



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of CERCLA Financial Assurance Guidance, Updated and New Sample Mechanisms, and Model Language Provisions for Unilateral Administrative Orders

FROM: Cynthia L. Mackey, Director
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TO: Regional Counsels, Regions 1-10
Superfund National Program Managers, Regions 1-10

I. INTRODUCTION

This memorandum transmits guidance, sample, and model language documents that address financial assurance (FA) requirements in cleanup settlement agreements and orders. The guidance and documents, issued under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), were developed in collaboration with Regional, Headquarters (i.e., Office of Civil Enforcement, Office of General Counsel, Office of Resource Conservation and Recovery, and Office of Superfund Remediation and Technology Innovation), and Department of Justice (DOJ) staff. The documents include:

- 1) "Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders" (see Section II below);
- 2) Updates to six previously-issued sample FA mechanisms for use in connection with settlement agreements (see Section III below);
- 3) Model language provisions for use in all unilateral administrative orders (UAOs) addressing FA and Work Takeovers (see Section IV below); and
- 4) Six new sample FA mechanisms for use in connection with UAOs.

These documents further the Agency's commitment to facilitate cleanups through the imposition of FA requirements in the cleanup enforcement program and to provide transparency in the use of our Superfund authority.

The transmittal memorandum, guidance document, sample mechanisms, and model FA provisions for UAOs are available from the Orders-unilateral category of the [Superfund Enforcement Policy and Guidance Database](#). The sample FA mechanisms for settlements and orders are also available from the Financial Assurance categories of the [Cleanup Enforcement Model Language and Sample Documents Database \(“Models Database”\)](#). The documents are effective today, and we intend to incorporate the model UAO FA language into fully revised UAO models as they are issued. Case teams are encouraged to use the guidance and model/sample documents to address site-specific issues as they arise.

II. GUIDANCE ON FA IN CERCLA ENFORCEMENT CONTEXT

As detailed in the guidance, FA requirements set forth in enforcement documents protect human health and the environment by ensuring that adequate financial resources are available for cleanups. These FA requirements serve the dual purpose of providing protection in the event of default by potentially responsible parties (PRPs) on their cleanup obligations (whether due to financial difficulties, recalcitrance, or otherwise) and preserving limited Superfund resources.

FA has become an increasingly important part of EPA’s Superfund enforcement program. In recent years, FA has been identified by the Office of Enforcement and Compliance Assurance as a national enforcement initiative for the CERCLA and the Resource Conservation and Recovery Act enforcement programs, and it continues to be a vital component of the Agency’s core CERCLA enforcement program. EPA has gained considerable experience on FA matters over time. Accordingly, the guidance is designed to build upon the extensive knowledge developed and to encapsulate lessons learned by Agency attorneys and FA specialists.

III. REVISED SAMPLE FA MECHANISMS FOR SETTLEMENTS

The updates to the sample FA mechanisms being released today supersede the samples issued between 2004 and 2006¹ and improve upon those prior samples to ensure more effectively that cleanups are completed as contemplated in settlements. The following are some of the more notable updates to the samples, which are for use in connection with settlement agreements (e.g., consent decrees and administrative orders on consent) rather than in UAOs (see Section IV below):

- Introductory notes that identify general areas of concern (e.g., that FA mechanism language should be consistent with settlement language);
- Placeholders for case teams to elicit contact information from settling defendants and FA providers and to identify whom at EPA will receive FA documentation (Regional official, site attorney, FA specialist, etc.);

¹ Specifically, we are superseding in full the samples included in the following transmittal packages, as those samples are the six that we are reissuing in full today: *CERCLA Financial Assurance Tools: Letter of Credit* (Dec. 15, 2004); *CERCLA Financial Assurance Tools: Surety Bonds* (Aug. 12, 2005) (samples for payment and performance bonds); *CERCLA Financial Assurance Tools: The Financial Test* (Feb. 14, 2006); *CERCLA Financial Assurance Tools: The Corporate Guarantee* (Apr. 7, 2006); *CERCLA Financial Assurance Tools: Trust Funds* (Sept. 26, 2006).

- Revisions to better harmonize language in FA mechanisms and settlement agreements relating to EPA’s demands for guaranteed funds or work; and
- Changes to streamline the sample corporate guarantee.

The 2014 revised model RD/RA consent decree (RD/RA CD) requires settling defendants to provide FA mechanisms that are “substantially identical” to the sample FA mechanisms found in the Models Database. The revisions were designed to streamline Regional case teams’ work on FA mechanisms and achieve greater consistency in FA mechanisms across the Regions, while affording Regions flexibility to modify samples as needed based on Regional practices.

IV. MODEL FA PROVISIONS AND SAMPLE FA MECHANISMS FOR UAOS

The model language for FA and Work Takeover and sample FA mechanisms for use in connection with UAOS are intended to provide clarity on how FA funds should be utilized to facilitate required cleanup work under EPA’s oversight. The documents are necessary because, while EPA has included FA requirements in its RD/RA UAOS since 1990² and in removal UAOS, as appropriate, for many years to ensure completion of cleanup work, EPA-issued model UAOS have been silent on the use of FA funds until now. As detailed in the guidance, the documents collectively specify that UAO FA funds should be provided to PRP-established trust funds, rather than to EPA, as a means of ensuring PRPs’ cleanup obligations.

Specifically, when EPA issues UAOS to PRPs, and case teams determine that FA requirements are necessary, PRPs should be given a choice among FA mechanism options to satisfy their FA obligations. When PRPs elect to use certain FA mechanisms to satisfy their FA obligations—namely, bonds, letters of credit, and corporate guarantees—they will also be required to establish an unfunded “standby” trust to receive any funds subsequently drawn from those mechanisms in accordance with the UAO. For example, if PRPs fail to perform required UAO work, EPA may notify PRPs and affected FA providers of the non-compliance. If PRPs fail to cure the UAO non-compliance within the cure period specified in the UAO and EPA notice, then EPA should call upon the FA providers to deposit funds into the standby trust. Once funded, named trustees should be in position to fulfill PRPs’ UAO obligations, primarily by disbursing funds to contractors or other non-EPA entities (including PRPs resuming work in accordance with UAOS) for performance of UAO work.

V. CONTACTS FOR FURTHER INFORMATION

Any questions about the guidance, samples, or model language provisions may be directed to a member of OSRE’s Financial Assurance Team. Contact information is available from the team’s intranet page at <http://intranet.epa.gov/oeca/osre>. The Office of Site Remediation Enforcement (OSRE) would like to thank everyone who assisted with the development and review of the guidance, samples, and model language provisions.

² See *Model Unilateral Administrative Order for Remedial Design and Remedial Action Under Section 106 of CERCLA*, Section XXIII (Mar. 30, 1990), available at <http://www2.epa.gov/enforcement/model-cercla-section-106-uao-rdra> (update under development).

VI. DISCLAIMER

This memorandum and the documents referenced herein are intended as guidance for EPA employees. They are not rules and do not create any legal obligation. The extent to which EPA applies them in a particular case will depend on the facts of the case.

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Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders

**Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance (OECA)
U.S. Environmental Protection Agency**

April 6, 2015

DISCLAIMER

This document is intended solely as guidance for employees of the U.S. Environmental Protection Agency. It is not a rule and does not create any legal obligations. Whether and how EPA applies this guidance in any given case will depend on the facts of the case.

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Executive Summary

This document provides guidance to EPA Regions on financial assurance (FA) issues and requirements at sites subject to enforcement actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as “Superfund”).¹ Under the “enforcement first” policy,² EPA seeks to have potentially responsible parties (PRPs) conduct cleanups of hazardous waste sites. PRPs that conduct such cleanups are often subject to FA requirements set forth in settlement agreements and unilateral administrative orders for removal and remedial actions.

Financial assurance requirements in CERCLA enforcement documents protect human health and the environment by ensuring the availability of adequate financial resources to conduct site cleanups. In the event PRPs become unwilling or unable to complete their work obligations, this FA allows EPA or other parties to perform such work without using limited Superfund resources. As discussed below, PRPs can meet these FA requirements in several different ways. Especially given the multi-year timeline of many Superfund cleanups, FA requirements provide an invaluable safeguard against the effect of financial distress that PRPs may experience over that time period. In this way, these FA requirements ensure that PRPs—and not public funding sources—bear the financial burden of completing Superfund cleanups, and thereby both protect limited Superfund resources and accomplish the “polluter pays” principle underpinning of CERCLA.

¹ For additional resources on and contacts to help with FA-related issues, see Appendix A.

² For documents describing EPA’s enforcement first policy, view the documents listed in the Enforcement Processes & Strategies category within the Superfund enforcement policy and guidance documents database, available on the Agency’s website at

http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=104.

I. Statutory and regulatory background

A. RCRA closure/post-closure FA requirements as guidelines for CERCLA FA

EPA requires financial assurance (FA) from potentially responsible parties (PRPs) pursuant to its enforcement authorities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as “Superfund”) (e.g., CERCLA §§ 106 and 122). Separate from the FA requirements included in enforcement documents under these sections, EPA is also developing FA regulations pursuant to CERCLA § 108(b).³

EPA’s Resource Conservation and Recovery Act (RCRA) Subtitle C regulations for closure and post-closure care at hazardous waste treatment, storage, and disposal facilities prescribe FA requirements⁴ that EPA uses as points of comparison for establishing CERCLA FA requirements in enforcement documents. RCRA closure and post-closure FA regulations, however, are not binding in the CERCLA enforcement context. Moreover, FA provisions typically used in the CERCLA enforcement context can differ from those required by such RCRA regulations because of differences in the underlying programs.

The following table summarizes some of the key aspects of FA requirements in the CERCLA enforcement context.

Key Aspects of CERCLA Financial Assurance	
Universe of entities subject to FA obligations for any given site	One or more PRPs could be obligated to comply with FA requirements in connection with a site cleanup
Source of FA requirements	Pursuant to a settlement agreement or unilateral administrative order
Time period that FA requirements are to remain in place	The duration of a cleanup, including any operation and maintenance (O&M) period
Language of FA mechanisms	Should generally follow EPA’s sample language, but could vary on a case-by-case basis

³ This guidance does not address any future CERCLA § 108(b) requirements. For information on the rulemaking process to date, see the Agency’s Superfund Financial Responsibility Web page at <http://www.epa.gov/superfund/policy/financialresponsibility/>.

⁴ See 40 C.F.R. Part 264, Subpart H (regulations relating to closure, post-closure care, and third-party liability for owners and operators of permitted hazardous waste facilities); 40 C.F.R. Part 265, Subpart H (similar regulations relating to owners and operators of facilities operating under interim status); and 40 C.F.R. Part 267, Subpart H (regulations relating to closure and third-party liability for owners and operators of hazardous waste facilities with standardized permits).

B. CERCLA enforcement documents that contain FA requirements

FA requirements are included in settlement agreements and unilateral administrative orders to ensure that PRPs will properly conduct response actions. The basis for FA requirements set forth in both contexts is described below.

1. Settlement agreements

Settlement agreements that provide for performance of response actions, including FA requirements designed to ensure that funds are available to complete such work, are authorized pursuant to CERCLA §§ 106 and 122. Settlements are memorialized either judicially through consent decrees (CDs) or administratively through agreements on consent, commonly known as administrative settlement agreements and orders on consent (ASAOCs). Settlements are the preferred and most cost-effective means for remediating sites. Among the benefits that settlements provide to PRPs are covenants not to sue from the United States⁵ and contribution protection.⁶

2. Unilateral administrative orders

If a settlement cannot be reached, rather than initiating a Superfund-financed response action, EPA may choose to issue a unilateral administrative order (UAO) to compel PRPs to perform specified response actions and should generally include FA requirements within the UAO to ensure that funds are available to complete such work.⁷ UAOs are authorized pursuant to CERCLA § 106(a). In relevant part, CERCLA § 106(a) states that, when the Agency finds that there may be an “imminent and substantial endangerment” to human health or the environment due to conditions at a site, EPA may “take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.” PRPs subject to UAOs receive neither covenants not to sue nor contribution protection, and they are subject to civil penalties under CERCLA § 106(a) and/or treble damages under CERCLA § 107(c)(3) in the event of noncompliance with the terms of the UAO.

II. Implementation of FA requirements through enforcement documents

A. Imposition of FA requirements

As a general matter, FA requirements should be included in settlements and UAOs to ensure that response actions are completed without the need for public funding sources. Response actions can take a variety of forms—removal action, remedial investigation (RI), feasibility study (FS),

⁵ See 42 U.S.C. § 9622(f) (2013) (authorizing EPA to grant covenants not to sue if specified conditions are met).

⁶ See 42 U.S.C. § 9613(f)(2) (2013) (providing that PRPs who enter into settlements are not liable for contribution claims relating to “matters addressed” in such settlements).

⁷ See, e.g., *Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites*, OSRE (June 17, 1999), available at <http://www2.epa.gov/enforcement/guidance-strategies-achieve-timely-settlement-and-implementation-rdra-superfund-sites>.

remedial design (RD), or remedial action (RA)—depending on site conditions and the status of the case on the Superfund timeline.

1. Site-specific considerations

The facts of each case need to be evaluated in determining FA requirements. For example, when deciding whether and how to impose FA requirements, case teams may need to consider the following:

- **Risk factors:** potential risks to human health and the environment if PRPs' required cleanup work at a site were to cease prior to completion.
- **Estimated cost of performing the response action:** the more costly the response action, the more important it is for FA to be in place to protect scarce government resources.
- **Estimated time to complete the response action:** FA may not be as crucial for shorter-term actions (e.g., time-critical removal actions) yet is extremely important for longer-term work requirements (e.g., where construction or O&M is required for a year or more, and especially where the requirements span a very long period of time or are perpetual).
- **Nature and extent of contamination at the site or facility:** FA can be essential at sites with significant quantities of contamination, especially since certain types of contamination are more difficult or complicated to address than others.
- **Details concerning PRPs obligated to perform the response action** (e.g., industry sectors in which PRPs operate and their long-term viability): FA is especially important at sites where the long-term viability of PRPs is in question.

As the factors above indicate, there will usually be a need for Regions to include FA requirements in settlements and UAOs, and especially for the more costly and time-consuming response actions.

2. Regional discretion on the use and type of FA

Despite the general preference for requiring FA from PRPs, Regions have discretion with regard to the specifics of the FA requirements imposed via settlements and UAOs, including whether to include or exclude particular mechanisms as FA options that are available to PRPs.⁸ In doing so, case teams should determine whether Office of Site Remediation Enforcement (OSRE) consultation or prior written approval is necessary relating to the FA requirements at issue.⁹

⁸ To illustrate, Region 10 instituted an FA policy of requiring secure forms of FA at certain mine sites. See *Region 10 Mining Financial Assurance Strategy*, EPA Region 10 (Jan. 16, 2009), available at [http://yosemite.epa.gov/R10/ECOCOMM.NSF/b8b7c39a103a235088256c3e007a4dd9/74d70c3512661df988257402006d039a/\\$FILE/R10%20Mining%20Financial%20Assurance%20Strategy.pdf](http://yosemite.epa.gov/R10/ECOCOMM.NSF/b8b7c39a103a235088256c3e007a4dd9/74d70c3512661df988257402006d039a/$FILE/R10%20Mining%20Financial%20Assurance%20Strategy.pdf).

⁹ For information regarding Headquarters' review requirements, see the *OECA/OSRE/CERCLA and RCRA/CWA/UST Roles Chart*, March 2013, available at <http://intranet.epa.gov/oeca/osre/documents/roles.html>; see also *OSRE Procedures Handbook for Prior Written and Oral Approvals of CERCLA and RCRA/CWA/UST Settlements*, Sept. 30, 2010, available at <http://intranet.epa.gov/oeca/osre/documents/pwa.html>.

