate that he is signing for the partnership (i.e. with words such as "for the partnership" or "for ABC Company"). If the owner or operator is an individual, he may sign himself. In all cases, however, persons having an appropriate POWER OF ATTORNEY may sign on behalf of the owner or operator; a copy of the power of attorney should be attached to the document.

These documents must be in effect by the effective date of the regulations (for facilities under interim status), or before the first receipt of hazardous waste (for new permitted facilities). The owner or operator is responsible for verifying that the accountant, financial institution, assurance mechanism, or corporate parent meets EPA requirements, which are detailed in Chapters III through VIII of this manual.

The amount of the financial assurance must, at a minimum, equal the CURRENT COST ESTIMATES for closure and/or post-closure care. Of course, if multiple mechanisms are used (see Section B of Chapter II), the combined coverage must at least equal the cost estimate. The initial amount of coverage may be larger than the cost estimate in order to accommodate expected revisions in the estimate due to inflation.

The owner or operator is responsible for ensuring that the mechanism(s) cover(s) the entire estimated cost, with one exception. If the trust fund is employed, then a pay-in period is allowed before the trust fund completely covers the closure or post-closure cost estimates.

2. Obtaining Financial Assurance

If an owner or operator decides on a mechanism involving a credit or insurance arrangement (surety bond, letter of credit, insurance policy), the financial institution will request detailed information on the facility and the firm itself. This information may include:

- Historical financial data (balance sheets and profit and loss statements) on the facility and the business entity (corporation, partnership, etc.) owning or operating it;
- Current financial statements (probably the latest interim statements will be required);
- Projected financial information (income statements, cash flows, and balance sheets) reflecting the expected risks and profits associated with the future operation of the facility;
- The closure or post-closure plans and cost estimates;
- A description of the facility, its location, the types and quantities of waste, and other information reflecting the risks involved with the site;
- A description of the business entity owning or operating the facility and its other facilities and lines of business;
- The past operating experience of this facility and others owned or operated by the same business entity; and
- A description of the principal individuals owning and operating the facility, including their qualifications, experience, and financial condition.

Initially, the availability of certain mechanisms (e.g., surety bond, insurance) may be limited in some areas.

E. SUBSEQUENT RESPONSIBILITIES FOR UPDATING AND MAINTAINING COVERAGE

1. Updating Coverage

EPA rules for estimating closure and post-closure costs require that during the operating life of the facility cost estimates be adjusted annually to take account of inflation and that new cost estimates be calculated each time closure or post-closure plans are changed. In either instance, owners or operators may need to increase the amount of financial assurance initially provided.

Adjustment for inflation is calculated using the INFLATION FACTOR derived from the Implicit Price Deflator for Gross National Product as published in the U.S. Department of Commerce Survey of Current Business and in the Economic Indicators published by the Council of Economic Advisors. The inflation factor is calculated by dividing the latest published annual deflator by the deflator for the previous year. Owners or operators may contact local libraries or the appropriate Regional Office to obtain data on deflators and the current inflation factor. The adjustment must be made within 30 days after the anniversary of date on which the initial cost estimate was prepared.

Whenever the CURRENT COST ESTIMATE exceeds the coverage of the financial assurance mechanism(s) because of increases due to inflation or changes in plans, the owner or operator must arrange for increased coverage using the same mechanism or through a combination of mechanisms. The additional coverage must be obtained and evidence of it submitted to the Regional Administrator within 60 days after the cost estimate increase.

If during the operating life of the facility the cost estimate for closure or post-closure should decrease due to a change in operating plans or other factors, the owner or operator may apply to the EPA Regional Administrator for approval of a decrease in coverage. In certain instances, decreases in assurance may be permitted during the post-closure period. Generally, the Regional Administrator will require that the closure or post-closure plans and cost estimates be submitted for review; requests for decreases in coverage will be denied when plans or cost estimates are incomplete or if cost estimates are unreasonably low. Potential effects of inflation will also be a major consideration in evaluating requests for decreases in the amount of post-closure funds assured. See Chapters III through VII for details.

Cost estimates, closure and post-closure plans, and amount of financial assurance may be verified by the Regional Administrator. The latest or latest adjusted closure and post-closure cost estimates must be kept with the latest closure and post-closure plans at the facility.

2. Maintaining Assurance

To maintain assurance, owners or operators are required to make required payments and provide assurance at least equal in amount to current cost estimates. In addition, an owner or operator must also change to an alternate assurance mechanism:

- In the event of bankruptcy of the institution acting as trustee or issuing the letter of credit, surety bond, or insurance contract;
- Whenever the financial institution ceases to qualify under the regulations; and
- If the financial test or corporate guarantee is disallowed.

In the first two of these cases, the owner or operator has 60 days to obtain alternate assurance; in the last, it has 30 days.

In addition, the owner or operator or corporate guarantor must inform the Regional Administrator within 10 days after being named as a debtor in a bankruptcy proceeding.

Finally, if ownership or operating responsibility for the facility is transferred, the Regional Administrator will not permit the previous owner or operator to terminate financial assurance until the new owner or operator has obtained acceptable assurance.

3. Cancellations

Because the financial requirements have been developed to assure the availability of funds for closure or post-closure care, the regulations impose specific requirements on financial institutions or parent guarantors who wish to cancel their RCRA financial mechanisms. An issuer of a surety bond, letter of credit, insurance policy or corporate guarantee must notify both the owner or operator and the Regional Administrator(s) by certified mail of its intent to cancel or terminate the mechanism. Cancellation of a surety bond, insurance contract, or corporate guarantee may not occur during the 120 days beginning with the date of receipt of the notice by both the Regional Administrator and the owner or operator, as evidenced by the return receipts. In the case of the letter of credit, notice must be given at least 120 days before the current expiration date.

In general, the owner or operator is responsible for obtaining alternate assurance if the financial institution or corporate guarantor intends to cancel; however, the chapters on the individual mechanisms will need to be consulted because the obligations and powers of the EPA Regional

Administrator, the owner or operator, and the financial institution or corporate guarantor may differ depending on the mechanism being used.

Of course, the owner or operator may request cancellation or termination of a mechanism when alternate assurance has been substituted or when released from the financial requirements. See Section G below.

4. Changing Mechanisms Voluntarily

Owners or operators may voluntarily change the mechanism being used to provide assurance of financial responsibility with prior written approval from the Regional Administrator. If the mechanism has been providing assurance for facilities in more than one Region, the prior written approval of all the affected Regional Administrators is needed.

To receive approval, the new mechanism must comply with EPA's regulations for eligibility. The new mechanism, if approved, must become effective before or at the time that the previous mechanism expires. The Regional Administrator must ensure continuity of coverage, but should strive for the minimum necessary amount of overlap to reduce the cost to the owner or operator. For example, if an owner or operator changes from a trust fund to another financial assurance mechanism, the Regional Administrator should not direct the trustee to release funds from the trust until the new mechanism is effective.

Changing to a trust fund poses special problems. When an owner or operator cancels other assurance to change to a trust fund, the amount of money deposited into the trust fund must be equal to the amount that would have had to be in the trust fund if the trust had been the original financial assurance mechanism and payments to the trust had been made as specified in the regulations. This is discussed in more detail in Chapter III.

F. DRAWING ON FUNDS

The conditions under which the owner or operator or the Regional Administrator may draw on a financial assurance mechanism will vary with each mechanism. These conditions are described in Chapters III through VII. Regional Administrators may follow a common procedure, however, when authorizing reimbursement of closure or post-closure expenses in certain situations, including the following:

- the owner or operator uses the trust fund mechanism to satisfy financial requirements
- the surety has placed funds in a standby trust
- the Regional Administrator has directed the deposit of funds through a letter of credit into a standby trust

- the owner or operator uses the insurance mechanism to satisfy financial requirements

- the corporate guarantor has placed funds in a trust

In these cases, reimbursement of expenses for closure or post-closure care will be subject to the regulations governing trust funds (See Section C.5 of Chapter III) and insurance (see Section C.5 of Chapter VI). The basic requirements include:

(1) review of itemized bills;

(2) determination within 60 days whether the expenditures are consistent with closure or post-closure plans, or are otherwise justifiable;

(3) approval of requests for reimbursement and direction of payment within 60 days unless there is reason to believe that the cost of closure will be significantly greater than available funds; in that case, complete reimbursement should be withheld until certification of proper closure is completed;

(4) approval of requests for reimbursement of post-closure expenditures, if determined to be justifiable.

When assessing itemized bills submitted by owners or operators, the Regional Administrator will need to decide if any extra expenditures, such as the costs of responding a contingency not accounted for by the plan (bad weather, liner failure, etc.) should be reimbursed by the trust or paid by the owner or operator. Separate payment required of a financially troubled owner or operator may cause it to go into bankruptcy. In this case, EPA might be left responsible for completion of closure or post-closure care of the facility. On the other hand, if the Regional Administrator agrees to reimbursement, there is the possibility that the trust fund will run out of funds before the completion of these activities. This dilemma will have to be solved by the Regional Administrator on a case-by-case basis, in consultation with Headquarters. The owner or operator, of course, remains responsible for all closure and/or post-closure costs even if the financial assurance monies are exhausted.

G. RELEASE FROM RCRA FINANCIAL REQUIREMENTS

An owner or operator of a hazardous waste facility is released by the Regional Administrator (1) from the closure financial assurance requirements when it satisfactorily certifies to EPA that closure has been completed in accordance with the closure plan and (2) from the post-closure financial assurance requirements when the post-closure care requirements have been completed in accordance with the post-closure plan. The certification of

closure must be provided by the owner or operator and by an independent registered professional engineer.

In the case of financial assurance for closure, the Regional Administrator will determine whether closure is satisfactory, and notify the owner or operator within 60 days of receiving the certifications. For release from post-closure assurance requirements, the Regional Administrator will approve release at the end of the post-closure period specified in the post-closure plan, upon request of the owner or operator, if post-closure care has been satisfactorily provided in conformity with the plan.

Additionally, an owner or operator may be released from the federal RCRA requirements if (1) the administration of the hazardous waste program is taken over by an authorized state government or (2) ownership or operation of the facility has been transferred, but only in accordance with the specific conditions of such transfers. There should be no lapse in coverage allowed in such circumstances.

H. DIFFERENCES BETWEEN REQUIREMENTS FOR INTERIM STATUS AND PERMITTED FACILITIES

This manual contains guidance for both interim status and permitted facilities. Interim status facilities are existing facilities who have submitted notifications and Part A's and are awaiting final disposition of permit applications. A permitted facility is one which has demonstrated compliance with RCRA standards and has received a permit.

The guidance in this manual primarily addresses the financial responsibility requirements for interim status facilities. The additional requirements for permitted facilities are included in the chapters on the mechanisms. It is useful to remember that there are only four differences between interim status and permitted facility financial assurance requirements:

(1) While financial assurance mechanisms for interim status facilities must generally be in force by the effective date of the regulations, new permitted facilities must provide assurance before the first receipt of hazardous waste at the facility.

(2) The "pay-in" period for trust funds is defined differently for permitted and interim status facilities. The pay-in period is 20 years (interim status) or the life of the initial RCRA permit (permitted facilities) or the remaining life of the facility (both interim status and permitted facilities), whichever is shorter. (See Chapter III)

(3) The receipt from the trustee for the initial payment into the trust fund must be submitted by the owner or operator to the Regional Administrator before the first receipt of hazardous waste at a new permitted facility. Interim status facilities need not submit a receipt. (See Chapter III)

(4) Performance bonds are not a permissible form of surety bond for interim status facilities under the regulations, but are permissible for permitted facilities. (See Chapter IV)

I. USE OF THE HAZARDOUS WASTE DATA MANAGEMENT SYSTEM

The Hazardous Waste Data Management System (HWDMS) is being developed to aid Regional Office staff in tracking enforcement activities, compliance monitoring, and the status of permits. The HWDMS could prove particularly valuable for management of the financial assurance programs in at least four ways, outlined below.

(1) Recordkeeping. The HWDMS will have at a minimum a list of EPA facilities in the region, indexed by name and by EPA Identification Number. Each facility must have the following financial assurance information in its file:

- Type of instrument or guarantee
- Name and address of issuer or guarantor
- Amount of closure or post-closure costs currently covered by instrument (both in dollars and as a percentage of total costs)

This information will enable Regional Office staff to identify the facilities for which financial assurance has not been provided, as well as the adequacy of the funds assured. In addition, the HWDMS can be used to track other pieces of information such as:

- Number of instrument
- Effective date of instrument
- Date of expiration of instrument
- If multifacility instrument, name and number of other facilities in Region, name and number of facilities outside Region
- Authorized payments made from instrument

- Total closure and post-closure cost estimates
- Narrative comments

A detailed, computerized recordkeeping function could reduce clerical requirements and speed access to critical information.

(2) "Tickler" File. The RCRA financial assurance regulations specify different timetables and deadlines that the Regional Administrator must follow. The HWDMS could ease this burden considerably by automatically tracking critical dates of submission, notifications, etc. and providing computer readouts of facilities or owners and operators that require attention. For example, the printouts of critical dates and required actions could be ordered for a given owner, operator, or facilities. Alternatively, the printouts could be weekly updates of actions required from all facilities, owners, operators, or financial institutions within the next 30 days.

Two levels of tickler files could be established, one for regularly scheduled events, and one for unscheduled events:

(A) Scheduled events such as expiration dates of financial instruments and inflation adjustment dates could be programmed into the file on the date of submission, and at known intervals after submission.

(B) Unscheduled events such as increases in cost due to operating plan changes, cancellation notices, owner or operator bankruptcies, and issuer disqualifications can be programmed in the file when notification is received.

The HWDMS can be particularly useful in tracking the adequacy of financial assurance with respect to annual adjustments in cost estimates due to inflation.

(3) Financial Test and Corporate Guarantee. The Regional staff could develop a filing system of data taken from the chief financial officer's letter and auditor's opinion (see Exhibit VII-4 for an example of such a file). If this filing system were automated, a simple computer program could screen trends in the financial data and "red flag" any owner, operator or corporate parent that appears to be deteriorating.

(4) Trust Fund Payment Calculations. The Regional Administrator could develop an audit system to ensure that the required payments are being made to the trust fund, as explained in Chapter III. The calculation of the required payments could become complex if multi-instrument or multi-facility financial assurance mechanisms are employed. Automating these calculations would result in a fast, error-free audit process.

Undoubtedly, other applications of the HWDMS to managing financial assurance programs could be developed. However, detailed discussion of the HWDMS is outside the scope of this manual.

ATTACHMENT II-1

SUMMARY OF OWNER OR OPERATOR RESPONSIBILITIES*

(1) Be certain that the financial assurance mechanism:

(a) Is worded as required;
(b) Is in the proper amount;
(c) Is signed as required;
Is issued by a qualifying institution;
(d) Is in effect at the appropriate time; and
(e) Is submitted to the Regional Office on time.

(2) Increase the amount of assurance when necessary during the operating life of the facility due to:

(a) Annual adjustments for inflation; and
(b) Changes in plans and increases in cost estimates
Submit evidence of increase in coverage within 60 days.

(3) Apply for decreases in the amount of assurance when appropriate.

(4) Obtain new assurance:

(a) When the financial institution enters bankruptcy, ceases operations, or ceases to qualify; or

(b) When the financial institution notifies its intent to cancel the assurance.

(5) Notify the Regional Administrator by certified mail within 10 days after the commencement of a bankruptcy proceeding.

(6) Request termination of financial assurance when alternate assurance is provided or when released from financial assurance requirements.

(7) Submit itemized bills for reimbursement for closure and post-closure care.

(8) Request release from financial assurance requirements when final closure is properly completed and again when post-closure care is completed.

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

ATTACHMENT II-2

SUMMARY OF REGIONAL OFFICE RESPONSIBILITIES*

(1) Check the qualifications of the financial institution, etc.

(2) Verify that the financial assurance mechanism:

  (a) Is correctly worded;
  (b) Is in the proper amount;
  (c) Is complete;
  (d) Is signed as required; and
  (e) Is in effect and submitted to the Regional Office on time.

(3) Make sure that the amount of financial assurance is increased when necessary during the operating life of the facility due to:

  (a) Annual adjustments for inflation, and
  (b) Changes in plans and increases in cost estimates

(4) Allow decreases in the amount of financial assurance only when cost estimates decrease and the amount of assurance will be adequate.

(5) Verify that new assurance is obtained:

  (a) When the financial institution enters bankruptcy or ceases operations;

  (b) When the financial institution or parent guarantor ceases to qualify; or

  (c) When the owner or operator requests termination of assurance because a new mechanism is being used or ownership or operating responsibility is being transferred.

(6) Approve requests for a change in mechanisms when no lapse in coverage will result.

(7) When the financial institution or parent guarantor sends notice of cancellation, ensure that alternate assurance is provided or the financial mechanism is used to fund closure and/or post-closure care.

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

ATTACHMENT II-2 (continued)

SUMMARY OF REGIONAL OFFICE RESPONSIBILITIES*

(8) Approve requests for reimbursement for closure and/or post-closure expenses only when itemized bills are submitted and the expenses are in accordance with the plan or otherwise justified. Instruct the insurer or trustee in writing to make reimbursement in the specified amounts. If closure costs will significantly exceed the value of a trust fund or remaining insurance, withhold a portion of reimbursement until completion of closure.

(9) Permit release from financial assurance requirements only when closure and/or post-closure care is properly completed.

(10) Approve requests to terminate financial assurance:

(a) When alternate assurance is substituted; or

(b) When the owner or operator is released from financial assurance requirements.

(11) Record relevant information in HWDMS and monitor deadlines for submissions

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* NOTE: Responsibilities and rights may vary with the specific financial assurance mechanism used. For details, consult Chapters III through VIII of this manual.

III. ESTABLISHING FINANCIAL RESPONSIBILITY USING TRUST FUNDS

A. INTRODUCTION

This chapter describes how owners or operators can fulfill their RCRA financial requirements through TRUST FUNDS. A TRUST is a three-party agreement whereby one party, called the GRANTOR (sometimes also called the TRUSTOR), transfers some assets (often money) to a second party, called the TRUSTEE, to hold on behalf of a third party, called the BENEFICIARY. In a RCRA trust fund, the owner or operator is the grantor, a bank or other entity that fulfills the RCRA requirements is the trustee, and EPA is the beneficiary. The owner or operator, as grantor, pays into the trust fund which is held in trust by the trustee. The fund is used to pay for closure and/or post-closure care. The entire arrangement is governed by a TRUST AGREEMENT that sets out the responsibilities and rights of each party.

The trustee is empowered to invest the trust funds during the existence of the trust. The investments which the trustee may make are limited by the RCRA regulations (see Exhibit III-1 below) and sometimes by state law. Any investment income accrues to the trust, and reduces the required payments into it by the owner or operator. Of course, the return on the truste's assets will vary depending on the investments made. The owner or operator usually pays a fee for the trust services provided.

The regulations pertaining to RCRA trust funds are as follows:

EXHIBIT III-1

RCRA TRUST FUND REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure trust	40 CFR §265.143(a)	40 CFR §264.143(a)
Post-closure trust	40 CFR §265.145(a)	40 CFR §264.145(a)
Wording of Trust Agreement	40 CFR §264.151(a)	40 CFR §264.151(a)

Source: Title 40, Code of Federal Regulations (CFR).

B. RCRA TRUST FUND REQUIREMENTS

This section describes both the features of RCRA trust funds themselves and the responsibilities of owners and operators using trust funds to demonstrate financial assurance. A checklist of these responsibilities appears in Attachment III-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for Trustee. The first step that an owner or operator considering using a trust fund must take is to locate a qualified entity willing to act as trustee. EPA requires that the trustee be an entity that has the authority to act as trustee and whose trust operations are regulated and examined by a federal or state agency. If the owner or operator has any doubt about whether the entity is empowered to act as a trustee, he should ask the entity what authority regulates it and then contact the authority to determine whether the entity has the power to act as trustee. Exhibit III-2 at the end of this chapter indicates the primary regulatory authority for different types of financial institutions. Appendix A-2 lists relevant federal agencies; Appendix B includes a list of relevant state agencies.

2. Wording and Amount of Assurance. Several particular aspects of the trust agreement merit special attention:

First, the trust is irrevocable; it cannot be changed or terminated by the owner or operator except with written agreement of the trustee and the Regional Administrator.

Second, unlike the surety bond, letter of credit, insurance contract, or corporate guarantee, the trust agreement does not assure that the total amount (i.e., the current cost estimate) for closure or post-closure will be made available at any time; the trustee need only provide the amount of funds that has accumulated in the trust as of the time of closure. (See Section 4 of the Trust Agreement form, Attachment III-3.) Generally, annual payments will be made into the fund based on the formula discussed in Section B, Part 5 below. Payments into the trust are based on a formula which should ensure that the total amount needed will be available at the end of the planned PAY-IN PERIOD. (See Attachment III-4 which shows how initial payments are calculated.) The owner or operator may, however, choose to make payments to the fund at an accelerated rate or deposit the full amount of the cost estimates at the time the fund is established. The owner or operator remains responsible at all times for the full amount of closure and post-closure expenses even if--due to early closure, for example--the trust fund has not accumulated sufficiently to reimburse the owner or operator for all required expenses.

Finally, the text of the trust agreement itself does not identify the facilities covered by the trust fund or the current cost estimates for these facilities. The facilities and cost estimates are listed on a separate

EXHIBIT III-2

RCRA TRUST FUND: REGULATORY AUTHORITIES FOR FINANCIAL INSTITUTIONS

Type of Financial Institution	Primary Regulatory Authority	Whom to Call
1. State-Chartered Financial Institutions, Including Commercial Banks, Savings and Loans, Mutual Savings Banks, Credit Unions, State Licensed Foreign Banks	State Authority	See Appendix B
2. Nationally-Chartered Commercial Banks, Nationally-Licensed Foreign Banks, all Washington, D.C. commercial banks	Comptroller of the Currency	Trust Division (202) 447-1731
3. Nationally-Chartered Savings and Loans	Federal Home Loan Bank Board	General Counsel, (202) 377-6000
4. Nationally-Chartered Mutual Savings Banks	Federal Home Loan Bank Board, State Authorities	As Number 3, and see Appendix B
5. Nationally-Chartered Credit Unions	National Credit Union Administration	General Counsel, (202) 357-1030

Schedule A. This Schedule A must be updated within 60 days after each change in cost estimates, either because of adjustments due to inflation or because new closure and/or post-closure plans or cost estimates have been prepared.

Attachment III-3 contains the required wording for RCRA trust agreements. The trust agreement must be signed by both the owner or operator and the trustee. These signatures certify that the wording of the trust agreement is identical to the wording in the regulations. Attachment III-3 also provides samples of Schedule A (identification of facilities and cost estimates) and Schedule B (property used to establish trust fund).

The agreement must be properly "ACKNOWLEDGED." An ACKNOWLEDGMENT is a formal declaration by persons entering into an agreement that they affirm their obligations created in the agreement and are acting of their own free will. See Attachment III-3 for an example. The requirements for acknowledgments differ from state to state.

3. Establishing a Trust Fund. The wording of the agreement itself is specified in the regulations, but the trustee will be able to tell the owner or operator (1) the fees to be paid for its trust services, (2) the investment strategy it plans to follow, and (3) whether the trust could qualify to be invested together with other funds in a COMMON TRUST. Each of these topics receives further discussion here.

(a) Fees and Taxes - Trustee's fees can be expected to vary depending on the specific institution chosen, the amount of funds held in trust, the extent to which the owner or operator uses other services of the institution, and the extent and type of investment activity and trustee involvement. The owner or operator should not only find out what fees the institution itself will charge, but also the other applicable fees and charges, including brokerage fees, legal fees (such as those for setting up the trust), accounting fees, and provisions for local, state, and federal income taxes. There is currently no provision in the U.S. Internal Revenue Code that allows payments into the fund to be deducted from taxable income or allows trust income to be exempt from taxation. EPA has asked the Internal Revenue Service to render an opinion on the tax aspects of RCRA trust funds. Owners or operators may want to request private rulings on this matter from the Internal Revenue Service under Revenue Procedure 80-20.

(b) Investment Strategy - Money held in a RCRA trust fund must be invested by the trustee in accordance with the general investment policies and guidelines of the owner or operator and subject to the conditions listed in the trust agreement. Trustees have reasonably broad discretion in investing trust funds, but they are held to a legal standard called the "PRUDENT MAN" STANDARD. This standard is stated in the trust agreement as requiring the discharge of duties "with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims" (Section 6). EPA has,

however, provided several exceptions to the usual interpretation of this standard. The reasons for these exceptions are discussed in the Background Document cited in Exhibit I-5 in Chapter I.

First, the trust agreement forbids the trustee to invest in SECURITIES OR OTHER OBLIGATIONS of the grantor, or any other owner or operator of the facilities for which the trust fund is established, or any of their affiliates as defined in Section 6(i) of the Trust Agreement. Thus, even if the grantor is owned by a very large, stable corporation that would be a sound, prudent investment, the trust agreement specifically prohibits the trustee from investing trust funds in the grantor's parent. This prohibition does not apply, however, to securities or other obligations of the federal government or state governments. Even if the federal government or a state government owns a facility or the land on which it is situated, the trustee for the operator may invest in federal or state securities or other obligations.

The second exception to the prudent man standard contained in the trust agreement applies to the usual rule requiring the trustee to keep trust property segregated from the trustee's own funds and from other funds. The trustee is allowed to invest in time or demand deposits of the trustee institution, up to the amount insured by law. The trustee is also permitted to put trust fund assets into any appropriate "common, commingled, or collective trust fund created by the Trustee," in other words, a common trust.

The third and final exemption to the prudent man standard is that the trustee can hold cash for a reasonable period of time while awaiting investment or distribution and is not liable for paying interest on that cash.

It should be noted that individual states may impose stricter requirements than the federal regulations concerning the investments in which trust funds may be placed. Owners or operators will want to make sure that the trustee is aware of any state requirements concerning hazardous waste site trust funds.

(c) Common Trust Funds - Finally, the owner or operator should determine whether the trustee plans to invest the trust in a common trust fund. Common-trust funds pool a number of trust accounts and invest them for potentially higher yields and at sometimes decreased fees and costs because of the increase in investment size. Since smaller trusts can often benefit from common trust funds, common trusts may make the trust-fund mechanism of financial assurance more attractive to owners or operators with small financial assurance needs. Not every financial institution will offer such a trust fund due to the requirements of other federal and state agencies such as the Securities and Exchange Commission. The trustee need not establish a special common trust for RCRA trust funds, but any common trust in which RCRA trust funds participate would have to fulfill all the requirements of the trust agreement.

4. Submission of Documents to EPA. The owner or operator is required to submit the following documents to the EPA Regional Administrator:

- An ORIGINALLY SIGNED DUPLICATE of the trust agreement;
- A formal certification of acknowledgement.

The trust agreement must be effective, the first payment into the trust fund made, and an originally signed duplicate of the agreement delivered to the Regional Administrator, all by the effective date of the regulations for interim status facilities.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating the Trust Fund. The owner or operator generally must make annual payments into the trust fund. The trust agreement provides that, during the "PAY-IN PERIOD," the trustee must notify the Regional Administrator (by certified mail, within 10 days) if the owner or operator fails to make an annual payment into the trust fund within 30 days after the anniversary date of the first payment. The pay-in period is defined as 20 years or the remaining operating life of the facility as estimated in the closure plan, wnichever is shorter. The amount of the payments is determined by the closure and/or post-closure cost estimates, the amount already in the trust fund, and the pay-in period. As already mentioned, the first payment must be made by the effective date of the regulations.

The formula for computing the amount of payment is:

$$\frac{CE - CV}{Y}$$

where
CE is the current closure cost estimate and/or the current post-closure cost estimate,
CV equals the current value of the trust fund, and
Y equals the number of years remaining in the pay-in period.

Each year, at least 30 days prior to the anniversary date of the establishment of the trust fund, the trustee must value the assets in the trust fund and send a statement of the valuation, detailing the results of investment activity and the expenses levied against the fund, to the owner or operator and the Regional Administrator. Securities in the trust fund must be valued at their market value no more than 60 days prior to the anniversary date of the fund.

The owner or operator may object, in writing, to the trustee's investment activities or to expenses levied against the trust fund within 90 days of receiving the valuation statement. Despite any objections, the owner or

operator is obliged to make the required payments into the fund by the appointed dates. EPA may object to any of the trustee's activities at any time.

As mentioned previously, owners or operators may elect to make payments into the trust fund at an accelerated rate or to deposit the full amount of the cost estimates at the time the fund is established. The trustee must still, however, value the fund annually and provide a statement to the grantor and Regional Administrator confirming the value of the fund. The owner or operator must maintain the value of the trust fund at no less than if payments had been made according to the formula described above.

If the operating life of the facility extends beyond the original pay-in period, the owner or operator continues to remain responsible for ensuring that the value of the trust fund equals or exceeds the current cost estimate. Thus, whenever the cost estimate changes and becomes greater than the most recent annual valuation of the trust fund, an additional deposit must be made into the trust fund or alternative financial assurance obtained within 60 days. The Trustee is not required to send the Regional Administrator a notice of non-payment if the owner or operator fails to make a payment after the pay-in period is completed, however.

During the operating life of the facility, the Regional Administrator may approve a request by the owner or operator for release of funds from the trust fund if the current value of the trust fund (according to the trustee's most recent statement of value) exceeds the total of the applicable cost estimates. Similarly, during the period of post-closure care, the Regional Administrator may approve a release of funds if the owner or operator can demonstrate that the value of the trust fund exceeds the remaining cost of post-closure care. Such situations might occur if the owner or operator had made deposits higher than those required by these regulations, inflation was lower than expected,[1] investment earnings were higher than expected, or a change in closure and/or post-closure plans lowered the cost estimates.

6. Maintaining Assurance. The owner or operator is responsible for ensuring continuous compliance with the financial assurance regulations. Specifically, if the trustee institution enters bankruptcy, ceases operations, or loses its authority to act as a trustee, it no longer qualifies to act as a RCRA trustee. Arrangements for a new trustee or other financial assurance must be made by the owner or operator within 60 days after such an event.

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[1]During the period of post-closure care, the post-closure cost estimates will not be adjusted for inflation, but lower inflation may affect the value of the trust fund or the cost of the remaining post-closure care.

If the owner or operator sells or transfers operating responsibility for the facility for which the trust fund provides financial assurance, the trust fund will not automatically transfer to the next owner or operator. Instead, the new owner or operator will have to provide new financial assurance for the facility. Of course, the new owner or operator can enter into an agreement with the old owner or operator by which the trust fund is transferred to the new owner or operator. This will require amendments to the trust agreement which must be approved by the trustee and the Regional Administrator. The Regional Administrator will not allow a trustee to release funds from a trust fund to an owner or operator until the new owner or operator meets the applicable financial responsibility requirements and the facility is in interim status or is issued a permit.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverage. See Section E.4 of Chapter II.

7. Role of Trustee. The Trustee will usually prepare the trust agreement, Schedule A (according to the instructions of the owner or operator), Schedule B, and the certificate of acknowledgment. The trustee has control over the trust, can sue to protect it, and is responsible for its preservation. The trustee is responsible for annual valuations of the trust, for notifying the Regional Administrator if the owner or operator fails to make an annual payment, and for making payments out of the trust fund at the direction of the Regional Administrator. The trustee is responsible for errors in administering the trust resulting from not acting in good faith (e.g., willful negligence, gross misconduct, and violation of the prudent man standard).

A change in trustees does not affect the existence of the trust itself. The trustee may be changed if the owner or operator is dissatisfied with the performance of the trustee or if the trustee resigns; the trustee must be changed if the trustee institution enters bankruptcy or ceases to meet the qualifications. In either case, the trustee can be changed only upon agreement by the owner or operator, the trustee, and the Regional Administrator. The present trustee may not unreasonably withhold its permission to change trustees.[2] The successor trustee must be appointed by the owner or operator. If the owner or operator fails to do so, a trustee wishing to resign may request a court to appoint a successor trustee. The present trustee remains responsible until it has been replaced.

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[2]See the discussion in Section B.2 of Chapter VI concerning when refusal to consent to an assignment of a RCRA insurance contract would be "unreasonable."

8. Drawing on the Trust Fund. After the beginning of final closure, the owner or operator may request reimbursement for closure expenditures by submitting itemized bills to the Regional Administrator. Similarly, bills for post-closure care may also be submitted for reimbursement. Within 60 days after receiving the bills, the Regional Administrator will instruct the trustee to make reimbursements, if the expenditures are in accordance with the closure or post-closure plan or are otherwise justifiable. The Regional Administrator will exercise judgment in determining what expenses are justifiable. Where the cost of closure appears to be significantly greater than the value of the trust fund, the Regional Administrator is empowered to withhold reimbursement from the trust fund until he has received satisfactory certification of completion of closure. See Section G of Chapter II.

The owner or operator remains responsible for all closure or post-closure costs and for the performance of closure and post-closure care, even if the funds available through the trust fund are exhausted.

9. Termination of the Trust Fund. The owner or operator should request the approval of the Regional Administrator to terminate the trust fund in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA financial requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or operator should forward a copy of it to the trustee institution. The trust fund can only be terminated with the written consent of the Regional Administrator. The owner or operator should request the Regional Administrator to instruct the trustee to terminate the trust and to forward the remaining funds (after subtraction of fees and expenses) to the owner or operator. The owner or operator will also have to instruct the trustee to terminate the trust.

PERMITTED FACILITIES

Permitted facilities are subject to trust fund rules almost identical to those covering interim status. The major difference is in computing the amount of required annual payments. The formula (CE-CV)/Y is still used and CE is still the relevant current cost estimate, CV is still the current value of the trust fund, and Y is still the number of years remaining in the pay-in period. The pay-in period is defined differently, however. For permitted facilities, it is the term of the initial RCRA permit or the remaining operating life of the facility as estimated in the closure plan, whichever is shorter. Facilities that obtain permits after being in interim status will become subject to this permitted facility pay-in period; see example 4 in Attachment III-4. The formula will take into account payments made into the trust fund while the facility was in interim status. For new permitted facilities, this same permitted facility pay-in period applies.

The only other differences from interim status standards are (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before waste is first received at the facility; (2) the initial payment into

the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator before the initial receipt of hazardous waste.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the Regional Office in reviewing trust funds for RCRA financial assurance and ensuring satisfaction of requirements. A summary checklist appears in Attachment III-2 at the end of this chapter.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Trustee. The first step that EPA Regional Office staff must take is to ensure that the trustee is qualified. The easiest way to do this may be to maintain a current list of the qualified entities in the region. This list can be initially compiled by simply checking the qualifications of each trustee as trust agreements are submitted and compiling a list of the trustees that qualify. Additions can be made to this list as qualified entities are checked during the review of submissions. Necessary deletions from this list--because entities fail to continue to qualify--can be discovered by regular contact with the regulatory agencies listed in Exhibit III-3 and Appendix B.

2. Conformity to Other Requirements. The Regional Administrator will want to make certain that the following additional tasks have been accomplished by the appropriate dates:

- An originally signed duplicate of the trust agreement, including Schedules A and B, is submitted to the Regional Administrator;
- The trust agreement is signed by the owner or operator and the trustee and is properly acknowledged;
- The amount of coverage is adequate; and
- The first payment is made.

For facilities with interim status, all of this must be done by the effective date of the regulations. For new permitted facilities, the initial payment must be made and a receipt for this payment submitted to the Regional Administrator before hazardous waste is first received. The trust agreement itself must be submitted to the Regional Administrator 60 days before that date.

The wording of the trust agreement in all cases must be identical to that in the regulations; Regional Offices should proofread the wording of trust agreements to ensure conformity to requirements. The required wording of the

trust agreement and examples of supporting documentation are given in Attachment III-3 at the end of this chapter.

3. Recordkeeping and Tracking Systems. As trust fund agreements are received, relevant information should be recorded including the name, address, and EPA Identification Number of the covered facilities; the name of the financial institution; amount of coverage for each facility and the effective date; and information verification procedures performed. Automatic data processing systems can be used for this. A list of trust funds in effect should be kept not only under the owner or operator's name, but also under the name of each financial institution so that, in case of bankruptcy or ineligibility or other reasons, it will be easy to determine which owners or operators need to obtain financial assurance elsewhere. This sytem can be used to keep track of mergers and changes in the names of financial institutions.

SUBSEQUENT RESPONSIBILITIES

4. Updating the Trust Fund. An important responsibility for the Regional Administrator will be to ensure that annual payments to the trust fund are being made during the pay-in period in the proper amount, no later than 30 days after each anniversary date of the first payment. There are three reasons for this: (1) the owner or operator is not required to submit receipts for annual payments into the fund; (2) the trustee must notify the Regional Administrator only of the failure of the owner or operator to make annual payments (i.e., an absence of a payment), not a payment that is too small; and (3) the trustee need not report failure to make payments due to increases in cost estimates after the pay-in period is completed. Therefore, the Regional Administrator will have to keep track of notifications of failures to make the required payments and to spot check (audit) those trust fund payments that have been made. To do such an audit, the Regional Administrator should:

(1) Obtain the closure plan and the current closure and post-closure cost estimates from the facility;

(2) Compute the value of each of the variables in the payment formula, (CE-CV)/Y, by using the plans, the cost estimates, and the most recent trust fund valuation;

(3) Determine the required payment from the formula; and

(4) Contact the trustee to find out if the amount the trustee actually received from the owner or operator was at least as great as the required payment. Note, however, that the trustee is not required to divulge this information and may be unwilling to do so.

Since the trustee is only required to send notice of non-payment during the pay-in period, the Regional Administrator may wish to notify trustees when the pay-in period is completed. After completion of the pay-in period, the owner or operator must still make additional deposits into the trust fund or obtain alternative financial assurance within 60 days after any change in the current cost estimates that makes the current cost estimates exceed the value of the trust. The Regional Administrator must ensure that these payments are made or alternative assurance obtained. Spot-checking may again be required.

As with any financial assurance mechanism, the closure and post-closure estimates will be adjusted annually for inflation and new estimates will be prepared when closure and/or post-closure plans are changed. Unlike most of the other mechanisms, however, the amount of assurance (the amount in the trust) will fluctuate depending upon the payments made into the trust and the investments made by the trustee. Thus, it may happen that the value of the trust exceeds the current cost estimates and the owner or operator will request the Regional Administrator to have the excees returned to him. The Regional Administrator must act on such requests within 60 days after receiving them. They should be granted and the trustee instructed to release the appropriate amount of funds after the Regional Administrator has checked that the current value of the trust exceeds the current cost estimates.

5. Maintaining the Trust Fund. The Regional Administrator will also be called upon to approve changes in trustees. Authorizing new trustees is a simple matter; the only requirement is that the new trustee be qualified.

The Regional Administrator will also want to check that existing trustees continue to remain qualified and do not enter bankruptcy. This, too, is not difficult since the financial status of qualified trustees can be checked regularly. A list of the trustees holding RCRA trusts should be kept on the HWDMS, not only under the owner or operator's name, but also under the trustee's name. This will make it easy to determine which owners or operators need to obtain alternate assurance when a trustee ceases to qualify or enters bankruptcy.