Specifically, on FA matters, the *OECA/OSRE CERCLA and RCRA/CWA/UST Roles Chart* (“Roles Chart”) requires:

- (a) OSRE prior written approval of:
 - (i) all RD/RA CDs that do not include FA (except for those that involve records of decision (RODs) calling for only institutional controls (ICs) or monitored natural attenuation); and
 - (ii) RA CDs regarding Superfund Alternative approach (*see* Section II.C.5 below) sites that omit or substantively modify liquid FA requirements; and
- (b) Consultation with OSRE on FA provisions in UAOs.

Headquarters encourages the Regions to continue to use OSRE’s FA team as a resource and to informally consult with the team on significant and novel FA issues as they arise.

3. FA language

When drafting FA requirements for inclusion in settlements or UAOs, case teams should use existing model/sample FA language, unless site-specific considerations dictate otherwise.¹⁰ At a minimum, Regions should make sure that FA provisions in enforcement documents are consistent with the terms of related FA mechanisms (e.g., by ensuring consistency among provisions relating to when and how EPA can access FA funds). Moreover, as described in greater detail in Section II.C.3 below, if PRPs subject to UAO FA requirements seek to establish FA by using particular FA mechanisms, then case teams should require such PRPs to also establish an unfunded “standby” trust fund¹¹ pursuant to the UAO.¹²

B. Establishing the FA amount

After the case team determines that FA should be required for a settlement or UAO, a key issue is determining the amount of FA to be provided. EPA’s standard approach is to require an FA amount that is at least equal to the most recent cost estimate for the applicable work at issue and is not offset by FA required pursuant to other authorities.¹³ Thus, EPA typically requires an initial FA amount that, subject to necessary adjustments, mirrors the cost estimate for work to be completed (investigatory, design, removal, remedial, long-term management and treatment, etc.)

¹⁰ *See, e.g., Model Remedial Design/Remedial Action Consent Decree*, § IX, EPA and DOJ (Sept. 2014) (hereinafter, the “Model RD/RA CD”), available in the RD/RA category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>; *see also* EPA’s sample FA mechanisms, available in the Financial Assurance categories of the same database.

¹¹ Standby trusts differ from stand-alone trusts described in Section III.C below in that they are unfunded (i.e., in standby) until another FA mechanisms pays into them.

¹² Model UAO FA language and a sample UAO FA standby trust fund are included with this package. As noted in Section II.A.2 above, consultation with OSRE is required on FA provisions in UAOs. Regions are also encouraged to contact a member of OSRE’s FA team (for contact information, see Appendix A) for assistance on UAO-related FA matters.

¹³ Before offsetting the amount of FA required under a settlement or UAO by FA required pursuant to other authorities, case teams should exercise care and are encouraged to contact a member of OSRE’s FA team (for contact information, see Appendix A) for assistance.

as set forth in the applicable decision document (e.g., a ROD for remedial work or an engineering evaluation/cost analysis or action memorandum for removal actions). Among other things, the required FA amount should capture EPA's indirect costs¹⁴ and the costs of long-term measures, such as O&M.

1. Potential adjustments to the FA amount

Cost estimates are more accurate as a cleanup progresses along the Superfund pipeline (from investigatory work into planning, design, implementation, and post-remedy measures), so the FA amount should reflect cost estimate modifications and site-specific developments. Therefore, EPA should require increases in the FA amount when appropriate (e.g., to account for unexpected costs or analysis periods that differ from the relevant decision document's assumptions).

Knowing that cleanup cost estimates and required FA amounts may change over time, FA provisions in settlements and UAOs should include a process for implementing adjustments to required FA amounts.¹⁵ For example, PRPs should be able to request reductions in the FA amount at certain intervals, but should not be able to implement such reductions without EPA's written approval.

2. Considerations for applying a discount rate for FA

A discount rate is the interest rate used in calculating the present value of expected future costs.¹⁶ As noted in existing EPA guidance for documenting cost estimates during the FS, the Agency generally uses a 7% real discount rate to compare alternatives during the remedy selection process.¹⁷ The goal of that guidance was to improve consistency, completeness, and accuracy of cost estimates developed specifically during the feasibility study phase of the Superfund remedy selection process, but not to offer guidance on determining an FA amount.

FA requirements are generally designed to ensure that sufficient funds are available for the government or another party to complete cleanup work if a PRP does not perform the required work. The Agency believes that FA based on a 7% discount rate could be insufficient to perform

¹⁴ For information on Superfund indirect cost rates, see the memorandum available at http://www.epa.gov/superfund/policy/pdfs/indirect_rate.pdf.

¹⁵ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 32.

¹⁶ If a discount rate is applied to a cost estimate to establish an FA amount, it would take into account the time value of money—the general idea that a dollar today is worth more than a dollar tomorrow—by assuming that the initial FA amount would appreciate over time at a projected growth rate. The higher the discount rate that is applied, the less FA would initially be required, and the more it would need to appreciate to meet the anticipated funding needs at the site.

¹⁷ See EPA Office of Solid Waste and Emergency Response, *OSWER 9355.0-75, A Guide to Developing and Documenting Cost Estimates During the Feasibility Study* (July 2000), p. 4-4, available at <http://www.epa.gov/superfund/policy/remedy/pdfs/finaldoc.pdf> (stating that the “specified rate of 7% represents a ‘real’ discount rate in that it approximates the marginal pretax rate of return on an average investment in the private sector in recent years and has been adjusted to eliminate the effect of expected inflation”).

the work because funds called in from FA mechanisms are typically deposited into “special accounts”¹⁸ or standby trusts, which are unlikely to grow at this annualized real rate.

EPA recommends that, when using discount rates to derive FA estimates, case teams consider using publicly-available return rates on whichever vehicle ultimately stands to receive any FA funds while factoring in both the estimated time to complete the cleanup work¹⁹ and any potential reductions in the vehicle over time (e.g., taxes and fees on trusts, and rate of inflation). For instance, if a special account is expected to receive funds from an FA mechanism, case teams could apply a discount rate derived from the Superfund’s rates of return.²⁰ Likewise, if a trust fund is to receive such funds, expected returns on the trust’s permissible investments could be applied based on the expected cleanup time horizon.²¹

C. Potential FA mechanisms

When FA is needed for a response action, case teams need to decide the types of FA mechanisms that are available to PRPs to satisfy their FA obligations under the settlement or UAO. For instance, in CERCLA settlements, EPA normally accepts one or more of the six FA mechanisms listed and generally described below.²²

- **Trust fund:** an agreement between a PRP (the trust’s “grantor”) and a trustee whereby the trustee holds grantor-provided funds in trust to pay for EPA-approved cleanup expenses;²³
- **Surety (payment or performance) bond:** a contract between a PRP (the bond’s “principal”) and an issuing institution (the bond’s “surety”) whereby the surety guarantees that it will pay for or perform the PRP’s cleanup work obligations up to a specified amount if the PRP fails to perform such work as required;

¹⁸ Special accounts are site-specific, interest-bearing accounts within the Superfund. For documents concerning special accounts, view the Special Accounts category in the Superfund enforcement policy and guidance database, available at

http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=1235.

¹⁹ Establishing FA amounts to cover settlement or UAO obligations over a very long period of time (e.g., hundreds of years) or even perpetually can be complicated, so Regions are encouraged to contact OSRE’s FA team for assistance if such issues arise in a particular case. For a link to OSRE’s FA team members’ contact information, see Appendix A.

²⁰ See EPA’s Office of the Chief Financial Officer’s chronology of interest rates from 1980 to the present, available at http://www.epa.gov/ocfo/finstatement/superfund/int_rate.htm (noting 0.81% rate for fiscal year 2014).

²¹ See, e.g., OMB Circular A-94 Appendix C (Revised Dec. 2013), available at http://www.whitehouse.gov/omb/circulars_a094/a94_appx-c (forecasting real interest rates for six periods, including a 1.1% real rate for 30-year Treasuries that can be applied for 30-year or 30-plus year cleanups).

²² For a link to sample FA mechanisms, see *supra* note 11.

²³ As stated in Section II.A.3 above and as described in Section II.C.3 below, EPA may require the establishment of a standby trust fund in combination with certain other FA mechanisms (e.g., surety bonds, letters of credit, and corporate guarantees) to receive funds called in from such other FA mechanisms if the applicable FA provider is directed to do so pursuant to the applicable enforcement document.

- **Letter of credit:** a document issued by an institution that guarantees the payment of a PRP’s (the letter of credit “applicant”) cleanup work obligations up to a specified amount if the PRP fails to perform such work as required;
- **Insurance policy:** a contract between a PRP (the “insured” policyholder) and an insurance company (the “insurer”) whereby the insurer agrees to pay for claims made against the PRP or policy in connection with site-related issues;
- **Financial test:** specified criteria and reporting requirements that a PRP must satisfy to demonstrate its ability to pay for its cleanup work obligations; and
- **Corporate guarantee:** a guarantee by an affiliated entity (the “guarantor”) of a PRP, predicated on the guarantor’s ability to satisfy specified financial test criteria and reporting requirements, to pay for or perform the PRP’s cleanup work obligations if the PRP fails to perform such work as required.

Other FA mechanisms (e.g., escrow accounts, certificates of deposit, and commitments to secure FA upon asset sales) may also be acceptable in the CERCLA enforcement context based on site-specific considerations.²⁴

FA is required to ensure that funds are available to complete cleanups, so case teams should understand that EPA’s ability to access FA funds (in the case of a settlement agreement) or direct FA funds into a standby trust (in the case of a UAO) could differ from a timing standpoint between the mechanisms. The following table is designed to highlight the relative extent to which the FA mechanisms listed above are readily convertible into cash to fund cleanups.

Convertibility into Cash	FA Mechanism
Readily convertible into cash	Trust funds, payment bonds, and letters of credit
Convertible to cash but may involve procedural delays	Performance bonds and insurance policies
No FA monies are set aside by the PRP or guarantor ²⁵	Financial tests and corporate guarantees

Note that FA monies are not set aside with the financial test and corporate guarantee mechanisms and that EPA’s ability to access funds from insurance policies is subject to the insurance claims process. Thus, when PRPs seek to use these mechanisms to satisfy their FA obligations, case teams should refer to the following two sub-sections for additional information before deciding whether to accept a particular PRP’s proposal.

²⁴ If a PRP proposes to use a nonstandard FA mechanism, Regions are encouraged to contact OSRE’s FA team for assistance. For a link to OSRE’s FA team members’ contact information, see Appendix A.

²⁵ EPA’s sample financial test nevertheless includes a “standby funding commitment” for use in connection with settlements, which is essentially a springing guarantee in that it requires PRPs utilizing the financial test to pay to EPA an amount up to the FA amount if EPA has to take over such PRP’s cleanup work obligations. And EPA’s sample corporate guarantee states that the guarantor must pay for or perform the PRP’s cleanup work obligations if the PRP fails to perform such work as required. For a link to sample FA mechanisms, see *supra* note 11.

1. Considerations relating to the financial test and corporate guarantee

Financial tests and corporate guarantees allow PRPs or their guarantor to essentially “self-insure” the costs of cleanup and other environmental obligations. As such, neither mechanism involves FA monies being set aside by the PRP or guarantor to fund cleanup costs upon a PRP’s failure to satisfy its cleanup work obligations. In this way, the two mechanisms offer a low-cost FA alternative to PRPs and their guarantors who may—on paper—present low risks of failure to EPA. Importantly, however, any submission pursuant to these two FA options should capture all environmental obligations (under CERCLA, RCRA, the Safe Drinking Water Act, etc.) assured through the use of a test or guarantee.

Submissions by PRPs or guarantors in connection with these mechanisms are based on audited financial statements and/or credit ratings, which are reevaluated periodically (ideally, at least once per year) by EPA.²⁶ Moreover, settlements and UAOs typically include provisions requiring such entities to notify EPA if and when they no longer pass the test.

Case teams should bear the following considerations in mind, along with various practical considerations outlined in Appendix B, when financial test and corporate guarantee mechanisms are proposed to be utilized by PRPs for FA purposes at a particular site:

- Both mechanisms rest on the assumption that a company’s (either the PRP itself or a guarantor) recent financial performance is a reasonable predictor of its ability to satisfy environmental obligations covered by the underlying test going forward.
- As a form of self-insurance, the financial test carries with it a higher risk of non-payment than third-party instruments in cases where the relevant PRP’s (or guarantor’s) financial health rapidly declines. For instance, in the event that a PRP files for bankruptcy protection while using the test, the Agency may not be able to ensure that the PRP obtains alternate FA as required under the settlement or UAO.
- The efficacy of the financial test depends on the reliability of the data used to satisfy the financial test requirements (i.e., in calculating the financial ratios underpinning the test and yielding a passable bond rating).

Even so, certain concerns related to the above considerations surrounding the financial test can be counterbalanced by other aspects of the test, including periodic reporting requirements, independent audits, and the use of credit ratings.

In general, before case teams approve the use of a financial test or corporate guarantee as FA at a site, they should appreciate the administrative burdens on the Agency that are associated with the two mechanisms,²⁷ as well as the financial expertise and capabilities that are needed within the

²⁶ For greater protection, case teams may require additional information from PRPs or guarantors, such as more frequent (e.g., quarterly) submissions and notifications upon any bond rating downgrades.

²⁷ Accordingly, case teams may want to caution PRPs that utilizing the financial test or corporate

Region to analyze documentation. For instance, numerous financial submissions (annual letters from entities' financial officers and annual reports from entities' accountants) are involved, which can be difficult and/or time-consuming to fully understand and administer. Analyses of such documentation may exceed a Region's financial expertise and capabilities, in which case the Region should seek Headquarters' assistance.

2. Considerations relating to insurance policies²⁸

If case teams have limited experience in evaluating the effectiveness of an insurance policy as an acceptable FA mechanism, they should exercise caution when insurance policies are offered by PRPs as FA. There is considerable variation among the insurance policy forms employed by different insurance companies, and there are varying impacts of state law on the structure and interpretation of insurance policies. For these reasons, OSRE developed a tip sheet regarding the use of insurance policies as FA but—unlike other FA mechanisms—not a sample insurance policy.²⁹

Based on EPA's limited experience in seeking to collect on insurance policies provided as FA, it may be difficult and/or time-consuming to make successful claims. If so, payments flowing from such insurance policies could be insufficient and/or untimely for FA purposes. And exclusions in policies could limit the coverage provided by the policy to EPA's detriment. Regions reviewing proposed FA insurance policies are encouraged to contact OSRE insurance team members for assistance with these issues.³⁰

3. Standby trusts for use in connection with UAOs

As previewed in Section II.A.3 above, PRPs subject to UAO FA requirements (UAO "Respondents") who provide FA via certain FA mechanisms should also be required to establish an unfunded standby trust fund. Standby trusts should be employed in the UAO context to maintain continuity in the cleanup work process by collecting and disbursing funds called in from certain FA mechanisms. Standby trusts are necessary in conjunction with certain UAO FA mechanisms because, in the absence of a settlement agreement, EPA cannot establish special accounts in accordance with CERCLA § 122(b)(3) to "retain and use" the funds.³¹ As a result, UAO-related FA documents collectively specify that FA funds may not be provided to EPA and should instead be deposited into standby trusts to facilitate required cleanup work under UAOs.³²

guarantee may result in higher oversight billings.

²⁸ Insurance for FA purposes is unrelated to, and an unacceptable replacement for, liability insurance (e.g., commercial general liability insurance and automobile liability insurance) required by settlements and UAOs to cover liabilities arising out of cleanup work performed by or on behalf of PRPs. *See, e.g.*, Model RD/RA CD, *supra* note 11, at ¶ 50.

²⁹ For a link to OSRE's FA tip sheets and sample mechanisms, see Appendix A.

³⁰ For general insurance information and a list of insurance contacts, visit the Insurance team's Web page on the OSRE intranet, available at <http://intranet.epa.gov/oeca/osre>.

³¹ *See generally* 42 U.S.C. § 9622(b)(3) (authorizing EPA to retain and use funds pursuant to settlement agreements); *see also* 31 U.S.C. § 3302(b) (Miscellaneous Receipts Act, requiring EPA to deposit money it receives into the U.S. Treasury's general fund absent statutory authority to retain and use the money).

³² For model UAO FA and Work Takeover language, as well as sample FA mechanisms for use in

Specifically, when EPA issues UAOs to Respondents, and case teams determine that FA requirements are necessary, Respondents should be given a choice among FA mechanism options (e.g., stand-alone trusts,³³ bonds, letters of credit, satisfaction of financial test criteria, and/or corporate guarantees) to satisfy their FA obligations. If Respondents elect to use a bond, letter of credit, or corporate guarantee to satisfy their FA obligations, then they should also be required to establish a standby trust to receive any funds drawn from those mechanisms in the future in accordance with the terms of the UAO. UAOs should provide that, if a Respondent fails to perform required UAO work, then EPA may notify both Respondents and the providers of the affected FA mechanism of the performance failure. EPA's notice should provide Respondents an opportunity to cure the UAO non-compliance within a specified time period. If Respondents fail to cure the non-compliance within the allotted cure period, then EPA should direct the FA providers to deposit funds assured under the UAO into the standby trust. Funds deposited into the standby trust should be used in accordance with the terms of the trust to fulfill Respondents' UAO obligations.³⁴

If a standby trust is funded from an FA mechanism as described in the previous paragraph, then the standby trustee should already be in place to facilitate required cleanup work, subject to EPA's oversight of the work. In particular, the trustee should be authorized by the trust agreement to disburse trust funds to any non-EPA entity (e.g., the trustee's environmental contractors, contractors previously retained by Respondents, or Respondents who resume cleanup work in accordance with the UAO) to pay for UAO past or future costs, subject to any EPA objections solely related to work costs that are inconsistent with the terms and conditions of the UAO. Similarly, the trustee should be authorized to disburse excess monies not needed for cleanups. In this way, the standby trust achieves EPA's goal of ensuring site cleanups—facilitated either by trustees or Respondents.

4. Use of multiple FA mechanisms

Multiple FA mechanisms can be used to satisfy the FA requirements relating to a particular site. So long as the FA provided to EPA—in total—covers the estimated cost of the work, PRPs can decide among themselves how to divide up their respective FA obligations.

EPA typically does not allow the combination of most FA mechanisms that are convertible into cash with financial test, corporate guarantee, or performance bond FA mechanisms at a particular site³⁵ because of, among other things, added burdens on the Agency and possible confusion in monitoring the combination of FA mechanisms that differ in terms of their convertibility into cash. Still, there could be multiple PRPs at a given site and significant variation between the parties' financial health. Accordingly, though it is generally discouraged, based on the facts and

connection with UAOs, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://cfpub.epa.gov/compliance/models/>.

³³ A stand-alone FA trust, as opposed to a standby trust, is a separate FA mechanism that is established and funded from the outset to finance cleanup work.

³⁴ Another scenario in which standby trusts may be funded is when Respondents fail to secure alternative FA as required by UAOs (e.g., preceding the cancellation of a letter of credit).

³⁵ See Model RD/RA CD, *supra* note 11, at ¶ 27.

circumstances of each case, Regions may allow PRPs to satisfy their FA obligations by using a mix of FA mechanisms along the convertibility-into-cash spectrum (see table in Section II.C above).

5. FA in SAA site agreements

FA requirements set forth in agreements relating to Superfund Alternative Approach (SAA) sites—sites that are eligible to be listed on the National Priorities List (NPL) but are not listed—merit special attention.³⁶ In contrast to NPL sites, SAA sites are not eligible to receive Superfund monies for remedial action, and are thus susceptible to cleanup delays if PRPs at such sites fail or refuse to perform required work.

As a result, SAA settlements for remedial action work should require PRPs to provide at least some portion of the FA—the estimated amount to facilitate work during the NPL listing process—in a form that can be readily converted into cash (see table in Section II.C above), while the balance of the required FA amount may be provided through other available FA mechanisms. This safeguard positions SAA sites in a way that guarantees the continuation of cleanup work during the NPL listing process.

D. Timing considerations

The settlement or UAO should specify the time within which PRPs need to secure FA and send FA-related documentation to EPA. Ideally, FA mechanisms should be negotiated and agreed upon prior to any settlement, in which case the mechanisms should be attached to the settlement.³⁷ Otherwise, PRPs should be given a window of time—usually a specified number of days after the settlement’s “effective date”—to submit finalized FA documents to EPA.

FA requirements pursuant to UAOs are not the product of negotiations, so additional time may be necessary for the PRPs to secure and submit FA, and Regions are encouraged to require the submission of draft FA mechanisms within a specified time period after the UAO’s effective date. Generally, Regions should use their discretion regarding these timing considerations to effectuate the purpose of the FA.

E. Modifications to FA requirements

Recognizing that the type of work (and thus FA) could change over the course of a CERCLA cleanup, and that FA amounts are based on cost estimates that could also change over time, settlements and UAOs usually authorize FA modifications—to amounts, form, and/or terms of the FA—upon EPA’s approval at certain intervals. For instance, PRPs may request a reduction in

³⁶ See generally *Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach*, OSWER 9200.2-125, OSRE and OSRTI (Sept. 28, 2012), available at <http://www2.epa.gov/enforcement/transmittal-memo-updated-superfund-response-and-settlement-approach-sites-using>.

³⁷ Case teams lacking expertise on FA matters should solicit input from EPA FA experts, such as a member of OSRE’s FA team, during negotiations and before documents are ready to be executed.

the FA amount based on cleanup work already performed at a site. When evaluating such a request, case teams' focus should be on the estimated costs to complete all required actions at the site rather than on the original cost estimate less any costs incurred by PRPs. PRPs' FA modification requests are usually permitted on a yearly basis, though Regions could consider such requests on a more frequent basis, depending on the particulars of the request and case.

EPA usually has the ability under settlements and UAOs to demand FA modifications as necessary to effectively guarantee the completion of required cleanup work.³⁸ To illustrate, EPA may decide to do so as part of a five-year review³⁹ at a site: during that process, EPA could review the cost estimates for the remaining work at the site in order to verify the reliability of the cost estimate underlying the FA amount.

F. Termination of FA requirements

FA requirements remain in effect unless and until they are released in accordance with the terms of the enforcement document and the relevant FA mechanism. For example, typical FA provisions in settlements and UAOs provide that, if a PRP arranged with a third-party FA provider to satisfy its FA obligations and such FA provider seeks to cancel the mechanism at a later date, then the PRP must secure alternate FA within a specified period before the cancellation date—or else EPA may call in the funds secured by the mechanism.

Any disagreements between EPA and PRPs relating to the release of FA (and certain other circumstances) pursuant to settlements are typically addressed through a “dispute resolution” process. Outside of dispute resolution situations, before releasing PRPs from FA obligations, EPA should make certain that all required work, including long-term response actions such as O&M, has been completed to EPA's satisfaction.

G. Compliance monitoring and assessment

Settlements and UAOs usually provide that PRPs' compliance obligations pursuant to FA requirements are of an ongoing nature. Thus, settlements and UAOs typically require PRPs to monitor the adequacy of their FA commitments over the lifespan of the CERCLA cleanup. If a PRP determines that its FA no longer meets the requirements of the relevant settlement or UAO, then the settlement or UAO typically requires the PRP to notify EPA, within a specified period of time, that it has fallen out of compliance. EPA also has a monitoring role and can notify PRPs of any FA-related non-compliance that comes to the Agency's attention. In either case, the notification of FA non-compliance—by the PRP to EPA or by EPA to the PRP—starts the clock

³⁸ EPA may not, however, on its own initiative or at the request of a PRP, modify the terms of FA in the case of a UAO to provide that EPA—as opposed to the standby trustee—will be taking in or otherwise directly accessing the funds, even if the Region believes such an amendment is necessary to effectively guarantee the completion of the required cleanup work.

³⁹ Five-year reviews, conducted either to meet the CERCLA § 121(c) statutory mandate (i.e., whenever a remedial action results in hazardous substances, pollutants, or contaminants remaining on site) or as a matter of EPA policy, are designed to assist EPA in determining if a remedy is or will be protective of human health and the environment by evaluating the implementation and performance of a remedy. *See generally* <http://www.epa.gov/superfund/fiveyearreview/> (EPA's Five-Year Reviews internet page).

on a cure period, during which time penalties may accrue and the PRP must propose to EPA (and ultimately secure) additional or alternate FA in accordance with the settlement or UAO.

Regions should carefully review initial submissions of FA mechanisms, including the underlying cost estimates, and prudently monitor subsequent FA submissions.⁴⁰ It is also prudent to be aware of PRPs' additional FA obligations, especially relating to financial test and corporate guarantee submissions. The amount and types of FA provided by PRPs across all programs could have an impact on the protectiveness on any given FA mechanism. Proper coordination and tracking of FA mechanisms in each Region will assist in making determinations regarding the soundness of PRPs' proposed FA mechanism. If PRPs seek to change the amount, form, and/or terms of existing FA as referenced in Section II.E above, Regions should evaluate the relevant proposal, approve such requests only if the newly-proposed FA is satisfactory, and release existing FA mechanisms only after alternate FA is established.

Regions are also encouraged to take certain administrative steps to ensure that PRPs satisfy their FA obligations. For example, Regions should:

- Establish and maintain contact with appropriate personnel from third-party FA providers (banks, surety companies, insurers, etc.);
- Ensure that contact information (e.g., name, title, address, and telephone number) for such personnel is included in all FA mechanisms;
- Track required deadlines for submissions of documents associated with the financial test and corporate guarantee mechanisms; and
- Monitor notices from third-party FA providers, especially cancellation or comparable (e.g., non-renewal) notices.⁴¹

⁴⁰ For resources designed to assist in the FA review process, see Appendix A. Regions are also encouraged to contact Region 5 to learn from their recent FA coordination and monitoring efforts. Region 5 developed an electronic tracking program, the *Financial Assurance Compliance Tracking Tool* (FACT Tool) to track FA information submitted under various authorities. For additional information on the FACT Tool, see <http://r5intradev.epa.gov/div/sfd/main/index.php/enforcement/financial-assurance> (Region 5's financial assurance intranet website).

⁴¹ Cancellation-like notices signal that action may be required for the affected PRP to comply with its FA obligations in the future, or that EPA may need to call in the funds guaranteed by the soon-to-be-cancelled mechanism.

Regions should make sure that they have staff dedicated to FA matters for each affected site or facility to monitor the adequacy of FA over time. While certain Regional staff may be extremely experienced with financial matters and FA-related matters in particular, FA monitoring and enforcement objectives are often best accomplished through team efforts.

H. Documentation

Prudent management and safekeeping of FA documentation is critical to ensure that FA provided in connection with settlements and UAOs serves its intended purpose. As described in Appendix C, Regions are encouraged to develop internal procedures detailing how FA mechanisms submitted to EPA should be received, maintained, and monitored.⁴² For instance, Regions should explore instituting logistical controls, including the following:

- Establish a central repository to receive and maintain FA documentation;
- Use a fireproof safe to store FA submissions (or, at a minimum, employ a secure place in which originals of FA mechanisms can be kept);
- Select a dedicated point person, for a particular site or all sites in the Region, to whom FA documentation should be submitted; and
- Maintain a receipt log to record when FA documentation is received by EPA.

It is important to store original FA documents in a safe place with no public access because they may need to be presented—by EPA to the issuing institution—to access the funds guaranteed by the FA mechanisms.

I. Potential external influences on FA mechanisms

Despite best efforts to secure FA to ensure the completion of cleanups, at times EPA must deal with general market conditions beyond the Agency's control that could affect the nature and availability of FA provided in connection with settlements and UAOs.⁴³

Example of case-team collaboration on PRPs' FA obligations:

- A Regional financial analyst initially reviews an FA submission to gauge compliance;
- The analyst works with technical staff (e.g., a remedial project manager or an on-scene coordinator) for up-to-date information on cost estimates; and
- The analyst consults with the case attorney on any legal issues (e.g., potential enforcement actions).

⁴² In addition to developing the FACT Tool referenced above, Region 5 issued standard operating procedures to outline FA roles and responsibilities across all offices in the Region. For a link to Region 5's FA-related practices, see *supra* note 41.

⁴³ Alerts regarding the financial health of FA providers are often discussed on OECA-led monthly FA calls, referenced in Appendix A, with Regions and states.

1. Inability of third-party FA providers to satisfy FA obligations

One example of an external influence on FA requirements is when a third-party provider of an FA mechanism has financial difficulties and is unable to fulfill its contractual obligations related to the PRP-provided FA. In this circumstance, whether or not the FA provider is required to notify EPA about its situation, EPA may need to act to protect the Agency's interests.

As referenced in Section II.G above, PRPs remain responsible for maintaining adequate FA and need to obtain alternative FA within an allotted time period regardless of why their third-party FA providers are unable to satisfy their obligations. For instance, because FA provisions in settlements and UAOs typically require that surety bond providers be listed by the Department of the Treasury as acceptable sureties,⁴⁴ if a surety bond provider is no longer listed as such, then EPA should demand alternative FA from the relevant PRP. Likewise, if a trustee or insurance company can no longer fulfill its obligations under an FA trust fund or insurance policy due to a bankruptcy proceeding or an analogous occurrence (e.g., the loss of a required license or the inability to maintain specified levels of capital), then EPA should require the affected PRP to provide alternative FA.

2. Impact of bankruptcy filings on FA

The filing of a bankruptcy petition by a PRP (a "debtor" in bankruptcy) subject to FA requirements complicates EPA's ability to secure new or additional FA. The degree of difficulty EPA will confront in obtaining new or additional FA after a bankruptcy petition is filed depends on many case-specific factors, such as the nature of the debtors' bankruptcy proceedings (reorganization, liquidation, etc.), the site(s) at issue (operating or closed, debtor-owned or non-owned, etc.), whether the relevant jurisdiction has case law on the interaction between bankruptcy and FA, other parties in interest (U.S. trustees, other environmental regulators, professionals retained by debtors, bankruptcy trustees/examiners, secured/unsecured creditors, etc.), and the debtors' assets (or lack thereof). Therefore, it is difficult to forecast how FA issues will play out in any given bankruptcy.

Still, the following general legal considerations relating to the intersection of FA and bankruptcy matters should be assessed in any bankruptcy case with FA issues:⁴⁵

- A bankruptcy proceeding should have little, if any, effect on debtors' ongoing regulatory compliance obligations or obligations relating to sites they own or operate, including FA requirements, because debtors must "manage and operate the property in [their] possession" in compliance with all valid state and federal laws;⁴⁶

⁴⁴ For a list of acceptable sureties at any given time, see *Department of the Treasury's Listing of Approved Sureties* (Treasury Department Circular 570), available at <http://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

⁴⁵ For additional specifics on the FA/bankruptcy interplay and on EPA's ability to access FA funds during bankruptcies, see Section III.C.2 below.

⁴⁶ See generally 28 U.S.C. § 959(b); *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir. 2001). However, many debtors and trustees contend that 28 U.S.C. § 959(b) does not apply in liquidating cases where operations have been closed.

- The United States believes that debtors must comply with injunctive (i.e., cleanup work-related) obligations, including any FA requirements, at CERCLA sites pursuant to settlements and UAOs; and
- While the filing of a bankruptcy petition results in the “automatic stay”—a prohibition set forth in Bankruptcy Code Section 362(a) on various creditor actions against debtors, property of the debtors, and the debtors’ estates outside the bankruptcy court—EPA may nevertheless be allowed to commence or continue FA-related enforcement actions seeking injunctive relief, cost recovery, and/or penalties pursuant to a statutory exception to the stay.⁴⁷

EPA must refer matters (e.g., claims against, or injunctive obligations of, PRPs) to the Department of Justice (DOJ) to participate in bankruptcies because they are judicial proceedings. Thus, EPA staff dealing with bankruptcy-related FA issues should contact attorneys with bankruptcy expertise to discuss such issues before taking any enforcement actions.⁴⁸ Taking into account the applicable facts and law in a given jurisdiction, EPA and DOJ should assess the degree of any litigation risk in pursuing FA after a bankruptcy petition is filed and whether a particular case is likely to create a good or bad precedent in the developing law in this area.