6. Drawing on the Trust Fund. A more difficult situation exists when release of funds is being requested as reimbursement for closure or post-closure expenses. Owners or operators may begin submitting requests for reimbursement of final closure expenses even while closure activities continue; they need not wait until closure is complete. For reimbursement, the Regional Administrator must insist upon itemized bills (as the regulations provide) and stay abreast of closure activities and how much remains in the trust fund. For both closure and post-closure care expenses, the Regional Administrator should only authorize reimbursement when the expenditures were in accordance with the plan or otherwise justifiable, but not even all expenses properly incurred should be reimbursed when requested. The regulations permit the Regional Administrator to withhold reimbursement until closure is completed if there is reason to believe that the cost of closure will significantly exceed the value of the trust fund. This allows financial

assurance to be maintained until completion of closure and can give an incentive to the owner or operator to complete closure. See Section G of Chapter II for further discussion. Withholding of reimbursement is not permitted for post-closure care expenses. Of course, the owner or operator remains responsible for all closure and/or post-closure costs even if the fund is exhausted.

The Regional Administrator must act on requests for release of funds discussed in this section within 60 days after receipt of the request for reimbursement.

7. Requests to Terminate the Trust Fund - The Regional Administrator may consent to the termination of the trust fund only (1) if alternate assurance is substituted (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements (see Section G of Chapter II). Consent must be in writing and may accompany the Regional Administrator's letter releasing the owner or operator from closure or post-closure financial assurance requirements. The Regional Administrator should instruct the trustee to terminate the trust and to forward the remaining funds (after subtraction of fees and expenses) to the owner or operator.

PERMITTED FACILITIES

There are two major areas in which interim status and permitted facilities differ: (1) the definition of the pay-in period and (2) the dates by which the first payment must be made into the trust fund and the trust agreement submitted to the Regional Administrator.

In calculating the required payments into the trust fund, the pay-in period for permitted facilities is the shorter of the term of the initial RCRA permit or the remaining operating life of the facility as estimated in the closure plan.

For new permitted facilities, the initial payment must be made and a receipt for this payment submitted to the Regional Administrator before hazardous waste is first received. The trust agreement itself must be submitted to the Regional Administrator 60 days before that date.

D. SOURCES OF FURTHER INFORMATION

Exhibit III-2 lists the regulatory authorities to contact if there is any doubt that a financial institution qualifies to be trustee of a RCRA trust. A copy of the regulations (see Exhibit III-1 above) themselves may be obtained from EPA Regional Administrators. Owners or operators are also encouraged to contact their state hazardous waste agencies to determine whether the state imposes any restrictions on trust funds as a means of establishing financial responsibility for hazardous waste facilities. (See Appendix B.)

National trade associations can supply information about financial institutions in general. Major national organizations include:

1. American Bankers Association
   1120 Connecticut Avenue, N.W.
   Washington, D.C. 20036
   (202) 467-4000
   Trade association of banks and trust companies.

2. Independent Bankers Association of America
   P.O. Box 267
   Sauk Centre, Minnesota 56378
   (612) 352-6546
   Association of medium size and smaller independent banks.

3. National Association of Mutual Savings Banks
   200 Park Avenue
   New York, New York 10017
   (212) 973-5432
   Trade assocition of mutual savings banks.

4. United States League of Savings Associations
   111 East Wacker Driver
   Chicago, Illinois 60601
   (312) 644-3100
   Trade association of savings and loan associations, cooperative banks, and state and local savings and loan association leagues.

5. Credit Union National Association
   5710 Mineral Point Road
   Box 431
   Madison, Wisconsin 53701
   (608) 231-4000
   Trade association of state credit union leagues.

6. Conference of State Bank Supervisors
   1015 Eighteenth Street, N.W., Suite 606
   Washington, D.C. 20036
   (202) 296-2840
   Organization of state officials responsible for the supervision of state-chartered banking institutions.

7. National Association of State Credit Union Supervisors
   1499 Chain Bridge Road, Suite 201
   McClean, Virginia 22101
   (703) 821-2243
   Organization of state credit union supervisors and state-chartered credit unions.

8. National Association of State Savings and Loan Supervisors
   1001 Connecticut Avenue, N.W., Suite 800
   Washington, D.C. 20036
   (202) 452-1523
   Organization of state savings and loan supervisors.

ATTACHMENT III-1

RCRA TRUST FUND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *	
(1) ___	Locate a financial entity willing to act as trustee that has the authority to act as trustee and is regulated and examined by a federal or state agency.
(2) ___	Make certain that the wording of the agreement is identical to the wording in the regulations (See Attachment III-3), that properly completed Schedules A and B are attached, and that the agreement is acknowledged in accordance with state requirements.
" ___	Attach Schedule A to the trust agreement listing the facilities and cost estimates covered by the trust fund and update Schedule A within 60 days after each change in cost estimates.
(3) ___	Discuss with the prospective trustee: (a) fees and taxes, (b) investment strategy, and (c) any common trust funds for which the trust fund qualifies.
(4) ___	For interim status facilities, by the effective date of the regulations, make the first payment into the trust fund and submit an originally signed duplicate of the trust agreement, including Schedules A and B and a certification of acknowledgment to the Regional Administrator.
" ___	For new permitted facilities: (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before hazardous waste is first received at the facility; (2) the initial payment into the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator by this date.
(5) ___	During the pay-in period, make the required payments into the trust fund annually, no later than 30 days after the anniversary date of the first payment.

* The numbers correspond to the paragraph numbers in Section B.

ATTACHMENT III-1 (continued)

RCRA TRUST FUND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
"	___	After the pay-in period is completed, make payment (or provide alternative assurance) within 60 days after any change in cost estimates that makes the current cost estimate exceed the value of the trust fund.
"	___	If the owner or operator wishes to object to the trustee's annual valuation statement, object, in writing, to the trustee's investment activities or to expenses levied against the trust fund within 90 days after receiving the statement.
"	___	Request a release of funds from the trust fund when the value of the trust fund exceeds the current cost estimates.
(6)	___	When the trustee enters bankruptcy or loses its authority to act as a trustee, obtain a new trustee or alternative financial assurance within 60 days.
(7)	___	If the owner or operator is dissatisfied with the performance of the old trustee, the old trustee resigns, or the old trustee ceases to qualify to act as trustee, appoint a new trustee, subject to agreement by the old trustee and the Regional Administrator.
(8)	___	When the owner or operator begins paying for final closure, submit itemized bills and request reimbursement from the trust fund.
"	___	When the owner or operator pays for post-closure care, submit itemized bills and request reimbursement from the trust fund.
(9)	___	Request approval to terminate the trust and release of remaining funds (1) when alternate assurance is substituted, and (2) when released from closure or post-closure financial assurance requirements by the Regional Administrator.

* The numbers correspond to the paragraph numbers in Section B.

ATTACHMENT III-2

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator should ensure that:

Paragraph Number *

(1) ___ The trustee financial institution is qualified.

(2) ___ For interim status facilities, by the effective date of the regulations:

___ An originally signed duplicate of the trust agreement, including Schedules A and B, is submitted to the Regional Administrator;

___ The trust agreement is signed by the owner or operator and the trustee;

___ The trust agreement is properly acknowledged;

___ The amount of coverage is adequate; and

___ The first payment is made.

" ___ For new permitted facilities: (1) the trust agreement must be submitted to the Regional Administrator at least 60 days before hazardous waste is first received at the facility; (2) the initial payment into the trust fund must be made before hazardous waste is first received at the facility; and (3) a receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator by this date.

" ___ The wording of the trust agreement is identical to that in the regulations.

(3) ___ Relevant information is recorded.

* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-2 (continued)

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(4)	___	Annual payments are being made during the pay-in period in the proper amount and no later than 30 days after each anniversary date of the first payment, using this auditing procedure:
	___	Obtain the closure and/or post-closure cost estimates;
	___	Compute the value of each variable in (CE-CV)/Y;
	___	Determine the required payment;
	___	Contact the trustee to allow a comparison of the actual payment with the required payment.
"	___	After completion of the pay-in period, additional deposits are made or alternative assurance obtained within 60 days after any change in the current cost estimates that makes the current cost estimates exceed the value of the trust.
"	___	Within 60 days after receiving a request for release of funds because the value of the trust exceeds the current cost estimates, the request is approved, but only when the fund actually exceeds the current cost estimates by the amount claimed.
(5)	___	Authorization is granted for a change in trustees only when the new trustee is qualified.
"	___	If existing trustees enter bankruptcy or do not remain qualified, alternate assurance is obtained within 60 days.

* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-2 (continued)

RCRA TRUST FUND CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(6)	___	Requests for reimbursement for closure and/or post-closure expenses are approved within 60 days after they are received, but only when itemized bills are submitted and the expenses are in accordance with the plan or otherwise justified.
"	___	If the Regional Administrator has reason to believe that the closure costs will significantly exceed the value of the closure trust fund, complete reimbursement is withheld until closure is completed.
(7)	___	Requests for termination of the trust and return of any funds remaining in the trust are approved in writing when (1) alternate financial assurance is substituted or (2) the owner or operator has been released from closure or post-closure financial requirements.

* The numbers correspond to the paragraph numbers in Section C.

ATTACHMENT III-3

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

TRUST AGREEMENT, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of State] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "incorporated in the State of _____" or "a national bank"], the "Trustee."

WHEREAS, the United States Environmental Protection Agency, "EPA," an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of the facility,

WHEREAS, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

WHEREAS, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

NOW, THEREFORE, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Cost Estimates. This Agreement pertains to the facilities and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current closure and/or post-closure cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of EPA. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by EPA.

Section 4. Payment for Closure and Post-Closure Care. The Trustee shall make payments from the Fund as the EPA Regional Administrator shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the EPA Regional Administrator from the Fund for closure and post-closure expenditures in such amounts as the EPA Regional Administrator shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the EPA Regonal Administrator specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depositary with other securities deposited

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate EPA Regional Administrator a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor Trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the EPA Regional Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Regional Administrator to the Trustee shall be in writing, signed by the EPA Regional Administrators of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notice of Nonpayment. The Trustee shall notify the Grantor and the appropriate EPA Regional Administrator, by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate EPA Regional Administrator, or by the Trustee and the appropriate EPA Regional Administrator if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses; shall be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of [insert name of State].

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording

ATTACHMENT III-3 (continued)

REQUIRED WORDING FOR RCRA TRUST FUND AGREEMENT
40 CFR 264.151(a)

specified in 40 CFR 264.151(a)(1) as such regulations were constituted on the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

ATTACHMENT III-3 (continued)

SAMPLE CERTIFICATION OF ACKNOWLEDGMENT
FOR RCRA TRUST FUND AGREEMENT
(FROM 40 CFR 264.151(a), EMPHASIS ADDED)

The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §§264.143(a) and 264.145(a) or §§265.143(a) or 265.145(a) of this chapter. State requirements may differ on the proper content of this acknowledgment.

State of _____

County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

ATTACHMENT III-3 (continued)

SAMPLE SCHEDULE A

This Agreement demonstrates financial assurance for the following cost estimate(s) for the following facility(ies):

U.S. Environmental Protection Agency Identification Number of Facility	Name of Facility	Address of Facility	Cost Estimates for Which Financial Assurance Being Demonstrated by This Agreement	
	East Minor Facility	42 Main Street Los Tunas, California 90006	Closure	$110,000
			Post-Closure	$ 62,000
			Total	$172,000

The cost estimates listed here were last adjusted on July 1, 1982.

ATTACHMENT III-3 (continued)

SAMPLE SCHEDULE B

The Fund is established initially as consisting of the following property:

$17,200 (seventeen thousand, two hundred dollars), as evidenced by Midtown National Bank Cashier's Check Number 14,282, dated August 1, 1982.

ATTACHMENT III-4

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

This attachment shows how the first two required payments into a trust fund are calculated for three sample facilities. Note that all calculations, trust fund values, and inflation factors are hypothetical.

Example 1

Assumptions:

(1) The facility has interim status.

(2) The trust fund is designed to cover both closure and post-closure care.

(3) The closure plan estimates that the remaining operating life of the facility is 10 years.

(4) The total current closure and post-closure cost estimates is $150,000.

(5) The inflation factor during the first year is 1.10.

Calculations:

All payments are calculated using the formula:

$$\frac{CE-CV}{Y}$$

Where

CE is the current cost estimate
CV is the current value of the trust fund, and
Y is the number of years remaining in the pay-in period.

For the first payment here,

CE = $150,000
CV = 0 (No payments into the trust fund have yet been made.)
Y = 10 (The pay-in period for interim status facilities is the shorter of 20 years or the remaining operating life of the facility.)

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

Thus, the first payment is

$$\frac{CE-CV}{Y} = \frac{\$150,000-0}{10} = \$15,000$$

The second payment calculation requires the value of the trust fund after one year. Assume the trustee valued the investments and other assets comprising the trust at $16,500 (the value of the trust fund has increased because the fund has been invested for one year). The values for the second payment calculation are therefore:

CE = $150,000 x 1.10 (1.10 is the inflation factor.)
CV = $16,500
Y = 9 (One year has passed in the pay-in period.)

The second payment required is:

$$\frac{CE-CV}{Y} = \frac{\$165,000-16,500}{9} = \$16,500.$$

Example 2

Assumptions:

(1) The facility has interim status.

(2) The trust fund covers closure only.

(3) The remaining operating life is 25 years.

(4) The current closure cost estimate is $80,000.

(5) The inflation factor during the first year is 1.15.

Calculations:

For the first payment,

CE = $80,000
CV = 0
Y = 20 (20 years is shorter than the remaining operating life)

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

The first payment is:

$$\frac{CE-CV}{Y} = \frac{\$80,000-0}{20} = \$4,000$$

To compute the second payment, assume that the value of the trust is only $3,150 after the first year (the trust's investments were not very successful). The second payment can be calculated as follows:

CE = 80,000 x 1.15 = $92,000
CV = $3,150
Y = 19

$$\frac{CE-CV}{Y} = \frac{\$92,000-\$3,150}{19} = \$4,676$$

Example 3

Assumptions:

(1) The facility has a 10-year permit.

(2) The trust fund covers both closure and post-closure care.

(3) The remaining operating life of the facility is 15 years.

(4) The total current cost-estimate is $120,000.

(5) The inflation factor for the first year is 1.12.

Calculations:

For the first payment,

CE = 120,000
CV = 0
Y = 10

and

$$\frac{CE-CV}{Y} = \frac{\$120,000-0}{10} = \$12,000$$

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

For the second payment, assume that the trust fund is worth $12,600. The second payment can be calculated:

CE = $120,000 x 1.12 = $134,400
CV = $12,600
Y = 9

$$\frac{CE-CV}{Y} = \frac{\$134,400-\$12,600}{9} = \$13,533$$

Example 4

Assumptions:

(1) In year 1, the facility has interim status.

(2) By year 2, the facility obtains general status with a 10-year permit.

(3) The trust fund covers both closure and post-closure care.

(4) The remaining operating life of the facility is 15 years.

(5) The total current cost-estimate is $150,000.

(6) The inflation factor during the first year is 1.11.

Calculations:

For the first payment,

CE = $150,000
CV = 0
Y = 15

Thus the first payment is:

$$\frac{CE-CV}{Y} = \frac{\$150,000-0}{15} = \$10,000$$

ATTACHMENT III-4 (continued)

SAMPLE CALCULATIONS OF REQUIRED PAYMENTS INTO RCRA TRUST FUND

In the second year, the facility is in general status, and a new pay-in period will apply. The pay-in period is equal to the shorter of the remaining operating life of the facility or the term of the initial permit. The remaining operating life is equal to 14 years, while the permit term is 10 years; thus, the new pay-in period is 10 years.

To compute the second payment, assume that the trust fund is now valued at $10,800. The second payment can be calculated as follows:

$$CE = \$150,000 \times 1.11 = \$166,500$$
$$CV = \$10,800$$
$$Y = 10$$

and $$\frac{CE-CV}{Y} = \frac{\$166,500-\$10,800}{10} = \$15,570$$

IV. ESTABLISHING FINANCIAL RESPONSIBILITY USING SURETY BONDS

A. INTRODUCTION

This chapter describes how owners or operators can fulfill their RCRA financial requirements using SURETY BONDS. Surety bonds are common in business when one party, in order to protect itself in a transaction, insists that another party obtain such a bond. Only RCRA surety bonds are discussed here, however. A surety bond is a contract which an owner or operator (sometimes called the PRINCIPAL) can enter into with a qualified surety company (called the SURETY). Under this contract, the surety guarantees to EPA (sometimes called the OBLIGEE) that the closure and/or post-closure obligations of the owner or operator will be fulfilled. Of course, the owner or operator must pay the surety for this guarantee, because the surety will be liable for these obligations should the owner or operator fail to fulfill them.

The RCRA regulations allow two types of surety bonds, FINANCIAL GUARANTEE BONDS and PERFORMANCE BONDS, although this latter type of bond can be used only at permitted facilities and can not be combined with other financial assurance mechanisms. Financial guarantee bonds, as the name implies, simply assure EPA that, if the owner or operator fails to fund the STANDBY TRUST FUND or provide appropriate alternative financial assurance for closure and/or post-closure care, the surety will fund the standby trust fund up to a stated amount. Performance bonds, on the other hand, may be carried out either by paying for or actually providing closure and/or post-closure care. Both types of bonds limit the liability of the surety to the face amount of the bond, called the PENAL SUM. As cost estimates increase, this penal sum may be increased upon agreement of the owner or operator and the surety. The bond may provide, by way of an optional RIDER, that the penal sum can be increased up to 20 percent in any year, without a new agreement between the parties.

EPA expects, on the basis of information received from sureties, that very few sureties will be willing to write surety bonds, at least initially, and that many of those sureties that will write them will do so only for their largest, most creditworthy clients. The long-term nature of the obligation guaranteed, the requirement that the surety pay the penal sum in the event the surety attempts to cancel the bond and the owner cannot obtain alternate assurance, and the unfamiliarity of sureties with the hazardous waste industry all make these bonds unattractive to sureties. Nevertheless, owners and operators have asked that surety bonds be allowed as a financial assurance mechanism. EPA believes that, in the future, the availability of RCRA surety bonds may increase as more facilities are permitted, especially in instances where remaining facility life is relatively brief and the time of closure is highly predictable.

The regulations pertaining to RCRA surety bonds are as follows:

EXHIBIT IV-1

RCRA SURETY BOND REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure Bond		
• Financial Guarantee Bond	40 CFR §265.143(b)	40 CFR §264.143(b)
• Performance Bond	NA	40 CFR §264.143(c)
Post-Closure Bond		
• Financial Guarantee Bond	40 CFR §265.145(b)	40 CFR §264.145(b)
• Performance Bond	NA	40 CFR §264.145(c)
Wording of Bonds		
• Financial Guarantee Bond (closure and/or post-closure)	40 CFR §264.151(b)	40 CFR §264.151(b)
• Performance Bond (closure and/or post-closure)	NA	40 CFR §264.151(c)

Source: Title 40, Code of Federal Regulations (CFR).

NA: Not applicable.

B. RCRA SURETY BOND REQUIREMENTS

This section describes the responsibilities of owners or operators in fulfilling the surety bond requirements established under RCRA. Except for the last part of this section dealing with permitted facilities, the discussion here covers only financial guarantee bonds, since they are the only type of bond allowed at interim status facilities. Apart from the few differences noted in the last section, the requirements for financial guarantee bonds also apply to performance bonds. A checklist of the responsibilities of owners or operators appears as Attachment IV-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for Surety Company. An owner or operator wishing to use a surety bond to fulfill its RCRA closure and/or post-closure requirements must enter into a contract with a qualified surety. Qualified sureties are those listed by the U.S. Department of the Treasury in its CIRCULAR 570, which is published annually on approximately July 1 and updated periodically in the Federal Register. To obtain the most up-to-date information, owners or operators can contact the Audit Staff of the Department of the Treasury (telephone number: (202) 634-5010). Care should be used in consulting Circular 570 since many sureties have similar names.

Circular 570 also lists the maximum amount which each surety can guarantee in one bond, called the UNDERWRITING LIMITATION. A surety may only issue a surety bond exceeding this amount when it brings another company into the surety agreement to help share the risk. Even several sureties acting together may not exceed the total of their individual underwriting limitations, however. Finally, Circular 570 lists the states in which each qualified surety is licensed to enter into a surety bond; a RCRA surety bond must be signed in one of those states.

In addition, owners or operators must also identify a financial institution qualified to establish a STANDBY TRUST FUND (discussed below). The qualifications of trustee institutions are described in Section B.1 of Chapter III.

2. Wording and Amount of Assurance. The wording required for surety bonds is specified in the regulations and both the owner or operator and the surety must certify that the bond matches this wording exactly. The bonds are shown in Attachments IV-3 and IV-4 at the end of this chapter. The penal sum of a RCRA surety bond, together with any amount being assured by other mechanisms (see Section B of Chapter II for information on combinations of mechanisms), must be in an amount at least equal to the current closure and post-closure cost estimates.

The owner or operator must also establish a standby trust fund[1] to accompany each RCRA surety bond. The moneys necessary to pay for closure and/or post-closure care will be disbursed from this fund. The fund is often initially established with a NOMINAL SUM, and must be funded in an amount equal to the penal sum of the bond before the beginning of final closure of the facility or within 15 days after an order by the Regional Administrator or a U.S. court to begin closure (See Attachment IV-3). Any payments made under the bond will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. A standby trust fund is not to be confused with an ordinary RCRA trust fund (described in Chapter III), although a standby trust is subject to the same requirements except that:

(a) annual payments into the standby trust fund are not required (only the nominal initial payment mentioned above is usually made);

(b) Schedule A of the trust agreement need not be updated;

(c) Annual valuations by the trustee are not required; and

(d) The trustee need not send notices of nonpayment.

A standby trust fund is also required with a letter of credit. The standby trust fund is not a financial assurance mechanism under RCRA, it merely facilitates drawing on surety bonds and letters of credit that are used as financial assurance. The standby trust fund must be worded exactly as required for trust funds. See Attachment III-3 and discussion in Section B.2 of Chapter III.

3. Obtaining a Surety Bond. The first step an owner or operator should take in approaching a broker or agent for a surety company is to check that the broker or agent is authorized by a qualified surety to issue RCRA bonds in the amount desired. (The owner or operator can check the qualifications of sureties in CIRCULAR 570, as discussed above.) Sureties give brokers and agents authority to sell surety bonds for them in a written document called a POWER OF ATTORNEY. If the owner or operator has any doubt about the authority of the broker to act on the surety's behalf, to issue RCRA bonds, or to issue bonds in the amount needed, he should ask for a copy of the power of attorney.

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[1]Even if a combination of financial assurance mechanisms is used, only one trust fund is necessary. If an owner or operator uses a trust fund together with a surety bond, the trust fund may be used as the standby trust fund. If a financial guarantee bond and letter of credit are both used, one standby trust fund is sufficient. Remember, however, that a performance bond may not be used in combination with other mechanisms.

The broker or agent will undoubtedly ask for detailed information on the facility and the owner or operator applying for the surety bond. This information may include any of the financial and operating data listed and the facility visit mentioned in Section D of Chapter II.

Once the broker or agent evaluates this information, he will be able to tell the owner or operator if a surety bond can be issued and if so, on what terms. The terms may include not only the premiums required but also a requirement that the owner or operator provide a certain amount of COLLATERAL to reduce the surety's risk. Even if collateral is not required, the surety may be willing to lower its premiums if collateral is provided voluntarily. The owner or operator will probably also want the optional rider that is permitted by the regulations. This could save it from having to renegotiate a new surety bond each year that cost estimates increase.

4. Submission of Documents to EPA. To complete the surety bond, both the surety and the owner or operator will have to sign it; someone properly authorized to act on the behalf of either or both parties may sign instead. The owner or operator must then submit the surety bond and an ORIGINALLY SIGNED DUPLICATE of the standby trust agreement to the Regional Administrator before the effective date of the regulations.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating Coverage. During the operating life of the facility, when closure or post-closure cost estimates are adjusted due to inflation or new estimates are prepared because of a change in closure and/or post-closure plans, the owner or operator is responsible for ensuring either that the bond's penal amount is increased sufficiently or that other financial assurance is given. This must be done--and evidence of the increase in the penal sum submitted to the Regional Administrator--within 60 days after the increase in cost estimates. Further increases in financial assurance are not required after closure.

The bond may (but is not required to) provide for an optional RIDER to permit increase in the penal sum by up to 20% per year. This rider allows an owner or operator to increase the amount of its coverage without having to renegotiate for additional surety bond coverage each time the closure or post-closure cost estimates increase. If there is no rider or the rider is not sufficiently large, the owner or operator may nevertheless agree with the surety to increase the face amount. Alternatively, the owner or operator may obtain another financial responsibility instrument to cover the increase (combinations of instruments covering one facility are discussed in Section B of Chapter II).

The regulations provide that the owner or operator may apply to the Regional Administrator for a decrease in the amount of bond coverage if the cost estimates decrease. The Regional Administrator will probably require

supporting documentation such as the closure and/or post-closure plans and cost estimates in order to respond to a request to decrease coverage. This is further described in Section E.1 of Chapter II.

6. Maintaining Assurance. The owner or operator is required to obtain alternative financial responsibility assurance within 60 days after bankruptcy of the surety or the removal of the surety's name from Circular 570.

In addition, assurance must be maintained until ownership of or operating responsibility for the facility changes, and the new owner or operator has met the applicable financial responsibility requirements.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverages. See Section E.4 of Chapter II.

7. Cancellation of the Surety Bond by the Issuer. The surety company may also cancel the bond. In order to exercise this right, a surety company must send notices of cancellation to both the owner or operator and the Regional Administrator. Cancellation may not occur during the 120 days beginning on the date of receipt of these notices. The owners or operator will have 90 days to provide alternate financial assurance and obtain written approval from the Regional Administrator of the new assurance. See Section E.3 of Chapter II. If the owner or operator fails to provide this assurance and obtain such approval within the 90 days, the Regional Administrator will direct the surety to pay the penal sum into the standby trust.

8. Drawing on Funds for Closure and Post-Closure. Financial guarantee bonds are designed to guarantee that funds will be available to pay for closure and post-closure care. Thus, if the owner or operator does not fulfill its obligation to fund the standby trust fund in the amount of the penal sum or to obtain alternative financial assurance when required, the surety will be responsible for funding the standby trust fund. Specifically, the surety will be required to pay the penal sum of the bond into the standby trust in these circumstances:

a. The owner or operator has failed to fund the standby trust fund in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility;

b. The Regional Administrator or a court has ordered closure to begin and the owner or operator has not funded the standby trust within 15 days; or

c. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

If the owner or operator properly funds the standby trust fund or otherwise fulfills its obligations under the regulations, funds will not be drawn from the surety bond.

9. Termination of Bond. The owner or operator should request the approval of the Regional Administrator to terminate the bond in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or operator should forward a copy of it to surety along with a request that the bond be terminated. The surety bond can only be terminated with the written consent of the Regional Administrator. At the same time, the owner or operator should request the Regional Administrator to approve the termination of the standby trust fund unless the owner or operator is maintaining assurance with a letter of credit and without a trust fund. Procedures for terminating the standby trust fund are identical to the procedures for terminating trust funds, discussed in Section B.9 of Chapter II.

PERMITTED FACILITIES

There are only a few differences between interim status and permitted facilities with respect to financial assurance through surety bonds. The main difference is the types of bonds allowed. Financial guarantee bonds may be used at both interim status and permitted facilities and may be used in combination with other financial assurance mechanisms; performance bonds, however, may be used only for permitted faciliites, not for those with interim status, and they may not be used in combination with other financial assurance mechanisms.

Performance bonds assure performance in accordance with closure and/or post-closure plans and other permit requirements. Upon default by the owner or operator, a surety may fulfill its obligations under such a bond by either securing performance in accordance with the plans or by depositing the penal sum into the standby trust.

In many respects, performance bonds are like financial guarantee bonds, although there are some differences. The owner or operator may request a reduction in the penal sum of a performance bond in the same manner as for a financial guarantee bond. With a performance bond covering post-closure care, such a request may even be made during the period of post-closure care.

Performance bonds state that the surety will either have to perform closure and/or post-closure care (in accordance with (1) the permit requirements, (2) the plans, and (3) RCRA regulations) or pay the penal sum into the standby trust fund in the following circumstances:

a. The owner or operator fails to fulfill its closure and/or post-closure obligations, even though closure may occur sooner than expected or the requirements in the plans, regulations, and/or permit have changed; or

b. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

The only other major difference between the surety bond requirements for permitted facilities and those with interim status is that for new permitted facilities, the surety bond must be submitted to the Regional Administrator at least 60 days before the date on which hazardous waste is first received at the site and the bond must be effective before the date on which hazardous waste is first received.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the Regional Office in reviewing surety bonds for RCRA financial assurance and ensuring satisfaction of requirements. A summary checklist appears in Attachment IV-2.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Surety and Broker or Agent. The first step that the Regional Administrator must take is to ensure that the surety is qualified. Circular 570 (published annually on approximately July 1) must be reviewed to check that the surety is listed, is licensed to do business in the state in which the bond is signed, and has an underwriting limitation equal to or larger than the bond amount. Because many sureties have similar names, great care should be exercised in consulting Circular 570. The most recent information can be obtained by contacting the Audit Staff of the Department of the Treasury (telephone number: (202) 634-5010). The bond amount can exceed the surety's underwriting limitation if the surety properly indicates that other sureties are sharing the risk. In particular, if the surety is using REINSURANCE, a Treasury reinsurance form must be submitted with the bond or within 45 days thereafter. If COSURETIES are being used, the original bond must reflect that fact. In all cases, the Regional Administrator will want to ensure that the total underwriting limitation of all sureties involved is not exceeded.

For each surety bond submitted, the Regional Administrator should request to see the broker or agent's POWER OF ATTORNEY and review it to make certain that the broker or agent has authority to act for the surety on this type of bond (hazardous waste) and in the amount of the bond.

The qualifications of the trustee institution for the standby trust fund must also be verified. The qualifications required are the same as for the RCRA trust fund. See Section C.1 of Chapter III for procedures.

2. Conformity to Other Requirements. For interim status facilities, the financial guarantee bond must establish financial assurance by the effective date of the financial responsibility regulations. For permitted facilities, the effective date of the bond must be no later than the date that hazardous waste is first received at the site and the bond must be submitted to the Regional Administrator at least 60 days before that date. In either case, the wording of the surety bond must be identical to that specified in the regulations and signed by the appropriate parties. It must also be accompanied by an originally signed duplicate of the standby trust agreement (See Section B, Part 2 of this chapter). The penal sum of the bond must at least equal the closure and/or post-closure cost estimates unless additional assurance has been properly submitted.

3. Recordkeeping and Tracking Systems. As surety bonds and standby trust agreements are received, relevant information should be recorded including the name, address, and EPA Identification Number of the covered facilities; the name of the surety, bond number, and trustee; amount of coverage for each facility and the effective date; and information verification procedures performed. Automatic data processing systems can be used for this. A list of surety bonds in effect should be kept not only under the owner or operator's name, but also under the name of each surety company and trustee institution so that, in case of bankruptcy or ineligibility or other reasons, it will be easy to determine which owners or operators need to obtain financial assurance elsehwere. This system can be used to keep track of mergers and changes in the names of sureties.

SUBSEQUENT RESPONSIBILITIES

4. Updating Surety Bonds. As cost estimates for closure and post-closure care are adjusted annually for inflation or revised based on new plans, the Regional Administrator has several tasks. First, the Regional Administrator will need to check that increases in cost estimates are covered within 60 days by increases in the penal sum of surety bonds or by other added financial assurance and that owners and operators have submitted evidence of any increases in the penal sum. Automated data processing can be used to assist in this task. See Chapter II, Section I.

Second, while increases in coverage are mandatory when cost estimates increase during the operating life of the facility, decreases in coverage are not required when cost estimates decrease. The Regional Administrator should allow the amount of a performance bond for post-closure care to be decreased after the facility is closed only if the owner or operator demonstrates that the amount of the bond exceeds the remaining cost of post-closure care. Future inflation rates are uncertain and cost estimates are not subject to increase due to inflation after closure. See Section E of Chapter II for a more detailed discussion.

5. Maintaining Assurance. Regional Administrators will have to maintain up-to-date lists of what sureties are currently listed on Circular 570, the states where they are licensed, and what their underwriting limitations are. One person in the office should be made responsible for regularly updating information on qualifying sureties based on the notices regarding sureties sent by EPA headquarters. In addition, a list of surety bonds in effect must be kept on the HWDMS not only under the owner or operator's name, but also under each surety's name so that in the case of bankruptcy or other reason for a financial institution failing to continue to qualify under the RCRA regulations, it is easy to determine which owners or operators need to obtain financial assurance elsewhere. This system could also be used to keep track of mergers and changes in the names of sureties. Automated data processing can be used to assist these efforts and can be particularly useful in helping the Regional Administrator assure that alternative assurance is obtained within 60 days after the surety becomes bankrupt or otherwise ceases to qualify. See Section I of Chapter II.

In the event of transfer of ownership or operation of a facility, the Regional Administrator should verify that assurance maintained until the new owner or operator satisfies the financial requirements.

The Regional Administrator should approve requests to use alternate assurance mechanisms if no lapse in coverage will result.

6. Cancellation of the Surety Bond by the Issuer. Sureties may not cancel RCRA surety bonds until after they send notice of cancellation to both the owner or operator and the Regional Administrator. Cancellation may not occur during the 120 days beginning on the date of receipt of these notices. The Regional Administrator will have to ensure that owners or operators obtain acceptable alternative means of financial assurance within 90 days after receipt of these notices. Cancellation will only be allowed if the owner or operator provides other financial assurance within this period. If it is not obtained, the surety must fulfill its obligations under the bond.

Upon receipt of a notice from a surety, Regional Office staff should contact the owner or operator to determine (1) the date it received the notice from the insurer and (2) its plans to provide alternate assurance or fund the standby trust fund. Both pieces of information will be essential for determining the nature and timing of future agency action.

7. Drawing on the Surety Bond. The Regional Administrator will have to make demand upon the surety to fulfill its obligations under a financial guarantee bond when:

a. The owner or operator has failed to fund the standby trust fund in the amount of the cost estimate for closure and/or post-closure care before the beginning of final closure of the facility;

b. The Regional Administrator or a court has ordered closure to begin and the owner or operator has not funded the standby trust within 15 days; or

c. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

If possible, the Regional Administrator should notify the trustee of the standby trust in advance of expected payments into the trust. Payments out of the standby trust will be made as specified in Section C.5 of Chapter III on trust funds.

8. Requests to Terminate the Surety Bond. The Regional Administrator may consent to the termination of the surety bond only (1) if alternate assurance is substituted (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements (see Section G of Chapter II). Consent must be in writing and may accompany the Regional Administrator's letter releasing the owner or operator from closure or post-closure financial assurance requirements.

At the same time, the Regional Administrator may consent to the termination of the standby trust fund unless the owner or operator is maintaining assurance with a letter of credit and without a trust fund. Procedures for terminating the standby trust fund are identical to the procedures for terminating trust funds, discussed in Section B.9 of Chapter III.

PERMITTED FACILITIES

The two major differences between facilities with permits and with interim status are (1) performance bonds are allowed for permitted facilities and (2) surety bond for a new permitted facility must be submitted to the Regional Administrator at least 60 days before the date on which hazardous waste is first received at the site and must be effective before the date on which hazardous waste is first received. Of course, performance bonds are significantly different than financial guarantee bonds as explained in Section B of this chapter. First of all, performance bonds may not be used together with other financial assurance mechanisms to cover one cost estimate. Second, a surety may fulfill its obligations under a performance bond either by securing performance in accordance with the plans or by depositing the penal sum into the standby trust fund. The surety will have to fulfill its obligations in the following circumstances:

a. The owner or operator fails to fulfill its closure and/or post-closure obligations, even though closure may occur sooner than expected or the requirements in the plans, regulations, and/or permit have changed; or

b. The surety has sent notice of cancellation of the bond and the owner or operator has not obtained alternate financial assurance within 90 days.

Finally, with a financial guarantee bond, the Regional Administrator can easily determine whether the surety has fulfilled its obligations -- the surety has either funded the standby trust or it has not. With a performance bond, the Regional Administrator's task is not so easy if the surety undertakes performance instead of funding the standby trust. The Regional Administrator will need to oversee the surety's performance in such cases; EPA Headquarters guidance will be available for such purposes on a case-by-case basis.

D. SOURCES OF FURTHER INFORMATION

Circular 570 (the June 30, 1981, version is at 46 Federal Register 33962), its updates available through the audit staff of the U.S. Department of Treasury (telephone number: (202) 634-5010), and the Treasury Department lists of sureties with deteriorating financial conditions are vital sources of information that all Regional Offices should have.

Another, more technical, document is Circular 297 of the Treasury Department that contains the Treasury regulations governing sureties doing business with the United States. These regulations were promulgated pursuant to Title 6 of the U.S. Code, Sections 6-13. They could be useful to answer specific questions that may arise concerning sureties.

National trade associations are an additional source of information. Major organizations concerned with surety bonds are:

1. National Association of Surety Bond Producers
   5454 Wisconsin Avenue
   Suite 1625
   Chevy Chase, Maryland 20015
   (301) 986-4166

   Trade association of surety bond agents.

2. Surety Association of America
   100 Wood Avenue, South
   Iselin, New Jersey 08830
   (201) 494-7600

   Trade association of surety companies.

3. National Association of Insurance Commissioners
   350 Bishops Way
   Brookfield, Wisconsin 53005
   (414) 784-9540

   Organization of state insurance commissioners, who are responsible for the state regulation of surety companies and their agents.

ATTACHMENT IV-1

RCRA SURETY BOND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(1)	___	Seek out an agent or a broker of a qualified surety, namely, a surety that is listed on Circular 570, is licensed to transact business in the state, and whose underwriting limit is sufficient (either alone or acting with other sureties) to cover the cost estimates for which assurance is sought.
"	___	Identify a qualified trustee institution.
(2)	___	Obtain the right type of bond--only financial guarantee bonds are acceptable for interim status sites, while both financial guarantee bonds or performance bonds are allowed at permitted facilities.
"	___	Check that the penal sum is correct and that the wording of the agreement is identical to the wording in the regulations.
"	___	Establish a standby trust worded exactly as required by the regulations.
(3)	___	If there is any doubt about the agent's or broker's authority to act for a qualified surety, check the agent or broker's power of attorney to ensure that the agent or broker has authority to act on behalf of the surety, to issue RCRA surety bonds, and to issue surety bonds in the amount needed.
(4)	___	For interim status facilities, sign the bond and standby trust papers, including Schedules A and B and the certification of acknowledgment, and submit them to the Regional Administrator by the effective date of the regulations.
"	___	For new permitted facilities, the bond must be submitted to the Regional Administrator at least 60 days before the date on which hazardous waste is first received at the site and the bond must be effective before the date on which hazardous waste is first received.