EPA and DOJ may decide to file a “protective” claim in a bankruptcy to seek to ensure that a debtor continues to adhere to, among other things, its pre-bankruptcy injunctive obligations, including FA requirements, under settlements and UAOs. If the debtor is subject to FA requirements under a settlement or UAO, then the protective claim should disclose the existence of any FA provided by the debtor and EPA’s rights relating to such FA.

III. Enforcement of FA provisions

A. Types of FA violations

Regions should be aware of, and consider instituting enforcement actions relating to, potential FA violations. For example, some of the more common FA violations involve failures to:

- Obtain adequate FA;
- Submit required FA documentation;
- Satisfy the metrics underlying the financial test and corporate guarantee options; and
- Secure alternative FA when appropriate (e.g., preceding the cancellation of an FA mechanism or once a company no longer passes the financial test).

PRP arguments of good faith efforts to comply with FA requirements, and lack of actual harm to the Agency resulting from an FA violation, are not defenses to FA enforcement actions. FA violations do not excuse the PRPs’ performance of any other requirements set forth in settlements and UAOs.

⁴⁷ See 11 U.S.C. § 362(b)(4) (the “police and regulatory power” exception to the automatic stay).

⁴⁸ For a list of EPA and DOJ bankruptcy practitioners, visit the Bankruptcy Center Workgroup’s Web page on the OSRE intranet, available at <http://intranet.epa.gov/oeca/osre>.

B. Repercussions of FA violations⁴⁹

Case teams should take action, consistent with the process prescribed by the settlement or UAO, if a PRP fails to satisfy its FA obligations. To illustrate, if a PRP fails to comply with its FA obligations or if the adequacy of its FA submissions is unclear, the case team should follow up with the PRP as appropriate and could put the out-of-compliance PRP on a schedule to come into compliance. Similarly, the case team could issue a notice of non-compliance to the PRP, requiring the PRP to comply with its FA obligations within a specified “cure” period. Ultimately, if a PRP is not complying with its FA obligations, the case team could seek what is guaranteed by the relevant FA mechanism (see Section III.C below), seek penalties (see Section III.D below), and/or commence an enforcement action (e.g., injunctive relief to require FA).

C. Obtaining funds or work secured by FA⁵⁰

Funds or work guaranteed by FA mechanisms can be obtained (or funds can be directed into a standby trust in the case of a UAO) under specified circumstances. For instance, under many settlements, EPA can demand funds or work⁵¹ secured by an FA mechanism if:

- The applicable PRP fails to perform all or any portion of the required response action and EPA takes over such work—a “work takeover” situation; or
- EPA receives notice of an impending FA mechanism cancellation or non-extension, and the affected PRP fails to establish alternative FA within the allotted time.

In the former scenario, EPA can draw on any of the guaranteed funds after a work takeover notice is issued to, and not timely cured by, the applicable PRP. In the latter scenario, EPA can draw on any of the guaranteed funds for a set period of time (i.e., EPA must usually act by a certain date or else the mechanism could lapse).

Though settlements and UAOs fully preserve EPA’s ability to use Superfund monies to perform response actions at NPL sites in work takeover situations, once EPA decides that FA funds or guarantees are needed to facilitate such work, EPA should follow the procedures set forth in the applicable enforcement document and FA mechanism to seek funds guaranteed by an FA mechanism. For instance, if a PRP is out of compliance and EPA therefore elects to draw on a payment bond secured by the PRP to satisfy its FA obligations, the Agency would typically send a written notification to both the PRP (informing the PRP of its non-compliance and EPA’s intent to access the bond) and the surety company (explaining the nature of the PRP’s non-compliance and how such non-compliance gives rise to EPA’s right to demand funds guaranteed

⁴⁹ For assistance with drafting, or to see examples of, letters to PRPs regarding FA non-compliance matters (e.g., letters to call in FA funds, delinquency letters, and notices of violations), Regions are encouraged to contact OSRE’s FA team (for contact information, see Appendix A).

⁵⁰ If questions arise regarding whether or how to access FA mechanisms in a particular case, Regions are encouraged to contact OSRE’s FA team for assistance (for contact information, see Appendix A).

⁵¹ Certain FA mechanisms (e.g., performance bonds and corporate guarantees) typically allow the FA provider to pay for or perform required work if the applicable PRP fails to do so. As such, while this Section III.C highlights payment-related scenarios, case teams should understand that such FA providers could avail themselves of the option to perform work in the PRP’s stead.

by the bond); concurrently, EPA would direct the surety company to deposit, within the time period specified in the bond obtained by the PRP, the guaranteed FA funds into a special account or standby trust fund as appropriate.

1. Multi-PRP situations

Even with the joint and several liability underpinnings of CERCLA, PRPs obligated to finance and perform cleanup work pursuant to settlements and UAOs are not necessarily similarly situated from a financial standpoint. Accordingly, FA matters can get complicated with multi-PRP-led cleanups, especially where PRPs provide separate mechanisms to satisfy their FA obligations in a piecemeal way as opposed to a jointly-funded (e.g., trust) mechanism to collectively cover the PRPs' FA obligations.⁵²

Case teams should decide how to proceed in such instances by keeping in mind the overall cleanup. To illustrate, if a PRP under a multi-PRP settlement that had separately secured FA initiates a bankruptcy proceeding or is recalcitrant (i.e., ceases to perform required cleanup work, is seriously or repeatedly deficient or late in performing such work, or is performing such work in a manner that may cause an endangerment to human health or the environment), then the case team, irrespective of the case team's enforcement actions against the bankrupt or recalcitrant PRP, may elect to invoke the joint and several liability provision of the settlement⁵³ and request that the remaining PRPs perform the bankrupt or recalcitrant party's work.

2. FA resources potentially impacted by bankruptcy proceedings

While EPA should always be aware of FA-related cut-off dates, case teams should be especially attentive to deadlines related to FA mechanisms provided by PRPs in bankruptcy given all of the other tight time pressures the Agency faces in bankruptcy cases. Before seeking to access FA resources that could be implicated by a bankruptcy proceeding, case teams should exercise care and contact DOJ's bankruptcy attorneys.

The threshold question that must be analyzed in bankruptcy scenarios is whether EPA's actions may affect "property of the [debtor's] estate"⁵⁴ because attempts to obtain such property may be subject to the automatic stay if the police and regulatory power exception referenced in Section II.I.2 above does not apply. FA that exists at the time of the filing of a bankruptcy petition may not be property of the debtor's estate. In some circumstances, FA may be found to be property of the estate yet the debtor's interest in it may be limited to a narrow technical legal

⁵² If PRPs subject to FA requirements under a settlement or UAO plan to use multiple mechanisms to satisfy their FA obligations, then the case team may want to explain to the PRPs that such an approach would likely lead to higher oversight billings because of the need for EPA to review the assorted mechanisms.

⁵³ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 6.b.

⁵⁴ The Bankruptcy Code provides that the filing of a bankruptcy petition creates an estate that is comprised of the debtor's "legal or equitable interests" in property. See 11 U.S.C. § 541(a)(1). Property of the estate is administered by the debtor (in reorganizations) or trustee (in liquidations) and used for distributions pursuant to bankruptcy plans.

interest or theoretical reversionary interest. EPA may have a predominant equitable interest in the FA, which may be considered a secured interest.

If an FA mechanism is not property of the estate, then EPA should be able to obtain any resources guaranteed by such mechanism during the bankruptcy without court approval; if not, EPA would need bankruptcy court approval to do so. For example, if a PRP secured a letter of credit as FA pursuant to a settlement before filing for bankruptcy, EPA should be able to draw on the letter of credit because it and its proceeds are generally considered assets outside of bankruptcy estates.⁵⁵ Still, EPA should consult with DOJ to determine whether there are any arguments that the debtor might make that could affect EPA's rights. Other FA mechanisms, such as trust funds, may in some circumstances be considered property of the debtors' bankruptcy estates to the extent of debtors' interest in the FA. This would mean that EPA may have to obtain bankruptcy court approval before collecting funds pursuant to the FA mechanism. EPA faces additional litigation risks when an entity using the financial test or providing a guarantee files for bankruptcy protection.

Each bankruptcy case, like each site cleanup, is different. Therefore, the resolution of the debtors' FA obligations in the bankruptcy context will depend on the facts and circumstances of the case referenced in Section II.I.2 above.

D. Penalties for non-compliance with FA provisions

For deterrence purposes, stipulated and/or civil penalties may be available in connection with FA violations of settlements and/or UAOs. Such penalties may typically accrue regardless of whether EPA has notified the applicable PRP of a violation.

1. Stipulated penalties

CERCLA settlements typically authorize EPA to seek "stipulated penalties" in the event of any future violations of the conditions of the settlements.⁵⁶ Generally speaking, stipulated penalties are fixed amounts that PRPs agree to pay in the event that they fail to comply with a settlement provision in the future, unless the failure to comply is excused due to a "force majeure" event.

⁵⁵ See *In re War Eagle Constr. Co.*, 283 B.R. 193, 201 (S.D. W. Va. 2002).

⁵⁶ CERCLA requires the inclusion of stipulated penalty provisions in RD/RA CDs. See 42 U.S.C. § 9621(e)(2) ("Each [CD] shall also contain stipulated penalties for violations of the [CD] . . ."); see also *Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees*, EPA Office of Enforcement and Compliance Monitoring (Sept. 21, 1987), available at <http://www2.epa.gov/enforcement/guidance-use-stipulated-penalties-hazardous-waste-consent-decrees>. As a matter of policy, EPA strives to also include such provisions in other types of CERCLA settlements as well, except for settlements with *de minimis* parties. See, e.g., *Revised Model Administrative Settlement Agreement and Order on Consent for Removal Actions*, ¶¶ 46-55, OSRE (Jan. 30, 2007), available at <http://www2.epa.gov/enforcement/model-administrative-settlement-agreement-and-order-consent-removal-actions>; EPA and DOJ *Model CERCLA § 107 Consent Decree for Recovery of Past Response Costs*, ¶ 11 (Sept. 26, 2014), available in the Past Cost category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

In drafting CERCLA settlement agreements, EPA usually strives to ensure that the stipulated penalty provision covers all of the settlement's obligations, including FA obligations. When case teams list out violations and compliance milestones subject to the stipulated penalty provisions during the settlement drafting process, the following language should be included to capture FA-related obligations:

“Establishment and maintenance of financial assurance in compliance with the timelines and other substantive and procedural requirements of Section [insert section number] (Financial Assurance).”⁵⁷

Meanwhile, in the FA section of the settlement document, case teams should delineate various FA milestones (e.g., due dates for the submission of FA mechanisms to EPA and for annual submissions regarding the financial test and corporate guarantee FA options).

2. Statutory and civil penalties

In addition to stipulated penalty provisions, EPA normally seeks to have CERCLA settlements preserve the Agency's ability to seek statutory penalties for settlement violations.⁵⁸ CERCLA settlements usually give EPA the option of pursuing stipulated penalties, statutory penalties, or both in the event of a violation of the settlement conditions.⁵⁹

Finally, statutory penalties are available in connection with violations of UAOs, including UAO provisions for FA. EPA can seek statutory penalties up to \$37,500 per day against any person who, without sufficient cause, willfully violates, or fails or refuses to comply with a UAO.⁶⁰ EPA can also seek punitive damages when it incurs response costs as a result of UAO non-compliance.⁶¹

E. Use of CERCLA Section 104(e) to collect additional FA information

EPA is authorized to request various types of information from PRPs to facilitate cleanups, including “[i]nformation relating to the ability of a person to pay for or to perform a cleanup.”⁶² Beyond helping EPA identify PRPs, CERCLA § 104(e) information requests aid in the assessment of PRPs' financial viability when reviews of publicly-available information are inconclusive. Thus, when questions arise regarding FA matters and informal attempts to obtain

⁵⁷ See Model RD/RA CD, *supra* note 11, at ¶ 63.b(2).

⁵⁸ See 42 U.S.C. § 9622(l).

⁵⁹ See, e.g., Model RD/RA CD, *supra* note 11, at ¶ 72 (preserving CERCLA § 122(l) penalty option for violations of obligations not covered by the settlement's stipulated penalties' section and for “willful” violations of obligations covered by such section).

⁶⁰ See 42 U.S.C. § 9606(b)(1); see also *Revised Penalty Matrix for CERCLA §106(b)(1) Civil Penalty Policy*, OECA (July 17, 2009), available at <http://www2.epa.gov/enforcement/guidance-updated-penalty-matrix-cercla-section-106b1-civil-penalty-policy>.

⁶¹ See 42 U.S.C. § 9607(c)(3); see also Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643 (Nov. 6, 2013) (to be codified at 40 C.F.R. pt. 19).

⁶² 42 U.S.C. § 9604(e)(2)(C).

relevant information from PRPs are insufficient, case teams should consider sending a CERCLA § 104(e) request to elicit information that would be responsive to such questions.⁶³

IV. Conclusion

Along with other provisions in settlements and UAOs, FA requirements place the financial burden of cleanups on PRPs and ensure that sufficient financial resources are in position to complete cleanups once PRPs commence such work. By compelling PRPs to internalize their environmental cleanup costs, FA requirements therefore minimize costs borne by taxpayers at sites where PRPs default on their cleanup obligations.

Regions and case teams are encouraged to:

- Strategize on how to address FA matters prior to entering into settlement negotiations or issuing UAOs;
- Use the FA resources available on the Agency's internet and intranet;
- Become familiar with model documents, tip sheets, and sample mechanisms developed for CERCLA settlements and UAOs;
- Use the recommended best practices attached to this guidance (Appendix C); and
- Seek Headquarters' assistance as needed, but especially for novel or nationally-significant FA issues.

⁶³ For lists of questions under specific categories (including financial) that were compiled to assist staff tailor information requests to PRPs and their involvement at sites, see <http://www2.epa.gov/enforcement/superfund-104e-information-request-questions-category>. For assistance with drafting 104(e) requests relating to FA matters, Regions are encouraged to contact OSRE's FA team (for contact information, see Appendix A).

LIST OF APPENDICES

- APPENDIX A: Additional FA Resources and Contacts
- APPENDIX B: Practical Considerations Regarding Financial Test and Corporate Guarantee FA Options
- APPENDIX C: Recommended Best Practices for Documentation and Data Management of Financial Assurance Obtained Pursuant to CERCLA Settlement Agreements and Unilateral Administrative Orders

Appendix A Additional FA Resources and Contacts

EPA has developed numerous resources and employs different outlets to assist federal and state regulators with their FA compliance and enforcement efforts, including the following:

1. **OSRE's FA Team intranet page:** contains team members' contact information, information about OECA-led monthly FA calls, and a link to tip sheets to educate Regional staff on FA mechanisms, as well as model FA language and sample language for use in FA mechanisms.⁶⁴
2. **Financial Responsibility Enforcement Tool (FRET):** an online compilation of FA information, policies, and step-by-step instructions on reviewing various FA mechanisms.⁶⁵
3. **Monthly FA calls:** coordinated by OECA to provide a venue for federal and state regulators to collectively discuss FA-related concerns and issues.⁶⁶
4. **Continuation of FA as an OSRE enforcement priority:** from 2005 to 2007 and then again from 2008 to 2010, EPA identified FA as a national enforcement initiative for the CERCLA and RCRA enforcement programs.⁶⁷ With the return of FA to the core CERCLA enforcement program in 2011, FA compliance remains an OSRE enforcement priority as it both protects against the risk of default by PRPs on their CERCLA cleanup obligations and helps EPA preserve its limited resources.

⁶⁴ See <http://intranet.epa.gov/oeca/osre/>. For sample FA mechanisms that are also publicly available on the EPA website, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://cfpub.epa.gov/compliance/models/>.

⁶⁵ FRET is only available to federal and state regulators. To request access to FRET, please contact an OSRE FA team member.

⁶⁶ For information about participating on monthly FA calls, please contact an OSRE FA team member.

⁶⁷ EPA sets national enforcement initiatives every three years to focus resources toward the most significant environmental problems and human health challenges identified by EPA staff, states, tribes, and the public. As part of previous national priorities, EPA assessed the use of FA mechanisms, reviewed numerous site-specific FA documents, and commenced enforcement actions as appropriate to ensure compliance with FA requirements.

Appendix B

Practical Considerations Regarding Financial Test and Corporate Guarantee FA Options

Case teams considering allowing the use of a financial test or corporate guarantee, or reviewing submissions associated with the two FA mechanisms, may want to consider the following practical points:

- Audited financial statements with clean opinions are important to ensure the integrity of the financial data in a submission.
 - Private companies' financials are not required by the Securities and Exchange Commission (SEC) to be audited, so Regions should verify that private companies seeking to use the financial test or corporate guarantee are willing to provide audited financials.
 - Quarterly filings—even for public companies—are not typically required by the SEC to be audited, so Regions should be aware of other sources of information to monitor companies' financial health (see last bullet and related sub-bullets below).
 - Adverse opinions and disclaimers of opinion should disqualify a financial test or corporate guarantee applicant.
 - Qualifications of opinions should be investigated further.
- In addition to publishing current ratings, ratings agencies maintain “watch lists” that give an indication of possible future downgrades.
 - Therefore, if the financial test or corporate guarantee is used by a company, Regions should monitor the watch lists to see if that company is added.
- Regions should be aware of how a bond relied upon by the company to satisfy the financial test or corporate guarantee fits into the company's capital structure.
 - Regions can have greater confidence in bond ratings for debenture or unsecured bond issuances rather than those secured by collateral.
 - Unsubordinated (senior) debt may receive a more favorable rating than subordinated debt from the same company.
 - In general, a company's senior unsecured debt issuance usually has the same rating as the company's long-term corporate credit rating.
- Routine monitoring of the relevant company's financial (annual and/or quarterly) statements and the business press is advisable. Among other things, Regions should be aware of the following indicators of potential financial trouble:
 - An omission or cut in the company's dividend payouts;
 - The delisting (i.e., removal) of a company's security from an exchange;
 - News of a merger, acquisition, or divestiture involving the company;
 - A negative change (i.e., downgrade) in the rating of the company's bond(s);
 - Financial losses and impairments;
 - Sharp stock price decreases; and
 - Eroding leverage and coverage ratios over time.

- Negative attestations from auditors (e.g., a statement in the auditor’s report that “nothing came to [his/her] attention that caused [him/her] to believe that the specified data should be adjusted”) are not allowed under current accounting protocols.
 - An “agreed-upon procedures engagement” report, prepared in accordance with applicable statements on standards by the American Institute of Certified Public Accountants (AICPA), which describes the procedures performed by and related findings of the auditor, including whether or not any discrepancies were found, would be more appropriate for purposes of CERCLA FA in the enforcement context.⁶⁸

⁶⁸ See EPA Office of Solid Waste, *Obsolete Language in the Financial Test for Subtitle C Treatment Storage and Disposal Facilities* (Feb. 27, 1997), available at [http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C68C99D730932BE28525670F006C2B4A/\\$file/14066.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/C68C99D730932BE28525670F006C2B4A/$file/14066.pdf); see also AICPA, *Statements on Standards for Attestation Engagements: Agreed-Upon Procedures Engagements*, AT Sec. 201, available at <http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AT-00201.pdf>.

Appendix C
Recommended Best Practices for Documentation and Data Management of Financial Assurance Obtained Pursuant to CERCLA Settlement Agreements and Unilateral Administrative Orders

I. PURPOSE

These recommendations are intended to aid Regions in formulating a plan or updating existing procedures to address financial assurance (FA) documentation and data management relating to FA requirements in CERCLA settlement agreements and unilateral administrative orders (UAOs).

II. BACKGROUND

FA requirements are imposed on potentially responsible parties (PRPs) in CERCLA settlements and UAOs to ensure that funds are available to complete cleanups. The settlement or UAO will specify the PRP's FA obligations. FA mechanisms available to PRPs in a given settlement or UAO could have different documentation requirements: self-insurance-type mechanisms, such as financial tests and corporate guarantees, call for initial and periodic submissions to EPA to demonstrate the relevant entity's financial strength vis-à-vis its environmental obligations; third-party provided mechanisms, such as trust funds, letters of credit, surety bonds, and insurance policies, usually involve an initial submission of the mechanism to EPA and subsequent submissions to account for any necessary changes (e.g., changes to the underlying cost estimate) or requests to cancel or replace the existing FA mechanism.

III. ROLES AND RESPONSIBILITIES

Regions should clearly define the roles and responsibilities of the various offices and staff involved in overseeing FA requirements to ensure that compliance tracking is successful. Therefore, Regions should designate staff responsible for FA matters through each step of the process. Moreover, Regions should limit access to FA submissions to appropriate staff. At a minimum, Regions should plan for the following FA-related undertakings, each of which is examined in greater detail below: (A) receiving FA submissions; (B) maintaining FA files; (C) reviewing FA submissions and monitoring FA compliance; (D) analyzing FA data and monitoring continued FA compliance; (E) demanding funds or work guaranteed by FA mechanisms; and (F) releasing FA documents.

A. Receiving FA Submissions

Regions should develop internal procedures stating how FA submissions will be handled when submitted to EPA. First, Regions should decide who should receive FA documentation: the person(s) receiving FA documentation will vary by Region, but generally could be a remedial project manager, an on-scene coordinator, a financial analyst, or staff within the legal or financial offices. The appropriate designee should be specified in the FA section of the settlement or UAO.

Second, Regions should employ a receipt log to record key information regarding any FA documentation received by EPA. These log books should record information such as the date of receipt, the type of mechanism at issue, the name of the PRP who submitted the mechanism, the amount of the mechanism, and the third-party provider of the mechanism.

B. Maintaining FA Files

FA submissions, including original mechanisms and related correspondence, should be maintained based on Regional conventions in a uniform, easily searchable way (e.g., by site and/or PRP). The safekeeping of third-party FA mechanisms is especially important: some third-party FA providers require originals to be presented to draw upon the mechanism, so all such mechanisms should be stored in a secure location—ideally a fireproof safe.

FA submissions may be claimed by PRPs as confidential business information (CBI) and should be treated accordingly until CBI determinations can be made. Any designated staff should be aware of CBI claims and should follow applicable regulations⁶⁹ to ensure the proper use and handling of CBI.

C. Reviewing FA Submissions and Monitoring FA Compliance

Regional offices should coordinate the review of FA submissions to monitor PRPs' compliance with FA obligations. FA reviews should be performed both initially and over time. Periodic reviews are usually performed on an annual basis, though it may be necessary to do so more frequently due to site-specific circumstances. Regions should determine who will have the lead responsibilities for reviewing and monitoring FA submissions.

Shortly after receiving an FA submission, the designated reviewer should perform an initial review of the FA document for conformity with the applicable requirements.⁷⁰ The reviewer should verify, among other things, that:

- All FA documents submitted are signed.
- The text of the FA submission follows or is substantially identical to EPA's sample FA mechanism language.⁷¹
- The amount of the FA mechanism(s) is at least equal to the cost of work to be performed.

⁶⁹ See, e.g., 40 C.F.R. §§ 2.211, 2.310 (2014).

⁷⁰ If reviewers have questions concerning whether a mechanism is in compliance, they can access the Financial Responsibility and Enforcement Tool (FRET), which is an online compilation of FA information that includes step-by-step instructions on reviewing various FA mechanisms. FRET is username and password protected. To request access to FRET, please contact an OSRE FA team member.

⁷¹ For additional information, see the Financial Assurance categories of the Cleanup Enforcement Model Language and Sample Documents Database, available at <http://cfpub.epa.gov/compliance/models/>.

- Contact information (e.g., name, title, address, phone number, email address) for relevant EPA, PRP, and/or third-party FA provider personnel is clear or easily obtainable.
- In the case of a trust fund or letter of credit, the identified financial institution is authorized to issue such mechanisms and is regulated and examined by a federal or state agency.
- In the case of a surety bond, the surety provider is listed on U.S. Treasury Circular 570 and that the amount of the bond is within the provider's underwriting limitation.
- In the case of insurance, the insurer is licensed or eligible to provide insurance.

As stated above, even FA mechanisms that are not required to be renewed annually should be reviewed periodically to ensure, for instance, that the face amount is sufficient to cover the current cost estimate at the site.

If additional information is needed, the submitter of the FA document should be contacted. If the reviewer determines that an FA submission does not comply with an FA requirement, s/he should coordinate with relevant legal and/or program staff, and their management as appropriate to determine the appropriate outreach or enforcement action, such as a notice of violation or an assessment of penalties. Regions should coordinate with the Department of Justice regarding contemplated judicial enforcement actions.

Moreover, FA information should be entered into EPA's Superfund Enterprise Management System (SEMS). It is important to track FA submissions, not only to help with monitoring compliance for individual instruments, but also so that integrated FA information can be used to detect broader FA issues, such as ensuring that a PRP has adequate FA coverage across Regions and being able to respond quickly if a PRP or financial institution defaults on its FA obligations. Populating SEMS with FA-related data allows EPA to monitor the status of various FA requirements in the CERCLA program.⁷²

D. Analyzing FA Data and Monitoring Continued FA Compliance

FA data in SEMS should be reviewed regularly to ensure accuracy and to track compliance. Any incomplete FA-related data fields in SEMS, such as FA expiration dates, should be identified during the review process and populated when available.

Likewise, FA reviews should identify any FA mechanisms set to expire and any delinquent documents. The staff responsible for conducting SEMS reviews should provide the assigned FA reviewer with a reminder of FA documents that have upcoming expiration dates and should notify such individual(s) of any delinquent documents.

E. Demanding Funds or Work Guaranteed by FA Mechanisms

⁷² When entering data into SEMS, Regions should take appropriate measures to properly safeguard any potential or actual CBI and to protect against its improper disclosure.

If necessary (e.g., upon an EPA work takeover in settlement scenarios), case teams should call upon FA providers, in accordance with the terms of the applicable enforcement document and FA mechanisms, to fund or perform cleanup work. Assuming the PRP neither timely cures a violation which gave rise to an EPA request for guaranteed FA resources nor provides an alternate FA mechanism within the allotted time period before an impending mechanism cancellation, the case team should communicate with the PRP and/or FA provider to address any issues that arise in connection with the PRP's FA obligations. When a case team submits a request to an FA provider seeking funds or work guaranteed by an FA mechanism, the case team should ensure, among other things, that EPA's request is timely, includes appropriate language or documentation (e.g., a "sight draft" for a drawdown on a letter of credit), and comes from an authorized Regional official.

F. Releasing FA Documents

FA documents should only be released by EPA after a request for release has been reviewed/or and a final determination has been made by EPA that a release of an FA mechanism is appropriate per the terms of the relevant settlement or UAO. If an alternate (i.e., substitute) FA mechanism has been received and the FA reviewer has determined that the replacement mechanism is adequate, the replaced FA mechanism can be returned to the relevant financial institution. Once an FA mechanism has been released, SEMS should be updated to record the replacement FA mechanism and its details or to reflect that FA is no longer required.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION ____

)
IN THE MATTER OF:) U.S. EPA Region ____
) CERCLA Docket No. ____
[Site Name and Location])
)
[Names of Respondents (if many, reference)
attached list)],)
)
Respondents) **UNILATERAL ADMINISTRATIVE**
) **ORDER FOR [INSERT AS**
) **APPROPRIATE: “REMEDIAL DESIGN**
) **AND REMEDIAL ACTION,”**
Proceeding under Section 106(a)) **“REMEDIAL INVESTIGATION AND**
of the Comprehensive Environmental) **FEASIBILITY STUDY,” OR**
Response, Compensation, and Liability) **“REMOVAL ACTION”]**
Act, 42 U.S.C. § 9606(a).)

**MODEL UNILATERAL ADMINISTRATIVE ORDER FOR
[RD/RA, RI/FS, OR REMOVAL ACTION]**

April 2015

**[FINANCIAL ASSURANCE AND ENFORCEMENT/WORK TAKEOVER SECTIONS
ONLY]**

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

I. FINANCIAL ASSURANCE

[NOTES ON THIS SECTION: When determining whether to include this Section in the Order or whether to modify it to limit the form of the financial assurance to certain mechanisms, case teams should consider the facts and circumstances of each case, including: the estimated cost of Work to be performed; the estimated time to complete the Work; the nature and extent of contamination at the Site; whether the financial assurance can be secured before commencement of the Work (or soon thereafter); the industry sectors in which Respondents operate; and the financial health of Respondents. Regions are strongly encouraged to include this Section for the more costly and time-consuming response actions. When this Section is included in an Order, Regions should examine the form and substance of all financial assurance mechanisms submitted by Respondents, both initially and over time, to ensure consistency and compliance with this Section (e.g., case teams should ensure that entities providing a demonstration or guarantee pursuant to Paragraph [1].d or [1].e have: (a) submitted all required documentation so that EPA can determine whether such financial assurance is adequate; and (b) fully and accurately reflected in their submission all of their financial assurance obligations (under CERCLA, RCRA, and any other federal, state, or tribal environmental obligation) to the United States or other governmental entities so all such obligations have been properly accounted for in determining whether such entity meets the financial test criteria). Financial assurance team members within the Office of Site Remediation Enforcement are available to assist with any financial assurance matters, including the evaluation of submissions.]

1. In order to ensure completion of the Work, Respondents shall secure financial assurance, initially in the amount of \$**[insert initial FA estimate]** (“Estimated Cost of the Work”). The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available under “Financial Assurance” at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm>, and satisfactory to EPA. Respondents may use multiple mechanisms if they are limited to trust funds, surety bonds guaranteeing payment, and/or letters of credit.

a. A trust fund: (1) established to ensure that funds will be available as and when needed for performance of the Work required by this Order; (2) administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency; and (3) governed by an agreement that requires the trustee to make payments from the fund only when the **[insert appropriate Regional official (e.g., Superfund Division Director)]** advises the trustee in writing that: (A) payments are necessary to fulfill the affected Respondents’ obligations under the Order; or (B) funds held in trust are in excess of the funds that are necessary to complete the performance of Work in accordance with this Order;

b. A surety bond, issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury, guaranteeing payment or performance in accordance with Paragraph [6] (Access to Financial Assurance);

c. An irrevocable letter of credit, issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a

federal or state agency, guaranteeing payment in accordance with Paragraph [6] (Access to Financial Assurance);

d. A demonstration by one or more Respondents that each such Respondent meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

e. A guarantee to fund or perform the Work executed by one of the following: (1) a direct or indirect parent company of a Respondent; or (2) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a Respondent; provided, however, that any company providing such a guarantee must demonstrate to EPA’s satisfaction that it meets the relevant financial test criteria of 40 C.F.R. § 264.143(f) and reporting requirements of this Section for the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee.

2. Standby Trust. If Respondents seek to establish financial assurance by using a surety bond, a letter of credit, or a corporate guarantee, Respondents shall at the same time establish and thereafter maintain a standby trust fund, which must meet the requirements specified in Paragraph [1].a, and into which payments from the other financial assurance mechanism can be deposited if the financial assurance provider is directed to do so by EPA pursuant to Paragraph [6] (Access to Financial Assurance). An originally signed duplicate of the standby trust agreement must be submitted, with the other financial mechanism, to EPA in accordance with Paragraph [3]. Until the standby trust fund is funded pursuant to Paragraph [6] (Access to Financial Assurance), neither payments into the standby trust fund nor annual valuations are required.