* The numbers correspond to the paragraphs in Section B.

ATTACHMENT IV-1 (continued)

RCRA SURETY BOND CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(5)	___	Within 60 days after cost estimates increase, obtain additional coverage or an alternative method of assurance and submit evidence to the Regional Administrator of the increase in coverage.
"	___	When cost estimates decrease, apply to the Regional Administrator for a decrease in coverage.
(6)	___	Within 60 days of bankruptcy of the surety or the surety ceasing to be listed in Circular 570, obtain alternative coverage and inform the Regional Administrator.
(7)	___	Obtain alternative assurance within 90 days after receipt by both the owner or operator and the Regional Administrator of notice of cancellation.
(8)	___	To avoid having funds drawn from the surety bond, either fund the standby trust fund (before the beginning of final closure or within 15 days after an order to begin closure) or obtain alternative financial assurance within 90 days after receipt of notice of cancellation from the surety.
(9)	___	Request approval to terminate the bond (1) when alternate assurance is substituted, and (2) when released from closure or post-closure financial assurance requirements by the Regional Administrator.

* The numbers correspond to the paragraphs in Section B.

ATTACHMENT IV-2

RCRA SURETY BOND CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator must ensure that:

Paragraph Number *		
(1)	___	At a minimum, the surety is listed in Circular 570, is licensed in the state, and has a sufficiently large underwriting limitation (or shares the risk with other sureties or reinsurors and the combined underwriting limitation is not exceeded).
"	___	The broker or agent's power of attorney is reviewed to be certain that the broker or agent is authorized by the surety to issue RCRA bonds in the amount needed.
"	___	The trustee institution for the standby trust is qualified.
(2)	___	For interim status facilities, the bond is received and effective by the effective date of the regulations.
"	___	For new permitted facilities, the bond is submitted to the Regional Administrator at least 60 days before the date on which hazardous waste is first received at the site and the bond is effective before the date on which hazardous waste is first received.
"	___	The wording of the bond is identical to the wording specified in the regulations.
"	___	An originally signed duplicate of the standby trust agreement, including Schedules A and B and a certification of acknowledgment, accompanies the bond.
"	___	Only financial guarantee bonds are accepted for facilities with interim status; either financial guarantee bonds or performance bonds may be accepted for permitted facilities.
"	___	The penal sum equals or exceeds the cost estimates, or other assurance is also provided.
(3)	___	Relevant information is recorded.

* The numbers correspond to the paragraphs in Section C.

ATTACHMENT IV-2 (continued)

RCRA SURETY BOND CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(4)	___	Increases in cost estimates are covered within 60 days by increases in the penal sum of surety bonds or other added financial assurance.
"	___	Decreases in surety bond penal sums are approved only when sufficient coverage will remain.
(5)	___	The Regional Office keeps track of which sureties enter bankruptcy or cease to be listed in Circular 570 and ensures that owners or operators obtain alternate assurance within 60 days after such events.
(6)	___	The owner or oprator is contacted following notice from the surety of intent to cancel.
"	___	The owner or operator obtains alternative means of financial assurance within 90 days after receipt by the owner or operator and the Regional Administrator of notice of cancellation of a surety bond by a surety.
(7)	___	Demand is made upon the surety to fulfill its obligation under the surety bond when the conditions specified in the bond occur.
"	___	If possible, the trustee of the standby trust is notified in advance of expected payments into the trust.
(8)	___	Requests to terminate the bond are approved in writing when (1) alternate financial assurance is substituted or (2) the owner or operator has been released from closure or post-closure financial requirements.

* The numbers correspond to the paragraphs in Section C.

ATTACHMENT IV-3

REQUIRED WORDING FOR RCRA FINANCIAL GUARANTEE BOND
(40 CFR 264.151(b))

Date bond executed: _____

Effective date: _____

Principal: [legal name and business address of owner or operator]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

Surety(ies): [name(s) and business address(es)]

EPA Identification Number, name, address, and closure and/or post-closure amount(s) for each facility guaranteed by this bond [indicate closure and post-closure amounts separately]: _____

Total penal sum of bond: $_____

Surety's bond number: _____

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the U.S. Environmental Protection Agency (hereinafter called EPA), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be full amount of the penal sum.

Whereas said Principal is required, under the Resource Conservation and Recovery Act as amended (RCRA), to have a permit or interim status in order to own or operate each hazardous waste management facility identified above, and

Whereas said Principal is required to provide financial assurance for closure, or closure and post-closure care, as a condition of the permit(s) or interim status, and

ATTACHMENT IV-3 (continued)

REQUIRED WORDING FOR RCRA FINANCIAL GUARANTEE BOND
(40 CFR 264.151(b))

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of final closure of each facility identified above, fund the standby trust fund in the amount(s) identified above for the facility,

Or, if the Principal shall fund the standby trust fund in such amount(s) within 15 days after an order to begin closure is issued by an EPA Regional Administrator or a U.S. district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance, as specified in Subpart H of 40 CFR Parts 264 or 265, as applicable, and obtain the EPA Regional Administrator's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the EPA Regional Administrator(s) from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by an EPA Regional Administrator that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the EPA Regional Administrator.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the EPA Regional Administrator(s), as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective

ATTACHMENT IV-3 (continued)

REQUIRED WORDING FOR RCRA FINANCIAL GUARANTEE BOND
(40 CFR 264.151(b))

until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

[The following paragraph is an optional rider that may be included but is not required.]

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure and/or post-closure amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the EPA Regional Administrator(s).

In Witness Whereof, the Principal and Surety(ies) have executed this Financial Guarantee Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 264.151(b) as such regulations were constituted on the date this bond was executed.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

ATTACHMENT IV-3 (continued)

REQUIRED WORDING FOR RCRA FINANCIAL GUARANTEE BOND
(40 CFR 264.151(b))

Corporate Surety(ies)

[Name and address]

State of incorporation: _____

Liability limit: $_____

[Signature(s)]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $_____

ATTACHMENT IV-4

REQUIRED WORDING FOR RCRA PERFORMANCE BOND
(40 CFR 264.151(c))

Date bond executed: _____

Effective date: _____

Principal: [legal name and business address of owner or operator]

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: _____

Surety(ies): [name(s) and business address(es)]

EPA Identification Number, name, address, and closure and/or post-closure amount(s) for each facility guaranteed by this bond [indicate closure and post-closure amounts separately]: _____

Total penal sum of bond: $_____

Surety's bond number: _____

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the U.S. Environmental Protection Agency (hereinafter called EPA), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Resource Conservation and Recovery Act as amended (RCRA), to have a permit in order to own or operate each hazardous waste management facility identified above, and

Whereas said Principal is required to provide financial assurance for closure, or closure and post-closure care, as a condition of the permit, and

ATTACHMENT IV-4 (continued)

REQUIRED WORDING FOR RCRA PERFORMANCE BOND
(40 CFR 264.151(c))

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of the obligation are such that if the Principal shall faithfully perform closure, whenever required to do so, of each facility for which this bond guarantees closure, in accordance with the closure plan and other requirements of the permit as such plan and permit may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended.

And, if the Principal shall faithfully perform post-closure care of each facility for which this bond guarantees post-closure care, in accordance with the post-closure plan and other requirements of the permit, as such plan and permit may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended.

Or, if the Principal shall provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264, and obtain the EPA Regional Administrator's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the EPA Regional Administrator(s) from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by an EPA Regional Administrator that the Principal has been found in violation of the closure requirements of 40 CFR Part 264, for a facility for which this bond guarantees performance of closure, the Surety(ies) shall either perform closure in accordance with the closure plan and other permit requirements or place the closure amount guaranteed for the facility into the standby trust fund as directed by the EPA Regional Administrator.

Upon notification by an EPA Regional Administrator that the Principal has been found in violation of the post-closure requirements of 40 CFR Part 264, for a facility for which this bond guarantees performance of post-closure care, the Surety(ies) shall either perform post-closure care in accordance with the post-closure plan and other permit requirements or place the post-closure amount guaranteed for the facility into the standby trust fund as directed by the EPA Regional Administrator.

ATTACHMENT IV-4 (continued)

REQUIRED WORDING FOR RCRA PERFORMANCE BOND
(40 CFR 264.151(c))

Upon notification by an EPA Regional Administrator that the Principal has failed to provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264, and obtain written approval of such assurance from the EPA Regional Administrator(s) during the 90 days following receipt by both the Principal and the EPA Regional Administrator(s) of a notice of cancellation of the bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the EPA Regional Administrator.

The Surety(ies) hereby waive(s) notification of amendments to closure plans, permits, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the EPA Regional Administrator(s), as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

[The following paragraph is an optional rider that may be included but is not required.]

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure and/or post-closure amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the EPA Regional Administrator(s).

ATTACHMENT IV-4 (continued)

REQUIRED WORDING FOR RCRA PERFORMANCE BOND
(40 CFR 264.151(c))

In Witness Whereof, The Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 264.151(c) as such regulation was constituted on the date this bond was executed.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

Corporate Surety(ies)

[Name and address]

State of incorporation: _____

Liability limit: $_____

[Signature(s)]

[Name(s) and title(s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $_____

V. ESTABLISHING FINANCIAL RESPONSIBILITY USING LETTERS OF CREDIT

A. INTRODUCTION

A LETTER OF CREDIT is a mechanism by which the credit of one party, such as a bank, is extended on behalf of a second party, called the ACCOUNT PARTY, to a third party, the BENEFICIARY. The first party, the ISSUER, allows the beneficiary to draw funds upon the presentation of documents in accordance with the terms of the letter of credit. In a RCRA letter of credit, the owner or operator is the account party, the financial institution is the issuer, and the EPA is the beneficiary.

The purpose of a RCRA letter of credit is to guarantee availability of funds for closure and/or post-closure care. The issuer offers this assurance in exchange for a fee paid by the owner or operator. The owner or operator also undertakes to repay, with interest, any funds drawn through the letter of credit. While EPA specifies the wording of the letter, the terms of the credit arrangement between the owner or operator and the issuer will depend on individual circumstances and negotiations. If an owner or operator has a good relationship with a bank, a letter of credit may be a desirable method of establishing financial responsibility under RCRA.

The regulations pertaining to RCRA letters of credit are as follows:

EXHIBIT V-1

RCRA LETTER OF CREDIT REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure Letter of Credit	40 CFR §265.143(c)	40 CFR §264.143(d)
Post-Closure Letter of Credit	40 CFR §265.145(c)	40 CFR §264.145(d)
Wording of Letter of Credit	40 CFR §264.151(d)	40 CFR §264.151(d)

Source: Title 40, Code of Federal Regulations (CFR).

B. REQUIREMENTS FOR USING RCRA LETTERS OF CREDIT

This section outlines the requirements for using letters of credit, laying out the responsibilities of owners or operators. A checklist of these responsibilities appears in Attachment V-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for Issuing Institution. The issuing institution must be an entity which has the authority to issue a letter of credit, and whose letter of credit operations are regulated and examined by a federal or state agency (e.g., a bank or other financial institution). All domestic commercial banks and some mutual savings banks, foreign banks, credit unions, and savings and loan associations satisfy this requirement. Owners or operators should confirm qualifications of a prospective issuer with the appropriate regulatory authority (see Exhibit V-2 and Appendix B).

In addition, owners or operators must also identify a financial institution qualified to establish a STANDBY TRUST FUND (discussed below). The qualifications of trustee institutions are described in Section B.1 of Chapter III.

2. Wording and Amount of Assurance. RCRA letters of credit must be expressly IRREVOCABLE for an initial period of at least one year, and must provide for AUTOMATIC EXTENSIONS of at least one year. The wording of the letter of credit must be identical to that required by the regulations in force on the date of issuance. The letter of credit must also be effective by the effective date of the regulations. Attachment V-3 shows the required wording of a RCRA letter of credit.

The amount of the letter of credit must, at a minimum, equal the CURRENT COST ESTIMATES for closure and/or post closure care. Of course, if the letter of credit is combined with another mechanism (see Section B of Chapter II), the combined coverage must at least equal the cost estimate. The initial amount of coverage may be larger than the cost estimate in order to accommodate expected revisions in the estimate due to inflation.

An owner or operator who uses a letter of credit to satisfy RCRA requirements must also establish a standby trust fund.[1] Under the terms of the letter of credit, funds will be deposited by the issuing institution

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[1]Even if a combination of financial assurance mechanisms is used, only one trust fund is necessary. If an owner or operator uses a trust fund together with a letter of credit, the trust fund may be used as the standby trust fund. If a letter of credit and a financial guarantee bond are both used, one standby trust fund is sufficient.

EXHIBIT V-2

LETTER OF CREDIT: REGULATORY AUTHORITIES FOR FINANCIAL INSTITUTIONS

Type of Financial Institution	Primary Regulatory Authority	Whom to Call
1. State-Chartered Financial Institutions: Commercial Banks, Savings and Loans, Mutual Savings Banks, Credit Unions. State-licensed Foreign Banks	State Authority	See Appendix B.
2. Nationally-Chartered Commercial Banks. All Washington, D.C. Commercial Banks, Nationally-Licensed Foreign Banks	Comptroller of the Currency	Commercial Examinations Division (202) 447-1164
3. Nationally-Chartered Savings and Loans	Federal Home Loan Bank Board	Regulatory Division Director, (202) 377-6000, ext. 6440
4. Nationally-Chartered Mutual Savings Banks	Federal Home Loan Bank Board, State Authorities	As Number 3, and see Appendix B
5. Nationally-Chartered Credit Unions	National Credit Union Administration	General Counsel, (202) 357-1030

directly into the standby trust fund in accordance with instructions from the Regional Administrator if the owner or operator fails to (1) maintain assurance or (2) perform closure or post-closure care. (See Section B.8 below for details.) The monies necessary to pay for closure and/or post-closure care will be disbursed from this trust fund. The trust fund is often initially established with a NOMINAL SUM and further payments are not required by EPA until it calls upon the letter of credit. A standby trust fund is not to be confused with an ordinary RCRA trust fund (described in Chapter III), although a standby trust is subject to the same requirements except that:

(a) annual payments into the standby trust fund are not required (only the nominal initial payment mentioned above is usually made);

(b) Schedule A of the trust agreement need not be updated;

(c) Annual valuations by the trustee are not required; and

(d) The trustee need not send notices of nonpayment.

The standby trust fund is not a financial assurance mechanism under RCRA, it merely facilitates drawing on letters of credit and surety bonds that are used as financial assurance. The standby trust fund must be worded exactly as required for trust funds. See Attachment III-3 and discussion in Section B.2 of Chapter III.

3. Obtaining a Letter of Credit. Qualified issuers include all commercial banks and some mutual savings banks, savings and loans, and credit unions (see Exhibit V-2 for more information on qualified issuers). The fee for the letter of credit may be negotiable, depending on the business history of the parties and particularly on the COLLATERAL required to secure the credit. Banks may provide letters of credit for certain owners or operators who otherwise would not qualify, if collateral is deposited with the bank. Collateral may be required up to a value of 100 percent (or more) of the letter of credit. The letter of credit mechanism allowed for RCRA financial assurance is different in two major respects from standard commercial versions; (1) the RCRA version can only be cancelled with 120 days notice before the current expiration date, and (2) the RCRA version must be extended automatically at least one year if it is not cancelled. Therefore, although many financial institutions will be qualified, it is not clear how many will be willing to provide a letter of credit for RCRA financial assurance.

As discussed above, an owner or operator will also need to arrange for a standby trust fund to accompany the RCRA letter of credit. Many institutions qualified to issue a RCRA letter of credit will also be qualified to establish the standby trust fund; however, not all financial institutions may be willing to provide both mechanisms.

4. Submission of Documents to EPA. Documents which must be submitted to the EPA Regional Administrator include:

- The letter of credit itself;
- An ORIGINALLY SIGNED DUPLICATE of the standby trust agreement.
- A separate letter stating the amount of credit applicable to each site covered by the letter of credit. This letter must include the letter of credit number, name of the issuer, date; EPA identification number, name, and address of each facility; and the amount of funds assured for closure and/or post-closure care of each facility.

These documents must be submitted by the effective date of the regulations.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating Coverage. Within 60 days after an increase in the cost estimates because of inflation or changes in plans, the owner or operator is required to either (1) increase the amount of the letter if necessary to cover the estimated cost and submit evidence to the Regional Administrator of that increase or (2) obtain another form of financial assurance to cover the increase. The amount need not be increased once a facility has been closed.

If closure or post-closure cost estimates decrease, the owner or operator may reduce the amount of the letter of credit following written approval by the Regional Administrator. This includes decreases during the period of post-closure care. See Section E.1 of Chapter II for more details regarding documentation that should be provided with such requests.

6. Maintaining Assurance. The owner or operator is responsible for maintaining the letter of credit until closure or post-closure care has been completed. Thus, the owner or operator must substitute alternate financial assurance if the authority of the institution to issue letters of credit is revoked or suspended or in the event of bankruptcy of the issuing institution. For example, a bank's charter or license may be suspended or revoked, it could become bankrupt, or it could lose its authority to issue letters of credit. In such cases, the owner or operator must establish other financial assurance and submit evidence of this within 60 days after the issuer's disqualification.

In addition, assurance must be maintained until ownership of or operating responsibility for the facility changes, and the new owner or operator has met the applicable financial responsibility requirements.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverage. See Section E.4 of Chapter II.

7. Cancellation or Nonrenewal of the Letter of Credit by the Issuer. If the issuer decides not to extend the letter of credit past the current expiration date, it must notify both the owner or operator and the Regional Administrator by certified mail at least 120 days before the current expiration date. The 120 days will begin on the date when both the owner or operator and the Regional Administrator have received the notice, as evidenced by the return receipts. The owner or operator has 90 days in which to arrange for new financial assurance. After 90 days, the Regional Administrator will draw on the letter of credit unless alternate assurance is obtained and approved or the issuer grants an extension of the term of credit. If an extension is granted, the Regional Administrator will draw on the letter of credit during the last 30 days of such an extension if the owner or operator fails to provide alternate financial assurance and obtain written approval.

8. Drawing on Funds for Closure or Post-Closure. The owner or operator is not authorized to draw on the RCRA letter of credit, only the Regional Administrator may do this. The owner or operator is legally obligated to repay any amounts drawn under the letter of credit with interest as agreed, however. The owner or operator is free to negotiate a separate letter of credit to finance its own closure or post-closure expenses. If the owner or operator fulfills its closure and post-closure obligations, the Regional Administrator will not draw on the letter of credit.

9. Termination of Letter of Credit. The owner or operator should request the approval of the Regional Administrator to terminate the letter of credit in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA financial requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or operator should forward a copy of it to the institution issuing the letter of credit. The letter of credit can only be terminated with the written consent of the Regional Administrator..

At the same time, the owner or operator should request the Regional Administrator to approve the termination of the standby trust fund unless the owner or operator is maintaining assurance with a financial guarantee bond. Procedures for terminating the standby trust fund are identical to the procedures for terminating trust funds, discussed in Section B.9 of Chapter III.

PERMITTED FACILITY REQUIREMENTS

The only additional permitted facility requirements are that the letter of credit must be effective before hazardous wastes are first received at a new

facility and the letter of credit must be submitted to the Regional Administrator at least 60 days before the first receipt of such wastes.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the responsibilities of the Regional Office for reviewing letters of credit used to establish financial assurance. A summary checklist appears in Attachment V-2 at the end of this chapter.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Issuers. Financial institutions must have authority to issue letters of credit and their letter of credit operations must be regulated by a Federal or State agency. Regional Office personnel should check the issuer's qualification with the appropriate regulatory authorities on a case by case basis. For a list of the proper regulatory authorities to contact, see Exhibit V-2 and Appendix B.

The qualifications of the trustee institution for the standby trust fund must also be verified. The qualifications required are the same as for the RCRA trust fund. See Section C.1 of Chapter III for procedures.

2. Conformity to Other Requirements. When a letter of credit arrives at the EPA Regional Office, Regional Office personnel must verify that the letter of credit is

- effective by the effective date of the regulations;
- worded exactly as in the regulations (see Attachment V-3) in force on the date of signature;
- signed by an authorized officer of the financial institution;
- in an amount at least equal to the current cost estimate(s);
- accompanied by a letter referring to the letter of credit by number, issuing institution, and date which provides the EPA Identification Number, name, and address of each facility, and the amount of funds assured by the letter of credit for closure and post-closure care of each facility; and
- accompanied by an originally signed duplicate of the standby trust agreement worded exactly as required (see Attachment III-3).

3. Recordkeeping and Tracking Systems. As letters of credit and standby trust agreements are received, relevant information should be recorded, including the name, address, and EPA Identification Number of the facility; letter of credit number and financial institution name; amount of coverage for each facility and effective date; and information verification procedures performed. Automatic data processing systems can be used for this. A list of letters of credit and standby trust funds in effect should be kept not only under the owner or operator's name, but also under each financial institution's name so that in the case of bankruptcy, de-licensing, or other reasons, it is easy to determine which owners or operators need to obtain financial assurance elsewhere. This system could be used to keep track of mergers and changes in the names of financial institutions.

SUBSEQUENT RESPONSIBILITIES

4. Updating Coverage. The Regional Office should ensure that if closure or post-closure cost estimates increase, the owner or operator obtains additional financial assurance, either by increasing the amount of the letter of credit or adding a new mechanism for financial responsibility within 60 days after the increase.

If cost estimates decrease, the owner or operator may apply for a reduction in the letter of credit. The Regional Administrator should approve the decrease in writing only if the owner or operator has demonstrated that sufficient financial responsibility will remain to cover closure and/or post-closure expenses. Such a determination will require a review of the closure or post-closure plan for technical adequacy and completeness as well as a review of the reasonableness of the associated cost estimates. See Section E of Chapter II for a more detailed discussion.

5. Maintaining Assurance. The Regional Administrator must verify that the owner or operator provides new financial assurance when the issuer ceases to qualify under the regulations. Note that the issuing institution is not required by RCRA regulations to notify the Regional Administrator or the owner or operator regarding such an eventuality. Regional Offices are not expected to develop surveillance systems to monitor for such events but should be prepared to instruct owners or operators to obtain alternate assurance in the event the disqualification, bankruptcy, or termination of the issuer becomes known. The HWDMS may prove useful for this, as discussed in Section I of Chapter II.

In addition, Regional Office staff may want to periodically review the qualifications of issuers to ensure that no owner or operator is using an insurance policy from an unqualified insurer. The staff should check the possibility of changes in names of financial institutions so that genuinely qualified issuers are not disqualified; this may involve no more than a telephone call to the proper regulatory authority or the financial institution itself.

If the ownership of or operating responsibility for a facility has been transferred, the Regional Administrator must not allow the letter of credit for that facility to be terminated until the new owner or operator has met the applicable financial responsibility requirements.

The Regional Administrator should approve requests to use alternate assurance mechanisms when no lapse or coverage will result.

6. Nonrenewal by Issuer. The Regional Administrator must ensure that (1) the owner or operator obtains alternate financial assurance and (2) obtains written approval of such alternate assurance, within 90 days after receipt of a notice from the issuing institution that it has decided not to extend the letter of credit beyond its current expiration date. The 90-day period begins after receipt by both the owner or operator and the Regional Administrator of the notice; upon receiving such a notice the Regional Office should contact the owner or operator to determine exactly when the 90-day period commences. Nonrenewal will only be allowed if the owner or operator provides other financial assurance.

Upon receipt of a notice from the issuer, Regional Office staff should contact the owner or operator to determine (1) the date it received the notice and (2) its plans to provide alternate assurance. Both pieces of information will be essential for determining the nature and timing of future agency action.

7. Drawing on Funds for Closure or Post-Closure. The Regional Administrator is authorized to draw funds for closure and/or post-closure:

(1) the owner or operator fails to provide alternate assurance within 90 days after receipt of a notice from the issuing institution that it has decided not to extend the letter of credit beyond its expiration date, or

(2) following a determination pursuant to §3008 of RCRA that the owner or operator has failed to perform closure or post-closure care in accordance with previously approved plans whenever required to do so.

In the first case, the Regional Administrator may delay the drawing if the issuer grants an extension of the term of the credit. However, the Regional Administrator must draw on the letter during the last 30 days of any extension if the owner or operator fails to provide alternate assurance and obtain the written approval of the Regional Administrator.

Funds drawn from the letter of credit must be deposited into the standby trust fund. The Regional Administrator should instruct the issuing institution in writing to deposit the funds. If possible, the Regional Office

should notify the trustee of the standby trust in advance of expected payments into the trust.

Requests from parties other than the owner or operator for reimbursement from the trust should be handled as described in Section C.8 of Chapter III.

8. Requests to Terminate the Letter of Credit. The Regional Administrator may consent to the termination of the letter of credit only (1) if alternate assurance is substituted (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements. (See Section G of Chapter II.) Consent must be in writing and may accompany the Regional Administrator's letter releasing the owner or operator from closure or post-closure financial assurance requirements. The Regional Administrator should return the letter of credit to the issuing institution for termination.

At the same time, the Regional Administrator may consent to the termination of the standby trust fund unless the owner or operator is maintaining assurance with a financial guarantee bond. Procedures for terminating the standby trust fund are identical to the procedures for terminating trust funds, discussed in Section B.9 of Chapter III.

PERMITTED FACILITY REQUIREMENTS

The only differences for permitted facilities are that the letter of credit must be effective before hazardous wastes are first received at a new facility, and the letter of credit must be submitted to the Regional Administrator at least 60 days before the first receipt of those wastes.

D. SOURCES OF FURTHER INFORMATION

Further information on letters of credit may be found by contacting the appropriate state or federal regulatory agency, or by consulting Article 5 of the Uniform Commercial Code or the International Chamber of Commerce, "Uniform Customs and Practices for Documentary Credits."

Federal regulatory agencies are listed in Appendix A-2.

National trade associations can supply information about letters of credit and financial institutions in general. Major national organizations include:

1. American Bankers Association
   1120 Connecticut Avenue, N.W.
   Washington, D.C. 20036
   (202) 467-4000
   Trade association of banks and trust companies.

2. Independent Bankers Association of America
   P.O. Box 267
   Sauk Centre, Minnesota 56378
   (612) 352-6546
   Association of medium size and smaller independent banks.

3. National Association of Mutual Savings Banks
   200 Park Avenue
   New York, New York 10017
   (212) 973-5432
   Trade association of mutual savings banks.

4. United States League of Savings Associations
   111 East Wacker Drive
   Chicago, Illinois 60601
   (312) 644-3100
   Trade association of savings and loan associations, cooperative banks, and state and local savings and loan association leagues.

5. Credit Union National Association
   5710 Mineral Point Road
   Box 431
   Madison, Wisconsin 53701
   (608) 231-4000
   Trade association of state credit union leagues.

6. Conference of State Bank Supervisors
   1015 Eighteenth Street, N.W., Suite 606
   Washington, D.C. 20036
   (202) 296-2840
   Organization of state officials responsible for the supervision of state-chartered banking institutions.

7. National Association of State Credit Union Supervisors
   1499 Chain Bridge Road, Suite 201
   McClean, Virginia 22101
   (703) 821-2243
   Organization of state credit union supervisors and state-chartered credit unions.

8. National Association of State Savings and Loan Supervisors
   1001 Connecticut Avenue, N.W., Suite 800
   Washington, D.C. 20036
   (202) 452-1523
   Organization of state savings and loan supervisors.

ATTACHMENT V-1

RCRA LETTER OF CREDIT CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *

(1) ___ Verify that the issuer is authorized to issue letters of credit, and its letter of credit operations are regulated by a state or federal agency.

" ___ Verify that the trustee institution for the standby trust fund has the authority to act as a trustee and is regulated and examined by a federal or state agency.

(2) ___ Check that:

___ The letter of credit is irrevocable for at least 1 year and provides for automatic extensions of at least one year.

___ The letter of credit is in force by the effective date of the regulations (interim status) or before the first receipt of hazardous waste (new permitted facilities).

___ The wording of the letter of credit is identical to the regulations (see Attachment V-3).

___ The amount of coverage is at least equal to the current cost estimate.

" ___ Establish a standby trust fund worded exactly as required by the regulations (see Attachment III-3) and acknowledged in accordance with state requirements.

(4) ___ Submit the letter of credit to the EPA Regional Administrator.

" ___ Submit an originally signed duplicate of the standby trust agreement.

" ___ Submit a separate letter identifying the facilities and the amount of coverage for each facility provided under the letter of credit.

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* Numbers correspond to paragraphs in Section B.

ATTACHMENT V-1 (continued)

RCRA LETTER OF CREDIT CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *

(5) ___ Submit evidence of increases in coverage within 60 days after any increase in cost estimates.

(6) ___ If issuer becomes disqualified, establish new assurance within 60 days.

(7) ___ If issuer sends notice of nonrenewal of the letter of credit, owner or operator has 90 days to obtain alternate assurance and approval of Regional Administrator.

" ___ If issuer grants an extension, arrange for alternate assurance prior to the last 30 days of the extension period.

(8) ___ To avoid having funds drawn from the letter of credit, fulfill closure or post-closure obligations or provide alternate assurance after receipt of a notice of nonrenewal.

(9) ___ Request approval to terminate the letter of credit (1) when alternate assurance is substituted, and (2) when released from closure or post-closure financial assurance requirements by the Regional Administrator.

___ Request approval to terminate the standby trust fund unless assurance is being provided through a financial guarantee bond.

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* Numbers correspond to paragraphs in Section B.

ATTACHMENT V-2

RCRA LETTER OF CREDIT CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator should ensure that:

Paragraph Number *

(1) ___ The issuing institution is qualified.

" ___ The trustee financial institution is qualified.

(2) ___ The letter of credit is:

___ Effective by the appropriate dates.

___ Worded exactly as in the regulations.

___ Signed by an authorized officer of the financial institution.

___ Accompanied by a separate letter detailing the coverage for each facility.

___ Accompanied by an originally signed duplicate of the standby trust agreement.

(3) ___ Relevant information is recorded.

(4) ___ Evidence is submitted within 60 days that the amount of the letter of credit is properly increased if necessary to cover increases in cost estimates.

" ___ Decreases in the amount of the credit are approved only when sufficient coverage will remain.

(5) ___ Owners or operators obtain alternate assurance within 60 days if the issuing institution ceases to qualify, ceases operations, or files for bankruptcy.

(6) ___ The owner or operator is contacted after receipt of notice of intent to cancel or nonrenew.

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* Numbers correspond to paragraphs in Section C.

ATTACHMENT V-2 (continued)

RCRA LETTER OF CREDIT CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *

" ___ Alternate financial assurance is obtained within 90 days after notification of nonrenewal by the issuer.

(7) ___ Letters of credit are drawn upon when:

___ Owner or operator has not obtained alternate financial assurance within 90 days after notice of cancellation by issuing institution or prior to the last 30 days of any extension granted by the issuer, or

___ Following a determination pursuant to §3008 of RCRA that the owner or operator had failed to perform closure and/or post-closure care as required.

" ___ Funds drawn from the letter of credit are deposited by the issuer into the standby trust fund.

" ___ The trustee of the standby trust fund is notified, if possible, in advance of payments into the trust.

" ___ Closure and/or post-closure care expenses of parties other than the owner or operator are reimbursed within 60 days after requests are received, but only when itemized bills are submitted and the expenses are in accordance with closure and/or post-closure plans, or otherwise justifiable.

" ___ If the closure costs will significantly exceed the value of the closure standby trust fund, complete reimbursement is withheld until closure is completed.

(8) ___ Requests to terminate the letter of credit are approved in writing when (1) alternate assurance is provided or (2) the owner or operator has been released from closure or post-closure financial requirements.

___ Requests to terminate the standby trust fund are approved in writing unless assurance is being provided through a financial guarantee bond.

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* Numbers correspond to paragraphs in Section C.

ATTACHMENT V-3

REQUIRED WORDING FOR RCRA IRREVOCABLE OF CREDIT
40 CFR 264.151(d)

Regional Administrator(s)

Region(s) _____

U.S. Environmental Protection Agency

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of [owner's or operator's name and address] up to the aggregate amount of [in words] U.S. dollars $_____, available upon presentation [insert, if more than one Regional Administrator is a beneficiary, "by any one of you"] of

(1) your sight draft, bearing reference to this letter of credit No. _____, and

(2) your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of the Resource Conservation and Recovery Act of 1976 as amended."

This letter of credit is effective as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least 1 year] on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and [owner's or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and [owner's or operator's name], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner's or operator's name] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 264.151(d) as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution] [Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

VI. ESTABLISHING FINANCIAL RESPONSIBILITY USING INSURANCE

A. INTRODUCTION

Owners or operators may satisfy the RCRA financial responsibility requirements by obtaining INSURANCE in which an insurance company promises payment of closure or post-closure costs on behalf of the owner or operator.* Such payment must be provided whenever necessary; total payments up to the FACE AMOUNT of the policy must be made to the party or parties in the amounts specified by the Regional Administrator. A CERTIFICATE OF INSURANCE is a separate document used as evidence that an insurance contract has been arranged. Depending on the treatment of PREMIUM PAYMENTS for tax purposes, insurance contracts may be a desirable means of complying with the RCRA financial requirements for some firms. EPA has requested clarification of the tax treatment from the Internal Revenue Service; owners or operators may want to request private rulings on this matter from the Internal Revenue Service under Revenue Procedure 80-20. Companies may also wish to purchase insurance because then the closure and post-closure costs need not appear as liabilities on their financial statements. Finally, there is no defined PAY-IN PERIOD for premium payments, as is the case with TRUST FUNDS.

The regulations pertaining to RCRA insurance are as follows:

EXHIBIT VI-1

RCRA INSURANCE REGULATIONS

Topic	Interim Status	Permitted Facilities
Closure Insurance	40 CFR §265.143(d)	40 CFR §264.143(e)
Post-Closure Insurance	40 CFR §265.143(d)	40 CFR §264.143(e)
Certificate of Insurance Wording	40 CFR §264.151(e)	40 CFR §264.151(e)

Source: Title 40, Code of Federal Regulations (CFR).

* Closure or post-closure insurance is different from liability insurance which is discussed in a separate guidance manual.

B. RCRA INSURANCE REQUIREMENTS

This section describes both the requirements for using RCRA insurance and the responsibilities of owners or operators using insurance to demonstrate financial assurance. A checklist of these responsibilities appears in Attachment VI-1 at the end of this chapter.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications of Insurer. At a minimum, the insurance company must be LICENSED to transact business as an insurer in one or more states, or eligible to provide SURPLUS OR EXCESS LINES INSURANCE in one or more states. The license or eligibility need not be in the state in which the facility is located. If there is any question about the qualifications of an insurer, the owner or operator should contact the insurer about its licenses and then confirm with the regulatory authorities of the appropriate state or states. (See Appendix B)

2. Form and Amount of Assurance. To comply with RCRA regulations, closure or post-closure insurance policies must

- provide that funds will be available to close the facility whenever final closure occurs or provide funds for post-closure care whenever the post-closure period begins
- provide that the insurer will be responsible for paying out funds, up to the face amount of the policy, upon the direction of the Regional Administrator, to such party or parties as the Regional Administrator specifies
- be issued with a face amount at least equal to the current cost estimate for closure or post-closure, unless a combination of mechanisms is being used
- provide an option for automatic renewal at the face amount of the expiring policy
- provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium
- contain a provision allowing ASSIGNMENT of the policy to a successor owner or operator

With respect to the assignment provision, the policy may specify that assignment is conditional upon the consent of the insurer so long as the policy also states that such consent will not be "unreasonably refused." This

is standard legal language in many contracts. Right of assignment enables an owner or operator to redeem value from the policy if ownership or operation of the facility covered is transferred to a new party. The insurer may want the right to consent to or refuse assignment in order to protect itself against transfers of ownership or operation that would unfairly prejudice the interests of the insurer in a manner not contemplated originally (e.g., transfer of the facility to an insolvent owner). Refusal to consent to assignment would be "unreasonable" where the interests of the insurer are not prejudiced by a successor owner or operator "stepping into the shoes" of the original insured party.

The face amount of the insurance policy must, at a minimum, equal the CURRENT COST ESTIMATES for closure and/or post closure care. Of course, if insurance is combined with another mechanism (see Section B of Chapter II), the combined coverage must at least equal the cost estimate. The initial amount of coverage may be larger than the cost estimate in order to accommodate expected revisions in the estimate due to inflation.

The owner or operator who uses closure or post-closure insurance to assure financial responsibility is not required to set up a STANDBY TRUST FUND.

3. Obtaining an Insurance Contract. Initially, few insurance companies may offer RCRA closure and/or post-closure contracts of insurance. Owners or operators interested in this option are advised to contact Regional Office staff about what companies are known to offer this financial assurance mechanism. These companies are likely to ask for detailed information on the facility and the owner or operator applying for the insurance contract. This information may include any of the financial and operating data listed in Chapter II, Section C. Insurers may insist on an on-site scientific/engineering assessment in addition to a review of recent financial statements. Some insurers may ask that EPA first review and approve closure and post-closure plans for interim status facilities. The Regional Office might consider providing such a review, especially of closure plans for storage facilities. Because land disposal permit standards are not yet finalized, such reviews for disposal facilities are not feasible at present.

4. Submission of Documents to EPA. The owner or operator must submit to the Regional Administrator by the effective date of the regulations either a certificate of insurance or a letter from an insurer stating that the insurer is considering issuance of insurance to the owner or operator which conforms to RCRA requirements. Within 90 days after submission of such a letter, a certificate of insurance must be submitted to the Regional Administrator or evidence that other financial assurance has been established. The wording of the certificate must be identical to that required by the regulations in force at the time of submission (see Attachment VI-3 for current wording). The policy itself need not be submitted at that time. However, the insurer must submit a duplicate original of the policy, including all endorsements, whenever requested by the Regional Administrator.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

5. Updating Coverage. Whenever the cost estimate increases during the operating life of the facility, the owner or operator must arrange for assurance of payment of the extra cost and submit evidence of that increase (e.g., a new certificate) within 60 days.

Whenever the current closure or post-closure cost estimates decrease during the operating life of the facility, the face amount may be reduced accordingly following written approval by the Regional Administrator. This is further described in Section E.1 of Chapter II.

The post-closure insurance policy, like closure insurance, is paid up by the time of closure. However, during the post-closure period, the face amount of the post-closure policy will increase annually, on the anniverary of the date that liability to make payments accrues, to reflect earnings of the funds remaining under the policy. The increase must be equal to the face amount, less any payments by the insurer for post-closure expenses, multiplied by an amount equivalent to 85 percent of the most recent investment rate or the equivalent coupon-issue yield announced by the U.S. Treasury for 26 week Treasury securities. Reductions in the face amount of post-closure insurance during the post-closure period are not authorized by the regulations even if the face amount exceeds the post-closure cost estimate.

6. Maintaining Coverage. The owner or operator must maintain the insurance policy in full force and effect by making required PREMIUM PAYMENTS. Failure to pay the premium will constitute a significant violation of RCRA Subpart H regulations, warranting such remedy as the Regional Administrator deems necessary. Such violation will be deemed to begin upon receipt by the Regional Administrator of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium.