3. Within **[insert appropriate time period (e.g., 30)]** days after the Effective Date, Respondents shall submit to EPA proposed financial assurance mechanisms in draft form in accordance with Paragraph [1] for EPA’s review. Within **[insert appropriate time period (e.g., 60-90)]** days after the Effective Date, or 30 days after EPA’s approval of the form and substance of Respondents’ financial assurance, whichever is later, Respondents shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the **[insert desired recipient(s) (e.g., Regional Financial Management Officer, Regional financial assurance specialist, Regional attorney, and/or RPM) and relevant contact information if not provided elsewhere in the Order]**.

4. If Respondents provide financial assurance by means of a demonstration or guarantee under Paragraph [1].d or [1].e, the affected Respondents shall also comply, and shall ensure that their guarantors comply, with the other relevant criteria and requirements of 40 C.F.R. § 264.143(f) and this Section, including: (a) the initial submission to EPA of required documents from the affected entity’s chief financial officer and independent certified public accountant no later than 90 days after the Effective Date; (b) the annual resubmission of such documents within 90 days after the close of each such entity’s fiscal year; and (c) the notification

to EPA no later than 30 days, in accordance with Paragraph [5], after any such entity determines that it no longer satisfies the financial test criteria and requirements set forth at 40 C.F.R. § 264.143(f)(1). For purposes of this Section, references in 40 C.F.R. Part 264, Subpart H, to: (1) the terms “current closure cost estimate,” “current post-closure cost estimate,” and “current plugging and abandonment cost estimate” include the Estimated Cost of the Work; (2) “the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates” mean the sum of all environmental obligations (including obligations under CERCLA, RCRA, and any other federal, state, or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated, in addition to the Estimated Cost of the Work under this Order; (3) the terms “owner” and “operator” include each Respondent making a demonstration or obtaining a guarantee under Paragraph [1].d or [1].e; and (4) the terms “facility” and “hazardous waste management facility” include the Site.

5. Respondents shall diligently monitor the adequacy of the financial assurance. If any Respondent becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such Respondent shall notify EPA of such information within 30 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected Respondent of such determination. Respondents shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. Respondents shall follow the procedures of Paragraph [7] in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Respondents’ inability to secure and submit to EPA financial assurance in accordance with this Section shall in no way excuse performance of any other requirements of this Order, including, without limitation, the obligation of Respondents to complete the Work in accordance with the terms of this Order.

[NOTE: Case teams should make sure that the “trigger” regarding EPA’s ability to direct the deposit of funds into a standby trust and/or demand work under the financial assurance mechanism is consistent with the trigger in the following paragraph, e.g., if the Order allows EPA to direct a financial assurance provider to deposit funds into a standby trust in the event of either a Performance Failure Notice that is not remedied by a Respondent within the allotted cure period or a Respondent’s failure to provide alternative financial assurance 30 days prior to an impending mechanism cancellation, the mechanism should contain equivalent language.]

6. Access to Financial Assurance.

a. If EPA determines that Respondents (1) have ceased implementation of any portion of the Work, (2) are seriously or repeatedly deficient or late in their performance of the Work, or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (“Performance Failure Notice”) to both Respondents and the financial assurance provider regarding the affected Respondents’ failure to perform. Any Performance Failure Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Respondents a period of 10 days

within which to remedy the circumstances giving rise to EPA's issuance of such notice. If, after expiration of the 10-day period specified in this Paragraph, Respondents have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Performance Failure Notice, then, in accordance with any applicable financial assurance mechanism, EPA may at any time thereafter direct the financial assurance provider to immediately: (i) deposit any funds assured pursuant to this Section into the standby trust fund; or (ii) arrange for performance of the Work in accordance with this Order.

b. If EPA is notified by the provider of a financial assurance mechanism that it intends to cancel the mechanism, and the affected Respondent fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, EPA may, prior to cancellation, direct the financial assurance provider to deposit any funds guaranteed under such mechanism into the standby trust fund for use consistent with this Section.

7. Modification of Amount, Form, or Terms of Financial Assurance. Respondents may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to the EPA individual(s) referenced in Paragraph [3], and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, a description of the proposed changes, if any, to the form or terms of the financial assurance, and any newly proposed financial assurance documentation in accordance with the requirements of Paragraphs [1] and [2]. EPA will notify Respondents of its decision to approve or disapprove a requested reduction or change. Respondents may reduce the amount of the financial assurance mechanism only in accordance with EPA's approval. Within 30 days after receipt of EPA's approval of the requested modifications pursuant to this Paragraph, Respondents shall submit to the EPA individual(s) referenced in Paragraph [3] all executed and/or otherwise finalized documentation relating to the amended, reduced, or alternative financial assurance mechanism. Upon EPA's approval, the Estimated Cost of the Work shall be deemed to be the estimate of the cost of the remaining Work in the approved proposal.

8. Release, Cancellation, or Discontinuation of Financial Assurance. Respondents may release, cancel, or discontinue any financial assurance provided under this Section only (a) after receipt of documentation issued by EPA certifying completion of the Work; or (b) in accordance with EPA's written approval of such release, cancellation, or discontinuation.

II. ENFORCEMENT/WORK TAKEOVER

9. Any willful violation, or failure or refusal to comply with any provision of this Order may subject Respondents to civil penalties of up to \$37,500 per violation per day, as provided in Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), and the Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 40 C.F.R Part 19.4. In the event of such willful violation, or failure or refusal to comply, EPA may carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and/or may seek judicial enforcement of this Order pursuant to Section 106 of CERCLA, 42 U.S.C § 9606. **[Include the following sentence if Section [insert number] (Financial Assurance) is included in the Order:** In addition, nothing in this Order shall limit EPA's authority under Section [insert section number] (Financial Assurance).] Respondents may also be subject to punitive damages in an amount up to three times the amount of any cost incurred by the United States as a result of such failure to comply, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).

Sample Financial Assurance Mechanisms for Settlements

CERCLA Financial Assurance Sample Corporate Guarantee for Use in Connection with Settlements

NOTE: A corporate guarantee, as specified in the relevant settlement agreement, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. Case teams should make sure that provisions in the corporate guarantee and accompanying financial test submissions are consistent with relevant settlement provisions. For each site/facility covered by this guarantee, case teams should elicit the following information from the guarantor, both initially and over time: EPA or state site/facility/spill identification number, site or facility name, and address; and the basis for the liability or obligation (i.e., CERCLA; RCRA Subtitle C closure, post-closure, and/or corrective action; RCRA Subtitle D; etc.).

CORPORATE GUARANTEE FOR CERCLA WORK

Guarantee made this **[insert date]** by **[insert name of guaranteeing entity]**, a business corporation organized under the laws of the State of **[insert state]** (“Guarantor”). This Guarantee is made on behalf of **[insert name of PRP/Settling Defendant]** (“Settling Defendant”) of **[insert address]**, which is **[insert one of the following: “our subsidiary”; “a subsidiary of [insert name and address of common parent corporation]**, of which Guarantor is a subsidiary”; or “an entity with which Guarantor has a substantial business relationship, as defined in 40 C.F.R. § 264.141(h)”, to the United States Environmental Protection Agency (EPA).

RECITALS

Whereas, under a **[insert as appropriate: “Consent Decree,” “Administrative Settlement Agreement and Order on Consent,” or “Settlement Agreement”]** dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements]** (hereinafter, the “Settlement Agreement”), between Settling Defendant and EPA, relating to the **[insert site name [operable unit]]** (“Site”), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, Settling Defendant is required to perform the “Work” as defined in the Settlement Agreement (hereinafter, the “Work”) and to fulfill its other obligations as set forth therein.

Whereas, the Settlement Agreement requires Settling Defendant to provide financial assurance to EPA to ensure completion of the Work at the Site.

Whereas, in order to provide part or all of such financial assurance required by the Settlement Agreement, Settling Defendant has agreed to provide EPA with a guarantee, issued by Guarantor, of Settling Defendant’s obligations arising under the Settlement Agreement, all as set forth more fully in this Guarantee.

Whereas, Guarantor meets or exceeds the financial test criteria as specified in the Settlement Agreement and attached as Exhibits A and B and agrees to comply with the

reporting and notification requirements for guarantors as specified in the Settlement Agreement and this Guarantee.

AGREEMENT

1. For value received from Settling Defendant, Guarantor guarantees to EPA that, in the event that Settling Defendant fails to pay for or perform the Work as required by the Settlement Agreement, Guarantor shall do so or immediately, upon written demand from EPA, deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.
2. For so long as this Guarantee is in effect, within 90 days after the close of each fiscal year of Guarantor, Guarantor shall submit to EPA: (a) a letter signed by Guarantor's chief financial officer certifying Guarantor's compliance with the financial test criteria set forth in the Settlement Agreement's financial assurance section; (b) a copy of Guarantor's audited financial statements for its latest completed fiscal year, and a copy of Guarantor's independent certified public accountant's report on examination of such financial statements, which report on examination shall be unqualified or, if qualified, shall have been approved in writing by EPA; and (c) a special report from Guarantor's independent certified public accountant to Guarantor attesting to Guarantor's compliance with the financial test criteria set forth in the Settlement Agreement's financial assurance section.
3. Guarantor agrees that if, at the end of any fiscal year before termination of this Guarantee, Guarantor fails to meet the financial test criteria set forth in the Settlement Agreement, Guarantor shall send, within 90 days, by certified mail, notice to EPA and to Settling Defendant that Guarantor intends to provide alternative financial assurance as specified in the Settlement Agreement in the name of Settling Defendant. Within 120 days after the end of such fiscal year, Guarantor shall establish such financial assurance unless Settling Defendant has done so.
4. Guarantor agrees to notify EPA, 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.
5. Guarantor agrees that, within 30 days after being notified by EPA of a determination that Guarantor no longer meets the financial test criteria set forth in the Settlement Agreement or that Guarantor is disallowed from continuing as a guarantor, Guarantor shall establish alternative financial assurance as specified in the Settlement Agreement, as applicable, in the name of Settling Defendant unless Settling Defendant has done so.
6. Guarantor agrees to remain bound under this Guarantee notwithstanding any or all of the following: amendment or modification of the Settlement Agreement or any

documents, instruments or agreements executed in connection therewith, the extension or reduction of the time of performance of the Work required by the Settlement Agreement, or any other modification or alteration of an obligation of Settling Defendant pursuant to the Settlement Agreement.

7. Guarantor agrees to remain bound under this guarantee for as long as Settling Defendant must comply with the applicable financial assurance requirements of the Settlement Agreement, except as provided in paragraph 8 of this Guarantee.

8. **[Insert the following sentence if the Guarantor is (a) a direct or higher-tier corporate parent of the Settling Defendant, or (b) a firm whose parent corporation is also the parent corporation of the Settling Defendant:** Guarantor may terminate this Guarantee by sending notice, by certified mail, to EPA and to Settling Defendant, provided that this Guarantee may not be terminated unless and until Settling Defendant obtains, and EPA approves, alternative financial assurance as specified in the Settlement Agreement.]

[Otherwise (i.e., if the Guarantor is a firm qualifying as a guarantor due to its “substantial business relationship” with the Settling Defendant), insert the following sentence: Guarantor may terminate this Guarantee 120 days following the receipt of notification, through certified mail, by EPA and by Settling Defendant.]

9. Guarantor agrees that if Settling Defendant fails to provide alternative financial assurance as specified in the Settlement Agreement and obtain written approval of such assurance from EPA within 90 days after a notice of cancellation by Guarantor is received by EPA from Guarantor, Guarantor shall provide such alternative financial assurance in the name of Settling Defendant.

10. Guarantor expressly waives notice of acceptance of this Guarantee by EPA or by Settling Defendant. Guarantor also expressly waives notice of amendments or modifications of the Settlement Agreement or any documents, instruments or agreements executed in connection therewith.

11. All notices, elections, approvals, demands, and requests required or permitted hereunder shall be given in writing to (unless updated from time to time) the following:

If to Guarantor: **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)];**

If to Settling Defendant: **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)];** and

If to EPA: **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.) of appropriate EPA official/staff (e.g., Superfund Division Director, Remedial Project Manager, and/or Office of Regional Counsel contact)].**

IN WITNESS WHEREOF, the parties hereto, by their authorized representatives duly authorized, intending to be legally bound, have caused this Guarantee to be duly executed and delivered as of the date first above written.

Name of Guarantor: _____

Authorized signature for guarantor: _____

Name of person signing: _____

Title of person signing: _____

Contact information for signatory: _____

State of **[insert state]**

County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of Guarantor's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Guarantor]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

EXHIBIT A (CFO Letter)

Follow sample, available in the financial assurance category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

EXHIBIT B (CPA Report)

Follow sample, available in the financial assurance category of the Cleanup Enforcement Model Language and Sample Documents Database at <http://cfpub.epa.gov/compliance/models/>.

CERCLA Financial Assurance Sample Financial Test Documents for Use in Connection with Settlements

NOTE: A PRP/Settling Defendant may demonstrate its ability to pay for and/or perform cleanup work required by a settlement agreement by passing one of two financial tests, referred to below as “Alternative 1” or “Alternative 2.” To demonstrate compliance with either financial test, the PRP/Settling Defendant will be required by the relevant settlement agreement to submit certain documents and information to EPA. The submissions may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. For both financial test alternatives (Alternative 1 and Alternative 2), the samples that follow include a Sample CFO Letter and a Sample CPA Report: a PRP/Settling Defendant using financial test Alternative 1 should utilize “Sample CFO Letter (for Test Alternative 1)” and “Sample CPA Report (for Test Alternative 1),” while a PRP/Settling Defendant using financial test Alternative 2 should utilize “Sample CFO Letter (for Test Alternative 2)” and “Sample CPA Report (for Test Alternative 2).” Case teams should make sure that provisions in the financial test documents that follow are consistent with relevant settlement provisions. For each site/facility covered by this financial test and referenced below, case teams should elicit the following information from the PRP/Settling Defendant, both initially and over time: EPA or state site/facility/spill identification number, site or facility name, and address; and the basis for the liability or obligation (i.e., CERCLA; RCRA Subtitle C closure, post-closure, and/or corrective action; RCRA Subtitle D; etc.).

[Remainder of page left blank intentionally.]

**CERCLA Financial Assurance Financial Test:
Sample CFO Letter (for Test Alternative 1)
[To be printed on PRP/Settling Defendant's letterhead]**

[Insert date]

U.S. Environmental Protection Agency Region [insert number]
c/o [insert appropriate Regional official such as "Superfund Division Director"]
[Insert address]
[Insert contact information]

Dear [insert EPA recipient identified above]:

I am the chief financial officer of [insert name of PRP/Settling Defendant] (the "Company"). This letter is in support of the Company's use of a financial test to demonstrate financial assurance for the obligations of the Company under that certain [insert as appropriate: "Consent Decree," "Administrative Settlement Agreement and Order on Consent," or "Settlement Agreement"] dated [insert date], [insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements] (hereinafter, the "Settlement Agreement"), between the Company and the U.S. Environmental Protection Agency (EPA), for the [insert site name [operable unit]] ("Site"), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675. This letter confirms the Company's satisfaction of certain financial criteria, as set forth more fully below, that makes the Company eligible to utilize the financial test as financial assurance under the Settlement Agreement.

[Fill out the following paragraphs regarding CERCLA settlements and unilateral orders, RCRA facilities, TSCA facilities, SDWA facilities, and associated financial assurance requirements. If the Company has no CERCLA settlement, order, or RCRA/TSCA/SDWA facility obligations that belong in a particular paragraph, write "None" in the space indicated. For each settlement, order, and site/facility, include identifying information (civil action/docket number, site/facility/spill identification number, etc.) and the financial assurance dollar amount associated with such settlement, order, and/or site/facility.]