The owner or operator is also responsible for maintaining coverage in certain circumstances that are discussed fully in Chapter 2, Section E.2, including bankruptcy or ineligibility of the insurer.

If the owner or operator sells or transfers operating responsibility for the facility covered by RCRA insurance, the policy may be assigned to the new owner or operator to maintain assurance.

Finally, the owner or operator may substitute an alternate mechanism of financial assurance so long as there is no lapse in coverage. See Section E.4 of Chapter II.

7. Cancellation of the Insurance Policy by the Issuer. The insurer may cancel, terminate, or fail to renew the policy only if the premium is not paid. If that occurs, the insurer must provide notice to both the owner or operator and the Regional Administrator by certified mail. Cancellation, termination, or failure to renew may not occur, however, during the 120 days

beginning with the date of receipt of the notice by both the Regional Administrator and the owner or operator, as evidenced by the return receipts. See Section E.3 of Chapter II.

Cancellation, termination, or failure to renew may not occur -- and the policy will remain in full force and effect -- in the event that on or before the date of expiration:

- The Regional Administrator deems the facility to be abandoned;
- The Regional Administrator terminates or revokes interim status or revokes the permit;
- Closure is ordered by the Regional Administrator, a U.S. district court, or other court of competent jurisdiction;
- The owner or operator is named as a debtor in a bankruptcy proceeding under Title 11 of the U.S. Code; or
- The premium due is paid.

8. Drawing on Funds for Closure or Post-Closure. As closure or post-closure activities are conducted by the owner or operator, itemized bills should be submitted to the Regional Administrator with requests for reimbursement. Within 60 days after receiving the bills, the Regional Administrator will determine if the expenditures are justified, and instruct the insurer to make the reimbursement. Actual reimbursement payments by the insurer do not reduce the face amount of the policy, although they do reduce the future liability of the insurer by the amount of the payment.

The Regional Administrator may withhold authorization of a portion of reimbursement payments for closure if there is reason to believe that the cost of closure will be significantly greater than the face amount of the policy. He may continue to withhold reimbursement until receipt of satisfactory certification of proper closure. The purpose of this action is to assure the extension of financial assurance until closure is completed.

Of course, the owner or operator remains responsible for all closure or post-closure costs even if the funds available through insurance are exhausted.

9. Termination of the Policy by the Owner or Operator. The owner or operator should request the approval of the Regional Administrator to terminate the policy in two situations: (1) when alternative financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when released from applicable RCRA requirements (see Section G of Chapter II). Upon receiving the Regional Administrator's written consent, the owner or

operator should forward a copy of it to its insurer along with a request that the policy be terminated. Depending on the terms of the policy, the owner or operator may be entitled to any funds up to the face amount which have not been expended on closure or post-closure care. Insurance coverage can only be terminated with the written consent of the Regional Administrator.

PERMITTED FACILITIES

For new facilities, the insurance policy for closure or post-closure care must be effective before the initial receipt of hazardous waste and the certificate of insurance submitted to EPA 60 days before the initial receipt of waste.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the Regional Office in reviewing insurance policies for RCRA financial assurance and ensuring satisfaction of requirements. A summary checklist appears in Attachment VI-2 at the end of this chapter.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Insurer. Issuing institutions must be licensed to transact the business of insurance or eligible to provide EXCESS OR SURPLUS LINES INSURANCE in any of one or more states. EPA Regional Office personnel should contact the insurer and appropriate state regulatory agencies, such as insurance commissioners, to verify qualifications. See Appendix B. The insurer need not be qualified in the state in which the covered facility is located.

2. Conformity to Other Requirements. Owners or operators interested in using closure or post-closure insurance may submit by the effective date a letter from an insurer stating that the insurer is considering issuance of insurance to the owner or operator. The letter should state that the insurance -- if issued -- will conform to RCRA requirements. For such submittals, it is essential to verify that an insurance certificate is provided within 90 days after the effective date or that alternate assurance is established.

When an owner or operator submits a certificate of insurance to the EPA Regional Office, the Regional Administrator must verify that:

- The wording of the certificate is exactly as required by the regulations (see Attachment VI-3);
- The certificate indicates that the policy is effective by (1) the effective date of the regulations (interim status) (2) 90 days after the effective date if a letter from an insurer was submitted by the

effective date (interim status only), or (3) the first receipt of hazardous waste (new permitted facilities).

- The certificate indicates that the face amount is adequate.

3. Recordkeeping and Tracking Systems. As certificates of insurance are received, relevant information should be recorded, including the name, address, and EPA identification number of the facility; insurance policy number and insurer name; amount of coverage for each facility and effective date; and information verification procedures performed. Similarly, if an owner or operator submits a letter from a potential insurer, the name, address, and EPA identification number of the facility should be logged and provision made to track whether financial assurance is established within 90 days after the effective date. Automatic data processing systems can be used for this. A list of insurance contracts in effect should be kept not only under the owner or operator's name, but also under each insurer's name so that in the case of bankruptcy, de-licensing, or other reasons, it will be easy to determine which owners or operators need to obtain financial assurance elsewhere. This system could also be used to keep track of mergers and changes in the names of insurers.

SUBSEQUENT RESPONSIBILITIES

4. Updating Coverage. As cost estimates for closure and post-closure are adjusted for inflation or recomputed due to changes in plans, the Regional Administrator will need to (1) ensure that the face amount of every insurance contract is properly increased within 60 days of the increase in the cost estimates and (2) respond to requests for reduction in coverage if the cost estimates decrease.

The Regional Administrator will need to check that increases in cost estimates are covered by increases in the face amount of insurance contracts or by other added financial assurance and that owners and operators have informed the Regional Office of such changes. See the discussion in Chapter II, Section E.1.

The Regional Administrator should review requests for decreases in coverage individually and should deny those requests unless the Regional Administrator is convinced that sufficient coverage will remain. Such a determination will require a review of the closure or post-closure plan for technical adequacy and completeness as well as as review of the reasonableness of the associated cost estimates. See the discussion in Chapter II, Section E.1. No decreases in assurance for post-closure care should be allowed following closure.

5. Maintaining Assurance. The Regional Administrator must ensure that alternate financial assurance is provided by the owner or operator if the insurance company becomes disqualified, ceases operations, or files for

bankruptcy. Note that the insurer is not required to notify the Regional Administrator or the owner or operator regarding such an eventuality. Regional Offices are not expected to develop surveillance systems to monitor for such events but should be prepared to instruct owners or operators to obtain alternate assurance in the event of disqualification, bankruptcy, or termination of the insurer. The HWDMS may prove useful for this, as discussed in Section I of Chapter II.

In addition, Regional Office staff may want to periodically review the qualifications of insurers to ensure that no owner or operator is using an insurance policy from an unqualified insurer. To avoid duplication of effort, Regional Offices should contact EPA Headquarters before undertaking such activities.

In the event of transfer of ownership or operations of a facility, the Regional Administrator should verify that the insurance policy has been assigned to the new owner or operator or that alternate assurance has been provided.

The Regional Administrator should approve requests to use alternate assurance mechanisms if no lapse in coverage will result.

6. Cancellation of Insurance Contracts by the Insurer. The insurer may cancel, terminate, or fail to renew the policy only if the premium is not paid. If that occurs, the insurer must provide notice of its intent to cancel to both the owner or operator and the Regional Administrator by certified mail. Cancellation, termination, or failure to review may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the owner or operator and the Regional Administrator, as evidenced by the return receipts. The insurer may not cancel a policy if by the expiration date:

- The Regional Administrator deems the facility to be abandoned;
- The Regional Administrator terminates interim status or the RCRA permit;
- Closure is ordered by the Regional Administrator, a U.S. district court, or other court of competent jurisdiction;
- The owner or operator is named as a debtor in bankruptcy proceedings; or
- The premium is paid.

Upon receipt of a notice from an insurer, the Regional Administrator should contact the owner or operator to determine (1) if it is willing and

able to pay the premium and (2) the date it received the notice from the insurer. Both pieces of information will be essential for determining the nature and timing of further agency action.

7. Drawing on Funds for Closure and Post-Closure. Insurance contracts are designed to assure that funds will be available at any time to pay for closure and post-closure care. As closure or post-closure activities are conducted by the owner, operator, or other person authorized by the Regional Administrator, itemized bills will be submitted to the Regional Administrator with requests for reimbursement. Within 60 days after receipt of such requests, the Regional Administrator must determine if the expenditures are justified, and instruct the insurer in writing to make the reimbursement. This is discussed in Section F of Chapter II.

The Regional Administrator may withhold authorization of a portion of reimbursement payments for closure if there is reason to believe that the cost of closure will be significantly greater than the face amount of the policy. The Regional Administrator may continue to withhold reimbursement until certification of proper closure is submitted. The purpose of this action is to assure the extension of financial assurance until closure is completed. See Section F of Chapter II.

8. Requests to Terminate Insurance Coverage. The Regional Administrator may consent to the termination of insurance coverage only (1) if alternate assurance is substituted (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements. Consent must be in writing and may accompany the Regional Administrator's letter releasing the owner or operator from closure or post-closure financial assurance requirements.

REQUIREMENTS FOR PERMITTED FACILITIES

For new facilities, the insurance policy for closure or post-closure care must be effective before the initial receipt of hazardous waste, and the certificate of insurance submitted to EPA at least 60 days before the initial receipt of waste.

D. SOURCES OF FURTHER INFORMATION

State agencies listed in Appendix B can advise whether an insurer is licensed or eligible to provide insurance. In addition, national trade associations can supply general information about the insurance industry. Major national organizations include the following:

1. American Insurance Association
   85 John Street
   New York, New York 10038
   (212) 669-0400
   Trade and service organization of the property and casualty insurance industry.

2. Insurance Information Institute
   110 William Street
   New York, New York 10038
   (212) 669-9200
   Educational, fact-finding, and communications organization for all lines of insurance except life and health insurance.

3. Independent Insurance Agents of America
   100 Church Street
   New York, New York 10007
   (212) 285-4250
   Trade association of independent insurance agents.

4. Professional Insurance Agents
   400 North Washington Street
   Alexandria, Virginia 22314
   (703) 836-9340
   Trade association of insurance agents.

5. National Association of Insurance Commissioners
   350 Bishops Way
   Brookfield, Wisconsin 53005
   (414) 784-9540
   Organization of state insurance commissioners.

6. Alliance of American Insurers
   20 North Wacker Drive
   Chicago, Illinois 60606
   (312) 558-3700
   Trade association of fire and casualty insurance companies.

7. National Association of Insurance Brokers
   311 First Street, N.W.
   Suite 700
   Washington, D.C. 20001
   (202) 783-8880
   Trade association of commercial insurance brokers.

8. National Association of Independent Insurers
   2600 River Road
   Des Plaines, Illinois 60018
   (312) 297-7800
   Trade association of fire, casualty, and surety insurers.

9. National Insurance Consumer Organization
   344 Commerce Street
   Alexandria, Virginia 22314
   (703) 549-8050
   Non-profit public interest membership organization.

ATTACHMENT VI-1

RCRA INSURANCE CONTRACT CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *

(1) ___ Verify that the insurer is licensed to transact the business of insurance or eligible as an excess or surplus lines insurer in at least one state.

(2) ___ Check that:

___ the policy assures that funds will be available whenever needed,

___ the insurer agrees to pay out funds at the direction of the Regional Administrator,

___ the policy face amount is equal to the cost estimate,

___ the policy provides for an automatic renewal option at the face amount of the expiring policy,

___ assignment to a successor owner or operator is permitted, and

___ the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium, and must give 120 days notice to both the owner or operator and the Regional Administrator.

(4) ___ Submit a certificate of insurance to EPA worded exactly as specified (See Attachment VI-3) by effective date of regulations for interim status facilities or 60 days before the initial receipt of hazardous wastes for new facilities.

" ___ Interim status facilities may instead submit a letter from an insurer stating that it is considering issuance of insurance to the owner or operator; the certificate of insurance or evidence of alternate assurance must be submitted within 90 days after the effective date.

*Numbers correspond to paragraphs in Section B.

ATTACHMENT VI-1 (continued)

RCRA INSURANCE CONTRACT CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(5)	___	Submit evidence of increases in face amount of policy within 60 days after any increase in cost estimates, due to annual adjustments for inflation or changes in plans, during the operating life of the facility.
(6)	___	Pay premiums as due.
"	___	Arrange for alternate assurance in the event of bankruptcy or ineligibility of insurer within 60 days.
(7)	___	If insurer gives notice to owner or operator of cancellation or non-renewal, arrange for alternate assurance or pay premium.
(8)	___	Present itemized bills and requests for reimbursement for closure or post-closure expenses to Regional Administrator, who must respond within 60 days.
(9)	___	Request approval to terminate the insurance policy (1) when alternate assurance is substituted, and (2) when released from closure or post-closure financial assurance requirements by the Regional Administrator.

*Numbers correspond to paragraphs in Section B.

ATTACHMENT VI-2

RCRA INSURANCE CONTRACT CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator must ensure that:

Paragraph Number *	
(1) ___	The insurer is licensed to transact the business of insurance or eligible as a provider of excess or surplus lines insurance in any of one or more states.
(2) ___	The certificate of insurance:
	___ is worded exactly as in the regulations (see Attachment VI-3);
	___ has an adequate face amount;
	___ is received by EPA and effective by effective date of regulations (interim status) or 60 days before the first receipt of hazardous waste (general status); or
" ___	The owner or operator of an interim status facility (1) submits by the effective date a letter from an insurer stating that it is considering issuance of a policy and (2) submits the certificate of insurance or evidence of alternate assurance within 90 days.
(3) ___	Relevant information is recorded.
(4) ___	Evidence of increases in face amount of insurance is provided within 60 days if necessary to cover increases in cost estimates.
" ___	Decreases in face amount of insurance are approved only during the operating life of the facility and only when sufficient coverage will remain.
" ___	Face amount increases during post-closure period in accordance with 85% rule.

* Numbers correspond to paragraphs in Section C.

ATTACHMENT VI-2 (continued)

RCRA INSURANCE CONTRACT CHECKLIST FOR REGIONAL OFFICES

Paragraph Number		
(5)	___	Alternate financial assurance is provided within 60 days if insurance company becomes disqualified, ceases operations, or files for bankruptcy.
"	___	Insurance policies are assigned or other financial assurance is provided in the event of transfer of ownership or operation.
(6)	___	The owner or operator is contacted following notice from insurer of intent to cancel insurance.
(7)	___	Within 60 days after receiving bills, requests for reimbursement of closure are approved in a manner that assures the availability of funds until closure is completed. This may require verification of closure cost estimates and plans, and denial of a portion of the reimbursement request.
"	___	Requests for reimbursement of post-closure expenses are approved within 60 days after receiving bills if in accordance with plan or otherwise justifiable.
"	___	The insurer is instructed in writing to make reimbursement in the specified amounts
(8)	___	Requests to terminate insurance are approved in writing when (1) alternate financial assurance is substituted or (2) the owner or operator has been released from closure or post-closure financial requirements.

* Numbers correspond to paragraphs in Section C.

ATTACHMENT VI-3

REQUIRED WORDING FOR RCRA INSURANCE CERTIFICATE
40 CFR 264.151(e)

Name and Address of Insurer
(herein called the "Insurer"): _____

Name and Address of Insured
(herein called the "Insured"): _____

Facilities Covered: [List for each facility: The EPA Identification Number, name, address, and the amount of insurance for closure and/or the amount for post-closure care (these amounts for all facilities covered must total the face amount shown below).]

Face Amount: _____

Policy Number: _____

Effective Date: _____

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance for [insert "closure" or "closure and post-closure care" or "post-closure care"] for the facilities identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 40 CFR 264.143(e), 264.145(e), 265.143(d), and 265.145(d), as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the EPA Regional Administrator(s) of the U.S. Environmental Protection Agency, the Insurer agrees to furnish to the EPA Regional Administrator(s) a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is identical to the wording specified in 40 CFR 264.151(e) as such regulations were constituted on the date shown immediately below.

[Authorized signature for Insurer]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: _____

[Date]

VII. ESTABLISHING FINANCIAL RESPONSIBILITY USING THE FINANCIAL TEST OR CORPORATE GUARANTEE

A. INTRODUCTION

The RCRA financial assurance requirements may be satisfied by a test of financial soundness. Rather than arranging for a third party to guarantee payment of closure or post-closure costs, the owner or operator may demonstrate his future ability to meet costs by passing one of two FINANCIAL TESTS. Alternatively, the owner or operator may satisfy the financial assurance requirements by the CORPORATE GUARANTEE, whereby the owner or operator's PARENT CORPORATION passes one of the same two financial tests and agrees to guarantee the performance of or payment for closure or post-closure care.

The financial tests demonstrate that the owner, operator or parent corporation has adequate resources to cover closure and post-closure cost estimates. The tests are stringent enough so that, even in the event of a rapid deterioration in the firm's financial health, there is a reasonable assurance that funds will be available to meet RCRA obligations.

The financial test or corporate guarantee offers those qualifying owners or operators a particularly attractive mechanism to meet the RCRA financial assurance requirements. Unlike the surety bond, letter of credit, or insurance policy mechanisms, closure and post-closure costs are not automatically covered by a responsible third party. Because it is offered by the parent corporation of the owner or operator, the corporate guarantee does not involve a third party. Unlike the trust fund mechanism, no funds have to be set aside in anticipation of these costs. Thus, the owner or operator does not have to pay fees for third party guarantees, nor does it have to place funds in a trust fund. While the wording of the corporate guarantee stipulates that something of value be given to the corporate parent in exchange for the guarantee, this is done primarily to ensure that the guarantee agreement will be recognized as a valid legal contract. The amount that actually passes from owner or operator to corporate parent is generally a NOMINAL SUM that could be as little as one dollar.

Because of the lack of third party guarantees or set-aside funds, it is particularly important that the financial test criteria are vigorously enforced. To this end, the Regional Offices must completely re-evaluate every owner, operator, or corporate parent annually, even if there has been no change in closure or post-closure cost estimates. No other financial assurance mechanism requires this level of attention from the Regional Offices.

Owners or operators that wish to satisfy both liability insurance and financial assurance with the financial test should refer to Chapter II of the Liability Insurance Guidance Manual.

The regulations pertaining to the RCRA financial test are as follows:

EXHIBIT VII-1

RCRA FINANCIAL TEST REGULATIONS

Topic	Interim Status	Permitted Facilities
Financial test for closure	40 CFR §265.143(e)	40 CFR §264.143(f)
Financial test for post-closure	40 CFR §265.145(e)	40 CFR §264.145(f)
Required Wording of Letter from Chief Financial Officer	40 CFR §264.151(f)	40 CFR §264.151(f)
Required Wording of Corporate Guarantee	40 CFR §264.151(h)	40 CFR §264.151(h)

Source: Title 40, Code of Federal Regulations (CFR).

B. REQUIREMENTS OF THE FINANCIAL TEST

This section specifies the requirements of the financial test for owners, operators, or their parent corporations. A summary checklist is provided as Attachment VII-1.

INITIAL RESPONSIBILITIES OF THE OWNER OR OPERATOR

1. Qualifications for the Financial Test. The requirements of the financial tests for the owner, operator, or corporate parent are identical. Thus, when referring to the financial test criteria, the word "firm" will be used interchangeably with owner, operator, or corporate parent. To qualify for the corporate guarantee, however, the parent corporation must in addition hold at least 50 percent of the voting stock of the owner or operator firm.

The firm's financial statements must be AUDITED by an independent CERTIFIED PUBLIC ACCOUNTANT. If the accountant gives an ADVERSE OPINION or a DISCLAIMER OF OPINION of the financial statements, the firm can not qualify for the financial test. Furthermore, if the accountant gives a QUALIFIED OPINION of the financial statements, the Regional Administrator may disallow the use of the financial test. See Section VII-C, Regional Office Responsibilities, for more information on accountant's opinions, and under what circumstances the Regional Administrator would disallow use of the financial tests because of a Qualified Opinion.

The financial test requirements may be satisfied by meeting either of the two alternative financial tests. Exhibit VII-2 shows the specific requirements of the two alternative tests. The tests have a number of points in common, but two important differences. First, Alternative I requires a firm to demonstrate financial soundness by passing at least two of three financial ratios, while Alternative II allows to firm to demonstrate financial soundness with an INVESTMENT GRADE bond rating. Second, Alternative I requires the firm to have a large amount of working capital relative to closure and post-closure cost estimates, while Alternative II has no such requirements. Both tests require the owner, operator, or corporate parent to have a large amount of tangible net worth and U.S. assets relative to closure and post-closure estimates, and a minimum absolute level of tangible net worth ($10 million).

These two alternative tests were selected out of over 300 candidate tests, after extensive analysis. The reasoning behind the financial tests and why they were selected is thoroughly explained in the documents cited in Section VII-D, Sources of Further Information.

2. Arranging for the Financial Test and Corporate Guarantee. The only outside arrangements that must be made for the financial test or corporate guarantee are with an independent certified public accountant. Because the vast majority of owners or operators who will select the financial test or corporate guarantee will already have their financial statements or their corporate parent's financial statements independently audited, no explanation of how to select an independent accountant is necessary.

3. Submission of Documents to EPA. To use the financial test as a means of satisfying financial requirements, owners or operators must submit the following:

a) Chief Financial Officer's Letter Including Cost Estimates and Data from Audited Financial Statements. The owner, operator, or corporate parent must submit to the Regional Administrator a letter signed by its chief financial officer. The wording must be as specified in the regulations in force on the date of submittal. A copy of the required wording as it currently appears in the regulations is included as Attachment VII-2. The letter must address all facilities in the United States for which financial assurance is demonstrated by:

EXHIBIT VII-2

ALTERNATIVE FINANCIAL TESTS

Different Provisions of Tests

Alternative I (must meet A, B, C, and D)	Alternative II (must meet A, B, C, and D)
A. Meet <u>two</u> of the following three ratios:	A. A current rating for the most recent bond issuance of either:
(i) TOTAL LIABILITIES/NET WORTH less than 2.0	(i) AAA, AA, A, BBB, as issued by Standard and Poor's; or
(ii) The sum of net income plus depreciation, depletion, and amortization/total liabilities greater than 0.1	(ii) Aaa, Aa, A, Baa as issued by Moody's
(iii) CURRENT ASSETS/CURRENT LIABILITIES greater than 1.5	
B. Meet <u>both</u> of the following requirements:	
(i) NET WORKING CAPITAL at least 6 times the sum of current closure and post-closure cost estimates	

Identical Provisions of Tests

(ii) TANGIBLE NET WORTH at least 6 times the sum of current closure and post-closure cost estimates	B. Tangible net worth at least 6 times the sum of current closure and post-closure cost estimates
C. Tangible net worth of at least $10 million in the U.S.	C. Tangible net worth of at least $10 million
D. Meet <u>one</u> of the following tests:	D. Meet <u>one</u> of the following tests:
(i) ASSETS in the U.S. amounting to at least 90 percent of total assets	(i) assets in the U.S. amounting to at least 90 percent of total assets
(ii) ASSETS in the U.S. amounting to at least 6 times the sum of current closure and post-closure cost estimates	(ii) assets in the U.S. amounting to at least 6 times the sum of current closure and post-closure estimates

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Note:

See glossary for definition of terms.

See <u>Code of Federal Regulations</u>, Title 40, Part 265.143(e) and 145(e) (interim status).
264.143(f) and 145(f) (permitted facility).

- The financial test,
- The corporate guarantee, and
- An equivalent (or substantially equivalent) state financial test.

The letter must also identify the facilities which are not demonstrating financial assurance to EPA or a state; for example, facilities in states with financial assurance requirements that have received PHASE I INTERIM AUTHORIZATION. Facilities covered by alternative financial assurance mechanisms such as surety bonds or letters of credit do not have to be included in the letter.

The amount of the closure and post-closure cost estimates must be provided for all facilities mentioned in the letter. The financial test is applied to the sum of all cost estimates included in the letter, even to facilities not covered by any financial assurance mechanism.

The letter must include the financial test calculations in the appropriate form (see Attachment VII-2).

In preparing the financial test calculations, the chief financial officer of the firm may subtract closure or post-closure cost estimates included as liabilities in the firm's financial statements from the total liabilities figure and add the closure or post-closure cost estimates to the figures for net worth and tangible net worth. This is allowed in order not to penalize firms which are already carrying closure and post-closure costs as liabilities.

b) ACCOUNTANT'S OPINION (same as REPORT ON EXAMINATION). The owner or operator must submit a copy of the independent certified public accountant's opinion of the owner, operator, or parent corporation's year-end financial statements and footnotes for the latest complete fiscal year. There is no EPA required form or wording for this opinion.

c) SPECIAL REPORT. The owner or operator must submit a special report from an independent certified public accountant to the Regional Administrator which contains the accountant's confirmation that the financial data contained in the letter from the chief financial officer can be derived from the independently audited year-end financial statements and footnotes for the latest complete fiscal year. There is no EPA required wording for this report, but a sample special report is shown in Attachment VII-14. The special report must also state that no matters came to the attention of the independent certified public accountant which caused him to believe that the information in the chief financial officer's letter should be adjusted.

d) CORPORATE GUARANTEE. An owner or operator that employs the corporate guarantee must submit a written guarantee agreement completed by the corporate parent, using language exactly as specified in Attachment VII-3.

This is submitted along with the chief financial officer's letter completed by the corporate parent, and the accountant's opinion and special report. completed by the corporate parent. The written guarantee states the guarantor meets or exceeds all the requirements of the financial test criteria, including the submission of the accountant's opinion, the special report, and the letter from the chief financial officer. The written guarantee specifies that in the event the owner or operator fails to perform closure or post-closure care, the guarantor must do so or set up a trust fund for the amount of the current closure or post-closure estimates.

Although the initial cost and financial data must be submitted by the effective date of the regulations, EPA may grant extensions to interim status firms whose fiscal year ends in the 90 days prior to the effective date. The chief financial officer of the firm may request an extension by sending a letter to the EPA Regional Administrator requesting the extension. The chief financial officer must certify in the letter that there are grounds to believe that the owner or operator meets the criteria of the financial test, and indicate the date ending the last complete fiscal year before the effective date of the regulations. The letter must also:

- specify the facilities to be covered by the test, including EPA identification number, name, address, and current closure and post-closure cost estimates to be covered by the test;
- indicate the date on which the required documents will be submitted (within 90 days of the end of the fiscal year);
- certify that the year-end financial statements of the firm will be audited by an independent certified public accountant.

SUBSEQUENT RESPONSIBILITIES OF THE OWNER OR OPERATOR

4. Updating Assurance. For other financial assurance mechanisms, updating of coverage simply involves providing additional amounts of assurance when cost-estimates increase during the operating life of the facility or reducing coverage when cost estimates decrease. When cost estimates increase above the amounts assured by those mechanisms, no change in the instrument is required but either the amount assured must be increased for the original mechanism or supplementary assurance provided by an additional mechanism.

The financial test is somewhat different. If (1) cost estimates increase beyond the maximum amount that can be assured by the firm using the financial test, or (2) the amount that can be assured by the firm drops below the current cost estimates for covered facilities, or (3) some combination of the two, then the owner or operator can no longer use the financial test and must

provide alternate assurance. Procedures on options are discussed in Section 5 below.

Of course, the owner or operator using the financial test remains responsible for updating cost estimates due to changes in closure or post-closure plans or adjustments for inflation during the operating life of the facility even if these updates have no impact on the use of the financial test. In addition, during the period of post-closure care, firms may apply to the EPA Regional Administrator for approval of a decrease in the post-closure cost estimate for which the financial test provides financial assurance. Approval will only be granted if the owner or operator demonstrates that amount of the cost estimate exceeds the remaining cost of post-closure care. When applying for a decrease in the post closure cost estimate, the post-closure plan and cost estimate should be submitted to the Regional Administrator for review.

5. Maintaining Assurance. The owner or operator must submit updated information annually within 90 days of the close of the firm's fiscal year. The owner or operator must satisfy all of the financial test criteria at each annual update. As with the initial submission, the updated information consists of the letter from the chief financial officer, the accountant's opinion, and the special report from an independent certified public accountant. If the corporate guarantee is being used by the owner or operator, the written guarantee form must also be submitted. Submissions must be worded exactly as shown in Attachments VII-2 and VII-3.

If the year-end financial statements indicate that the firm is still qualified to use the financial test, but can no longer cover all the closure or post closure costs, it may supplement other mechanisms in combination with the financial test to assure the balance of the costs (see Section B.2 of Chapter II). This situation would occur if the firm could not meet requirement B of Exhibit VII-2, but could meet all other financial assurance requirements. However, if the year-end financial statements indicate that the financial status of the firm has changed so that it is no longer qualifies to use financial test, it is the responsibility of the owner, operator, or corporate parent to notify EPA of intent to establish alternate financial assurance. This situation would occur if the firm could not meet requirements A or C or D of Exhibit VII-2, or any of the other financial assurance requirements. The notice of intent must be sent to the EPA Regional Administrator by certified mail within 90 days after the close of the firm's fiscal year. The owner or operator or parent must provide alternate financial assurance within 120 days after the close of the firm's fiscal year.

If at anytime the EPA Regional Administrator believes that an owner or operator no longer satisfies the requirements of the financial test, he may require a report of financial condition in addition to the required annual reports. An explanation of why a Regional Administrator may believe that a firm no longer satisfies the financial test, and what additional reports may be required, is presented in Section C below. If the Regional Administrator determines that the requirements are not met, the owner or operator must

alternate financial assurance to EPA within 30 days after notification of EPA's finding.

The Regional Administrator must be notified by certified mail by the owner or operator or parent guarantor within 10 days after the commencement of a bankruptcy proceeding naming the owner, operator, or parent guarantor as debtor.

Also, if either the owner or operator, or the corporate parent is sold or merged, the new parent must meet all the criteria for the financial test, or alternative assurance must be provided.

6. Cancelling the Corporate Guarantee. A parent corporation wishing to cancel its guarantee of financial assurance must notify EPA and the owner or operator by certified mail of its intent to cancel. Actual cancellation may not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Regional Administrator, as evidenced by the return receipts. If the owner or operator fails to provide alternate financial assurance and obtain written approval of the assurance mechanism by the Regional Administrator within 90 days after receipt of the notification of cancellation, the parent corporation must provide alternate financial assurance in the name of the owner or operator.

7. Drawing on Funds for Closure or Post-Closure. The owner or operator must use its own funds to pay for final closure and post-closure care of facilities covered by the financial test or corporate guarantee. The parent guarantor agrees to either perform these obligations or establish a trust fund in the name of the owner or operator if the owner or operator fails to fulfill its obligations when required to do so.

8. Termination of the Corporate Guarantee. The parent guarantor may request the approval of the Regional Administrator to terminate the corporate guarantee in two situations: (1) when alternate financial assurance has been substituted (see Section E.4 of Chapter II) and (2) when the owner or operator is released from applicable RCRA financial assurance requirements (see Section G of Chapter II).

PERMITTED FACILITY REQUIREMENTS

A new permitted facility must submit the letter from the chief financial officer and the opinion and special report from an independent certified public accountant at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. There is no provision for extending this deadline to accommodate firms whose fiscal years end ninety days before.

C. REGIONAL OFFICE RESPONSIBILITIES

This section outlines the duties of the EPA Regional Office in reviewing the submission of financial data ensuring satisfaction of requirements. A summary checklist appears in Attachment VII-4 at the end of this chapter.

REVIEWING INITIAL SUBMISSIONS

1. Qualifications of Accountant and Parent Guarantor

EPA personnel should first confirm that the independent certified public accountant responsible for preparing the opinion and special report is certified by an officially recognized accreditation organization. Staff can check the credentials of the accountant by contacting the State Board of Accountancy in the state where the accountant resides, if there is any doubt about the accountant's qualifications. These are listed in Appendix B-4.

In addition to verifying financial data from parent corporations, Regional personnel should determine whether the corporation qualifies as a parent corporation. The parent must own at least 50 percent of the voting stock of the subsidiary. If the parent files with the SEC, verification may be made by checking the form 10-K filed with the SEC. If not, the independently audited financial statements of the firm must be requested from the firm. Both the 10-K and the independently audited statements will list the subsidiaries of the corporation in addition to other financial information.

2. Conformity to Other Requirements

A. Chief Financial Officer's Letter

EPA personnel should review the letter from the chief financial officer and verify that it is complete and accurate. The firm should be contacted to verify that the signatory of the letter is the chief financial officer. If any of the criteria for the financial test are not met, or if anything is missing from the letter, the Regional Administrator should immediately notify the submitter, and ensure that alternative financial assurance mechanisms are provided or proper submissions are made.

The Regional Office should ensure that all relevant facilities of the owner or operator are included in the Chief Financial Officer's letter. This includes facilities covered by the financial test guarantee, facilities covered by the corporate guarantee, facilities covered by an equivalent (or substantially equivalent) state financial test, and facilities for which no financial assurance has been demonstrated. The Hazardous Waste Data Management System (HWDMS) may include information that will be useful in making this determination. See Chapter II, Section I for more details on the HWDMS.

If there is any reason to suspect the validity of the financial data, for example if the firm barely passes the test criteria, the Regional Administrator may want to request the audited financial statements from the firm, or obtain the FORM 10K from the SEC (see Section VII-D, Sources of Further Information), and recalculate the financial ratios. Moody's or Standard and Poor's bond guides may be checked to verify the bond ratings are as claimed. Major libraries (public and university) as well as libraries in Regional Offices of the U.S. Securities and Exchange Commission (SEC) should have current editions of the guides. The reference staff of any library will know where the nearest copies are held.

To assist in future evaluations of the submitter, it is strongly recommended that the Regional staff establish a file of data taken directly from the chief financial officer's letter for each owner, operator or corporate parent. Exhibit VII-4 is an example of such a file. The use of the file will be described below.

B. Review of the Accountant's Opinion of the Financial Statements

EPA personnel should next determine what kind of opinion was expressed by the accountant: Unqualified Opinion, Qualified Opinion, Adverse Opinion, or Disclaimer of Opinion.

An Unqualified Opinion can be recognized because it usually consists of two short paragraphs expressing no doubts about the financial statements. See Attachment VII-5 for two examples of Unqualified Opinions.

Qualified Opinions express some reservations by the accountant that the financial statements fairly or completely represent the financial condition and operating results of the firm. Qualified Opinions are easily recognized because the final paragraph of the opinion will usually begin with "In our opinion, subject to ...", or "In our opinion, except for ...".

"Except for" Qualified Opinions are given when the accountant believes the financial statements, except for certain qualifications, represent fairly the economic condition of the firm. The phrase "except for" appears somewhere in the opinion. Examples of "Except for" Qualified Opinions are given in Attachments VII-9, VII-10, and VII-11.

"Subject to" Qualified Opinions are given when the accountant believes the financial statements only represent fairly the economic condition of the firm subject to the outcome of certain unforeseeable events. Examples of "Subject to" Qualified Opinions are given in Attachments VII-8, VII-12, and VII-13.

An Adverse Opinion is given when the accountant believes that the financial statements do not present fairly the financial condition of the firm. The auditor will clearly state this in the final paragraph of the opinion. An examle of an adverse opinion is given in Attachment VIII-6.

A Disclaimer of Opinion means that the accountant cannot express an opinion on the financial statements of the firm. A report or examination will still be given, but the final paragraph will state that an opinion could not be expressed on the financial statements. An example of a disclaimer of opinion is given in Attachment VII-7.

Some examples of conditions likely to result in a Qualified Opinion, Adverse Opinion, and Disclaimer of Opinion are given in Attachment VII-14

When evaluating accountants' opinions, EPA personnel should:

1. Immediately "pass" an owner or operator if it has received an Unqualified Opinion and meets all the other requirements. Most owners or operators, at least 90%, will probably have Unqualified Opinions. Accountants generally render Unqualified Opinions to most large companies. Since owners or operators must have a tangible net worth of at least $10 million to qualify for the financial test, most applicants should fall into this category. See Attachment VII-5 for two examples of an Unqualified Opinion.

2. Immediately disqualify an owner or operator from the financial test if he has received either (1) an Adverse Opinion, (2) a Disclaimer of Opinion. None of the owners or operators should have these types of opinions. The regulations explicitly disqualify owners or operators from the financial test if they have either of first two types of opinions. In addition, although not specifically addressed in the regulation, a "subject to" type of Qualified Opinion based on a "going concern" issue is generally considered so serious that any firm receiving one should be immediately disqualified from the financial test. See Attachment VII-8 for an example of a "subject to" Qualified Opinion based on a "going concern" issue.

3. Conduct further investigations if an owner or operator received any other type of Qualified Opinion (either an "except for" or a "subject to"). A small number of owners or operators, approximately 10%, will probably have Qualified Opinions. Most of the review effort should be directed toward owners or operators falling into this category.

EPA Staff should undertake the following four steps whenever an owner or operator has a Qualified Opinion (either an "except for" or "subject to," excluding those rendered on the basis of a "going concern" issue).

1. The owner, operator, or corporate parent should be asked to submit a copy of the latest financial statements. Alternatively, a copy of the latest Form 10-K could be obtained from the SEC.

2. The opinion rendered by the accountant should be thoroughly understood in the context of the financial statements:

- If it is an "except for" opinion, the EPA staff should determine if the part of the statements which give rise to the "except for" qualification have any bearing on the firm's ability to pass the financial test.

- If it is a "subject to" opinion, EPA staff should determine the likelihood of the occurrence of the event the accuracy of the financial statements are "subject to," and the importance of the unforeseeable event's occurrence or nonoccurrence on the firm's ability to pass the financial test.

3. If not enough information is available in the opinion or the financial statements to make a satisfactory decision, the firm should be required to submit a written explanation as to why the qualification should not be grounds for disqualification from the financial test.

4. If the matter is still unresolved, contact EPA headquarters for additional assistance.

C. Special Report from Auditor

EPA personnel should review the auditor's confirmation of the letter from the Chief Financial Officer, and verify that the auditor has reviewed the data specified in the Chief Financial Officer's letter and was able to trace the data back to amounts found in the owner's or operator's independently audited, year-end financial statements for the latest fiscal year. It should be noted that the auditor's confirmation does not pass judgment on whether the owner, operator, or corporate parent is economically viable, nor does it assess the value of the financial data contained in the letter. See Attachment VII-15 for an example of an auditor's confirmation.

D. Corporate Guarantee

The written guarantee form should be verified for completeness and accuracy. The wording should be identical to that prescribed in the regulations. (See Attachment VII-3.)

3. Recordkeeping and Tracking Systems. As financial information and corporate guarantees are received, relevant information should be recorded including the name, address, and EPA Identification Number of the covered facilities; name of the corporate guarantor; amount of coverage for each facility and effective date; and information verification procedures performed. Regional Office staff could keep a file on each submitting firm, such as the one shown in Exhibit VII-4, which keeps track of key financial data.

EXHIBIT VII-3

SAMPLE FILE ON OWNER, OPERATOR, OR CORPORATE PARENT

DATE OF
CLOSE OF FISCAL YEAR _____

Owner/Operator _____
Corporate Parent _____

		Initial Year	Second Year	Third Year
1.	Sum of total closure and post-closure cost estimates			
2.	Bond Rating			
*3.	Total Liabilities			
*4.	Tangible Net Worth			
*5.	Net Worth			
*6.	Current Assets			
*7.	Current Liabilities			
*8.	Net Working Capital			
*9.	Sum of Net Income, Depreciation, Depletion, and Amortization			
*10.	Total assets in U.S.			
11.	Line 4 divided by Line 1			
12.	Line 8 divided by Line 1			
13.	Line 10 divided by Line 1			

* Denotes figures derived from financial statements.

EXHIBIT VII-3 (continued)

SAMPLE FILE ON OWNER, OPERATOR, OR CORPORATE PARENT

	Initial Year	Second Year	Third Year
14. Line 9 divided by Line 3			
15. Line 6 divided by Line 7			
16. Line 3 divided by Line 5			
17. Qualified Auditor's Opinion?			
18. Cost estimates changed because of changes in operating plans?			

NOTES:

[Adverse Business Press Releases, Competitive Problems, Drop in Bond Ratings]

SUBSEQUENT RESPONSIBILITIES

4. Updating Coverage. As cost estimates for closure and post-closure are adjusted for inflation or revised due to changes in plans, the Regional Administrator will need to (1) ensure that the financial test criteria are still satisifed if closure or post-closure cost estimates increase and (2) respond to requests for reduction if post-closure cost estimates decrease.

5. Maintaining Assurance. The Regional Administrator must re-evaluate each owner or operator every year. Thus, the same procedures should be followed that were outlined for Initial Responsibilities:

• Reviewing Annual Submissions. The owner, operator, or corporate parent must resubmit updated information, that is, the letter from the Chief Financial Officer, the accountants' opinion and special audit report, and the written guarantee within 90 days after the close of every fiscal year. Failure to do so could be an indication of financial deterioration in the submitting firm, so late submitters should be watched closely. All the financial test criteria must be met; if not the Regional Administrator should issue a notice of disallowance.

If the firm barely passes any of financial test criteria, it should be subjected to further investigation. In addition, further investigation should be made into firms whose bond rating or net worth has fallen from previous submissions (lines 2, 4 and 5 in Exhibit VII-2) or where the required financial ratios have deteriorated significantly (i.e. if lines 11-15 fall, or if line 16 rises).

• On-going Monitoring. The Regional Office staff can monitor the business press for adverse news about owners, operators, or corporate parents. Ideally, an online computerized business data base service such as DIALOG could be used for this purpose. Through the computerized data base, or manually, the Business Periodical Index and the F&S Corporate Index should be searched using the firm's name as a "keyword," for:

- Omission of a dividend
- Delisting from an exchange, Suspended trading
- Mergers, Acquisitions, Divestitures,
- Financial losses, Competitive problems,
- Bankruptcy proceedings,
- Decreases in bond ratings, and
- Sharp stock price decreases.

If any of the above or other inauspicious events occur, the firm should be singled out for further investigation. Regional Offices should coordinate their review efforts with EPA Headquarters. Approaches to centralize review procedures for the financial test are currently under investigation.

• Further Investigation. The Regional Administrator has broad powers to obtain reports of financial condition from the owner, operator, or corporate parent, if he believes that the firm may no longer meet the financial test criteria. At a minimum, if there is any suspicion of non-compliance the latest quarterly financial report should be obtained from the firms, or the FORM 10-Q obtained from the SEC. See Section D below.

Ratios from the quarterly financial report or Form 10-Q should be calculated to see if the firm still meets the test requirements. The Standard and Poor's or Moody's bond guides should be checked, if relevant, to verify that the latest bond ratings are still investment grade. Firms singled out for further investigation should be monitored more frequently than annually.

The Regional Administrator, based on the owner, operator, or parent's reports of financial condition or any other materials, may at any time find that the owner, operator or corporate parent no longer meets the financial test criteria. If so, the owner, operator, or corporate parent must provide alternative financial assurance within 30 days after receiving notification of this finding.

In addition, the Regional Office should ensure that assurance is maintained by the owner, operator or corporate guarantor:

- following receipt of notice of intent to establish alternate assurance because the owner or operator or guarantor no longer meets the financial test requirements -- such assurance must be provided within 120 days after the end of the fiscal year; and

- whenever the owner or operator fails to perform final closure or post-closure care in accordance with the plans or other requirements, the guarantor must perform or establish a trust fund in the name of the owner or operator.

In the latter case, the RCRA trust fund rules will apply. See Chapter III for details.

6. Cancelling the Corporate Guarantee. The corporate parent may cancel its guarantee of financial assurance, although actual cancellation may not occur during the 120 days after receipt of notification by both EPA and the owner or operator. The Regional Administrator should ensure that the owner, operator, or corporate parent supplies alternative financial assurance with the approval of the Regional Administrator within 90 days. If not, the Regional Administrator must draw on the corporate guarantee before the 120 days have passed and the guarantee is cancelled.

7. Drawing on Funds For Closure or Post-Closure. The Regional Administrator is authorized to draw upon the corporate guarantee for closure and/or post-closure when:

1) the owner or operator fails to provide alternate assurance within 90 days after they and the Regional Administrator receive notice of cancellation from the parent guarantor, or

2) following a determination pursuant to §3008 of RCRA that the owner or operator has failed to perform closure or post-closure care in accordance with previously approved plans whenever required to do so.

In the second case, the parent guarantor must perform closure or post-closure care, or set up a trust fund as specified in §265.145(a) in the name of the owner or operator.

8. Requests to Terminate the Corporate Guarantee. The Regional Administrator may consent to the termination of the corporate guarantee only (1) if alternate assurance is provided (see Section E.4 of Chapter II) or (2) if the owner or operator is released from applicable RCRA financial requirements (see Section G of Chapter II).

D. SOURCES OF FURTHER INFORMATION

For further information on the financial test, see General Research Corporation Background Document for the Financial Test and Municipal Revenue Test, 11/30/81 including Appendix A and Appendix B.

Standard reference books include:

American Institute of Certified Public Accountants. AICPA Professional Standards - Volume 1, June 1, 1981.

Burton, Palmer, and Kay. Handbook of Accounting and Auditing, Boston: Warren, Gorham and Lamont, 1981.

Kohler, Eric L. A Dictionary for Accountants, New Jersey: Prentice Hall, Inc. (Fourth edition 1970).

Lev, Baruch. Financial Statement Analysis - A New Approach, New Jersey: Prentice-Hall, Inc., 1974.

Merrill Lynch Pierce Fenner & Smith, Inc. How to Read a Financial Report, May 1979.

Myer, John N. Understanding Financial Statements, American Research Council, Inc., 1964.

Myer, John N. Accounting for Non-Accountants, New York: New York University Press, 1957.

Myer, John N. Financial Statement Analysis, Englewood Cliffs: Prentice Hall Inc., 1969.

To obtain Form 10-K or 10-Q reports from the SEC, contact: The U.S. Securities and Exchange Commission's Public Reference Room, located at 1100 L Street, N.W., Washington, D.C. (telephone: (202) 523-5506).

State Boards of Accountancy are listed in Appendix B-4.

Finally, the American Institute of Certified Public Accountants, 1620 Eye Street, N.W., Washington, D.C. 20006, (202) 872-8190 may be of assistance.

ATTACHMENT VII-1

RCRA FINANCIAL TEST CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(1)	___	Owner, operator, or corporate parent's financial statements are independently audited.
(2)	___	Owner, operator, or corporate parent meets requirements of Alternative I or Alternative II.
"	___	Corporate parent holds at least 50 percent of the voting stock of the owner or operator firm.
(3)	___	Submit letter from chief financial officer.
"	___	Submit independent CPA's report on examination of year-end financial statements.
"	___	Submit independent CPA's Special Report confirming data in chief financial officer's letter.
"	___	Submit written corporate guarantee if parent corporation is meeting financial test.
"	___	Request extension of initial reporting deadline if fiscal year ends less than 90 days before effective date of regulations.

* Numbers correspond to the paragraphs in Section B.

ATTACHMENT VII-1 (continued)

RCRA FINANCIAL TEST CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *		
(4)	___	Update closure or post-closure cost estimates when increased by inflation or revisions in closure/post-closure plans during the operating life of the facility.
(5)	___	Submit no later than 90 days after the end of every fiscal year an updated:
"	___	• Chief financial officer's Letter
"	___	• Independent CPA's report on examination of year-end financial statements
"	___	• Independent CPA's confirmation of data in Chief Financial Officer's letter
"	___	Notify EPA if firm or parent corporation no longer meets requirements of financial test or if parent corporation no longer meets ownership requirements. Provide alternate assurance.
(6)	___	Provide alternate financial assurance and obtain written approval by the Regional Administrator of the assurance within 90 days after notification by parent corporation of cancellation of the corporate guarantee.

ATTACHMENT VII-2

REQUIRED WORDING FOR LETTER FROM CHIEF FINANCIAL OFFICER
40 CFR 264.151(f)

[Address to Regional Administrator of every region in which facilities for which financial responsibility is to be demonstrated through the financial test are located.]

I am the chief financial officer of [name and address of firm]. This letter is in support of this firm's use of the financial test to demonstrate financial assurance, as specified in Subpart H of 40 CFR Parts 264 and 265.

[Fill out the following four paragraphs regarding facilities and associated cost estimates. If your firm has no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its EPA Identification Number, name, address, and current closure and/or post-closure cost estimates. Identify each cost estimate as to whether it is for closure or post-closure care.]

1. This firm is the owner or operator of the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility:

   _____.

2. This firm guarantees, through the corporate guarantee specified in Subpart H of 40 CFR Parts 264 and 265, the closure or post-closure care of the following facilities owned or operated by subsidiaries of this firm. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility:

   _____.

3. In States where EPA is not administering the financial requirements of Subpart H of 40 CFR Parts 264 and 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility:

   _____.

ATTACHMENT VII-2 (continued)

REQUIRED WORDING FOR LETTER FROM CHIEF FINANCIAL OFFICER
40 CFR 264.151(f)

4. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in Subpart H of 40 CFR Parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: _____.

This firm [insert "is required" or "is not required"] to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

This fiscal year of this firm ends on [month, day]. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements and footnotes for the latest completed fiscal year, ended [date].

[Fill in Alternative I if the criteria of paragraph (f)(1)(i) of §§264.143 or 264.145, or of paragraph (e)(1)(i) of §§265.143 or 265.145 of this chapter are used. Fill in Alternative II if the criteria of paragraph (f)(1)(ii) of §§264.143 or 264.145, or of paragraph (e)(1)(ii) of §§265.143 or 265.145 of this chapter are used.]

ATTACHMENT VII-2 (continued)

REQUIRED WORDING FOR LETTER FROM CHIEF FINANCIAL OFFICER
40 CFR 264.151(f)

ALTERNATIVE I

1.	Sum of current closure and post-closure cost estimates [total of all cost estimates shown in the four paragraphs above]	$ _____
*2.	Total liabilities [if any portion of the closure or post-closure cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4]	$ _____
*3.	Tangible net worth	$ _____
*4	Net worth	$ _____
*5.	Current assets	$ _____
*6.	Current liabilities	$ _____
*7.	Net working capital [line 5 minus line 6]	$ _____
*8.	The sum of net income plus depreciation, depletion, and amortization	$ _____
*9.	Total assets in U.S. (required only if less than 90 percent of firm's assets are located in the U.S.)	$ _____

		Yes	No
10.	Is line 3 at least $10 million?	____	____
11.	Is line 3 at least 6 times line 1?	____	____
12.	Is line 7 at least 6 times line 1?	____	____

* Denotes figures derived from financial statements.

ATTACHMENT VII-2 (continued)

REQUIRED WORDING FOR LETTER FROM CHIEF FINANCIAL OFFICER
40 CFR 264.151(f)

ALTERNATIVE I (continued)

13.	Are at least 90 percent of firm's assets located in the U.S.? If not, complete line 14.	____	____
14.	Is line 9 at least 6 times line 1?	____	____
15.	Is line 2 divided by line 4 less than 2.0?	____	____
16.	Is line 8 divided by line 2 greater than 0.1?	____	____
17.	Is line 5 divided by line 6 greater than 1.5?	____	____

* Denotes figures derived from financial statements.

ATTACHMENT VII-2 (continued)

REQUIRED WORDING FOR LETTER FROM CHIEF FINANCIAL OFFICER
40 CFR 264.151(f)

ALTERNATIVE II

1.	Sum of current closure and post-closure cost estimates [total of all cost estimates shown in the four paragraphs above]	$ _____
2.	Current bond rating of most recent issuance of this firm and name of rating service	_____
3.	Date of issuance of bond	_____
4	Date of maturity of bond	_____
*5.	Tangible net worth [if any portion of the closure and post-closure cost estimates is included in "total liabilities" on your firm's financial statements, you may add the amount of that portion to this line]	$ _____
*6.	Total assets in U.S. (required only if less than 90 percent of firm's assets are located in the U.S.)	$ _____

		Yes	No
7.	Is line 5 at least $10 million?	____	____
8.	Is line 5 at least 6 times line 1?	____	____
*9.	Are at least 90 percent of firm's assets located in the U.S.? If not, complete line 10.	____	____
10.	Is line 6 at least 6 times line 1?	____	____

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 264.151(f) as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

ATTACHMENT VII-3

REQUIRED WORDING FOR CORPORATE GUARANTEE
40 CFR 264.151(g)

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of the State of [insert name of State], herein referred to as guarantor, to the United States Environmental Protection Agency (EPA), obligee, on behalf of our subsidiary [owner or operator] of [business address].

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 264.143(f), 264.145(f), 265.143(e), and 265.145(e).

2. [Owner or operator] owns or operates the following hazardous waste management facility(ies) covered by this guarantee: [List for each facility: EPA Identification Number, name, and address. Indicate for each whether guarantee is for closure, post-closure care, or both.].

3. "Closure plans" and "post-closure plans" as used below refer to the plans maintained as required by Subpart G of 40 CFR Parts 264 and 265 for the closure and post-closure care of facilities as identified above.

4. For value received from [owner or operator], guarantor guarantees to EPA that in the event that [owner or operator] fails to perform [insert "closure," "post-closure care" or "closure and post-closure care"] of the above facility(ies) in accordance with the closure or post-closure plans and other permit or interim status requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in Subpart H of 40 CFR Parts 264 or 265, as applicable, in the name of [owner or operator] in the amount of the current closure or post-closure cost estimates as specified in Subpart H of 40 CFR Parts 264 and 265.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator] that he intends to provide alternate financial assurance as specified in Subpart H of 40 CFR Parts 264 or 265, as applicable, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless [owner or operator] has done so.

ATTACHMENT VII-3 (continued)

REQUIRED WORDING FOR CORPORATE GUARANTEE
40 CFR 264.151(g)

6. The guarantor agrees to notify the EPA Regional Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

7. Guarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor of closure or post-closure care, he shall establish alternate financial assurance as specified in Subpart H of 40 CFR Parts 264 or 265, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.

8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure or post-closure plan, amendment or modification of the permit, the extension or reduction of the time of performance of closure or post-closure, or any other modification or alteration of an obligation of the owner or operator pursuant to 40 CFR Parts 264 or 265.

9. Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial assurance requirements of Subpart H of 40 CFR Parts 264 and 265 for the above-listed facilities, except that guarantor may cancel this guarantee by sending notice by certified mail to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by both EPA and [owner or operator], as evidenced by the return receipts.

10. Guarantor agrees that if [owner or operator] fails to provide alternate financial assurance as specified in Subpart H of 40 CFR Parts 264 or 265, as applicable, and obtain written approval of such assurance from the EPA Regional Administrator(s) within 90 days after a notice of cancellation by the guarantor is received by an EPA Regional Administrator from guarantor, guarantor shall provide such alternate financial assurance in the name of [owner or operator].

11. Guarantor expressly waives notice of acceptance of this guarantee by the EPA or by [owner or operator]. Guarantor also expressly waives notice of amendments or modifications of the closure and/or post-closure plan and of amendments or modifications of the facility permit(s).

ATTACHMENT VII-3 (continued)

REQUIRED WORDING FOR CORPORATE GUARANTEE
40 CFR 264.151(g)

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR 264.151(h) as such regulations were constituted on the date first above written.

Effective date: _____

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: _____

ATTACHMENT VII-4

RCRA FINANCIAL TEST CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator should ensure that:

Paragraph Number *		
(1)	___	Credentials of the independent certified public accountant are valid.
"	___	Corporate guarantor qualifies as a corporate parent of the owner or operator.
(2)	___	The required criteria are satisfied in the chief financial officer's letter.
"	___	The signature of chief financial officer is verified.
"	___	Independent auditor's report on examination of year-end financial statements is reviewed:
"	___	• "Pass" firms with unqualified opinions who otherwise qualify.
"	___	• Immediately disqualify firms with disclaimers of opinion, or adverse opinions, or "subject to" qualified opinions based on a "going concern" issue, regardless of other qualifications.
"	___	• Submit to further investigation firms with any other type of qualified opinion.
"	___	Independent auditor's special report, confirming chief financial officer's letter is acceptable.
"	___	The wording of the written guarantee of corporate parent is identical to that required by RCRA regulations.

* Numbers correspond to paragraphs in Section C.

ATTACHMENT VII-4 (continued)

RCRA FINANCIAL TEST CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *		
(2)	___	All facilities are accounted for in chief financial officer's letter.
(4)	___	Subsequent submissions account for changes in cost estimates due to either inflation or revised closure/post-closure plans.
(5)	___	The following are submitted no later than 90 days after the close of the fiscal year:
"	___	• Updated chief financial officer's letter
"	___	• Independent auditor's report on examination of year end financial statements.
"	___	• Updated special report
"	___	• Updated written guarantee
"	___	Firms are subjected to further investigation if:
"	___	• Firm barely passes financial test criteria
"	___	• Firm is late to submit updated information
"	___	• Bond ratings have fallen
"	___	• Financial ratios have deteriorated
"	___	• Adverse business reports in media
"	___	If financial submissions do not satisfy the tests and notification of disallowance is issued, the firm is monitored to ensure provision of alternate assurance within 30 days after notification.
(6)	___	If parent corporation indicates intent to cancel its guarantee, the owner or operator is monitored to ensure provision of alternate assurance within 90 days after they and EPA are notified by the parent of cancellation.
(6)	___	If alternate assurance is not provided by the owner or operator within 90 days after notification of cancellation, the Regional Administrator has 30 more days in which to draw upon the corporate guarantee before it lapses.

ATTACHMENT VII-5

EXAMPLES OF UNQUALIFIED OPINIONS

The following is an unqualified report covering two years of a corporation's statements. It is prepared in this form when the accountant has no limitations on scope, no reservations as to his opinion and feels no supplemental information is needed in a middle paragraph:

Example 1: Unqualified Two-Year Opinion

> "We have examined the balance sheets of XYZ Company, Inc. as of December 31, 19X1 and 19X0, and the related statements of earnings, stockholders' equity* and changes in financial position for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the financial statements referred to above present fairly the financial position of XYZ Company, Inc. as of December 31, 19X1 and 19X0, and the results of its operations and the changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis."

Based on accounting practice, it is preferable to present comparative financial statements and to cover two or three years. However, for non-public companies, it is still acceptable to present and report on only the current year. In those situations, the report is modified to cover only that one year. Where the prior year's financials are presented, but are unaudited or were examined by another auditor, the current report must acknowledge that fact.

---

* When appropriate, the terms "retained earnings" and "additional paid-in capital" are substituted for "stockholders' equity."

ATTACHMENT VII-5 (continued)

EXAMPLES OF UNQUALIFIED OPINIONS

Example 2: Unqualified Three-Year Opinion for SEC Registrants

"We have examined the balance sheets of ABC Company at December 31, 19X3 and 19X2, and the related statements of income, retained earnings and changes in financial position for each of the three years in the period ended December 31, 19X3. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedurs as we considered necessary in the circumstances.

In our opinion, the financial statements referred to above present fairly the financial position of ABC Company at December 31, 19X3 and 19X2, and the results of its operations and the changes in its financial position for each of the three years in the period ended December 31, 19X3, in conformity with generally accepted accounting principles applied on a consistent basis."

ATTACHMENT VII-6

EXAMPLE OF AN ADVERSE OPINION

An Adverse Opinion is a extreme form of an "except for" Qualified Opinion in the case of a generally accepted accounting principles (GAAP) violation.

"As discussed in Note X to the financial statements, the Company carries its property, plant and equipment accounts at appraisal values and provides depreciation on the basis of such values. Further, the Company does not provide for income taxes with respect to differences between financial income and taxable income arising because of the use, for income tax purposes, of the installment method of reporting gross profit from certain types of sales. Generally accepted accounting principles, in our opinion, require that property, plant and equipment be stated at an amount not in excess of cost, reduced by depreciation based on such amount and that deferred income taxes be provided. Because of the departures from generally accepted accounting principles identified above, as of December 31, 19XX, inventories have been increased $..... by inclusion in manufacturing overhead of depreciation in excess of that based on cost; property, plant and equipment, less accumulated depreciation, is carried at $..... in excess of an amount based on the cost to the Company; and allocated income tax of $..... has not been recorded, resulting in an increase of $..... in retained earnings and in appraisal surplus of $..... For the year ended December 31, 19XX, cost of goods sold has been increased $..... because of the effects of the depreciation accounting referred to above, and deferred income taxes of $..... have not been provided, resulting in an increase in net income and earnings per share of $..... and $....., respectively.

In our opinion, because of the effects of the matters discussed in the preceding paragraph, the financial statements referred to above do not present fairly, in conformity with generally accepted accounting principles, the financial position of X Company as of December 31, 19XX, or the results of its operations and changes in its financial position for the year then ended."

ATTACHMENT VII-7

EXAMPLE OF A DISCLAIMER OF OPINION

A disclaimer of opinion mean that the accountant can not express an opinion on the financial statements of the firm. An example of a disclaimer resulting from an extreme form of a scope restriction follows:

> "... Except as set forth in the following paragraph, our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> The Company did not take a physical inventory of merchandise, stated at $..... in the accompanying financial statements as of December 31, 19XX, and at $..... as of December 31, 19X1. Further, evidence supporting the cost of property and equipment acquired prior to December 31, 19XX, is no longer available. The Company's records do not permit the application of adequate alternative procedures regarding the inventories or the cost of property and equipment.
>
> Since the Company did not take physical inventories and we were unable to apply adequate alternative procedures regarding inventories and the cost of property and equipment, as noted in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the financial statements referred to above."

ATTACHMENT VII-8

EXAMPLES OF A "SUBJECT TO" QUALIFIED OPINION
BASED ON A "GOING CONCERN" ISSUE

The following are "subject to" Qualified Opinions based on a "going concern" issue. In both instances, the survival of the firm is uncertain.

Example 1

"The financial statements referred to previously have been prepared using generally accepted accounting principles applicable to a going concern which contemplates the realization of assets and the liquidation of liabilities in the normal course of business. However, continuation of the Company as a going concern is dependent upon its obtaining additional financing and achieving profitable operations. At December 31, 19X1, adverse operating results had reduced the Company's working capital below the amounts required under long-term debt agreements. As explained in Note , the working capital requirements under the debt agreements have been waived until December 31, 19X2. Should losses continue and the lenders exercise their rights under the debt agreements to accelerate the maturities of long-term debt, the order of maturity of the liabilities and the carrying values of assets would be significantly affected.

In our opinion, subject to the possible effects of such adjustments, if any, as might have been required had the outcome of the uncertainties relating to the Company's continuance as a going concern been known, the financial statements referred to above present fairly the financial position of ABC Corporation, Inc. at December 31, 19X2 and 19X1."

ATTACHMENT VII-8 (continued)

EXAMPLES OF A "SUBJECT TO" QUALIFIED OPINION
BASED ON A "GOING CONCERN" ISSUE

Example 2

"The financial statements referred to above have been prepared on a going concern basis and do not reflect any downward adjustments (prsently not determinable) to the carrying value of assets which could be required in the event of disposal other than in the ordinary course of business. Continuation of the business is dependent on (1) consummation of debt restructuring agreements as discussed in Note , (2) maintaining adequate financing arrangements with all lenders (3) achieving profitable operations. Should any of these circumstances interrupt the continuity of the business, the realization of assets and order of maturity of liabilities may be adversely affected.

In our opinion, subject to the possible effects of such adjustments, if any, as might have been required had the outcome of the uncertainties relating to the Company's continuance as a going concern been known, the financial statements referred to above present fairly the financial position of ABC Corporation, Inc. at December 31, 19X2 and 19X1."

ATTACHMENT VII-9

EXAMPLE OF AN "EXCEPT FOR" QUALIFIED OPINION DUE TO A SCOPE LIMITATION

We were not able to observe the taking of the physical inventories of cut timber, which were necessarily taken as of September 30, in 19X2 and 19X1, since those dates were prior to the time we are initially engaged as auditors for the Company. The cut timber inventory was stated at $ and $ at September 30, 19X2 and 19X1, respectively. Due to the nature of the Company's records, we were unable to satisfy ourselves as to the inventory quantities by means of other auditing procedures.

In our opinion, except for the effects of such adjustments, if any, as might have been determined to be necessary had we been able to observe the physical inventories of cut timber...."

ATTACHMENT VII-10

EXAMPLE OF AN "EXCEPT FOR" QUALIFIED OPINION DUE TO VARIANCES FROM GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

"The Company has excluded from property and debt in the accompanying balance sheet certain lease obligations, which, in our opinion, should be capitalized in order to conform with generally accepted accounting principles. If these lease obligations were capitalized, property would be increased by $, long-term debt by $ and retained earnings by $ as of December 31, 19XX, and net income and earnings per share would be increased (decreased) by $ and $, respectively, for the year then ended.

In our opinion, except for the effects of not capitalizing lease obligations, as discussed in the preceding paragraph, the financial statements present fairly...."

ATTACHMENT VII-11

EXAMPLES OF AN "EXCEPT FOR" QUALIFIED OPINION DUE TO INCONSISTENCIES IN A COMPANY'S APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

The following two examples illustrate how a similar "except for" situation might be reported differently by different accountants.

Example 1

"In our opinion ... generally accepted accounting principles consistently applied during the period except for the change, with which we concur, in the method of computing depreciation as described in Note A to the financial statements."

Example 2

"As disclosed in Note A to the financial statements, the Company has adopted the sum-of-the-years digits method for computing depreciation, whereas it previously used the straight-line method. In our opinion the Company has provided reasonable justification for making a change as required by the generally accepted accounting principles.

In our opinion, except for the change in accounting principles as stated above, the financial statements referred to above present fairly the financial position of X Company as of October 31, 19 , and the results of its operations and the changes in its financial position for the year the ended, in conformity with generally accepted accounting principles."

ATTACHMENT VII-12

EXAMPLE OF "SUBJECT TO" QUALIFIED OPINION DUE TO AN UNCERTAINTY REGARDING THE OUTCOME OF A JUDICIAL PROCEEDING

"As discussed in Note X to the financial statements, the Company is defendant in a lawsuit alleging infringement of certain patent rights and claiming royalties and punitive damages. The Company has filed a counteraction, and preliminary hearings and discovery proceedings on both actions are in progress. Company officers and counsel believe the Company has a good chance of prevailing, but the ultimate outcome of the lawsuits cannot presently be determined, and no provision for any liability that may result has been made in the financial statements.

In our opinion, subject to the effects of such adjustments, if any, as might have been required had the outcome of the uncertainty referred to in the preceding paragraph been known, the financial statements referred to above present fairly the financial position of ABC Company as of (current year-end) and the results of its operations and the changes in its financial position, in conformity with generally accepted accounting principles."

ATTACHMENT VII-13

EXAMPLE OF A "SUBJECT TO" QUALIFIED OPINION DUE TO A COMPANY WITHOUT AN OPERATING HISTORY

Often there is uncertainty about the ability of a new enterprise to establish a profitable level of operations. It has become accepted practice to render "subject to" opinions in these "development stage" situations. The middle paragraph must recite all of the uncertainties facing the company and that recitation is frequently quite extensive.

"We have examined the balance sheet of ABC Corporation, Inc., as of December 31, 19X2 and 19X1, and the related statements of operations, changes in stockholders' equity and changes in financial position for the years then ended. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

The Corporation is in the development stage as of December 31, 19X2. The accompanying financial statements have been prepared in accordance with generally accepted accounting principles applicable to a going concern which contemplates the realization of assets and liquidation of liabilities in the normal course of business. However, recovery of the Corporation's assets is dependent upon future events, the outcome of which is currently indeterminable. Additionally, successful completion of the Corporation's development program and its transition, ultimately, to attaining profitable operations is dependent upon obtaining financing adequate to fulfill its development activities and achieving a level of sales adequate to support the Corporation's cost structure. Should any of these events not occur, the accompanying financial statements may be affected materially.

In our opinion, subject to the ultimate resolution of the uncertainties described in the preceding paragraph, the financial statements referred to above present fairly the financial position of ABS Corporation, Inc. at December 31, 19X2 and 19X1, and the results of its operations, changes in its stockholders' equity and changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis."

ATTACHMENT VII-14

CONDITIONS LIKELY TO RESULT IN A QUALIFIED OPINION, ADVERSE OPINION AND DISCLAIMER OF OPINION

CONDITION		
VIOLATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES (GAAP)	UNCERTAINTY	SCOPE LIMITATIONS
"Except for" Qualified Opinion - Violation is not overwhelming or pervasive to financial statements as a whole. o Lease obligations that were not capitalized that auditor thinks should have been capitalized o Omission of disclosure that the auditor thinks should be included Adverse Opinion - Violation is overwhelming or pervasive to financial statements as a whole. o A large company uses the cash basis rather than the accrual basis of accounting and thus, does not match expenses with revenues for the accounting period.	"Subject To" Qualified Opinion Internal Matters: o Loss of management or other key personnel o Negative trends recurring operating losses, negative cash flow o Work stoppages o Uneconomical long-term commitments External Matters: o Legal proceedings o Legislation o Loss of key franchise, license, or patent o Loss of a principal customer or supplier o Uninsured catastrophes Disclaimer of Opinion o It is impossible to determine the future operational activity of company or the effect of material uncertainties.	"Except for" Qualified Opinion o Segments of inventory not observed at beginning or end of year (not so significant as to require a disclaimer). o Joint ventures were not audited. Disclaimer of Opinion o The accounting/operating systems are so unreliable that an audit cannot be performed.

ATTACHMENT VII-15

EXAMPLE OF AUDITOR'S SPECIAL REPORT,
CONFIRMATION OF CHIEF FINANCIAL OFFICER'S LETTER

We have examined the financial statements of XYZ Company for the year ended December 31, 19X1, and have issued our report thereon dated March 15, 19X2. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

The Company has prepared documents to demonstrate its financial responsibility under the Environmental Protection Agency's financial assurance regulations, in compliance with 40 CFR 264 and 265, Subpart H. This letter is furnished to assist the Company in complying with these regulations and should not be used for other purposes.

The attached schedule reconciles the specified information furnished in the Chief Financial Officer's Letter in response to the regulations with the Company's financial statements. In connection therewith, we have:

1. Agreed the amounts in the column "per financial statements" with amounts contained in the Company's financial statements for the year ended December 31, 19X1.

2. Agreed the amounts in the column "per Chief Financial Officer's Letter" to the Letter prepared in response to the regulations.

3. Agreed the amounts in the column "reconciling items" to analyses prepared by the Company setting forth the indicated items.

4. Recomputed the totals and percentages.

Because the above procedures do not constitute an examination made in accordance with generally accepted auditing standards, we do not express an opinion on any amounts or items referred to above. In connection with the procedures referred to above, no matters came to our attention that caused us to believe the Schedule should be adjusted.

ATTACHMENT VII-15 (continued)

XYZ COMPANY

YEAR ENDED DECEMBER 31, 19X1

SCHEDULE RECONCILING AMOUNTS CONTAINED IN THE CHIEF FINANCIAL OFFICER'S LETTER FURNISHED IN RESPONSE TO 40 CFR 264 AND 265, SUBPART H TO AMOUNTS CONTAINED IN THE FINANCIAL STATEMENTS

Line number in CFO's Letter		Per Financial Statements	Reconciling Items	Per CFO's Letter
2	Total current liabilities	X		
	Long-term debt	X		
	Deferred income taxes	X		
		XX		
	Accrued post-closure costs included in current liabilities		X	
	Total liabilities (less accrued post-closure costs)			X
3	Net Worth	XX		
	Less: Cost in excess of value of tangible assets acquired	X		
		XX		
	Accrued post-closure costs included in current liabilities		X	
	Tangible net worth (plus accrued post-closure costs)			XX
	[balance of schedule not illustrated]			
	[This illustrates the form of schedule which is contemplated. Details and reconciling items will differ in a specific situation.]			

VIII. ESTABLISHING FINANCIAL RESPONSIBILITY USING STATE MECHANISMS

A. INTRODUCTION

As discussed in Section F of Chapter 1, owners or operators are subject to applicable state laws or regulations pertaining to financial responsibility for closure or post-closure care in addition to the RCRA financial requirements. This chapter only applies to facilities located in states where EPA is administering financial assurance requirements.* The chapter explains how owners or operators of facilities in these states may satisfy federal requirements by demonstrating assurance using state laws.

Owners or operators may satisfy the RCRA financial assurance requirements by arranging for assurance under the authority of a state government in two ways. First, an owner or operator may provide assurance through a state-required financial mechanism equivalent to RCRA requirements. Many states are expected to adopt the federal requirements discussed in this manual or equivalent rules; in those cases, satisfaction of state requirements may be used to demonstrate compliance with RCRA requirements. Second, a state government or state fund may assume legal or financial responsibility for all or part of the closure and/or post-closure care of a facility. Such an assumption, similarly, may satisfy all or a part of the RCRA financial requirements; the specific terms and applicability of the state assumption will determine how much of the RCRA responsibility remains, if any.

Pertinent EPA regulations are listed below:

EXHIBIT VIII-1

RCRA STATE MECHANISM REGULATIONS

Topic	Interim Status	Permitted Facilities
State-Required Mechanisms	40 CFR 265.149	40 CFR 264.149
State Assumption of Responsibility	40 CFR 265.150	40 CFR 264.150

Source: Title 40, Code of Federal Regulations (CFR).

* EPA interim status financial assurance regulations (40 CFR 265) do not apply in states that have received PHASE I interim authorization, although RCRA standards (40 CFR 264) must be satisfied to receive a RCRA permit. States with PHASE II interim authorization administer their own financial requirements for both interim status and permitted facilities. See Chapter 1, Section F for a discussion of the applicability of federal and state requirements.

B. REQUIREMENTS FOR USING STATE MECHANISMS AND STATE ASSUMPTIONS OF RESPONSIBILITY TO SATISFY RCRA REQUIREMENTS

This section outlines the requirements for using state mechanisms to satisfy federal rules and the responsibilities of owners or operators. Included as Attachment VIII-1 is a checklist summarizing the requirements for owners or operators.

1. Satisfying State Requirements. Owners or operators must initially identify what state financial requirements apply and whether or not the state itself assumes responsibility for closure or post-closure care. State financial requirements may not be identical to RCRA requirements, although the allowable mechanisms typically include trust funds and bonds. Other states may have different requirements, as well as assumptions of closure or post-closure responsibility through funds or other provisions. (See Exhibit VIII-2.) The characterization of state laws and regulations included in Exhibit VIII-2 represents the opinions of ICF Incorporated and are not official EPA determinations of equivalence or acceptability.

Because state laws and regulations are still being developed or promulgated, it is strongly suggested that owners and operators check with the appropriate state agency for the requirements in any particular state. See Appendix B for a list of state agencies. An owner or operator whose facility is located in any state with financial requirements must satisfy both the state and federal requirements. State and federal officials encourage early and frequent contacts with agency staffs to discuss requirements. Similarly, an owner or operator will need to determine whether it is eligible for a state assumption of responsibility for closure or post-closure care.

2. Submission of Required Information. To use a state-required mechanism to satisfy RCRA requirements, the owner or operator must submit to the Regional Office evidence of the establishment of the mechanism, such as a letter from the appropriate state agency, a copy of the bond or trust fund, etc. The submission of evidence must be accompanied by a request that the State-required mechanism be considered acceptable for meeting the RCRA financial assurance requirements. (See Attachments VIII-3 through VIII-5.) The submission must include the amount of coverage assured through the state mechanism and identification information on each facility to be covered including the facility's EPA Identification Number, name, and address. Additional information may be requested by the Regional Administrator in order to determine the mechanism's acceptability.

Some state laws provide assurance of payment or performance of all or part of closure and/or post-closure responsibilities. In order to take advantage of such laws to demonstrate compliance with RCRA financial assurance requirements, the owner or operator must submit two letters: (1) a letter from the appropriate state agency describing the nature of the state's assumption of responsibility, together with (2) a letter requesting that the state's assumption of responsibility be considered acceptable for fulfilling

EXHIBIT VIII-2

STATE FINANCIAL REQUIREMENTS AND ASSUMPTIONS OF RESPONSIBILITY IN STATES WITHOUT INTERIM AUTHORIZATION AS OF MAY 10, 1982

	Has Financial Requirements	Provides Assumption of Responsibility
Alaska		
Colorado	3/	
District of Columbia	*	
Florida	1/	*
Hawaii		
Idaho		
Illinois	*	
Indiana	*	
Michigan	*	*
Minnesota	* 2/	
Missouri	*	
Nebraska	*	
Nevada	3/	
New Jersey	*	
New Mexico	1/	
New York	*	
Ohio	*	*
Puerto Rico	* 2/	
South Dakota		
Virgin Islands	*	
Washington	*	
West Virginia	3/	
Wyoming		

---

* State has some provision for the item in question.

1/ Requirements have been proposed but not yet adopted.

2/ Some financial assurance mechanism is required but the nature of the mechanism has not been specified.

3/ No regulations have yet been issued but some mechanism is required by state statute.

the RCRA financial assurance requirements. (See Attachments VIII-3 through VIII-5.) The letter from the state must include, or have attached, the following information: the facility's EPA Identification Number, name, address, and the amount of funds for closure or post-closure care guaranteed by the state. The owner or operator may be required to submit additional information requested by the Regional Administrator.

3. Satisfying Federal Requirements. The owner or operator may need to combine the State mechanism or guarantee with RCRA assurance mechanisms in order to provide complete coverage of the estimated closure and/or post-closure costs. For example, if a state fund or mechanism for post-closure only provides for fifteen years of care, it may need to be supplemented to provide for the full thirty-year RCRA post-closure period. A state fund assuming all responsibility for post-closure care beginning 20 years after closure would need to be supplemented by some mechanism assuring the first 20 years of post-closure care as well as by a mechanism assuring closure itself. The owner or operator has the option of either increasing the amount of funds available through the state-required mechanism or using additional RCRA financial mechanisms; only the latter choice will usually be available where a state fund assuming responsibility for post-closure is involved. If a combination of mechanisms is required, the owner or operator should follow the procedures for approval of combinations of RCRA mechanisms (discussed in Section B.2 of Chapter II). The total amount of funds available through the State and Federal mechanisms must at least equal the amount required under RCRA.