1. The dollar amount of financial assurance required by Paragraph [insert applicable paragraph number] of the Settlement Agreement and covered by the Company's use of the financial test is \$[insert dollar amount].
2. The Company is a signatory or respondent to the following CERCLA settlements (other than the Settlement Agreement) or unilateral administrative orders, respectively, under which the Company is providing financial assurance to EPA through the use of a financial test. The total dollar amount of such financial assurance covered by a financial

test is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such settlement or order as follows: [insert information as necessary].

3. The Company is the owner and/or operator of the following facilities for which the Company has demonstrated financial assurance to EPA, states, and/or other regulators in the United States through the use of a test equivalent or substantially equivalent to the test certified herein, including but not limited to hazardous waste Treatment, Storage, and Disposal (TSD) facilities under 40 CFR parts 264 and 265, Municipal Solid Waste Landfill (MSWLF) facilities under 40 CFR part 258, Underground Injection Control (UIC) facilities under 40 CFR part 144, Underground Storage Tank (UST) facilities under 40 CFR part 280, and Polychlorinated Biphenyl (PCB) storage facilities under 40 CFR part 761. The total dollar amount of such financial assurance covered by a financial test is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such facility as follows: [insert information as necessary].

4. The Company guarantees to EPA, states, and/or other regulators in the United States the CERCLA settlement or unilateral administrative order obligations and/or the MSWLF, TSD, UIC, UST, PCB, and/or other facility obligations of the following guaranteed parties: [insert information as necessary]. The total dollar amount of such CERCLA settlement or order obligations and regulated facility obligations so guaranteed is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such settlement, order, and/or facility as follows: [insert information as necessary].

5. The Company [insert “is required” or “is not required”] to file a Form 10K with the Securities and Exchange Commission for the Company’s latest fiscal year.

6. The Company’s fiscal year ends on [insert month and day]. I hereby certify that the figures for the following items marked with an asterisk are derived from the Company’s independently audited, year-end financial statements for its latest completed fiscal year, ended [insert date], and further certify as follows:

A. The aggregate total of the dollar amounts shown in Paragraphs 1 through 4 above equals \$[insert dollar amount].

*B. Company’s total liabilities equal: \$[insert dollar amount].

*C. Company’s tangible net worth equals: \$[insert dollar amount].

*D. Company’s net worth equals: \$[insert dollar amount].

*E. Company’s current assets equal: \$[insert dollar amount].

*F. Company’s current liabilities equal: \$[insert dollar amount].

G. Company’s net working capital [line E minus line F] equals: \$[insert dollar amount].

- *H. Sum of Company's net income plus depreciation, depletion, and amortization equals: \$[insert dollar amount].
- *I. Company's total assets in the United States equal (required only if less than 90% of Company's assets are located in the United States): \$[insert dollar amount].
- J. Is line C at least \$10 million? (Yes/No): [insert yes or no].
- K. Is line C at least 6 times line A? (Yes/No): [insert yes or no].
- L. Is line G at least 6 times line A? (Yes/No): [insert yes or no].
- *M. Are at least 90% of Company's assets located in the United States? (Yes/No): [insert yes or no]. If "No," complete line N.
- N. Is line I at least 6 times line A? (Yes/No): [insert yes or no].
- O. Is line B divided by line D less than 2.0? (Yes/No): [insert yes or no].
- P. Is line H divided by line B greater than 0.1? (Yes/No): [insert yes or no].
- Q. Is line E divided by line F greater than 1.5? (Yes/No): [insert yes or no].

I hereby certify that, to the best of my knowledge after thorough investigation, the information contained in this letter is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

By [signature]: _____
 Printed name: _____
 Title: _____
 Address: _____
 Contact information: _____
 Date: _____

**CERCLA Financial Assurance Financial Test:
Sample CFO Letter (for Test Alternative 2)
[To be printed on PRP/Settling Defendant's letterhead]**

[Insert date]

U.S. Environmental Protection Agency Region [insert number]
c/o [insert appropriate Regional official such as "Superfund Division Director"]
[Insert address]
[Insert contact information]

Dear [insert EPA recipient identified above]:

I am the chief financial officer of [insert name of PRP/Settling Defendant] (the "Company"). This letter is in support of the Company's use of a financial test to demonstrate financial assurance for the obligations of the Company under that certain [insert as appropriate: "Consent Decree," "Administrative Settlement Agreement and Order on Consent," or "Settlement Agreement"] dated [insert date], [insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements], between the Company and the U.S. Environmental Protection Agency (EPA), for the [insert site name [operable unit]] Site (hereinafter, the "Settlement Agreement"), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675. This letter confirms the Company's satisfaction of certain financial criteria, as set forth more fully below, that makes the Company eligible to utilize the financial test as financial assurance under the Settlement Agreement.

[Fill out the following paragraphs regarding CERCLA settlements and unilateral orders, RCRA facilities, TSCA facilities, SDWA facilities, and associated financial assurance requirements. If the Company has no CERCLA settlement, order, or RCRA/TSCA/SDWA facility obligations that belong in a particular paragraph, write "None" in the space indicated. For each settlement, order, and site/facility, include identifying information (civil action/docket number, site/facility/spill identification number, etc.) and the financial assurance dollar amount associated with such settlement, order, and/or site/facility.]

1. The dollar amount of financial assurance required by Paragraph [insert applicable paragraph number] of the Settlement Agreement and covered by the Company's use of the financial test \$[insert dollar amount].

2. The Company is a signatory or respondent to the following CERCLA settlements (other than the Settlement Agreement) or unilateral administrative orders, respectively, under which the Company is providing financial assurance to EPA through the use of a financial test. The total dollar amount of such financial assurance covered by a financial test is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such settlement or order as follows: [insert information as necessary].

3. The Company is the owner and/or operator of the following facilities for which the Company has demonstrated financial assurance to EPA, states, and/or other regulators in the United States through the use of a test equivalent or substantially equivalent to the test certified herein, including but not limited to hazardous waste Treatment, Storage, and Disposal (TSD) facilities under 40 CFR parts 264 and 265, Municipal Solid Waste Landfill (MSWLF) facilities under 40 CFR part 258, Underground Injection Control (UIC) facilities under 40 CFR part 144, Underground Storage Tank (UST) facilities under 40 CFR part 280, and Polychlorinated Biphenyl (PCB) storage facilities under 40 CFR part 761. The total dollar amount of such financial assurance covered by a financial test is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such facility as follows: [insert information as necessary].

4. The Company guarantees to EPA, states, and/or other regulators in the United States the CERCLA settlement or unilateral administrative order obligations and/or the MSWLF, TSD, UIC, UST, PCB, and/or other facility obligations of the following guaranteed parties: [insert information as necessary]. The total dollar amount of such CERCLA settlement or order obligations and regulated facility obligations so guaranteed is equal, in the aggregate, to \$[insert dollar amount], and is shown for each such settlement, order, and/or facility as follows: [insert information as necessary].

5. The Company [insert “is required” or “is not required”] to file a Form 10K with the Securities and Exchange Commission for the Company’s latest fiscal year.

6. The Company’s fiscal year ends on [insert month and day]. I hereby certify that the figures for the following items marked with an asterisk are derived from the Company’s independently audited, year-end financial statements for its latest completed fiscal year, ended [insert date], and further certify as follows:

A. The aggregate total of the dollar amounts shown in Paragraphs 1 through 4 above equals \$[insert dollar amount].

B. The current rating of the Company’s senior unsecured debt is [insert as appropriate either: [AAA, AA, A, or BBB] as issued by Standard and Poor’s or [Aaa, Aa, A or Baa] as issued by Moody’s Investor Services].

*C. Company’s tangible net worth equals: \$[insert dollar amount].

*D. Company’s total assets in the United States equal (required only if less than 90% of Company’s assets are located in the United States.): \$[insert dollar amount].

E. Is line C at least 6 times line A? (Yes/No): [insert yes or no].

F. Is line C at least \$10 million? (Yes/No): [insert yes or no].

G. Are at least 90% of Company’s assets located in the United States? (Yes/No): [insert yes or no]. If “No,” complete line H.

H. Is line D at least 6 times line A? (Yes/No): **[insert yes or no]**.

I hereby certify that, to the best of my knowledge after thorough investigation, the information contained in this letter is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

By [signature]: _____
Printed name: _____
Title: _____
Address: _____
Contact information: _____
Date: _____

**CERCLA Financial Assurance Financial Test:
Sample CPA Report (for Test Alternative 1)
[To be printed on CPA's letterhead]**

**Independent Accountants' Report
on Applying Agreed-Upon Procedures**

To the Board of Directors and Management of **[insert name of PRP/Settling Defendant]**:

We have performed the procedures outlined below, which were agreed to by **[insert name of PRP/Settling Defendant]** (the "Company"), to assist the Company in confirming selected financial data contained in the attached letter from **[insert name of CFO]**, the Company's Chief Financial Officer, dated **[insert date]**, to **[insert EPA recipient (Region, name, and title)]** (the "CFO Letter"). We have been advised by the Company that the CFO Letter has been or will be submitted to the United States Environmental Protection Agency (EPA) in support of the Company's use of a financial test to demonstrate financial assurance for the Company's obligations under that certain **[insert as appropriate: "Consent Decree," "Administrative Settlement Agreement and Order on Consent," or "Settlement Agreement"]** dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements]**, between the Company and EPA, for the **[insert site name [operable unit]]** Site (hereinafter, the "Settlement Agreement"), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675. The procedures outlined below were performed solely to assist the Company in complying with the financial assurance requirements contained in the Settlement Agreement.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

The procedures we performed and our associated findings are as follows:

1. We confirm that we have audited the consolidated financial statements of the Company as of and for the fiscal year ended **[insert date]** in accordance with United States generally accepted accounting principles (such audited, consolidated financial statements, the "Audited Financials"). Our report dated **[insert date]**, with respect thereto, is included in the Company's **[insert year]** Annual Report on Form 10-K.
2. Using data set forth in the Audited Financials, we calculated the amount of the Company's total liabilities as of **[insert date]** as \$**[insert dollar amount]**, by [adding

total current liabilities of \$[insert dollar amount] to total non-current liabilities of \$[insert dollar amount]]. We compared the amount of the Company’s total liabilities as so calculated with the amount set forth in Line 6(B) of the CFO Letter (“Total Liabilities”), and found such amounts to be in agreement.

3. Using data set forth in the Audited Financials, we calculated the amount of the Company’s tangible net worth as of [insert date] as \$[insert dollar amount], by [subtracting the amount of net intangible assets of \$[insert dollar amount] from the amount of total stockholders’ equity of \$[insert dollar amount]]. We compared the amount of the Company’s tangible net worth as so calculated with the amount set forth in Line 6(C) of the CFO Letter (“Tangible Net Worth”), and found such amounts to be in agreement.

4. We compared the amount of the Company’s net worth as of [insert date], as defined and set forth in the Audited Financials and as calculated therein as \$[insert dollar amount], with the amount set forth in Line 6(D) of the CFO Letter (“Net Worth”), and found such amounts to be in agreement.

5. We compared the amount of the Company’s total current assets as of [insert date], as defined and set forth in the Audited Financials and as calculated therein as \$[insert dollar amount], with the amount set forth in Line 6(E) of the CFO Letter (“Current Assets”), and found such amounts to be in agreement.

6. We compared the amount of the Company’s total current liabilities as of [insert date], as defined and set forth in the Audited Financials and as calculated therein as \$[insert dollar amount], with the amount set forth in Line 6(F) of the CFO Letter (“Current Liabilities”), and found such amounts to be in agreement.

7. Using data set forth in the Audited Financials, we calculated the amount of the Company’s net working capital as of [insert date] as \$[insert dollar amount], by [subtracting total current liabilities of \$[insert dollar amount] from total current assets of \$[insert dollar amount]]. We compared the amount of the Company’s net working capital as so calculated with the amount set forth in Line 6(G) of the CFO Letter (“Net Working Capital”), and found such amounts to be in agreement.

8. Using data set forth in the Audited Financials, we calculated the sum of the Company’s net income plus depreciation, depletion, and amortization as of [insert date] as \$[insert dollar amount], by [adding depreciation, depletion, and amortization of property and intangibles of \$[insert dollar amount] to net income of \$[insert dollar amount]]. We compared the sum of the Company’s net income plus depreciation, depletion, and amortization as so calculated with the amount set forth in Line 6(H) of the CFO Letter (“Net Income Plus Depreciation, Depletion, and Amortization”), and found such amounts to be in agreement.

9. [Insert either: “We compared the amount of the Company’s total assets located in the United States as of [insert date] of \$[insert dollar amount] (as such amount was

derived by the Company from its underlying accounting records that support the Audited Financials and notified to us in writing) with the amount set forth in Line 6(I) of the CFO Letter, and found such amounts to be in agreement[.]” or “We calculated the percentage of Company assets located in the United States as of [insert date] by dividing the amount of the Company’s total assets located in the United States of \$[insert dollar amount] (as such amount was derived by the Company from its underlying accounting records that support the Audited Financials and notified to us in writing) by the amount of the Company’s total assets as defined and set forth in the Audited Financials, and found such percentage to be greater than 90%.”]

10. Our calculation of the amount of the Company’s tangible net worth (as set forth in Line 3 above) is [insert either: “greater than or equal to” or “less than”] \$10 million.

11. The dollar amount identified in Line 6(A) of the CFO Letter is hereinafter referred to as the “Financial Assurance Amount.” Our calculation of the amount of the Company’s tangible net worth (as set forth in Line 3 above) is [insert either: “greater than or equal to” or “less than”] an amount calculated as six times the Financial Assurance Amount.

12. Our calculation of the amount of the Company’s net working capital (as set forth in Line 7 above) is [insert either: “greater than or equal to” or “less than”] an amount calculated as six times the Financial Assurance Amount.

13. **[Include and complete Line 13 only if less than 90% of Company’s assets are located in the United States]** Our calculation of the amount of the Company’s total assets located in the United States (as set forth in Line 9 above) is [insert either: “greater than or equal to” or “less than”] an amount calculated as six times the Financial Assurance Amount.

14. Our calculation of the amount of the Company’s total liabilities (as set forth in Line 2 above) divided by our calculation of the amount of the Company’s net worth (as set forth in Line 4 above) is [insert either: “greater than or equal to” or “less than”] 2.0.

15. Our calculation of the sum of the Company’s net income plus depreciation, depletion, and amortization (as set forth in Line 8 above) divided by our calculation of the amount of the Company’s total liabilities (as set forth in Line 2 above) is [insert either: “greater than” or “less than or equal to”] 0.1.

16. Our calculation of the amount of the Company’s total current assets (as set forth in Line 5 above) divided by our calculation of the amount of the Company’s total current liabilities (as set forth in Line 6 above) is [insert either: “greater than” or “less than or equal to”] 1.5.

[Remainder of page left blank intentionally.]

The foregoing agreed-upon procedures do not constitute an audit of the Company's financial statements or any part thereof, the objective of which is the expression of opinion on the financial statements or a part thereof. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the Board of Directors and Management of the Company and is not intended to be and should not be used by anyone other than these specified parties; *provided, however*, that we acknowledge and agree that the Company may provide this report to EPA in support of the Company's financial assurance demonstration under the Settlement Agreement.