4. Maintaining Coverage. Owners or operators have a continuing responsibility to maintain adequate financial assurance. Thus, whenever closure or post-closure plans change, or when making annual adjustments to cost estimates for inflation, owners or operators must provide increased coverage if revised cost estimates exceed the amount of financial responsibility previously assured. Procedures for doing this will vary with the type of mechanism being used; owners or operators should consult the other chapters in this manual for details.

PERMITTED FACILITIES

To receive a RCRA permit, new and existing facilities must satisfy RCRA financial requirements for permitted facilities. If the facility is located in a state without interim authorization or with Phase I authorization only, financial assurance must be demonstrated to the appropriate Regional Administrator as described in the other chapters of this manual. State-required mechanisms or assumptions of responsibility may be used to fulfill RCRA requirements in whole or part as discussed previously. The main point to remember is that unless the facility is located in a state with Phase II interim authorization (see Exhibit I-1), it must satisfy RCRA standards to receive a RCRA permit and may comply by using state-required mechanisms or state assumptions of responsibility, if any.

C. REGIONAL OFFICE RESPONSIBILITIES

This section presents the responsibilities for Regional Administrators in reviewing state mechanisms for equivalency. A summary checklist is provided as Attachment VIII-2.

1. Evaluating Equivalency. The Regional Administrator must determine whether the state mechanism or assumption of responsibility provides financial assurance at least equivalent to the RCRA financial mechanisms. Equivalency should be evaluated principally in terms of two criteria:

(1) Certainty of the availability of funds for the required closure or post-closure care activities. For example, the state mechanism must demonstrate a minimal risk of defaulting or lapsing due to bankruptcy, change in ownership, or cancellation of guarantee, without the provision of alternate assurance.

(2) The amount of funds that will be made available. The owner or operator must demonstrate that the state mechanism will assure payment of estimated closure and/or post-closure costs, including future cost increases due to inflation or changes in the closure and/or post-closure plan.

Regional Administrators must evaluate state mechanisms and compare them to the allowable federal mechanisms principally on the basis of the two criteria of certainty and amount of funds. This could be a very complex task, and the Regional Administrator must be careful to consider many factors. These factors include:

- Qualifications required of participating financial institutions;
- Provision for increases in amount of financial assurance due to inflation or changes in plans;
- Time periods and closure and post-closure activities covered by the state mechanism;
- The amount of funds assured as compared to the cost estimates;
- Provision for future contingencies, including bankruptcy, cancellation, or changing mechanisms; and
- The future taxation and budgetary constraints that could affect a state's ability to assure future payment of closure and/or post-closure costs.

In general, Regional Offices should first analyze the state mechanism itself for adequacy before reviewing the amount of coverage offered. State financial assurance mechanisms typically include trust funds, bonds, letters of credit, and, in some cases, financial tests. This means that Regional Offices can use federal requirements as a benchmark for evaluating these instruments. In reviewing the components of a mechanism, Regional Offices should distinguish requirements that are stricter than the RCRA rules from requirements that are more lax. For example, Wisconsin places strict limits on the type of investments allowed for trust funds. Unless these restrictions prevent the accumulation of reasonable returns, the mechanism should be qualified to satisfy RCRA requirements. Where states have adopted the federal requirements by reference, detailed evaluation will not be necessary.

Regional Offices should carefully review state financial tests against federal financial test criteria because this mechanism does not involve the advance financing of a fund for later use (e.g., trust fund or insurance contract), the dedication of a line of credit, nor the underwriting of the risk of failure to satisfy requirements (e.g., surety bond, insurance).

The checklists provided throughout this manual may be used for evaluating equivalency. Questions such as the following should be asked:

(1) Must the financial institution or corporate parent be adequately qualified? Are insurers required to be licensed? Must surety companies be state-approved?

(2) What circumstances will allow the state or EPA to collect a corporate parent guarantee? Or draw on funds held in trust? Or pursuant to a letter of credit? Are insurance contracts cancellable if the owner or operator is found in violation of performance standards unrelated to financial requirements?

(3) Could cancellation of a third-party guarantee become effective before the state or EPA could legally collect funds for closure and post-closure? Will the original guarantor honor the commitment and provide the necessary funds if the owner or operator is unable to find another financial responsibility mechanism satisfactory to the Regional Administrator?

Regional Offices may wish to consult with EPA Headquarters to discuss questions and options for evaluating equivalency.

State assumptions of responsibility may be more difficult to review in the absence of federal benchmarks for comparison. Regional Offices should review exactly which activities are covered by such an assumption (e.g., closure, post-closure care, groundwater monitoring, security systems). Most states providing for assumption of responsibility usually limit this to post-closure

care, commencing either immediately after closure or following a term of years. Regional Offices should not attempt to evaluate the future adequacy of state funds but may ask to review any such studies prepared by the responsible state agency.

The Regional Administrator must also determine which required closure or post-closure activities are covered neither by the state mechanism nor by the state assumption (if any) in order to identify additional assurances needed to satisfy federal requirements. Similarly, the dollar amount of coverage must be reviewed to determine equivalency. Because estimates of the cost of closure and/or post-closure care may vary, Regional Administrators should employ rough guidelines for assessing whether the dollar amount of coverage falls into the acceptable range, for facilities of the type covered. If the amount provided is clearly inadequate, the owner or operator should be required either to increase coverage afforded by the state mechanisms or establish an additional federal mechanism.

2. Reviewing Submissions. The Regional Administrator should review the information submitted by the owner or operator to verify that all the required information is included. In addition to the facility's EPA Identification Number, name, address, and the amount of funds assured, the following should be included:

- evidence of the establishment of a state-required mechanism, such as a copy of the trust agreement, surety bond, letter of credit, insurance contract, or corporate parent guarantee with the state listed as a beneficiary, including all required attachments, such as Attachment A for the trust fund, acknowledgements, power of attorney, etc.;

- a letter from the state describing the nature of the state's assumption of responsibility, if any, signed by an appropriate state-agency official; and

- a cover letter requesting that the state mechanism and/or assumption of responsibility be considered acceptable for meeting, in whole or part, RCRA financial requirements.

Three sample owner or operator request letters are included as attachments. They represent situations where:

(1) a combination of a state-required mechanism and assumption of responsibility are requested to fully satisfy RCRA requirements (Attachment VIII-3);

(2) state-required mechanisms equivalent to RCRA assurances are requested to fully satisfy RCRA requirements (Attachment VIII-4); and

(3) a state-required mechanism not equivalent to RCRA assurances is requested to fully or partially satisfy RCRA requirements (Attachment VIII-5).

Resort to state law as a means of fulfilling applicable RCRA requirements will fall into one of these three typical situations.

3. Verifying Conformity to Requirements. Regional Administrators must advise owners or operators concerning the acceptability of state mechanisms and assumptions of responsibility. Pending this determination, the owner or operator will be deemed to be in compliance with the applicable RCRA financial assurance requirements. Any additional coverage needed for the assurance to be at least equivalent to RCRA requirements should be specified. Additional assurances may be provided by increasing the amounts available under state mechanisms or using additional mechanisms meeting RCRA requirements.

4. Ensuring Maintenance of Coverage. Regional Offices should determine whether state mechanisms provide for later adjustments in coverage consistent with federal requirements. If not, the owner or operator will have to satisfy its ongoing responsibility by using additional federal mechanisms. Use of those mechanisms for maintaining coverage is discussed in the preceding chapters of this manual. In addition, should the state receive interim authorization to administer its own hazardous waste management program, the Regional Administrator should consent to the termination of financial assurance mechanisms only when no lapse in coverage will result.

PERMITTED FACILIITIES

Owner or operators may use state-required mechanisms or state assumptions of responsibility to satisfy federal financial assurance standards for permitted facilities in states which have not received applicable Phase II interim authorization. The guidance in this chapter applies to such situations.

D. SOURCES OF FURTHER INFORMATION

Because many state laws and regulations are currently in a state of flux, owners or operators are advised to contact the appropriate state agency to determine applicable requirements. State agency contacts are listed in Appendix B. EPA Regional Office contacts can also advise regarding the authorization status of state programs (see Appendix A).

ATTACHMENT VIII-1

RCRA STATE MECHANISMS CHECKLIST FOR OWNERS OR OPERATORS

Paragraph Number *

(1) ___ Identify pertinent state laws and requirements which can be used to satisfy RCRA regulations.

(2) ___ Submit:

___ Letter requesting consideration of state mechanism and/or assumption of responsibility to apply for RCRA requirements

___ Signed copies of financial instruments (with associated attachments, acknowledgements, or certificates) naming state agency as beneficiary

___ Letter from state agency acknowledging completion of state requirements, if available

___ Letter from state agency describing the nature of the State's assumption of responsibility

___ EPA Identification Number and information on each facility, including amount of funds assured for closure or post-closure

(3) ___ Satisfy federal requirements by providing additional assurances as necessary.

(4) ___ Maintain coverage throughout operating life of facility, including

___ Assurance of cost increases due to plan changes

___ Assurance of cost increases due to annual inflation adjustments

___ Change of mechanisms as required to maintain assurance in the event of incapacity, disallowance, or ineligibility of financial institution or parent guarantor

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* Numbers correspond to paragraphs in Section B.

ATTACHMENT VIII-2

RCRA STATE MECHANISMS CHECKLIST FOR REGIONAL OFFICES

The Regional Administrator should ensure that:

Paragraph Number *

(1) ___ Equivalency of State Mechanisms or Assumptions of Responsibility is determined principally on the basis of:

" ___ Certainty of Availability of Funds, including:

___ Qualifications for financial institutions, parent guarantors, or financial test

___ Irrevocability of trust fund and letter of credit

___ Adequate notice prior to termination, cancellation, or non-renewal of financial mechanism and provisions for obtaining alternate assurance or drawing upon mechanisms prior to termination, cancellation, or non-renewal

___ Requirements of financial test (e.g., assets, ratios)

___ Provisions for maintenance of assurance in the event of bankruptcy of parent guarantor or financial institution, incapacity, transfer of ownership or operation, change in mechanism

___ Source of funds to be used by states assuming responsibility for closure or post-closure care

" ___ Amount of Funds Available, including:

___ Closure or post-closure activities covered

___ Time period covered

___ Amount of funds provided compared to cost estimates

* Numbers correspond to paragraphs in Section B.

ATTACHMENT VIII-2 (continued)

RCRA STATE MECHANISMS CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *

___ Provisions for increases in coverage due to inflation or changes in closure or post-closure plans

___ Amount of funds available through state accounts or revolving funds

___ Additional assurances needed

(2) ___ The initial submission is complete, including:

___ Owner or operator request letter

___ Evidence of establishment of state mechanism, such as copies of executed (i.e., signed) financial instruments, letter of acknowledgment from state agency, etc.

___ Identifying information for covered facilities and amount of coverage

___ Copy of letter from state agency describing assumption of responsibility

___ The owner or operator is notified of the equivalency determination.

(3) ___ The amount of funds available at least equals the amount required by RCRA standards

___ State mechanisms and/or assurance completely fulfill RCRA requirements

___ Assurance provided by additional mechanisms is consistent with RCRA requirements

* Numbers correspond to paragraphs in Section B.

ATTACHMENT VIII-2 (continued)

RCRA STATE MECHANISMS CHECKLIST FOR REGIONAL OFFICES

Paragraph Number *

___ Amount of funds available under state mechanisms is increased as required

(4) ___ Coverage is maintained

___ State mechanisms provide for maintenance of assurance and owner or operator is in compliance

___ Owner or operator uses additional mechanism to provide for adjustments to financial assurance

___ There is no lapse in coverage if the State receives interim authorization

* Numbers correspond to paragraphs in Section B.

ATTACHMENT VIII-3

SAMPLE OWNER OR OPERATOR REQUEST LETTER (I)

HazWaste Corp.
Address
Date

EPA Regional Administrator
U.S. EPA Region ____
Street Address
City, State, Zip Code

Dear Sir/Madam:

This letter is submitted to request that RCRA financial requirements (40 CFR 265) be deemed satisfied, in whole or part, by state mechanisms and/or assumptions of responsibility with which HazWaste Corp. is in compliance.

HazWaste Corp. owns and operates three (3) facilities in State X whose EPA Identification Numbers and addresses are as follows:

[Insert identifying information]

State X requires financial responsibility demonstrations to cover the costs of closure and up to 15 years of post-closure care. See Rules 26.02 and 26.07 of the State X Department of Environmental Protection. HazWaste Corp. has established the required trust funds, as evidenced by the following documents which are attached:

(A) Copy of trust agreement and Schedule A (Attachment A) and

(B) Letter from State X Department of Environmental Protection acknowledging satisfaction of state requirements (Attachment B).

In addition, State X has established a Perpetual Care and Monitoring Fund to provide for sites which have been closed for fifteen years. See Rules 30.50 through 30.70. We request that the state assumption of post-closure care responsibility be deemed to partially satisfy federal RCRA requirements. We have attached a letter from the state agency acknowledging the inclusion of our facilities under the state assumption. (See Attachment C).

ATTACHMENT VIII-3 (continued)

SAMPLE OWNER OR OPERATOR REQUEST LETTER (I)

In conclusion, we request that the combination of our state-required financial responsibility demonstrations and the state assumption of post-closure care be deemed to completely satisfy federal RCRA requirements. We will be pleased to provide any further information you may need.

Sincerely,

_____

President, HazWaste Corp.

Attachments

A. Trust Fund Agreement (Closure and Post-Closure)
B. State agency acknowledgement
C. State assumption of responsibility

ATTACHMENT VIII-4

SAMPLE OWNER OR OPERATOR REQUEST LETTER (II)

Waste Control Inc.
Address
Date

EPA Regional Administrator
U.S. EPA Region ____
Street Address
City, State, Zip Code

Dear Sir/Madam:

This letter is submitted to request that RCRA financial requirements be deemed satisfied by state rules with which Waste Control Inc. has complied.

Waste Control Inc. owns and operates one (1) facility in State Y located at [insert address] assigned EPA Identification Number _____.

State Y has adopted by reference the RCRA financial requirements of 40 CFR 264 and 265, as amended. See Rule 70Y(1) of the State Department of Natural Resources. Waste Control Inc. has secured an irrevocable letter of credit to assure the availability of funds for both closure and post-closure, a copy of which is attached. The State Y [insert appropriate agency] has accepted this letter of credit as fulfilling the requirements of Rule 70Y(1).

Accordingly, we request that the establishment of this financial assurance mechanism be determined acceptable for meeting the requirements of 40 CFR 265. Further information, if needed, will be supplied at your request.

Thank you,

_____
Comptroller, Waste Control Inc.

Attachments
A. Irrevocable Letter of Credit (copy)
B. State agency acknowledgement

ATTACHMENT VIII-4

SAMPLE OWNER OR OPERATOR REQUEST LETTER (III)

Synthetic Chemical Industries
Address
Date

EPA Regional Administrator
U.S. EPA Region ____
Street Address
City, State, Zip Code

Subject: Financial Requirements

Synthetic Chemical Industries ("SCI") owns two hazardous waste facilities in the State of Z, both of which are in interim status and subject to the financial requirements of 40 CFR 265. The EPA Identification Numbers and addresses are:

[Insert identifying information]

SCI has complied with Section 394B of the Public Health Code of State Z by posting two bonds to assure the closing and covering of our landfills in a manner which prevents erosion, health and safety hazards, nuisances, and pollution. As required by state law, these bonds must be in the amount of $1,000 per acre of land for which a State Z permit is required, but in no event for less than $25,000. SCI has posted bonds of $25,000 and $42,000, respectively, for the two sites identified above. Pursuant to state law, liability for the bond is to extend until five (5) years after the closure of the landfill. This obligation is binding on the heirs, representatives, successors, and assignees of SCI.

SCI requests that this State-required mechanism be determined acceptable for meeting the financial requirements of 40 CFR 265, in whole or in part. Pending this determination, SCI understands that it will be deemed to be in compliance with such requirements (40 CFR 265.149(b)). SCI intends to provide whatever additional assurances are determined necessary.

ATTACHMENT VIII-4 (continued)

SAMPLE OWNER OR OPERATOR REQUEST LETTER (III)

We have enclosed copies of our closure and post-closure plans, facsimiles of the above-referenced bonds, and a copy of the letter of acknowledgement receive by SCI from State Z. SCI will provide such additional information as may be deemed necessary to make this determination.

Sincerely,

_____

General Counsel, SCI

Attachments

GLOSSARY OF TERMS

Term	Definition
ACCOUNT PARTY	One who purchases or arranges for a letter of credit from a financial institution.
ACCOUNTANTS OPINION	See REPORT ON EXAMINATION.
ACKNOWLEDGE, ACKNOWLEDGEMENT (OF AN INSTRUMENT)	Formal declaration before an authorized official such as a notary, by the person who executed the instrument, that it is his free act and deed.
ADJUSTED COST ESTIMATE	A cost estimate which has been updated using the appropriate inflation factor within 30 days of the anniversary date on which the first cost estimate was prepared.
ADVERSE OPINION	Statement by an accountant that the financial statements of the firm do not present fairly the financial condition of the firm in conformity with generally accepted accounting principles. This type of opinion will cause the EPA to disallow the use of the financial test for the firm.
ALIEN INSURER	An insurance company incorporated under the laws of a foreign country.
AMORTIZATION	Gradually reducing the accounting or "book" value of a fixed asset by allocating part of the cost of the asset over time to individual accounting periods. The term is used to refer to assets whose life is limited but which do not physically wear out. Examples include copyrights, patents, and leases. See DEPRECIATION.

Term	Definition
ASSET	All existing and all probable future economic benefits obtained or controlled by a particular entity. Any right or physical property that is owned and has a monetary value.
ASSIGNMENT	A transfer by one party to a contract of some or all of the rights of the contract to a third party. In this case, the contract is the liability insurance policy.
AUDIT	Systematic inspection of accounting records involving analyses, tests, and confirmations.
AUTOMATIC EXTENSION, AUTOMATIC RENEWAL	Continuation of an insurance policy or letter of credit without the need for renegotiation.
BENEFICIARY	One for whose benefit a trust or letter of credit is established.
BOND RATING	An assessment of the credit-worthiness of an obligor with respect to a specific debt obligation (bond). Ratings take the form of letters--e.g. AA, A, B, etc. For purposes of these regulations, Moody's and Standard & Poor's are the only two acceptable bond-rating corporations. See also INVESTMENT GRADE.
CAPTIVE INSURER	An insurance company set up by a company or group of companies to insure their own risks, or risks common to the group.
CASH FLOW	In accounting, a company's net income (sales minus operating expenses) plus allowances for depreciation, depletion, and amortization. Represents the funds available as working capital and for expansion.

Term	Definition
CERTIFIED PUBLIC ACCOUNTANT (CPA)	An accountant with a special state license indicating that he or she meets certain requirements for the public practice of accounting. Although requirements vary from state to state, all must pass a rigorous examination administered by the American Institute of Certified Public Accountants.
CIRCULAR 570	Circular of the U.S. Department of the Treasury, published annually in the Federal Register on July 1. The surety company issuing the surety bond must be among those listed as acceptable sureties on federal bonds in Circular 570.
COLLATERAL	A tangible security or property, usually readily convertible into cash, that is deposited with a creditor to guarantee payment of an obligation. Either the property itself or a document or title to it is held by the creditor until the loan is repaid.
COMMON TRUST FUND	A trust fund into which funds from several individual trusts may be placed.
CORPORATE GUARANTEE	A guarantee by the owner or operator's parent corporation that it will meet all financial assurance obligations specified in the regulations.
COSURETY	Two or more sureties who share one surety bond obligation.
CLOSURE OR POST-CLOSURE INSURANCE	A type of insurance coverage that provides funds for final closure or post-closure care whenever required.

Term	Definition
CURRENT ASSETS	Cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.
CURRENT COST ESTIMATE	The most recent cost estimate which includes any revisions due to changes in plans or inflation adjustments.
CURRENT LIABILITIES	Obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities or those expected to be satisfied within a relatively short period of time, usually one year.
DEPLETION	In accounting, an allowance made for the shrinkage or exhaustion of a natural resource.
DEPRECIATION	In accounting, the method of allocating part of the cost of an asset that will be used up over time to individual accounting periods. The number of accounting periods does not necessarily correspond to the actual life of the asset, i.e., a building that lasts 40 yeas may be depreciated over 10 years. See AMORTIZATION.
DISCLAIMER OF OPINION	Statement that the auditor does not express an opinion on the financial statements of the firm. This statement will cause EPA to disallow the use of the financial test for the firm.

Term	Definition
EXCESS OR SURPLUS LINES	The designation that a state gives to insurance companies which are not licensed to transact business in that state. Because such companies, also known as "non-admitted insurers," cannot be regulated, states include specific regulations for agents and brokers of excess or surplus lines in the broker or agent's license. The state of New York, for example, requires a broker or agent to submit declamations from five licensed (or admitted) insurers stating that the service(s) provided by a particular excess or surplus line cannot be obtained from their firm. Most states also maintain either "black lists" of non-admitted insurers which a broker or agent cannot take on as an excess or surplus line or "white lists" of eligible providers. The Non-Admitted Insurers Information Office (NAIIO) of the National Association of Insurance Commissioners (NAIC) publishes its own "Non-Admitted Insurer's Quarterly List."
EXISTING FACILITY	A facility that was in operation, or for which construction commenced on or before November 19, 1980. A facility has commenced construction if the owner or operator has obtained Federal, state, and local approval to begin construction; and physical construction has begun, or contracts for physical construction have been signed.
FACE AMOUNT OF POLICY	Face value of an insurance policy; the total amount the insurer is obligated to pay under the policy.
FACE VALUE	The value of a security, insurance policy, or letter of credit, expressed as a specific sum of money, which is printed, stamped, or otherwise marked on its face. The face value of a bond is usually the amount the issuer promises to pay at maturity.

Term	Definition
FIDUCIARY	A person whose duty is to act on behalf of another or to protect the interests of another. A trustee is a fiduciary.
FINAL AUTHORIZATION	Approval by EPA of a state program which has met the requirements of §3006(b) of RCRA and the applicable requirements of Part 123, Subparts A and B.
FINANCIAL GUARANTEE BONDS	A type of surety bond under which the surety agrees to pay the penal sum of the bond if the owner or operator fails to fulfill his closure and/or post-closure obligations. Financial guarantee bonds may be used by facilities with interim or general status.
FINANCIAL RATINGS OF INSURERS	Similar to a bond rating, an assessment of the credit-worthiness of an insurance company with respect to its future obligations.
FINANCIAL STATEMENTS	Formal reports of the status of accounts at a particular time, prepared to show the operating results and financial condition of the firm. The statements include the balance sheet, income statement, and statement of changes in financial position.
FINANCIAL TEST	Criteria specified in regulations which an owner, operator, or corporate parent must pass to establish financial assurance.
FORM 10-K, FORM 10-Q	A type of report that U.S. corporations file with the Securities and Exchange Commission. It frequently contains more information than the annual report distributed to stockholders. The 10-K is submitted annually; the 10-Q quarterly.

Term	Definition
GNP DEFLATOR	Weighted price index which reflects the rate of inflation. It is derived by dividing current-dollar Gross National Product (GNP) by constant-dollar GNP. See also INFLATION FACTOR.
GRANTOR	One who creates a trust. Also called a trustor.
INFLATION FACTOR	The price index used to update cost estimates for closure and post-closure care, in order to account for inflation. The index used is the GNP deflator.
INTERIM AUTHORIZATION	Approval by EPA of a state hazardous waste program which has met the requirements of §3006(c) of RCRA and applicable requirements of Part 123, Subpart F. See also PHASE I and PHASE II.
INTERIM STATUS FACILITIES	Existing hazardous waste management facilities for which notification under RCRA Section 3010 and Part A of the RCRA permit application have been submitted. Facility owners and operators with interim status are treated as having been issued a permit until EPA or a State with interim authorization for Phase II or final authorization under Part 123 makes a final determination on the permit application. Facility owners and operators with interim status are not relieved from complying with other State requirements.
INVESTMENT GRADE	A bond or other debt instrument with a rating from Moody's of Aaa, Aa, A, or Baa; or a rating from Standard & Poor's of AAA, AA, A, or BBB.

Term	Definition
IRREVOCABLE	That which cannot be revoked or recalled. All RCRA trusts must be irrevocable. A RCRA irrevocable letter of credit cannot be cancelled unless alternate assurance is substituted or the account party is released from financial requirements.
ISSUER	The party who issues an insurance policy, letter of credit, or surety bond.
JOINTLY AND SEVERALLY RESPONSIBLE	A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Any one of these parties may be liable for the entire amount.
LETTER OF CREDIT	A letter or instrument authorizing that credit up to a particular amount be extended to the person named therein.
LIABILITIES	Probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.
MOODY'S	One of the two bond-rating agencies acceptable for purposes of these regulations. Address: Moody's Investors Service, Inc., 99 Church Street, New York, New York 10007.
NET INCOME	The difference between total sales and total costs of goods sold plus expenses over the fiscal year.
NET WORKING CAPITAL	Current assets minus current liabilities.
NET WORTH	Total assets minus total liabilities and is equivalent to owner's equity.

Term	Definition
NOMINAL SUM	A small amount of money, such as $1.00 or $10.00, with which a standby trust fund is often started.
OBLIGEE	One in favor of whom the surety is obliged in a surety bond. In RCRA surety bonds, EPA is the obligee.
ORIGINALLY SIGNED DUPLICATE	A copy of a document with an original signature.
PARENT CORPORATION	A corporation which directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a "subsidiary" of the parent corporation.
PARENT GUARANTOR	A parent corporation which provides a corporate guarantee.
PAY-IN PERIOD	Period of time during which the owner or operator must make payments into the trust fund. For facilities with interim status, the pay-in period is 20 years or the remaining operating life of the facility as estimated in the closure plan, whichever is shorter. For facilities with general status, the pay-in period is the term of the initial RCRA permit or the remaining operating life of the facility as estimated in the closure plan, whichever is shorter.
PENAL SUM	An amount agreed upon in a bond, to be forfeited if the condition of the bond is not fulfilled. It represents the maximum liability of the surety.
PERFORMANCE BONDS	A type of surety bond under which the surety agrees to either pay the penal sum of the bond or perform the required actions if the owner or operator fails to fulfill his obligation. Performance bonds may only be used for facilities with general status.

Term	Definition
PERMITTED FACILITIES	Facilities which have demonstrated compliance with RCRA standards and have received permits.
PHASE I INTERIM AUTHORIZATION	The first phase of interim authorization of state programs by EPA. It allows states to administer a hazardous waste program in lieu of and corresponding to that portion of the federal program which covers identification and listing of hazardous waste, generators and transporters of hazardous waste, and establishes preliminary standards for hazardous waste treatment, storage, and disposal facilities. States need not have established financial assurance requirements to receive PHASE I interim authorization.
PHASE II INTERIM AUTHORIZATION	The second phase of interim authorization of state programs by EPA. It allows states to establish a permit program for hazardous waste treatment, storage, and disposal facilities in lieu of and corresponding to the federal hazardous waste permit program, including financial assurance requirements for both interim status and permitted facilities. Phase II interim authorization may be granted for treatment and storage facilities only; Phase II authorization is not currently available for disposal operations.
POWER OF ATTORNEY	A written authorization authorizing another to act as one's agent or attorney.
PREMIUM PAYMENTS	The periodic payments of money which the policy-holder agrees to pay the insurer for an insurance policy.
PRINCIPAL	One who establishes a surety bond. In RCRA surety bonds, the owner or operator is the principal.

Term	Definition
PRUDENT MAN STANDARD	An investment rule according to which a trustee may invest in a security only if it is one that a "prudent man" of discretion and intelligence, seeking reasonable income and preservation of capital, would buy.
QUALIFIED OPINION	Statement by an accountant that the financial statements of a firm present fairly the financial condition of the firm, subject to certain conditions, or except for certain limitations.
REINSURANCE	A contract between an insurer or surety and another party, called the reinsurer, in which the reinsurer agrees to protect (reinsure) the insurer or surety against loss on some of its insurance. Reinsurance allows an insurer or surety to share the risk among more parties and issue more policies or bonds within its allowable limits.
REPORT ON EXAMINATION	The independent certified public account's report on the financial statements, support schedules, and footnotes. Often referred to as the accountant's report or the auditor's opinion. The report on examination usually contains two paragraphs -- a scope paragraph and an opinion paragraph. The scope paragraph indicates the financial presentations covered by the opinion and affirms that generally accepted auditing standards and practices have been followed by the auditors. The opinion paragraph contains the accountant's opinion of the financial statements, schedules and footnotes. The opinion can be unqualified, qualified, or adverse; or there can be a disclaimer of opinion. See QUALIFIED OPINION, UNQUALIFIED OPINION, ADVERSE OPINION, and DISCLAIMER OF OPINION.

Term	Definition
RIDER	In insurance, a form adding special provisions to a policy. For RCRA bonds, an optional rider allows the owner or operator to increase the penal sum by up to 20 percent per year without renegotiating the bond.
SECURITIES OR OTHER OBLIGATIONS	Written instruments showing evidence of indebtedness of a business or government or equity ownership of a business. Bonds are securities which bear interest.
SHARE THE RISK	An action in which a surety company or insurance company enters into an agreement with other companies to share a potential obligation. Also called a co-surety agreement, co-insurance, or re-insurance.
SPECIAL REPORT	The independent certified public accountant's confirmation that the financial data in the letter from the Chief Financial Officer were derived from the annual report and need no adjustment.
STANDARD & POOR'S	One of the two bond-rating agencies acceptable for purposes of these regulations. Address: Standard & Poor's Corp., 25 Broadway, New York, New York 10004 or P.O. Box 992, New York, New York 10275.
STANDBY TRUST FUND	A trust fund which must be established by an owner or operator who obtains a RCRA letter of credit or surety bond. The institution issuing the letter of credit or surety bond will deposit into the standby trust fund any drawings by the Regional Administrator on the credit or bond.
SURETY	A person who undertakes to pay money or do any other act in the event that another party fails therein.

Term	Definition
SURETY BOND	A contract in which a party called the "surety", guarantees that certan obligations, such as the payment of money, will be paid if another party fails to perform his obligations.
TANGIBLE NET WORTH	Net worth minus intangible assets, such as goodwill and rights to patents or royalties.
TOTAL LIABILITIES	Total debts owed by a business or individual including all liabilities.
TRUST	A right of property, real or personal, held by one party for the benefit of another. The grantor or trustor creates the trust; the trustee holds the property held in trust; and the beneficiary is the party for whose benefit the trust is created.
TRUST AGREEMENT	The document which establishes a trust.
TRUST FUND	A trust fund establishes a reserve of capital to pay claims for the completion of closure and/or post-closure obligations.
TRUSTEE	The person appointed, or required by law, to execute a trust, i.e., to hold and protect trust assets and invest them according to the "prudent-man standard" and the terms of the trust agreement for the benefit of the beneficiary.
TRUSTOR	One who creates a trust by depositing assets into it. Also called a grantor.
UNDERWRITE (A RISK)	To insure life or property; to assume a risk. In insurance, a person or company undertakes all or part of the risk against theft, fire, death, or whatever the policy stipulates, in exchange for a payment called a premium.

Term	Definition
UNDERWRITING LIMITATION	The maximum amount allowed by law for which a surety can issue a surety bond. The limit may be exceeded if the surety "shares the risk" of the obligation, and then still may not exceed the combined underwriting limitation of those companies.
UNQUALIFIED OPINION	Statement by an accountant that the financial statements of a firm present fairly the financial position, results of operations, and changes in financial position in conformity with generally accepted accounting principles consistently applied.

APPENDIX A

FEDERAL REGULATORY AUTHORITIES

APPENDIX A-1

For information on implementation of the financial assurance regulations, contact the EPA regional offices below:

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont)

Gary Gosbee
Waste Management Branch
John F. Kennedy Building
Boston, Massachusetts 02203
(617) 223-1591

Region II (New Jersey, New York, Puerto Rico, U.S. Virgin Islands)

Helen S. Beggun, Chief
Grants Administration Branch
26 Federal Plaza
New York, New York 10007
(212) 264-9860

Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia)

Anthony Donatoni
Hazardous Materials Branch
6th and Walnut Streets
Philadelphia, Pennsylvania 19106
(215) 597-7937

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee)

Micky Hartnett
Residuals Management Branch
345 Courtland Street, N.E.
Atlanta, Georgia 30308
(404) 881-3016

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin)

Thomas Golz
Waste Management Branch
230 South Dearborn Street
Chicago, Illinois 60604
(312) 886-4023

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas)

Henry Onsgard
Attention: RCRA Financial Requirements
1201 Elm Street
First International Building
Dallas, Texas 75270
(214) 767-2630

Region VII (Iowa, Kansas, Missouri, Nebraska)

Robert L. Morby, Chief
Hazardous Materials Branch
324 East 11th Street
Kansas City, Missouri 64106
(816) 374-3307

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming)

Carol Lee
Waste Management Branch
1860 Lincoln Street
Denver, Colorado 80203
(303) 837-6258

Region IX (American Samoa, Arizona, California, Commonwealth of the Northern Marianas Islands, Guam, Hawaii, Nevada)

Richard Procunier
Hazardous Materials Branch
215 Fremont Street
San Francisco, California 94105
(415) 974-8157

Region X (Alaska, Idaho, Oregon, Washington)

Kenneth D. Feigner, Chief
Waste Management Branch
1200 Sixth Avenue
Seattle, Washington 98101
(206) 442-1260

APPENDIX A-2

FEDERAL REGULATORY AUTHORITIES FOR FINANCIAL INSTITUTIONS AND FINANCIAL MARKETS

I. Regulatory Authorities for Banks

1. Comptroller of the Currency
   Department of the Treasury
   490 L'Enfant Plaza East, S.W.
   Washington, D.C. 20219
   (202) 447-1810

2. Board of Governors of the
   Federal Reserve System
   20th and Constitution Avenue, N.W.
   Washington, D.C. 20551
   (202) 452-3000

3. Federal Deposit Insurance Corporation
   550 Seventeenth Street, N.W.
   Washington, D.C. 20429
   (202) 393-8400

II. Regulatory Authorities for Savings and Loan Institutions

1. Federal Home Loan Bank Board
   1700 G Street, N.W.
   Washington, D.C. 20552
   (202) 377-6000

2. Federal Savings and Loan Insurance Corporation
   1700 G Street, N.W.
   Washington, D.C. 20552
   (202) 377-6600

III. Regulatory Authority for Credit Unions

1. National Credit Union Administration
   1776 G Street, N.W.
   Washington, D.C. 20456
   (202) 357-1050

IV. Regulatory Authority for Financial Markets

1. U.S. Securities and Exchange Commission
500 N. Capitol Street, N.W.
Washington, D.C. 20549
(202) 272-2650

2. Copies of corporate financial reports may be obtained by written request (marked Attn: Public Reference) or may be obtained in person at:

Public Reference Room
U.S. Securities & Exchange Commission
1100 L Street, N.W.
Washington, D.C.
(202) 523-5506

APPENDIX B

STATE REGULATORY AUTHORITIES
(Compiled March 1982)

APPENDIX B-1

STATE AUTHORITIES WHICH REGULATE HAZARDOUS WASTE MANAGEMENT

This Appendix lists the names, addresses, and telephone numbers of state officials to contact for further information about state financial assurance requirements.

Alabama

Alfred S. Chipley, Director
Division of Solid Waste & Vector Control
Environmental Health Administration
Department of Public Health
Union Bank Building, Room 1212
Montgomery, Alabama 36130
(205) 834-1303

Alaska

Thomas R. Hanna
Air & Solid Waste Management
Department of Environmental Conservation
Pouch O
Juneau, Alaska 99811
(907) 465-2666

American Samoa

Pati Faiai, Executive Secretary
Environmental Quality Commission
American Samoa Government
Pago Pago, American Samoa 96799
Overseas Operator (Commercial Call 633-4116)

Arizona

Tilbaldo Canez, Bureau Chief
Bureau of Waste Control
Department of Health Services
1740 West Adams Street
Phoenix, Arizona 85007
(602) 255-1160

Arkansas

Jim Bearden, R.S., Acting Chief
Solid Waste Management Division
Department of Pollution Control and Ecology
P.O. Box 9583
8001 National Drive
Little Rock, Arkansas 72219
(501) 562-7444

California

Dr. Harvey Collins, Chief
Environmental Health Branch
Department of Health Services
744 P Street
Sacramento, California 95814
(916) 322-2308

Colorado

Dr. James Martin, Section Chief
Solid & Hazardous Waste Section
Department of Health
4210 East 11th Avenue
Denver, Colorado 80220
(303) 320-8333

Commonwealth of the Northern Marianas Islands

Carl Goldstein
Division of Environmental Quality
Department of Public Health and Environmental Services
Saipan, Mariana Islands 96950
Overseas Operator (Commercial Call 6984/6114)

Connecticut

Stephen Hitchcock, Director
Hazardous Waste Management Unit
Department of Environmental Protection
State Office Building
165 Capitol Avenue
Hartford, Connecticut 06115
(203) 566-5148

Pat Bowe, Chief
Hazardous Materials Management Unit
Department of Environmental Protection
State Office Building
165 Capitol Avenue
Hartford, Connecticut 06115
(203) 566-5712

Delaware

Kenneth Weiss, Supervisor
Solid Waste Management Section
Department of Natural Resources and
Environmental Control
Edward Tatnall Building
P.O. Box 1401
Dover, Delaware 19901
(302) 736-4781

District of Columbia

James McDermott, Acting Administrator
Office of Environmental Standards
and Quality Assurance
Department of Environmental Services
5000 Overlook Avenue, S.W.
Washington, D.C. 20032
(202) 767-8181

Florida

Robert McVety
Environmental Administrator
Solid Waste Section
Department of Environmental Regulation
Twin Towers Office Building, Room 421
2600 Blair Stone Road
Tallahassee, Florida 32301
(904) 488-0300

Florida (cont'd)

Robert Hawfield
Hazardous Waste Division
Department of Environmental
Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301
(904) 488-0300

Georgia

Moses McCall, III, Chief
Land Protection Branch
Environmental Protection Division
Department of Natural Resources
Room 822
270 Washington Street, S.W.
Atlanta, Georgia 30334
(404) 656-2833

John Taylor, Program Manager
Industrial & Hazardous Waste
Management Program
Land Protection Branch
Environmental Protection Division
270 Washington Street, S.W.
Atlanta, Georgia 30334
(404) 656-2833

Guam

James Branch, Deputy Administrator
EPA, Government of Guam
P.O. Box 2999
Agana, Guam 96910
Overasea Operator (Commercial Call
646-8863)

Hawaii

Melvin Koizumi, Deputy Director
Environmental Health Division
Department of Health
P.O. Box 3378
Honolulu, Hawaii 96801
(808) 548-4139

Idaho

Robert Olson, Supervisor
Solid/Hazardous Materials Section
Department of Health and Welfare
State House
Boise, Idaho 83720
(208) 334-4107

Illinois

John Moore, Manager
Division of Land and Noise Pollution Control
Environmental Protection Agency
2200 Churchill Road, Room A104
Springfield, Illinois 62706
(217) 782-6760

Indiana

David Lamm, Chief
Solid Waste Management Section
Division of Sanitary Engineering
State Board of Health
1330 West Michigan Street
Room A304
Indianapolis, Indiana 46206
(317) 633-0176

Iowa

Charles Miller, Director
Air and Land Quality Division
Department of Environmental Quality
Henry A. Wallace Building
900 East Grant Street, 3rd Floor
Des Moines, Iowa 50319
(515) 281-8853

Kansas

John Paul Goetz, P.E., Chief
Hazardous Waste Management Unit
Department of Health & Environment
Forbes Field
Topeka, Kansas 66620
(913) 862-9360

Kentucky

Roger Blair, Director
Division of Hazardous Materials and Waste Management
Department of Natural Resources and Environmental Protection
1121 Louisville Road
Pineville Plaza
Frankfort, Kentucky 40601
(502) 564-6716

Louisiana

James Hutchinson, Deputy Secretary
Department of Natural Resources
P.O. Box 44396
Baton Rouge, Louisiana 70804
(504) 342-4506

Gerald Healy, Jr., Administrator
Hazardous Waste Management Division
Office of Environmental Affairs
P.O. Box 44066
Baton Rouge, Louisiana 70804
(504) 342-1227

Maine

John Brochu, Director
Bureau of Oil & Hazardous Waste Materials
Department of Environmental Protection
State House -- Station 17
Augusta, Maine 04333
(207) 289-3355

Maryland

Ronald Nelson, Director
Waste Management Administration
Office of Environmental Programs
Department of Health & Mental Hygiene
201 West Preston Street, Room 212
Baltimore, Maryland 21201
(301) 383-2771

Massachusetts

Glen Gilmore, Chief
Hazardous Waste Section
Division of Hazardous Waste
Department of Environmental Quality Engineering
600 Washington Street
Boston, Massachusetts 02108
(617) 727-5431

Michigan

Delbert Rector, Acting Chief
Office of Hazardous Waste Management
Environmental Services Division
Department of Natural Resources
P.O. Box 30028
Lansing, Michigan 48909
(517) 373-3560

David Dennis, Chief
Oil & Hazardous Materials Control Section
Water Quality Division
Department of Natural Resources
P.O. Box 30028
Lansing, Michigan 48909
(517) 373-2794

Minnesota

Dale Wikre, Director
Division of Solid & Hazardous Waste
Pollution Control Agency
1935 West Country Road, B-2
Roseville, Minnesota 55113
(612) 297-2735

Mississippi

Jack McMillan, Director
Division of Solid Waste Management
State Board of Health
P.O. Box 1700
Jackson, Mississippi 39205
(601) 982-6317

Bureau of Pollution Control
Department of Natural Resources
P.O. Box 10385
Jackson, Mississippi 39209
(601) 961-5171

Missouri

Robert Robinson, P.E., Director
Solid Waste Management Program
Department of Natural Resources
P.O. Box 1368
Jefferson City, Missouri 65102
(314) 751-3241

Montana

Duane Robertson, Chief
Solid Waste Management Bureau
Department of Health & Environmental Sciences
Cogswell Building, Room A201
Helena, Montana 59601
(406) 449-2821

Nebraska

Maurice W. (Bill) Sheil, Deputy Chief
Water & Waste Management Division
Department of Environmental Control
Box 94877 Statehouse Station
Lincoln, Nebraska 68509
(402) 471-2186

Nevada

Lewis Dodgin, Administrator
Division of Environmental Protection
Department of Conservation & Natural Resources
Capital Complex
Carson City, Nevada 89710
(702) 885-4670

New Hampshire

Thomas Sweeney, Chief
Bureau of Solid Waste
Department of Health and Welfare
Hazen Drive
Concord, New Hampshire 03301
(603) 271-4610

New Jersey

Lee Pereira, Administrator
Solid Waste Administration
Division of Environmental Quality
P.O. Box CN027
Trenton, New Jersey 08625
(609) 292-9120

New Mexico

Dr. Raymond Krehoff, Program Manager
Solid & Hazardous Waste Management Program
Community Support Services Section
Health & Environment Department
P.O. Box 968, Crown Building
Santa Fe, New Mexico 97503
(505) 457-5271, ext. 282

New York

Norman H. Nosenchuck, P.E., Director
Division of Solid Waste
Department of Environmental Conservation
50 Wolf Road
Room 415
Albany, New York 12233
(518) 457-6603

William Wilkie, Assistant Director
Division of Solid Waste
Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233
(518) 457-6603

North Carolina

O. W. Strickland, Head
Solid & Hazardous Waste Management Branch
Division of Health Services
Department of Human Resources
P.O. Box 2091
Raleigh, North Carolina 27602
(919) 733-2178

North Dakota

Jay Crawford, Director
Division of Environmental Waste Management & Research
Department of Health
1200 Missouri Avenue, 3rd Floor
Bismarck, North Dakota 58505
(701) 224-2392

Ohio

Ernest Neal
Office of Hazardous Materials Management
Ohio EPA
361 East Broad Street
Columbus, Ohio 43215
(614) 466-8934

Ken Schultz
Office of Emergency Response
Ohio EPA
361 East Broad Street
Columbus, Ohio 43215
(614) 466-8934

Oklahoma

H. A. Caves, Chief
Industrial & Solid Waste Services
Department of Health
P.O. Box 53551
1000 N.E. 10th Street, Room 803
Oklahoma City, Oklahoma 73152
(405) 271-5338

Oregon

Ernest Schmidt, Administrator
Solid Waste Management Division
Department of Environmental Quality
P.O. Box 1760
522 S.W. 5th Avenue
Portland, Oregon 97207
(503) 229-5913

Pennsylvania

Donald Lazarchik, P.E., Director
Bureau of Solid Waste Management
Department of Environmental Resources
Fulton Building, 8th Floor
P.O. Box 2063
Harrisburg, Pennsylvania 17120
(717) 787-9870

Gary Galida, Chief
Division of Hazardous Waste Management
Bureau of Solid Waste Management
Department of Environmental Resources
Fulton Building, 8th Floor
P.O. Box 2063
Harrisburg, Pennsylvania 17120
(717) 787-7381

Puerto Rico

Santos Rohena, Associate Director
Environmental Quality Board
Office of the Governor
P.O. Box 11488
San Juan, Puerto Rico 00910
(809) 725-2062

Rhode Island

John Quinn, Jr., Chief
Solid Waste Management Program
Department of Environmental Management
204 Cannon Building
75 Davis Street
Providence, Rhode Island 02908
(401) 277-2808

Louis David, Jr., Executive Director
Rhode Island Solid Waste Corporation
39 Pike Street
Providence, Rhode Island 02903
(401) 277-2808

South Carolina

Robert Malpass, P.E., Chief
Bureau of Solid & Hazardous Waste Management
Department of Health & Environmental Control
J. Marion Simms Building
2600 Bull Street
Columbia, South Carolina 29201
(803) 758-5544

South Dakota

Kevin Tveidt
Environmental Specialist II
Solid Waste Program
Division of Environmental Health
Department of Health
Joe Foss Building
Pierre, South Dakota 57501
(605) 773-3329

Tennessee

Tom Tiesler, Director
Division of Solid Waste Management
Bureau of Environmental Services
Department of Public Health
Capitol Hill Building, Suite 326
Nashville, Tennessee 37219
(615) 741-3424

Texas

Wiley Osborne, P.E.
Hazardous Waste and Resource Recovery Programs Management Division
Bureau of Solid Waste Management
Department of Health
1100 West 49th Street
Austin, Texas 78756
(512) 458-7271

Texas (cont'd.)

Jay Snow, P.E., Chief
Industrial Solid Waste Unit
Department of Water Resources
P.O. Box 13087, Capitol Station
Austin, Texas 78711
(512) 475-2041

Utah

Dale Parker, Director
Bureau of Solid Waste Management
Division of Health
P.O. Box 2500
150 West North Temple
Salt Lake City, Utah 84101
(801) 533-4145

Vermont

Richard Valentinetti, Chief
Air and Solid Waste Programs
Agency of Environmental Conservation
State Office Building
Montpelier, Vermont 05602
(802) 828-3395

John Malter, Chief
Hazardous Materials Management Section
Agency of Environmental Conservation
State Office Building
Montpelier, Vermont 05602
(802) 828-3395

Virgin Islands

Francine Lang
Department of Cultural Affairs
Government of the Virgin Islands
Natural Resources Management Building
2nd Floor, Sub Base
St. Thomas, Virgin Islands 00801
(809) 774-6420

Virginia

William Gilley, Director
Bureau of Solid & Hazardous Waste Management
Department of Health
Madison Building, Room 927
109 Governor Street
Richmond, Virginia 23219
(804) 786-5271

Washington

Earl Tower, Supervisor
Solid Waste Management Division
Office of Land Programs
Department of Ecology
Mail Stop PV-11
Olympia, Washington 98504
(206) 753-6883

Tom Cook, Section Head
Hazardous Waste Section
Department of Ecology
Olympia, Washington 98504
(206) 753-4276

West Virginia

Dale Parsons, Director
Solid Waste Division
Department of Health
1800 Washington Street, East
Room 520
Charleston, West Virginia 25305
(304) 348-2987

John Northeimer
Division of Water Resources
Department of Natural Resources
1201 Greenbrier Street, 2nd Floor
Charleston, West Virginia 25311
(304) 348-5935

Wisconsin

Robert Krill, Director
Solid Waste Management
Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707
(608) 266-1327

Wyoming

David Finley, Supervisor
Hazardous Waste Management
Department of Environmental Quality
Solid/Hazardous Waste Management
401 West 19th Street
Cheyenne, Wyoming 82002
(307) 777-7752

Source: National Conference of State Legislators, Hazardous Waste Management: A Survey of State Laws, 1976-1980 (Update), April 1980.

APPENDIX B-2

STATE AUTHORITIES WHICH REGULATE FINANCIAL INSTITUTIONS WHICH MAY ACT AS TRUSTEE OR ISSUE LETTERS OF CREDIT

This Appendix lists the regulatory authorities which oversee state-chartered financial institutions (banks, savings and loan associations, and credit unions). Some or all of these institutions may be empowered to act as trustee or issue letters of credit in their state. In the list below, the type of institution regulated by each state authority is indicated to the left of that agency (B = banks, including mutual savings banks; S&L = savings and loan associations; CU = credit unions).

ALABAMA

B, S&L — Kenneth R. McCartha
Superintendent of Banks; Savings and Loan Commissioner
State Banking Department
651 Administration Building
Montgomery, Alabama 36104
(205) 832-6255

CU — C. W. Sauls, Jr.
Bureau of Credit Unions
State Banking Department
State Administration Building
Montgomery, Alabama 36104
(205) 269-6255

ALASKA

B, S&L — Willis F. Kirkpatrick, Director
Division of Banking, Securities, and Corporations
Department of Commerce
Pouch D
Juneau, Alaska 99811
(907) 465-2521

ARIZONA

B, S&L, CU — Walter C. Madsen
Superintendent of Banks
State Banking Department
101 Commerce Building
1601 West Jefferson Street
Phoenix, Arizona 85007
(602) 255-4421

ARKANSAS

B — Beverly J. Lambert, Jr.
Bank Commissioner
Bank Department
1 Capitol Mall, 4B-210
Little Rock, Arkansas 72201
(501) 371-1117

S&L, CU — Lee Thalheimer
Securities Commissioner
Arkansas Securities Department
Department of Commerce
1 Capitol Mall, 4B-206
Little Rock, Arkansas 72201
(501) 371-1011

CALIFORNIA

B — Richard M. Dominguez
Superintendent of Banks
State Banking Department
Suite 750
235 Montgomery Street
San Francisco, California 94104
(415) 557-3535 [S.F.]
(213) 736-2479 [L.A.]

S&L — Linda Tsao Yang, Commissioner
Department of Savings and Loan
350 Sansome Street, 2nd Floor
San Francisco, California 94104
(415) 557-3666 [S.F.]
(213) 736-2791 [L.A.]

CALIFORNIA (cont'd.)

CU Jack Carlson, Assistant Commissioner
Licensing and Examination Division
Department of Corporations
600 South Commonwealth Avenue
Los Angeles, California 90005
(213) 736-2741

COLORADO

B, CU Richard B. Doby
State Bank Commissioner
Division of Banking
325 State Office Building
Denver, Colorado 80203
(303) 866-3131

S&L David L. Paul
Savings and Loan Commissioner
Division of Savings and Loan
1525 Sherman Street, Room 110
Denver, Colorado 80203
(303) 866-2384

COMMONWEALTH OF THE NORTHERN MARIANAS ISLANDS

B, S&L Peter Van Nam Esser
Acting Attorney General
Office of the Governor
Commonwealth of the Northern Marianas Islands
Saipan, Marianas Islands 96950
Overseas Operator (Commercial Call 7111)

CONNECTICUT

B, S&L Brian Woolf
Acting Bank Commissioner
Department of Banking
State Office Building
165 Capitol Avenue
Hartford, Connecticut 06115
(203) 566-7580

CU Joseph D. Tirinzoni, Director
Credit Union Division
Banking Department
State Office Building, #234
Hartford, Connecticut 06115
(203) 566-7282

DELAWARE

B, S&L John E. Malarkey
State Bank Commissioner
Kirk Building
15 The Green
Dover, Delaware 19901
(302) 736-4235

FLORIDA

B, CU Gerald A. Lewis
State Comptroller
Office of the Comptroller
Capitol Building
Tallahassee, Florida 32301
(904) 488-0370

S&L Walton S. Kensey
Deputy Comptroller
Department of Banking and Finance
Capitol Buiding
Tallahassee, Florida 32301
(904) 488-0195

GEORGIA

B Edward D. Dunn, Commissioner
Department of Banking and Finance
2990 Brandywine Road, #200
Atlanta, Georgia 30341
(404) 393-7330

S&L, CU Charles W. Burge
Division Director
Department of Banking and Finance
2990 Brandywine Road, #200
Atlanta, Georgia 30341
(404) 393-7330

GUAM

B Jose R. Rivera
Banking Commissioner
P.O. Box 2796
Agana, Guam 96910
(671) 472-6440

GUAM (cont'd.)

S&L Joseph Bamba
Deputy Director
Department of Revenue and Taxation
P.O. Box 2396
Agana, Guam 96910

HAWAII

B, S&L, CU Lester G. L. Wee
Executive Bank Examiner
Bank Examination Division
Department of Regulatory Agencies
P.O. Box 2054
Honolulu, Hawaii 96805
(808) 548-5855

IDAHO

B, S&L, CU Tom D. McEldowney, Director
Department of Finance
700 West State Street, 2nd Floor
Boise, Idaho 83720
(208) 334-3313

ILLINOIS

B William C. Harris, Commissioner
of Banking and Trust Companies
400 Reisch Building
4 West Old State Capitol Plaza
Springfield, Illinois 62701
(217) 782-7966 [Springfield]
(312) 793-2043 [Chicago]

S&L Warren Wilson, Acting Commissioner
Savings and Loan Commission
160 North LaSalle Street, Room 526
Chicago, Illinois 60601
(312) 793-2030

CU Charles Filson
Credit Union Division
Department of Financial Institutions
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2010

INDIANA

B, S&L William T. Ray, Director
Department of Financial Institutions
1024 State Office Building
Indianapolis, Indiana 46204
(317) 232-3960

CU S&L John E. Simmons, Supervisor
Credit Union Division
Department of Financial Institutions
1024 State Office Building
Indianapolis, Indiana 46204
(317) 232-3955

IOWA

B Thomas H. Huston
Superintendent of Banking
Banking Department
530 Liberty Building
418 Sixth Avenue
Des Moines, Iowa 50309
(515) 281-4014

S&L John Pringle, Director
Financial Institutions Division
Lucas State Office Building
Des Moines, Iowa 50319
(515) 281-5491

CU Betty Minor
Credit Union Department
300 Fourth Street, 1st Floor
Des Moines, Iowa 50319
(515) 281-8514

KANSAS

B Roy P. Britton
State Bank Commissioner
Banking Department
818 Kansas Avenue, Suite 600
Topeka, Kansas 66612
(913) 296-2266

S&L Marvin Steinert, Commissioner
Savings and Loan Department
503 Kansas Avenue, Room 220
Topeka, Kansas 66603
(913) 296-3739

KANSAS (cont'd.)

CU John B. Rucker, Administrator
Department of Credit Unions
535 Kansas Avenue, Room 1005
Topeka, Kansas 66603
(913) 296-3021

KENTUCKY

B, Morris R. Smith
S&L, Commissioner of Banking and
CU Securities
Department of Banking and Securities
Public Protection and Regulation Cabinet
911 Leawood Drive
Frankfort, Kentucky 40601
(502) 564-3390

LOUISIANA

B, Hunter O. Wagner
S&L Commissioner of Financial Institutions
Department of Commerce
P.O. Box 44095, Capitol Station
Baton Rouge, Louisiana 70804
(504) 925-4660

CU Gerald Thompson, Staff Examiner
Credit Union Division
Office of Financial Institutions
Department of Commerce
P.O. Box 44095, Capitol Station
Baton Rouge, Louisiana 70804
(504) 925-4660

MAINE

B, H. Donald DeMatteis, Superintendent
S&L, Bureau of Banking
CU Department of Business Regulation
State House Station 36
Augusta, Maine 04333
(207) 289-3231

MARYLAND

B, Joseph R. Crouse
CU Bank Commissioner
Financial Regulation Division
Department of Licensing and Regulation
1 North Charles Street, Room 2005
Baltimore, Maryland 21201
(301) 659-6262

S&L Charles H. Brown, Jr., Director
Division of Building, Savings and Loan Associations
Department of Licensing and Regulation
1 South Calvert Street, Room 60
Baltimore, Maryland 21202
(301) 659-6330

MASSACHUSETTS

B, Gerald T. Mulligan, Commissioner
S&L Banks Division
Executive Office of Consumer Affairs
State Office Building
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-3120

CU Edward Welch
Deputy Commissioner of Credit Unions
Banks Division
Executive Office of Consumer Affairs
100 Cambridge Street
Boston, Massachusetts 02202
(617) 727-9520

MICHIGAN

B — Dr. Martha R. Seger
Commissioner of Finance
Financial Institutions Bureau
Department of Commerce
P.O. Box 30224
Lansing, Michigan 48909
(517) 373-3460

S&L — Richard D. Lake, Director
Savings and Loan Division
Financial Institutions Bureau
Department of Commerce
P.O. Box 30224
Lansing, Michigan 48909
(517) 373-6940

CU — Michael Fitzgerald, Director
Credit Union Division
Financial Institutions Bureau
Department of Commerce
P.O. Box 30224
Lansing, Michigan 48909
(517) 373-6930

MINNESOTA

B — Michael J. Pint
Commissioner of Banks
Banking Division
Department of Commerce
Metro Square Building, 5th Floor
St. Paul, Minnesota 55101
(612) 296-2135

S&L, CU — James G. Miller
Assistant Commissioner
Department of Commerce
Metro Square Building, 5th Floor
St. Paul, Minnesota 55101
(612) 296-2297

MISSISSIPPI

B, CU — Glenn Smith, Commissioner
Department of Banking and Consumer Finance
P.O. Box 731
Jackson, Mississippi 39205
(601) 354-6106

S&L — O. B. Marshall, Commissioner
Savings Associations
State Street Building, Suite 201
633 North State Street
Jackson, Mississippi 39201
(601) 354-6135

MISSOURI

B — Kenneth W. Littlefield
Commissioner of Finance
Division of Finance
515 East High Street
Jefferson City, Missouri 65101
(314) 751-3397

S&L — George McGuire, Director
Division of Savings and Loan Supervision
Department of Consumer Affairs, Regulation, & Licensing
308 East High Street, Room 303
Jefferson City, Missouri 65101
(314) 751-4243

CU — Doyle Brown, Director
Division of Credit Unions
P.O. Box 1607
Jefferson City, Missouri 65102
(314) 751-3419

MONTANA

B Gary Buchanan, Director
Department of Commerce
805 North Main Street
Helena, Montana 59601
(406) 449-3494

S&L Kent Kleinkopf, Director
Department of Business Regulation
805 North Main Street
Helena, Montana 59601
(406) 449-3163

CU L. W. Alke
Financial Division
Department of Business Regulations
805 North Main Street
Helena, Montana 59601
(406) 449-3163

NEBRASKA

B, S&L Paul J. Amen, Director
Department of Banking and Finance
301 Centennial Mall, South
Lincoln, Nebraska 68509
(402) 471-2171

CU John Foley, Assistant Director
Department of Banking and Finance
301 Centennial Mall, South
Lincoln, Nebraska 68509
(402) 471-2171

NEVADA

B James W. Johnson
Superintendent of Banks
Banking Division
Department of Commerce
406 East Second Street
Carson City, Nevada 89710
(702) 885-4260

NEVADA (cont'd.)

S&L, CU Norman T. Okada
Commissioner of Savings Associations, Credit Unions
Savings and Loan Division
Department of Commerce
406 East Second Street
Carson City, Nevada 89710
(702) 885-4259

NEW HAMPSHIRE

B A. Roland Roberge
Bank Commissioner
Banking Department
97 North Main Street
Concord, New Hampshire 03301
(603) 271-3561

S&L, CU Arlan S. McKnight
Deputy Bank Commissioner
Banking Department
97 North Main Street
Concord, New Hampshire 03301
(603) 271-3561

NEW JERSEY

B Michael Horn
Commissioner of Banking
Department of Banking
36 West State Street
Trenton, New Jersey 08625
(609) 292-3420 [Trenton]
(201) 648-6113 [Newark]

S&L William B. Lewis
Deputy Commissioner
Division of Savings and Loan Associations
Department of Banking
36 West State Street
Trenton, New Jersey 08625
(609) 292-5494

NEW JERSEY (cont'd.)

CU John J. Minton
Consumer Credit Bureau
Department of Banking
36 West State Street
Trenton, New Jersey 08625
(609) 292-5466

NEW MEXICO

B Andrew M. Swarthout, Director
Financial Institutions Division
Commerce and Industry Department
Lew Wallace Building
Santa Fe, New Mexico 87503
(505) 827-2217

S&L Snider Campbell
Savings and Loan Supervisor
Department of Banking
Lew Wallace Building
Santa Fe, New Mexico 87503
(505) 827-2217

CU Snider Campbell
Credit Union Division
Department of Banking
Lew Wallace Building
Santa Fe, New Mexico 87503
(505) 827-2217

NEW YORK

B Muriel F. Siebert
Superintendent of Banks
Department of Banking
2 World Trade Center, 32nd Floor
New York, New York 10047
(212) 488-2310

S&L, CU Alan Cohen
Deputy Superintendent
Thrift Institution Division
Department of Banking
2 World Trade Center, 32nd Floor
New York, New York 10047
(212) 488-2380

NORTH CAROLINA

B James S. Currie
Commissioner of Banks
Department of Commerce
P.O. Box 951
Raleigh, North Carolina 27602
(919) 733-3016

S&L George King
Acting Administrator
Office of Savings and Loans
Department of Commerce
P.O. Box 27945
Raleigh, North Carolina 27611
(919) 733-3525

CU Roy High, Administrator
Credit Union Division
Department of Commerce
P.O. Box 25249
Raleigh, North Carolina 27611
(919) 829-7501

NORTH DAKOTA

B, S&L, CU L. M. Stenehjem, Jr.
Commissioner
Department of Banking and
Financial Institutions
1301 State Capitol
Bismarck, North Dakota 58505
(701) 224-2256

OHIO

B Frederick E. Mills
Superintendent of Banks
Division of Banks
Department of Commerce
2 Nationwide Plaza
Columbus, Ohio 43215
(614) 466-2932

OHIO (cont'd.)

S&L Clark W. Wideman, Superintendent
Division of Building and Loan Associations
Department of Commerce
2 Nationwide Plaza
Columbus, Ohio 43215
(614) 466-3723

CU Eugene F. Conkle, Superintendent
Division of Credit Unions
Department of Commerce
2 Nationwide Plaza
Columbus, Ohio 43215
(614) 466-2384

OKLAHOMA

B Robert Y. Empie
Bank Commissioner
State Banking Department
Malco Building, 2nd Floor
4100 Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 521-2783

S&L, CU Wayne Osborn
Deputy Commissioner
State Banking Department
Malco Building, 2nd Floor
4100 Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 521-2783

OREGON

B, CU John B. Olin
Superintendent of Banks
Banking Division
Department of Commerce
Busick Building
Salem, Oregon 97310
(503) 378-4140

OREGON (cont'd.)

S&L Quintin Hess
Corporation Division, Savings and Loan Section
Department of Commerce
State Office Building
1400 S.W. 5th Avenue, Room 206
Portland, Oregon 97201
(503) 229-5530

PENNSYLVANIA

B Ben McEnteer
Secretary of Banking
Department of Banking
P.O. Box 2155
Harrisburg, Pennsylvania 17120
(717) 787-6991

S&L Walter L. Brenneman, Director
Savings Association Bureau
Department of Banking
P.O. Box 2155
Harrisburg, Pennsylvania 17120
(717) 787-7333

CU Robert Sarsfield, Director
Consumer Credit Bureau
Department of Banking
P.O. Box 2155
Harrisburg, Pennsylvania 17120
(717) 787-3717

PUERTO RICO

B Carmen Ana Culpeper
Acting Secretary of the Treasury
Commonwealth of Puerto Rico
P.O. Box 4515
San Juan, Puerto Rico 00905
(809) 725-4815

RHODE ISLAND

B, S&L
Edward L. Blue
Bank Commissioner
Department of Business Regulation
100 North Main Street
Providence, Rhode Island 02903
(401) 277-2405

CU
Peter Nevola
Deputy Banking Commissioner
Department of Business Regulation
100 North Main Street
Providence, Rhode Island 02903
(401) 277-2405

SOUTH CAROLINA

B, CU
Robert C. Cleveland
Commissioner of Banking
State Board of Bank Control
1026 Sumter Street, Room 217
Columbia, South Carolina 29201
(803) 758-2186

S&L
Samuel F. Free
Supervising Examiner, Building and Loan Associations
1026 Sumter Street, Room 217
Columbia, South Carolina 29201
(803) 758-2186

SOUTH DAKOTA

B, S&L
Glen F. Ritterbusch, Director
Banking and Finance Division
Department of Commerce
State Capitol
Pierre, South Dakota 57501
(605) 773-3421

TENNESSEE

B
Thomas C. Mottern
Commissioner of Banking
Department of Banking
James K. Polk State Office Building
505 Deaderick Street
Nashville, Tennessee 37219
(615) 741-2236

TENNESSEE (cont'd.)

S&L
John Neff, Director
Building and Loan Division
Department of Insurance
114 State Office Building
Nashville, Tennessee 37219
(615) 741-3186

CU
Oliver G. Barnett
Assistant Commissioner
Division of Credit Unions
Department of Banking
James K. Polk State Office Building
505 Deaderick Street
Nashville, Tennessee 37219
(615) 741-2236

TEXAS

B
Robert E. Stewart
Banking Commissioner
Banking Department
2601 North Lamar
Austin, Texas 78705
(512) 475-4451

S&L
L. Alvis Vandygriff
Commissioner
Department of Savings and Loan
1010 Lavaca Street, Box 1089
Austin, Texas 78767
(512) 475-7991

CU
John P. Parsons
Credit Union Department
914 East Anderson Lane
Austin, Texas 78753
(512) 837-9236

UTAH

B, S&L, CU
Richard L. Burt
Acting Commissioner
Department of Financial Institutions
10 West 3rd South, Suite 331
Salt Lake City, Utah 84110
(801) 533-5461

VERMONT

B, S&L, CU
George A. Chaffee, Commissioner
Department of Banking and Insurance
State Office Building
Montpelier, Vermont 05602
(802) 828-3301

VIRGIN ISLANDS

B
Henry A. Millin
Commissioner of Banking
Office of the Lieutenant Governor
Government Hill
P.O. Box 450
St. Thomas, U.S. Virgin Islands 00801
(809) 774-2991

VIRGINIA

B
Sidney A. Bailey
Commissioner of Financial Institutions
Bureau of Financial Institutions
701 East Byrd Street, Suite 1600
Richmond, Virginia 23219
(804) 786-3657

S&L, CU
Lewis S. Trueheart
Supervisor of Savings and Loans
Suite 1600
701 East Byrd Street
Richmond, Virginia 23219
(804) 786-3658

WASHINGTON

B
Michael D. Edwards
Supervisor of Banking
Banking and Small Loans Division
Deparmtent of General Administration
General Administration Building
Olympia, Washington 98504
(206) 753-6520

WASHINGTON (cont'd.)

S&L,
R. H. Lewis, Supervisor
Division of Savings and Loan Associations
Department of General Administration
General Administration Building
Olympia, Washington 98504
(206) 753-5597

WEST VIRGINIA

B, S&L
Phyllis Huff Arnold
Commissioner of Banking
Department of Banking
State Office Building 6
Room B-406
Charleston, West Virginia 25305
(304) 348-2294

CU
E. W. Turley
Deputy Commissioner
Department of Banking
State Office Building 6
Room B-406
Charleston, West Virginia 25305
(304) 348-2294

WISCONSIN

B
Thomas E. Pederson
Commissioner
Office of the Commissioner of Banking
30 West Mifflin Street
Room 401
Madison, Wisconsin 53703
(608) 266-1621

S&L
R. J. McMahon
Savings and Loan Commission
131 West Wilson Street
Suite 401
Madison, Wisconsin 53702
(608) 266-1821

WEST VIRGINIA (cont'd.)

CU William Hughes, Commissioner
Credit Unions
310 North Midvale Boulevard
P.O. Box 7960
Madison, Wisconsin 53707
(608) 266-0438

WYOMING

B, S&L, CU Dwight D. Bonham
State Examiner
Office of the State Examiner
819 West Pershing Boulevard
Cheyenne, Wyoming 82202
(307) 777-7797

Source: Adapted from information from the Conference of State Bank Supervisors, National Association of State Savings and Loan Supervisors, and the National Credit Union Administration.

APPENDIX B-3

STATE AUTHORITIES WHICH REGULATE THE ISSUANCE OF SURETY BONDS AND INSURANCE

Surety companies, insurance companies, and their agents are regulated by state insurance departments. This Appendix lists the name, address, and telephone number of the insurance commissioner in each state.

ALABAMA

Tharpe Forrester
Commissioner of Insurance
Department of Insurance
453 Administration Building
64 North Union Street
Montgomery, Alabama 36130
(205) 832-6140

ALASKA

Kenneth C. Moore
Director of Insurance
Division of Insurance
Department of Commerce
Pouch D
Juneau, Alaska 99811
(907) 465-2515

AMERICAN SAMOA

Patricia G. Trammel
Commissioner of Insurance
Office of the Governor
Pago Pago, American Samoa 96797

ARIZONA

J. Michael Low
Director of Insurance
Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007
(602) 255-4862

ARKANSAS

William H. L. Woodyard, III
Insurance Commissioner
Insurance Commission
Department of Commerce
400-18 University Tower Building
Little Rock, Arkansas 72204
(501) 371-1325

CALIFORNIA

Robert C. Quinn
Insurance Commissioner
Department of Insurance
100 Van Ness Avenue
San Francisco, California 94102
(415) 557-3245

or

Robert C. Quinn
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Source: Insurance Information Institute, Insurance Facts, 1981-82 Edition, pp. 73-75.

APPENDIX B-4

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Source: American Institute of Certified Public Accountants.

Exhibit CX70

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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SEP 30 2003

MEMORANDUM

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

FROM: Susan E. Bromm
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Robert Springer
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TO: RCRA Senior Policy Advisors, Regions I - X
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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.

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

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

Table of Contents

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.

[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

[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

[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

[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.

This is a living document and may be revised periodically without public notice.

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Exhibit CX71

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PROFESSIONAL EXPERIENCE

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Enforcement and Compliance Assurance Division
Chemical Safety and Land Enforcement Branch
RCRA Enforcement Section
September 2023 – Present
RCRA Enforcement Technical Advisor

- Plan, organize, and direct the activities of the RCRA Enforcement Section, ensuring that they comply with legal and regulatory requirements.
- Serve as the RCRA Senior Advisor and technical authority by providing advice and expertise to the section's planning and programmatic requirements.
- Provide expert guidance and coaching to compliance monitoring staff on highly technical compliance inspection procedures and complex compliance inspection reports.
- Serve as technical program authority in civil settlement and litigation proceedings. Develop and complete complex enforcement cases.
- Lead CCR Enforcement Workgroup and hold monthly meetings to discuss progress on the implementation of the coal combustion residuals (CCR) Enforcement Strategy.
- Coordinate with ECAD, LCRD, SEMD, EPA HQ, ORC legal staff, state agencies on resources needed to support RCRA and CCR enforcement work.
- Evaluate complex environmental issues with cross media contamination or challenges for multi statute / multimedia actions including CERCLA, SARA, EPCRA, CAA, RCRA, CWA, TSCA, FIFRA, and OPA.
- Collaborated with senior officials inside and outside my agency and/or organization to build consensus for strategic planning purposes.
- Gained cooperation and built consensus among senior level management related to my area of expertise.
- Managed, coached and/or mentored staff.
- Served as a senior staff member to whom others look to for advice and guidance in completing assignments.
- Led teams that resolved technical problems.
- Coordinate enforcement activities, including negotiation of settlements, and strategy development.
- Develop enforcement and compliance commitments for the RCRA Enforcement Section to be incorporated in the Regional Strategic Plan.
- Lead the RCRA Enforcement Section Inspection Targeting Planning Process by identifying and coordinating targets with the state coordinators.
- Ensure that the RCRA Compliance Monitoring Strategy requirements and national priority commitments are met such as environmental justice, climate change, PFAS and CCR via the Inspection Targeting Planning Process.

- Recommend inspection assignments and finalize inspection targets to RCRA Enforcement Section and LSASD staff.
- Develop Regional Priorities, as appropriate and by established deadlines, based on new and existing RCRA enforcement program areas such as PFAS, Coal Combustion Residuals (CCR), RCRA compliance initiatives, RCRA Core Program, environmental justice, e-manifests, and climate change to be incorporated in the Regional Strategic Plan.
- Develop templates and/or standard operating procedures (SOPs) to implement new and existing program initiatives and coordinate integration between the Section and the Branch, Division, and the Region 4 Office of Regional Counsel.
- Update and revise the RCRA Enforcement Section SOPs, as needed.
- Maintain and direct the portion of the SharePoint site related to the Quality Assurance Field Activities Procedure (QAFAP), SOPs, and templates.
- Analyze new and proposed RCRA regulations or program directives related to RCRA enforcement and compliance program areas such as PFAS, CCR, RCRA compliance initiatives, environmental justice, and climate change that may substantially impact the program's way of doing business, as needed.
- Develop a revised CCR Enforcement Strategy for based on the final NECI CCR Implementation Strategy.
- Provide expert advice and assistance to state and/or local governments by answering their direct phone calls and emails within two business days, timeframe provided, or two business days after returning from leave or travel.
- Provide clear briefings/presentations both internally and externally which articulate issues succinctly, with appropriate background and context, including perspectives from state, federal, and/or stakeholders within the specified timeframes.
- Serve as counselor to other recognized senior technical experts and provide regional expertise on highly complex and controversial RCRA compliance monitoring and enforcement issues involving new and existing RCRA enforcement program areas such as PFAS, Coal Combustion Residuals (CCR), RCRA compliance initiatives, RCRA Core Program, environmental justice, and climate change. Exercise supervisory personnel management responsibilities.
- Represent the Agency with a variety of functional area organizations.
- Serve as a technical advisor and assistant to management on issues pertaining to hazardous waste enforcement, remedial action, clean-up, sampling, policy.
- Management or directing activities of the enforcement program, including cost documentation activities, referrals, unilateral administrative orders, administrative orders on consent, judicial consent decrees.
- Develop, research, and interpret policies, regulations, and laws.
- Served as a supervisor, team leader or project coordinator.
- Coached and mentored staff to achieve desired results.
- Evaluated the effectiveness of a complete project or program goal.
- Followed-up with colleagues, team members, and others to ensure timeliness in meeting milestones.

- Participate on national workgroups to develop policies, enhance or refine policies, brief management on policies, and interpret and apply policies in complex situations, including PFAS cross media (Superfund, RCRA, CWA) policies.
- Planned work assignments to be assigned to colleagues, team members, and others.
- Reported progress to senior management.
- Resolved conflicts, differences or problems among colleagues, team members, and others.
- Reviewed completed work for technical adequacy and timeliness.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Enforcement and Compliance Assurance Division
Chemical Safety and Land Enforcement Branch
RCRA Enforcement Section
August 2021 – August 2023
Environmental Engineer/Enforcement Coordinator

- Develop and implement operating procedures to ensure compliance with policy and regulation, including but not limited to the On-site Civil Inspection Procedures Rule, and routine unit operational functions.
- Provide technical and programmatic support to colleges and junior staff, as needed, to support development and mission advancement.
- Provide technical and strategic advice on RCRA Subtitle C enforcement and compliance matters involving diverse stakeholders, including the public, management, private sector, and nontechnical individuals.
- Review all RCRA enforcement documents for technical adequacy and consistency.
- Evaluate RCRA enforcement work products and provide constructive counsel and coaching to achieve program improvement.
- Interpreted or implemented the multiple environmental regulations, including Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Superfund Amendments and Reauthorization Act (SARA), Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA), Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Oil Pollution Act (OPA), National Contingency Plan (NCP), Emergency Planning & Community Right to Know Act (EPCRA), National Environmental Policy Act (NEPA).
- Lead teams of diverse stakeholders to achieve mutually beneficial environmental settlements.
- Evaluate or interpret the use of imminent and substantial endangerment authorities under CERCLA Section 106, RCRA Section 7003, CAA Section 303, SDWA Section 1431, to achieve environmental clean-up in complex environmental situations.
- Provide training related to RCRA enforcement and inspection procedures, SharePoint and electronic routing to managment and staff to better improve business processes.
- Provide training and mentorship to junior staff. and team members to ensure their involvement, understanding and success using the concepts of RCRA.
- Attend all RCRA enforcement meetings.

- Coordinate with technical experts on technical matters and ensure that the appropriate expertise is involved in enforcement matters.
- Develop and issue timely consent agreements and final orders, unilateral orders, complaints, and referrals to the Department of Justice, primarily under Sections 3008, 3013, and 7003 of RCRA. Many of these on RCRA National Compliance Initiative cases.
- Provide advice on development of policy and oversight compliance assurance strategies and priorities, and the establishment enforcement and compliance assurance program evaluation procedures.
- Gained cooperation and built consensus among senior level management related to my area of expertise.
- Provide technical leadership and oversight in the planning and directing of RCRA enforcement program oversight and reviews.
- Develop, arrange, conduct, and/or participate in seminars, workshops, and training courses related to enforcement policies and principles.
- Oversee and conduct case development and enforcement activities involving complex policy and environmental challenges.
- Manage and develop administrative, civil, or criminal enforcement cases and programs.
- Develop policy and procedures for the enforcement programs.
- Manage and use data, for quality and to ensure the effectiveness of the compliance and enforcement programs.
- Review, identify, analyze, and resolve intergovernmental relations issues with an emphasis on environmental enforcement programs.
- Provide technical support to ongoing investigations, enforcement actions, and prosecutions.
- Oversee compliance with orders, settlement agreements and consent decrees.
- Present complex facts on controversial environmental issues/subjects to groups of people with conflicting viewpoints.
- Counsel employees on job performance and conflict resolution and make recommendations for awards and promotions.
- Provide clear and concise communication to groups of people of varying backgrounds to explain regulations, policies, including team members in my organization, supervisors and managers in my organization, legal staff in my organization, business/industry officials, non-technical audiences, scientists and researchers, and State/Local officials.
- Make formal oral presentations to decision-making bodies, advisory boards, and collaborative stakeholder groups.

United States Environmental Protection Agency – Washington, D.C.
Office of Civil Enforcement
Waste and Chemical Enforcement Division
Waste Enforcement Branch
October 2022 – January 2023
Environmental Engineer/Enforcement Coordinator

- Develop and implement operating procedures to ensure compliance with policy and regulation, including but not limited to the On-site Civil Inspection Procedures Rule, and routine unit operational functions.
- Provide technical and programmatic support to colleges and junior staff, as needed, to support development and mission advancement.
- Provide technical and strategic advice on RCRA Subtitle C enforcement and compliance matters involving diverse stakeholders, including the public, management, private sector.
- Manage and use data in support of enforcement activities.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Mission Support Division
Immediate Office
March 2021 – August 2021
Special Assistant to the Director

- As Special Assistant to the Mission Support Division Director, the I am responsible for assisting the Director and the Deputy Director with complex policy issues and coordinating regional office interactions with EPA Headquarters on Strategic Planning and hot issues. The incumbent reports directly to the MSD Division Director.
- Review proposed policies for completeness of analytical evaluations and for coordination within EPA and with other agencies, states, Congress, and outside constituencies, as directed by the Division Director.
- Review briefing papers and policy documents pertaining to prominent and emerging issues for soundness and accuracy to ensure program materials and proposed actions are appropriate. Coordinate closely with the regional Divisions to ensure that the Director is provided with information that is administratively in accordance with agency policy and in a well-presented format. These reviews involve complex issues that have a significant impact on industry and public and environmental well-being. Coordinate with Office Team Leaders, support staff team, other special assistants, scheduler and other key individuals to ensure a smooth flow of documents to ensure appropriate deadlines are met.
- Collaborated with senior officials inside and outside my agency and/or organization to build consensus for strategic planning purposes.
- Identify program issues which involve particularly difficult or sensitive decision-making actions arising in Region 4 related to regulatory policy, science, technology, and/or legislative mandates. This includes major program activities, outputs, and policy regarding implementation of related programs under the various statutes. Use a wide range of qualitative and/or quantitative methods to analyze and synthesize pertinent information on prominent and emerging issues which may impact the Region; anticipate potential questions, problems, or policy issues which subsequently may arise, and brings these to the Division Director's attention. Ensure potentially controversial/complex approaches or positions on prominent and emerging issues are fully analyzed and discussed with appropriate staff and management before decisions are made. Assure quality control of products (i.e. clarity, consideration of alternatives and adequacy of analytical support information). Continually meet with a wide range of Regional program personnel to keep abreast of latest issues and developments to track critical items for the

Division Director. Monitor activity and developments at the national, state and local levels as well as at the EPA Agency level and in the public forum (e.g., in the press) to keep the Division Director fully informed on latest developments, controversies, and positions of various parties involved in or affected by these emerging issues. Review, filter, and analyze incoming information to see that it is communicated and distributed as appropriate in a timely fashion. Collaborate closely with press and relevant program office staff to ensure that adequate and current summary briefings exist on priority substantive programs and issues, and regional reinvention programs. Ensure appropriate coordination and communication with EPA Headquarters on strategic planning and sensitive issues.

- Serve as the liaison between the Divisional program offices. Coordinate activities/issues that need involvement by the Divison Director and Deputy Division Director. Assist the Division Director by communicating agency priorities, direction, and initiatives for the flow of Regional activity. Demonstrate professional judgment and sensitivity to issues which affect EPA to keep Division Director advised and organized and to ensure overall balance of the Division's immediate office. Serve on the Regional Management Committee to address internal management and communication issues. Coordinate special events involving the entire regional office, including staff and management retreats and other regional events and activities.
- Coordinate with the Executive Assistant to ensure that the Division Director's appointment schedule for meetings and events is in accordance with the Regional Administrator's priorities. Serve as focal point for special requests from EPA Headquarters related to priority issues and visits to Atlanta by Agency and other government Officials.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Enforcement and Compliance Assurance Division
Chemical Safety and Land Enforcement Branch
Land, Asbestos and Lead Enforcement Section
February 2020 – March 2021
Environmental Engineer/Enforcement Coordinator

- Develop and implement operating procedures to ensure compliance with policy and regulation, including but not limited to the On-site Civil Inspection Procedures Rule, and routine unit operational functions.
- Provide technical and programmatic support to colleges and junior staff, as needed, to support development and mission advancement.
- Provide technical and strategic advice on RCRA Subtitle C enforcement and compliance matters to diverse stakeholders, including management, private sector, and nontechnical individuals.
- Review all RCRA enforcement documents for technical adequacy and consistency.
- Evaluate RCRA enforcement work products and provide constructive counsel and coaching to achieve program improvement.
- Lead teams of diverse stakeholders to achieve mutually beneficial environmental settlements.
- Participation in FIFRA E-Commerce COVID-19 Product Review Training and enforcement initiative.
- Led a multi-disciplinary, diverse, professional staff or team.

- Counsel employees on job performance and conflict resolution and make recommendations for awards and promotions.
- Develop or review performance plan agreements.
- Provide training related to SharePoint and electronic routing to managment and staff to better improve business processes during COOP.
- Provide training and mentorship to junior staff. and team members to ensure their involvement, understanding and success using the concepts of RCRA and LBP.
- Provide support and organization for the Lead Based Paint Program.
- Act as the Document Control Officer for all RCRA Confidential Business Information after determining the status of all CBI currently secured. Establish an electronic CBI System that tracks the location, dissemination, and destruction of RCRA CBI in Region 4. Ensure that staff are properly trained and documented in the management of CBI. Maintain and organize CBI files in accordance with the regulatory requirements and available guidance and policy.
- Guide and direct a team to successfully develop and implement an enforcement and compliance state oversight and grant review of the Lead Based Paint Program, Renovation and Repair Program, and Lead Abatement in authorized states. Coordinate with staff across divisions to accomplish goals.
- Attend Lead Based Paint, Disclosure show cause meetings.
- Develop consent agreements and final orders on RCRA National Compliance Initiative cases.
- Provide advice on development of policy and oversight compliance assurance strategies and priorities, and the establishment enforcement and compliance assurance program evaluation procedures.
- Provide technical leadership and oversight in the planning and directing of RCRA enforcement program oversight and reviews.
- Develop, arrange, conduct, and/or participate in seminars, workshops, and training courses related to enforcement policies and principles.

Federal Executive Board (FEB) Leadership Government Class President
October 2019 – September 2020

- Organize an execute Executive Lunch and Learns Sessions from June to August 2020.
- Represent the FEB Leadership Government Class at FEB Board Meetings, clearly communicating milestones and career development experienced by the cohort.
- Facilitate effective communication with the FEB Leadership Government Class and outside stakeholders.
- Encourage and organize group events and outings to facilitate team building and career development for the cohort.
- Provide coaching and mentorship to class members on a routine and an ad hoc basis.
- Identify development opportunities not currently in the curriculum and bring them to the FEBs attention for possible inclusion.

- Develop, organize, implement and direct activities of the Mock Interview Pilot Program spanning multiple agencies across the country focused on preparing senior staff and management for career advancement.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Land, Chemicals and Redevelopment Division
RCRA Programs and Cleanup Branch
RCRA Corrective Action Section
January 2017 - February 2020
Environmental Engineer
Corrective Action and Permitting Project Manager

- Manage or direct the development and implementation of effective procedures for the utilization of the Superfund Enterprise Management System in the RCRA Corrective Action Section.
- Ensure that RCRA permits and corrective action projects are managed efficiently and effectively so that they progress through the permitting/corrective action process in a timely, responsible, consistent, and technically sound manner.
- Develop, initiate and implement creative solutions to regulatory and technically complex environmental issues while considering public health impacts, regulatory requirements and precedents.
- Collaborate with all stakeholders to issue RCRA/HSWA permits and/or manage corrective action activities. This will includes working with State and federal officials, the owners and operators of regulated facilities, and REPA contractors to write draft and final RCRA permits, to find solutions to RCRA permitting problems, and to remove obstacles to obtaining RCRA permits or putting other approved controls in place.
- Prepare, direct, review and/or provide meaningful technical feedback on hazardous waste site investigation and remediation, including preliminary assessment, site inspections, engineering evaluation, cost analysis, screening-level or baseline ecological risk assessment, human health risk assessment, remedial investigation reports, feasibility study reports, RCRA facility investigation, field sampling plans, quality assurance project plans, proposed plans, records of decision, statement of basis, and 5-year reviews.
- Review proposed policies using judgement and discretion and prepares comments for management on applicability, completeness, acceptability and impact.
- Facilitate teamwork through communicating frequently with all project participants regarding project goals and expectations. Team-work and collaborative problem-solving will be demonstrated, when applicable. At a minimum, a monthly meetings or conference calls.
- Demonstrate leadership through the anticipation, identification, and/or prevention of problems/impediments or, alternatively, the resolution or elimination of problems/impediments, to achieving project milestones and goals.
- Provide support to project managers and management regarding cost estimating and financial assurance including development, analysis, and negotiation of acceptable cost estimates and financial assurance.

- Provide recommendations to Regional management, States, and colleges on both technically and regulatory complex issues.
- Develop orders and permits ensuring that they: encompass the appropriate steps to address known, suspected, or future releases of hazardous constituents, implement necessary controls to prevent releases, and are enforceable.
- Utilize all RCRA cleanup and enforcement avenues, as appropriate, to achieve project specific cleanup objectives.
- Ensure that all reviews are conducted within a reasonable timeframe and will result in programmatically and technically accurate work products that are supported by regulation, policy, and/or guidance and are clearly understandable, sound, and, as appropriate, enforceable. Resulting in appropriate remediation strategies and ensure the consistent application of action levels.
- Ensure community engagement efforts are conducted at assigned facilities, and that effective communication with the public is facilitated. This includes site fact sheets, public meetings and/or hearings, administrative record, site mailing list development, attendance at local community meetings, response to public comments, etc.
- Provide technical expertise and direction to States, facilities, and their consultants in the issuance of RCRA permits and/or the investigation and remediation of contaminated facilities.
- Maintain sound technical judgment, clearly supported by regulation, policy, or guidance, in the development of permits, technical review comments, and/or response to other RCRA permitting or corrective action documents.
- Provide technical expertise in RCRA permitting, particularly organic air emission requirements, and Financial Assurance in the RCRA permitting and corrective action process.
- Mentor and provide training to other project managers in the concepts of RCRA permitting and corrective action.
- Maintain and demonstrate a working knowledge of the RCRA regulations, policies, and guidance, and provides program advice and support to the Region and States.
- Prepare oral and written analyses on new and proposed rule-makings, evaluating their impact on EPA R4's regulatory resources, regulated enterprises, and the public.
- Serve as RCRA liaison to the public for public inquiries related to the RCRA program.
- Coordinate with EPA Headquarters, EPA Regional offices, State offices, facilities, and any other offices or the public.
- Support Community Engagement efforts in the RCRA Division per the RCRA Division Community Engagement Program Work Plan and supports the goals and objectives of the National OSWER Community Engagement and Environmental Justice Initiatives.
- As Project Coordinator, establish and implement strategy, objectives, and performance measures for assigned projects and determine costs and environmental benefits.

Region 4 United States Environmental Protection Agency
Resource Conservation and Restoration Division, Immediate Office
November 2015 – December 2019
Environmental Engineer

Special Assignment to provide Financial Assurance and cost estimation expertise to the RCR Division (part-time).

- Provide comprehensive review of financial reports, cost estimates, and financial assurance mechanisms submitted directly to the Region 4 Regional Administrator in response to the financial assurance requirements of 40 CFR 264 Subpart F (264.101), 40 CFR 264 Subpart H, and 40 CFR 761 Subpart D (TSCA/PCB). Ensuring financial assurance documentation is adequate, complete and timely.
- Provide comprehensive reviews of financial assurance (FA) mechanisms (instruments) provided to EPA and authorized state environmental agencies to determine compliance with state and federal FA regulations (RCRA and TSCA/PCB).
- Provide comprehensive reviews of environmental restoration cost estimates provided to EPA and authorized state environmental agencies to determine compliance with state and federal FA regulations, guidance and policies.
- Determine that the facility-submitted financial mechanisms are both suitable for the facilities' financial situations and fully meet the specifications of the regulations as to form and content. Make enforcement recommendations to managers when facilities fail to comply with the regulations.
- Develop internal government cost estimates for remediation projects (RCRA, TSCA/PCB, CERCLA, and others) at the request of government stakeholders both within the RCR Division and outside of the Division and Region.
- Develop parametric and detailed in-house cost estimates of the Resource Conservation and Recovery Act (RCRA) and Toxic Substances Control Act (TSCA) regulated facilities in support of the EPA Region 4 RCRA and TSCA/PCB regulatory programs, and as requested by EPA Headquarters, other EPA regions, and state and local environmental agencies.
- Serve as technical and regulatory consultant to EPA headquarters, other EPA regions, and state and local government agencies regarding financial assurance issues, mechanisms and cost estimating practices and procedures.
- Conduct financial assurance reviews of state permitted facilities, identify and clearly communicate any deficiencies to the state and/or the facility. Provide support to the state partners to ensure facility compliance.
- Conduct comprehensive financial assurance record reviews of facilities undergoing RCRA corrective action, permitted RCRA facilities and facilities having PCB approvals.
- Develop detailed and comprehensive in-house cost estimate of RCRA-regulated facilities, environmental restoration projects, and other environmental clean-up projects to determine the adequacy of the facility-prepared cost estimate. Using widely accepted cost estimation techniques and available software and data (CostPro, RACER, Excel, RSMeans, and ECHOS) to develop in house cost estimates.
- Ensure permitted (RCRA) and approved (TSCA/PCB) facilities meet the regulatory requirements for financial assurance by conducting complete reviews of corrective action, clean-up, closure

and post-closure plans, approval, permit and supporting documentation, and the corresponding cost estimates.

- Review new financial assurance instruments, or annual updates to existing ones, to determine their completeness and compliance with the requirements of the regulations.
- Review and analyze cost estimates and financial assurance instruments submitted by regulated facilities or parties and make recommendations for acceptance or modifications.
- Review facility-prepared cost estimates to determine adequacy of the quantities and unit pricing which underlie the financial assurance instruments.
- Review new or existing Corrective Action permits/orders, and TSCA/PCB Approvals issued by EPA to determine the degree of Financial Assurance provision and facility compliance.
- Researching cost data sources to update the financial assurance cost database used to evaluate facility-prepared cost estimates.
- Assisting state agency staff with requests related to financial assurance regulations and policies.
- Represent EPA Region 4 nationally in financial assurance workgroups, including but not limited to monthly financial assurance calls with HQ and the EPA regions and states.
- Work closely with staff and facilities to obtain detailed cost estimates and mechanisms that meet the regulatory and policy requirements. Providing support through cost estimate and financial assurance review resulting in constructive comments which result in the establishment of proper and adequate financial assurance.
- Assist project managers in obtaining financial assurance for corrective action and TSCA/PCB facilities. This assistance includes writing formal letters requesting cost estimates and financial assurance for ongoing activities and/or remedy implementation; development of in-house cost estimates; review of facility generated cost estimates; negotiation of estimated costs using well documented sources and policy; and review of financial assurance submittals.
- Coordinate with financial assurance coordinators in EPA Headquarters, other EPA Regions and in state agencies to facilitate the uniform dissemination and application of financial assurance regulations and policies.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Resource Conservation and Restoration Division
RCRA Enforcement and Compliance Branch
December 2010 – January 2017
Environmental Engineer

RCRA and TSCA/PCB Inspections and Reviews

- Routinely coordinate and lead environmental compliance evaluation inspections, follow-up inspections, focused compliance inspections, case development inspections, inter and intra-Agency briefings, interviews, and facility briefings, including sampling efforts, with
- State Agencies, other EPA regional program media and support offices, criminal investigators, and other Federal Agencies to determine regulatory compliance.

- Conducted more than 150 lead inspections at complex regulated facilities determining compliance with applicable RCRA and/or TSCA/PCB statutory, regulatory, permit/approval, and enforcement instruments in accordance with current Agency policies and guidance.
- Routinely and independently conduct site inspections of regulated facilities, involving landfills, incinerators, boilers, research and development, voluntary clean-up, remediation, decontamination, and/or storage, including the collection of environmental data, review of applications, permits, and approvals.
- Provided regulatory and technical compliance assistance to the RCRA and TSCA/PCB regulated communities.
- Provided technical and regulatory advice to management and supervisors on complex, highly visible, and politically sensitive environmental projects, making recommendations for next steps based on technical expertise, interpretation, and implementation of regulations, Agency policy and guidance.
- Independently identified more than 40 separate facilities in significant non-compliance with the applicable RCRA and/or TSCA/PCB statutory, regulatory, and permit/approval requirements requiring further action.
- Promptly written reports detailing complex process-based inspections and regulatory requirements.
- Researched and interpreted facility environmental compliance records, applications, permits, approvals, sampling results, annual reports, and confidential business information.
- Provided substantive comments from an enforcement and compliance perspective on RCRA and TSCA/PCB applications, permits and approvals in coordination with permit/approval application and/or renewal.
- Issued formal information requests to related entities identifying key documentation to ensure compliance with the applicable State and Federal regulations.
- Completed non-financial record reviews in the field as part of routine inspections, in follow through to requests for information, and in support of Regional Enforcement Priorities.
- Completed appropriate RCRA Info data entry, Integrated Compliance Information System inspection forms, environmental justice evaluations, environmental justice forms, and updates branch data systems.
- Significantly contributed to the accomplishment of the ROECB Annual Commitment System (ACS) enforcement commitments per fiscal year.
- Provided both effective and professional communication with a variety of public and private stake holders conveying the Agency's interests and position in support of the Agency's Mission and Objectives.
- Provided training and mentorship to team members to ensure their involvement, understanding and success.
- RCRA and TSCA/PCB Case Development, Project Management, and Enforcement Activities
- Independently plan and carry out environmental protection projects and programs which involve the independent determination of approach, methods, conflict resolution, coordination, and goal establishment.

- Provide leadership to teams working on a variety of different environmental projects with numerous stake holders.
- Coordinated enforcement activities with all stake holders, involving regional or national experts, and the National Enforcement Investigation Center, as appropriate.
- Lead or co-lead the development of enforcement strategies, inspection planning, information gathering, by leading environmental inspections to determine regulatory compliance, develop compliance strategies to comply with environmental laws and regulations, conduct monitoring of compliance schedules for regulated entities, provide advice on compliance with environmental laws and regulations, analyze data and prepare analyses to support enforcement and compliance priorities, interact with state and federal organizations on environmental compliance, participate in the development of policies and regulations.
- Worked collaboratively with agencies to facilitate information exchange, solve problems, build partnerships, and develop lasting working relationships.
- Worked collaboratively with the State and local Agencies to ensure that they are knowledgeable about the Federal enforcement cases brought by EPA in their respective Agency, as necessary.
- Manage and use data in support of enforcement activities.
- Develop and/or contribute to briefing papers, presentations, regulatory position summaries, administrative records, public notices, regulatory training, and other case and/or program development documents and support.
- Calculated penalties in accordance with the most recent penalty policies and developed correlating penalty justification memo.
- Developed administrative, civil, and criminal enforcement cases, using Agency enforcement policies and procedures.
- Provided technical support to ongoing investigations, enforcement actions, and criminal prosecutions, including oversight of orders with ongoing corrective action, compliance activities, and settlement agreements.
- Reviewed and provided technical comments on applications, permits, approvals, work plans and proposals.
- Oversight of facilities with ongoing environmental clean-up, and/or compliance activities involving challenging technical and scientific factors, sensitive political and community involvement, multi-stakeholder concerns, multiple responsible parties, and highly profiled via various public media outlets, while ensuring that all milestones, including removal, treatment, and construction, were met within allowable timeframes in accordance with applicable State and Federal policy, guidance, and orders.
- Oversight of compliance with orders, settlement agreements, and consent decrees.
- Developed written products for review or presentation to higher-level officials which include materials for briefings, meetings, conferences, memorandum, formal correspondence, procedural materials, standard operating procedures, correspondence which consolidates input from several different sources, technical reports that include recommendations, advice, analytical data, and interpretation and application of RCRA and TSCA/PCB regulations.

- Participated in the negotiation team (regional management, attorney, and DOJ attorneys, as appropriate) with the goal to settle and resolve enforcement cases within reasonable timeframes.
- Drafted for review and execution complex technical, and legal documents including. The documents prepared include inspection reports, case development documents, show cause letters, notices of violations, State notifications, formal enforcement documents, consent agreements, compliance orders, administrative orders, referrals, work plans, and other documents needed to support environmental programs and projects.
- Developed various written materials for audiences with various background including employees, managers, other federal agencies and departments, state and local governments, the general public, congress, senior government officials, private industry, and public interest groups.
- Drafted case summaries and recommendations addressing complex issues on development of enforcement cases, environmental regulations and policies.
- Prepared presentations to team members, supervisors, managers, academic faculty, government and private organizations, external audiences and private organizations.
- Completed an environmental justice review, and the appropriate data sheets for each final enforcement action.
- Competed data entry and associated forms into regional and national databases following the filing of an enforcement action.
- Reviewed regulated facilities' self-disclosure evaluations and documented results in memoranda to Office of External Affairs.

RCRA Hazardous Waste State Coordination

- Served as RCRA State Coordinator to the State of Mississippi from January 2011 to September 2014, and to the State of Georgia from October 2014 to present.
- Collaborated with national, regional, and State workgroups and colleagues to identify facilities and industry sectors that merit inspection or further investigation by Region 4 EPA, RCR Division inspectors each fiscal year.
- Targeted RCRA and TSCA/PCB EPA lead inspections to be conducted in the State during the fiscal year based on regional and national priorities outlined in the National Program Manager's Guidance and Compliance Monitoring Strategy, compliance assistance, database mining, complaints, cross-State and/or cross-media violators, and coordination with other Federal Agencies (i.e. the Department of Transportation and the Occupational Safety and Health Administration).
- Completed environmental justice reviews of each facility targeted for inspection.
- Worked closely with colleagues and the States to ensure that EPA regional inspection commitments in the State are met and that joint and oversight activities are coordinated in accordance with Agency and State policy and procedures.
- Worked collaboratively on a regular basis with the Federal and State Agencies, and non-governmental stakeholders to facilitate information exchange, problem solving and partnership building.

- Oversight of the State RCRA compliance and enforcement program by monitoring Federal and State databases (RCRAinfo, ECHO, OTIS, etc.) and holding regular conferences, ensuring that the State was meeting their Federal grant inspection commitments and enforcement process requirements in accordance with the appropriate Memorandum of Agreement, and the EPA Enforcement Response Policy.
- Monitored and utilized data from Federal and State databases to conduct oversight of the State's RCRA compliance and enforcement program throughout the year.
- Coordinated and conducted Enforcement Response Policy conferences (either in person or via teleconference) to discuss the findings of regular oversight of the State's inspection and enforcement activities, with State enforcement managers, and documented these meetings in formal reports, documenting the enforcement status of on-going case.
- Reviewed State data reporting to RCRAInfo to ensure that compliance and enforcement activities are promptly and adequately entered.
- Worked closely with the State to reconcile RCRAInfo data entry errors and processes.
- Ensured that the State is achieving national program consistency by reviewing the State's data listed on quarterly national watch list and provided watch list updates on-going enforcement cases lead by the State Agency and EPA, as appropriate.
- Annually reviewed the draft State grant work plan to ensure consistency with State and Federal policy.
- Conducted and documented a comprehensive, annual review of the State's compliance and enforcement program using the memorandum of agreement between the State and EPA, the EPA Enforcement Response Policy, State's Grant Work Plan, and data available through government databases.
- Provided clear and precise formal end-of-year report documenting the findings of the State's annual grant review.
- Participated in the Annual Review Pre-Exit Briefing and Exit Briefing.
- Participated and contributed to the State Review Framework program review in the assigned States.
- Provided compliance assistance by resolving complaints/inquiries received through the Regional compliant tracking system, by investigating, or forwarding the compliant to the appropriate party for investigation.
- Worked closely with the State to respond to citizen complaints, to organize compliance and enforcement activities, and to oversee emergency response activities.
- Reviewed, identified, analyzed, and resolved inter-governmental relations issues with environmental enforcement program.
- Provided compliance assistance in the office and in the field to the regulated communities.
- Provided technical advice and guidance on the implementation, compliance assistance, and evaluation of and for environmental regulations and/or programs.
- Responded to citizen concerns directly via control correspondence letters.

- Ensured that State counterparts had availability to and are made aware of relevant training opportunities and used data in support of enforcement activities for sites with hazardous waste, contaminants and materials.

Special Projects

- Developed and implemented the ROECB Tracking Database with tracks the group's annual inspection and enforcement commitments and individual project development, as well as electronic routing.
- Participated in the National Inspection Process Workgroup, representing Region 4, on the team discussing opportunities to improve the inspection process.
- Served as a member on the ROECB Enforcement Process Team, which was a team that volunteered to conduct a review of current processes to improve efficiency within the branch. This work serves as the basis of the new ROECB enforcement process.
- Worked closely with EPA Headquarters to develop policy relevant to the RCRA environmental enforcement program.

Region 4 United States Environmental Protection Agency – Atlanta, Georgia
Resource Conservation and Recovery Act Division
RCRA Enforcement and Compliance Branch
May 2010 – December 2010
Environmental Technician

Reviews and Inspections

- Provided technical and cost estimate support to the Region 4, Resource Conservation and Recovery Act Division.
- Conducted environmental reviews of closure and post closure plans submitted by RCRA and TSCA-PCB regulated facilities with special emphasis on phosphate mineral processing facilities negotiating multi regional consent decrees at a national level.
- Routinely attended conferences, meetings, and negotiations related to the mineral processing initiative.
- Conducted engineering evaluations of environmental work plans submitted by regulated entities in compliance with regulatory requirements.
- Analyzed cost estimates related to facility closure.
- Developed internal closure cost estimates, for corrective action, remediation, closure and post closure activities, using cost estimating software and generally accepted engineering principles to determine the adequacy of financial assurance instruments.
- Conducted research to determine average pricing for both construction/demolition and environmental impacts found in work plans.
- Conducted market research and trend analysis for major contributing variables.

- After careful consideration of proposed closure plan and scrutiny review of all associated cost estimates the facilities financial assurance mechanisms were analyzed for compliance with governing regulations.
- Assisted in unannounced RCRA facility inspections and record review.
- Communicated findings in appropriate media to management and other regulatory agents.
- Reviewed and evaluated hydrocarbon spills reported to the National Response Center for possible enforcement.
- Reviewed an oil spill caused by Flavor House for potential OPA spill violations and issued a letter of No Further Action to the file.

EDUCATION

Georgia Institute of Technology, Atlanta, Georgia
Bachelor of Science, Civil Engineering – December 2010, with Honors
Dean's List: Fall 2008, Fall 2009, and Spring 2010

PROFESSIONAL AWARDS AND RECOGNITION

2023 Friend of ORCR Award – for my effort in e-Manifest Enforcement, July 2023
OLEM National Notable Achievement Award for Outstanding Approaches to Achieve Permitting or Corrective Action Program Goals, May 2023
Region 4 Bronze Awards, 2018 and 2020
Atlanta Federal Executive Board 2018 Employee of the Year - Outstanding Law Enforcement, August 2018
National Notable Achievement Award for Outstanding Use of Innovative Approaches to Achieve RCRA Permitting, September 2018
Women Inspiring Innovation through Imagination – Nominee, March 20, 2013
Go for Green, January 2013
Enforcement Officer of the Quarter, January 2012
Time Off and/or Monetary Awards, Fiscal Years 2011-2023

PROFESSIONAL TRAINING

5-Day RCRA Seminar (McCoy)	November 2, 2023
RCRA AIR NCI Training	October 24, 2023
8 Hour HAZWOPER Refresher (annually since 2011)	August 2023
Emotional Intelligence Training	September 13, 2022
Public Involvement Training	August 31, 2022
National SEP Refresher Training for Enforcement Personnel	June 7, 2022
Imminent and Substantial Endangerment (ASE) Cross-Statute Training	June 1, 2022
Microaggressions Training	July 19, 2022
Groundwater Restoration Policy Training	February 9, 2022

PFAS Training Lawline	September 27, 2021
Civil & Criminal Environmental Enforcement Training	September 27, 2021
RCRA Targeting Tool Training	February 11, 2021
Mock Interviews	May 2021
PFAS Training	October 15, 2020
Metabase Training	October 14, 2020
Negotiations Training	October 13, 2020
Federal Executive Board Leadership Government Program	September 24, 2020
Paradigm 360 Executive Coaching Certification	September 24, 2020
Lean Six Sigma Green Belt Certification	September 10, 2020
META Leadership	August 12-13, 2020
Atlanta FEB Basic Mediation Skills	August 3-7, 2020
Emotional Intelligence	May 21, 2020
Speed Mentoring	March 10, 2020
ECQ Writing Course	January 13-16, 2020
Servant Leadership	December 12, 2019
Lean Six Sigma Green Belt Training	November 2, 2019
Lean Six Sigma Yellow Belt Certification	May 22, 2018
Respirator Training	February 14, 2018
First Aid and CPR (biannually)	January 31, 2018
Cost Estimation Training and RACER	July 31, 2017
BEN and ABLE Training	March 1, 2017
Organic Air Emission National Enforcement Initiative Training	January 23, 2017
RCRA Under Reporters Training	April 6, 2016
McCoy's Advanced RCRA Topics	February 5, 2016
RCRA Organic Air Emission Standards	September 21, 2016
RCRA Permit Writer’s Training	August 27, 2015
CostPro Training	January 20, 2015
Certified Hazardous Material Manager Course	November 6, 2014
RCRA CBI Management (with req. annual recertification)	April 17, 2013
5-Day RCRA Seminar (McCoy)	November 2, 2012
Advance Hazardous Waste Management Training	March 13, 2012

Brooke York

york.brooke@epa.gov (404)562-8025

PCB Management and PCB Record Keeping	September 22, 2011
40 Hour HAZWHOPER	February 10, 2011
OECA Inspection Manual	February 7, 2011
Initial Confidential Business Information Training	January 31, 2011
RCRA Inspector Training	January 6, 2011
Basic Inspector Training	December 30, 2010
RCRA Fundamentals	December 23, 2010
RCRA Enforcement Practitioners Training	June 9, 2010

Exhibit CX72

JUSTIN ABRAMS
abrams.justin@epa.gov
202-564-2190

PROFESSIONAL EXPERIENCE

US Environmental Protection Agency - October 2011- Present

Accountant 0510-GS13 2022-Present
HQ OECA

- Current work is directly related to previous regional work listed below with the substantive change being that the work is now at a national level and assist all 10 EPA regions rather than the direct POC.

Accountant 0510-GS12 2013-2022
Region 5

- Review financials for financial position and determine impairment or strength when the agency receives an ATP claim based on sought after fine/penalty- this includes reviewing IRS tax forms, Financial Statements in which the ABEL model is used to calculate the necessary financial parameters in the aid in making a determination on the ATP claim.
- Manages over $750M in assets held in a contingency fund required under Federal Regulations (financial assurance) related to environmental clean-up operations spanning a 5-state region.
- Ensures that the Financial assurance is transparent, accurate and meets all necessary required parameters, more specially related to the financial test in ensuring those metrics are meet and determining the risk assessed to the provided financial test and respondent and or entity related.
- Prepares, examines, and analyzes accounting records, financial statements and other financial reports of private and public companies ranging in size from tens of thousands to multi-million dollars to assess accuracy, completeness, and compliance with national reporting and procedural standards.
- Produce and manage site specific payroll charging reports for management use and oversight
- Provides timely, relevant and accurate reporting and analysis of the results of the division's performance against historical, budgeted, forecasted and strategic planning results to assist in determining progress towards the achievement of the budget and strategic plan.
- Proficient in data mining methods utilized for extracting relevant information for reports and presentations as requested by upper management.
- Prepares ad hoc analyses, performance reports, charts, tables, and other exhibits as requested to assist management in evaluating special projects in a timely manner using SAP BO and Oracle based BI systems functioning in both the drag and drop option as well as the SQL.
- Demonstrates and applies an appropriate understanding and a working knowledge of accounting principles, including those issued by the Governmental Accounting Standards Board, and internal controls.
- Creates current business process flow charts for use by upper management using Igrafx program.
- Performs special projects to improve process efficiency and performance as assigned by upper management and implementing Lean Six Sigma.
- Facilitates meetings to identify non-value-added process and seeks solutions by utilizing the standards of lean principles, techniques, and methodologies to include value stream mapping, 5-S, Kanban, Kaizen, quick changeover, six sigma quality, and design for lean. This has resulted in the savings of approximately 200 man hours expanding across 8 different lean events and divisions.
- Extracting data sets into Microsoft Excel to create data analysis on an ad hoc basis and implementing necessary financial modeling.
- Use Microsoft Access to develop data sets to construct a universe to use for reporting and analysis.
- Oversee the updates for portions of the intranet and make changes as requested using Dreamweaver (HTML5 and CSS) web design tool.

Financial Analyst-May 2013-August 2013

- Analyzed financial documents submitted as part of regulatory requirements.
- Reviewed and analyzed financial statements to ensure accuracy and compliance with federal regulation.
- Tested and implemented the data repository that is used to track and control the financial contingency program.
- Lead the redesign and implementation of a new business process used to control and ensure proper financial documentation was efficient and timely.

Administrative Program Assistant –October 2011-May 2013

- Redesigned, implemented and managed the business model and operational procedures under the delegated discretion of the Branch Program Manager.
- Recorded all expenditures including but not limited to travel, training and payroll.
- Supported team meetings with required documentation, reports and research.

- Managed schedules and procedures for staff and supported regional team meetings with clients.
- Supervise clerical staff and provide training and orientation to new staff.

US ARMY FT. KNOX, KY- March 2011- September 2011

Cavalry Scout–Squad Leader

- Served as a squad leader in charge of 4-6 subordinates.
- Operated as the Commander's eyes and ears in the line of duty providing real time information.
- Engaged the enemy with anti-armor weapons and scout vehicles in the field, tracked and reported enemy movement and activities, and directed the employment of various weapon systems on to the enemy.

ADDITIONAL SKILLS

- Advanced proficiency in Microsoft Office Suite; Excel (Pivot tables, v+h look up's, macros and VBA programming), PowerPoint, Word and Access
- Advanced proficiency in SAP Business Objects 4.2, Hana, Lumira, data manipulation/mining, SQL and Postgre SQL, Oracle BI
- Advanced proficiency Dreamweaver HTML5 CSS web design
- Advanced proficiency Igrafx flow chart used to create business models to develop efficiencies
- Lean Six Sigma Green Belt Certified

EDUCATION

AMERICAN INTERCONTINENTAL UNIVERISTY HOFFMAN ESTATES,IL
MBA-Accounting and Finance,Feb2012

AMERICAN INTERCONTINENTAL UNIVERSITY HOFFMAN ESTATES,IL
BBA-Accounting and Finance,Sep2010

Exhibit CX73

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revised Penalty Matrices for the RCRA Civil Penalty Policy

FROM: Gregory Sullivan, Director
Waste and Chemical Enforcement Division

GREGORY SULLIVAN
Digitally signed by GREGORY SULLIVAN
Date: 2024.02.14 13:41:10 -05'00'

TO: RCRA Branch Chiefs, Offices of Regional Counsel and Regional Enforcement and Compliance Assurance Divisions

This memorandum transmits updated penalty matrices for the 2003 RCRA Civil Penalty Policy (RCRA Penalty Policy). The matrices were updated to reflect the change to the RCRA Penalty Policy made by the January 10, 2024, memorandum from David M. Uhlmann (the 2024 Uhlmann Memorandum),[1] which increased RCRA penalty amounts to account for inflation. The 2024 Uhlmann Memorandum also referred to and discussed the 2024 Civil Monetary Penalty Adjustment Rule,[2] which was promulgated under the Federal Civil Penalties Inflation Adjustment Act Improvement Act to adjust the statutory maximum and minimum civil penalties under the various environmental laws implemented by EPA to account for inflation.

The 2024 Uhlmann Memorandum adjusts the 2003 RCRA Penalty Policy matrices upward by a multiplier of 1.91827 and the attached matrices reflect that adjustment. As set forth in the 2024 Uhlmann Memorandum, these matrices should be used for violations occurring after November 2, 2015. For violations occurring on or before November 2, 2015, use the RCRA Penalty Policy adjustment multiplier listed in the December 6, 2013, inflation adjustment memorandum entitled, *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013).*[3]

Any questions concerning the updated matrices can be directed to Pete Raack in the Waste and Chemical Enforcement Division by emailing him at raack.pete@epa.gov.

Attachment

[1] https://www.epa.gov/system/files/documents/2024-01/amendmentstotheepacivilpenaltypolicyinflation011524.pdf
[2] 88 Fed. Reg. 89,309 (Dec. 27, 2023).
[3] https://www.epa.gov/enforcement/amendments-us-environmental-protection-agencys-civil-penalty-policies-account-inflation

RCRA Civil Penalty Policy – Updated Subsequent to 1/10/24 D. Uhlmann Memorandum

Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2024)

INITIAL GRAVITY MATRIX

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$52,752 to $42,202	$42,201 to $31,651	$31,650 to $23,211
MODERATE	$23,210 to $16,881	$16,880 to $10,550	$10,549 to $6,330
MINOR	$6,329 to $3,165	$3,164 to $1,055	$1,054 to $211

RCRA Civil Penalty Policy – Updated Subsequent to 1/10/24 D. Uhlmann Memorandum
Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2024)

MULTI-DAY MATRIX OF MINIMUM DAILY PENALTIES (in dollars)

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$10,550 to $2,110	$8,440 to $1,583	$6,330 to $1,161
MODERATE	$4,642 to $844	$3,376 to $528	$2,110 to $317
MINOR	$1,266 to $211	$633 to $211	$211