By [signature]: _____
Printed name: _____
Title: _____
Address: _____
Contact information: _____
Date: _____

**CERCLA Financial Assurance Financial Test:
Sample CPA Report (for Test Alternative 2)
[To be printed on CPA's letterhead]**

**Independent Accountants' Report
on Applying Agreed-Upon Procedures**

To the Board of Directors and Management of **[insert name of PRP/Settling Defendant]**:

We have performed the procedures outlined below, which were agreed to by **[insert name of PRP/Settling Defendant]** (the "Company"), to assist the Company in confirming selected financial data contained in the attached letter from **[insert name of CFO]**, the Company's Chief Financial Officer, dated **[insert date]**, to **[insert EPA recipient (Region, name, and title)]** (the "CFO Letter"). We have been advised by the Company that the CFO Letter has been or will be submitted to the United States Environmental Protection Agency (EPA) in support of the Company's use of a financial test to demonstrate financial assurance for the Company's obligations under that certain **[insert as appropriate: "Consent Decree," "Administrative Settlement Agreement and Order on Consent," or "Settlement Agreement"]** dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements]**, between the Company and EPA, for the **[insert site name [operable unit]]** Site (hereinafter, the "Settlement Agreement"), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675. The procedures outlined below were performed solely to assist the Company in complying with the financial assurance requirements contained in the Settlement Agreement.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

The procedures we performed and our associated findings are as follows:

1. We confirm that we have audited the consolidated financial statements of the Company as of and for the fiscal year ended **[insert date]** in accordance with United States generally accepted accounting principles (such audited, consolidated financial statements, the "Audited Financials"). Our report dated **[insert date]**, with respect thereto, is included in the Company's **[insert year]** Annual Report on Form 10-K.
2. Using data set forth in the Audited Financials, we calculated the amount of the Company's tangible net worth as of **[insert date]** as \$**[insert dollar amount]**, by

[subtracting the amount of net intangible assets of \$[insert dollar amount] from the amount of total stockholders' equity of \$[insert dollar amount]]. We compared the amount of the Company's tangible net worth as so calculated with the amount set forth in Line 6(C) of the CFO Letter ("Tangible Net Worth"), and found such amounts to be in agreement.

3. **[Insert either:** "We compared the amount of the Company's total assets located in the United States as of [insert date] of \$[insert dollar amount] (as such amount was derived by the Company from its underlying accounting records that support the Audited Financials and notified to us in writing) with the amount set forth in Line 6(D) of the CFO Letter, and found such amounts to be in agreement[.]" or "We calculated the percentage of Company assets located in the United States as of [December 31, 20__] by dividing the amount of the Company's total assets located in the United States of \$[insert dollar amount] (as such amount was derived by the Company from its underlying accounting records that support the Audited Financials and notified to us in writing) by the amount of the Company's total assets as defined and set forth in the Audited Financials, and found such percentage to be greater than 90%."]

4. Our calculation of the amount of the Company's tangible net worth (as set forth in Line 2 above) is **[insert either:** "greater than or equal to" or "less than"] \$10 million.

5. The dollar amount identified in Line 6(A) of the CFO Letter is hereinafter referred to as the "Financial Assurance Amount." Our calculation of the amount of the Company's tangible net worth (as set forth in Line 2 above) is **[insert either:** "greater than or equal to" or "less than"] an amount calculated as six times the Financial Assurance Amount.

6. **[Include and complete Line 6 only if less than 90% of Company's assets are located in the United States]** Our calculation of the amount of the Company's total assets located in the United States (as set forth in Line 3 above) is **[insert either:** "greater than or equal to" or "less than"] an amount calculated as six times the Financial Assurance Amount.

[Remainder of page left blank intentionally.]

The foregoing agreed-upon procedures do not constitute an audit of the Company's financial statements or any part thereof, the objective of which is the expression of opinion on the financial statements or a part thereof. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the Board of Directors and Management of the Company and is not intended to be and should not be used by anyone other than these specified parties; *provided, however*, that we acknowledge and agree that the Company may provide this report to EPA in support of the Company's financial assurance demonstration under the Settlement Agreement.

By [signature]: _____
Printed name: _____
Title: _____
Address: _____
Contact information: _____
Date: _____

Sample Standby Funding Commitment
[To be printed on PRP/Settling Defendant's letterhead]

[Insert date]

U.S. Environmental Protection Agency Region **[insert number]**
c/o **[insert appropriate Regional official such as "Superfund Division Director"]**
[Insert address]
[Insert contact information]

Re: Standby Funding Commitment

Dear **[insert EPA recipient identified above]**:

[Insert name of PRP/Settling Defendant] (the "Company") hereby establishes this Irrevocable Standby Funding Commitment in favor of the United States Environmental Protection Agency (EPA) in the amount of \$**[insert dollar amount]** (the "Financial Assurance Amount"). The Financial Assurance Amount is equal to the financial assurance the Company has agreed to establish and maintain pursuant to Paragraph **[insert applicable paragraph number]** of that certain **[insert as appropriate: "Consent Decree," "Administrative Settlement Agreement and Order on Consent," or "Settlement Agreement"]** dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements]**, between the Company and EPA, for the **[insert site name [operable unit]]** Site (hereinafter, the "Settlement Agreement"), entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, as further described in the letter dated **[insert date]**, from the Company's Chief Financial Officer, **[insert name]**, to EPA. The Company is establishing this Irrevocable Standby Funding Commitment in consideration of the mutual promises and covenants contained in the Settlement Agreement.

Pursuant to this Irrevocable Standby Funding Commitment, upon the occurrence of any "Work Takeover" by EPA under Paragraph **[insert applicable paragraph number]** of the Settlement Agreement and at the request and direction of an authorized representative of EPA upon the Company's failure to remedy to EPA's satisfaction the circumstances giving rise to EPA's implementation of such Work Takeover, the Company agrees to pay to or at the direction of EPA an amount up to but not exceeding the Financial Assurance Amount in immediately available funds and without setoff, counterclaim, or condition of any kind. Amounts drawn under the immediately preceding sentence shall be paid as set forth in the Settlement Agreement to continue and complete the "Work." This Irrevocable Standby Funding Commitment shall continue in full force and effect until the earlier to occur of (a) the termination of the Settlement Agreement in accordance with its terms and (b) the establishment by the Company of alternative financial assurance consistent with and as permitted by the Settlement Agreement.

[SIGNATURES ON FOLLOWING PAGE]

By [signature]: _____
Printed name: _____
Title: _____
Address: _____
Contact information: _____
Date: _____

State of **[insert state]**
County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of Company's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Company]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

CERCLA Financial Assurance Sample Letter of Credit for Use in Connection with Settlements

NOTE: A letter of credit, as specified in the relevant settlement agreement, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. Case teams should make sure that provisions in the letter of credit relating to EPA’s ability to access funds guaranteed by the letter of credit are consistent with relevant settlement provisions.

[Letterhead of Issuing Institution]

IRREVOCABLE STANDBY LETTER OF CREDIT

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [insert number]

ISSUANCE DATE: [insert date]

MAXIMUM AMOUNT: \$[insert dollar amount]

APPLICANT:

[Insert name of PRP/Settling Defendant]

[Insert contact person(s), title(s), and contact information (address, phone, email, etc.)]

BENEFICIARY:

U.S. Environmental Protection Agency Region [insert number]

c/o [insert appropriate Regional official such as “Superfund Division Director”]

[Insert contact information (address, phone, email, etc.)]

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. [insert number] in your favor, at the request and for the account of [insert name of PRP/Settling Defendant] (the “Applicant”), in the amount of \$[insert amount] (the “Maximum Amount”). We hereby authorize you, the United States Environmental Protection Agency (the “Beneficiary”), to draw at sight on us, [insert name of issuing institution], an aggregate amount equal to the Maximum Amount upon presentation of:

- (1) Your sight draft, bearing reference to this Letter of Credit No. [insert number] (which may, without limitation, be presented in the form attached hereto as Exhibit A); and
- (2) Your signed statement reading as follows: “I certify that the amount of the draft is payable pursuant to that certain [insert as appropriate: “Consent Decree,” “Administrative Settlement Agreement and Order on Consent,” or “Settlement Agreement”], dated [insert date], [insert as appropriate: civil action number for

consent decrees or EPA docket number for administrative agreements], between the United States and **[insert settling parties]**, entered into by the parties thereto in accordance with the authority of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, relating to the **[insert site name [operable unit]]**.”

This letter of credit is effective as of **[insert issuance date]** and shall expire on **[insert date that is at least 1 year later]**, but such expiration date shall be automatically extended for a period of **[insert period of at least 1 year]** on **[insert date that is at least 1 year later]** and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and the Applicant 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 immediately thereupon be available to you upon presentation of your sight draft for a period of at least 120 days after the date of receipt by both you and the Applicant of such notification, as shown on signed return receipts.

All notifications, requests, and demands required or permitted hereunder shall be given in writing, identify the site, and provide a contact person (and contact information).

Multiple and partial draws on this letter of credit are expressly permitted, up to an aggregate amount not to exceed the Maximum Amount. Whenever this letter of credit is drawn on, under, and in compliance with the terms hereof, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft in immediately available funds directly into such account or accounts as may be specified in accordance with your instructions.

All banking and other charges under this letter of credit are for the account of the Applicant.

This letter of credit is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce.

Very Truly Yours,

Date: _____

By [signature]: _____

Printed name: _____

Title: _____

Address: _____

Contact information: _____

**Exhibit A - Form of Sight Draft
[EPA LETTERHEAD]**

SIGHT DRAFT

TO: **[Insert name of issuing institution]**
 [Insert name and title of contact person(s)]
 [Insert address]

RE: Letter of Credit No. **[insert number]**

DATE: **[Insert date on which draw is made]**

TIME: **[Insert time of day at which draw is made]**

This draft is drawn under your Irrevocable Standby Letter of Credit No. **[insert number]**. I certify that the amount of the draft is payable pursuant to that certain **[insert as appropriate: “Consent Decree,” “Administrative Settlement Agreement and Order on Consent,” or “Settlement Agreement”]**, dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees, or EPA docket number for administrative agreements]**, between the United States and **[insert settling parties]**, entered into by the parties thereto in accordance with the authority of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, relating to the **[insert site name [operable unit]]**. Pay to the order of the United States Environmental Protection Agency, in immediately available funds, the amount of \$**[insert dollar amount of draw]** or, if no amount certain is specified, the total balance remaining available under such Irrevocable Standby Letter of Credit.

Pay such amount as is specified in the immediately preceding paragraph by **[insert payment instructions as appropriate, such as: “Fedwire EFT, referencing Site/Spill ID Number [insert number] [and DJ Number [insert number]]**. The Fedwire EFT payment must be sent as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read [D 68010727
Environmental Protection Agency”]

The total amount paid shall be deposited by EPA in the **[insert site name [operable unit]]** Special Account to be retained and used to conduct or finance response actions at or in

connection with the site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

This Sight Draft has been duly executed by the undersigned, an authorized representative or agent of the United States Environmental Protection Agency, whose signature hereupon constitutes an endorsement.

By [signature]: _____
Printed name: _____
Title: _____
Address: _____
Contact information: _____

CERCLA Financial Assurance Sample Payment Bond for Use in Connection with Settlements

NOTE: A surety bond guaranteeing payment, as specified in the relevant settlement agreement, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. Case teams should make sure that provisions in the bond relating to EPA’s ability to access funds guaranteed by the bond (*see, e.g.*, paragraphs 3 and 5 below) are consistent with relevant settlement provisions.

[Letterhead of Bond Issuer]

PAYMENT BOND

Surety’s Payment Bond Number: **[insert number]**
Date of Execution of Payment Bond: **[insert date]**
Effective Date of Payment Bond: **[insert date]**
Total Dollar Amount of Payment Bond: **[\$[insert dollar amount]**

PRINCIPAL:

Legal Name: **[insert name of PRP/Settling Defendant]**
Address: **[insert address]**
Contact Person(s)/Information: **[insert name and contact information (phone, email)]**

SURETY:

Legal Name: **[insert name of surety providing the bond]**
Address: **[insert address]**
Contact Person(s)/Information: **[insert name and contact information (phone, email)]**

BENEFICIARY:

Legal Name: U.S. Environmental Protection Agency Region **[insert #]**
 c/o **[insert appropriate Regional official such as**
 “Superfund Division Director”]
Address/Contact Information: **[insert address and contact information (phone, email)]**

SITE INFORMATION:

Name and Location of Site: **[insert site name [operable unit] and location]** (“Site”)
EPA Identification Number: **[insert Site/Spill Identification Number]**
Agreement Governing Site Work: [That certain **[insert as appropriate: “Consent Decree,”**
 “Administrative Settlement Agreement and Order on
 Consent,” or **“Settlement Agreement”]** dated **[insert date]**,
 [insert as appropriate: civil action number for consent
 decrees or EPA docket number for administrative

agreements], between the United States of America and [insert settling parties] (the “Agreement”)]

KNOW ALL PERSONS BY THESE PRESENTS, THAT:

WHEREAS, said Principal is required, under the Agreement entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, to perform the “Work” as defined in such Agreement (hereinafter, the “Work”) and to fulfill its other obligations as set forth therein; and

WHEREAS, said Principal is required by the Agreement to provide financial assurance to ensure completion of the Work.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The Principal and Surety hereto are firmly bound to the United States Environmental Protection Agency (EPA or Beneficiary), in the above Total Dollar Amount of this Payment Bond, for the payment of which we, the Principal and Surety, bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, subject to and in accordance with the terms and conditions hereof.

2. The conditions of the Surety’s obligation hereunder are such that if the Principal shall promptly, faithfully, fully, and finally complete the Work in accordance with the terms of the Agreement, the Surety’s obligation hereunder shall be null and void; otherwise it is to remain in full force and effect.

3. Pursuant to and in accordance with the terms of the Agreement, and except as specifically provided in Paragraph 5 below, the Surety shall become liable on the obligation evidenced hereby only upon the Principal’s failure to perform all or any portion(s) of the Work, EPA’s subsequent notice of a Work Takeover, and the Principal’s failure to remedy to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of such notice. At any time and from time to time upon notification by EPA (as specified in the Agreement) that a Work Takeover has commenced, the Surety shall promptly (and in any event within 15 days after receiving such notification) pay to EPA funds up to the Total Dollar Amount of this Payment Bond in such amounts and to such person(s), account(s), or otherwise as EPA may direct. If the Surety does not render such payment within the specified 15-day period, the Surety shall be deemed to be in default of this Payment Bond and EPA shall be entitled to enforce any remedy available to it at law, in equity, or otherwise.

4. The liability of the Surety 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 Total Dollar Amount of this Payment Bond, but in no event shall the aggregate obligation of the Surety hereunder exceed the amount of said sum.

5. The Surety may cancel this Payment Bond only by sending notice of cancellation to the Principal and to the Beneficiary, provided, however, that no such cancellation shall be effective during the 120-day period beginning on the date of receipt of the notice of cancellation by both the Principal and the Beneficiary, as evidenced by return receipts. If after 90 days of such 120-day period, the Principal has failed to provide alternative financial assurance to EPA in accordance with the terms of the Agreement, EPA shall have the right to draw upon the Total Dollar Amount of this Payment Bond.

6. The Principal may terminate this Payment Bond only by sending written notice of termination to the Surety and to the Beneficiary, provided, however, that no such termination shall become effective unless and until the Surety receives written authorization for termination of this Payment Bond by the Beneficiary.

7. Any modification, revision, or amendment that may be made to the terms of the Agreement or to the Work to be done thereunder, or any extension of the Agreement, or other forbearance on the part of either the Principal or Beneficiary to the other, shall not in any way release the Principal and the Surety, or either of them, or their heirs, executors, administrators, successors, or assigns from liability hereunder. The Surety hereby expressly waives notice of any change, revision, or amendment to the Agreement or to any related obligations between the Principal and the Beneficiary.

8. The Surety will immediately notify the Beneficiary of any of the following events: (a) the filing by the Surety of a petition seeking to take advantage of any laws relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; (b) the Surety's consent to (or failure to contest in a timely manner) any petition filed against it in an involuntary case under such bankruptcy or other laws; (c) the Surety's application for (or consent to or failure to contest in a timely manner) the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator, or the like of itself or of all or a substantial part of its assets; (d) the Surety's making a general assignment for the benefit of creditors; or (e) the Surety's taking any corporate action for the purpose of effecting any of the foregoing.

9. Any provision in this Payment Bond that conflicts with CERCLA or any other applicable statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or legal requirement shall be deemed incorporated herein.

10. All notices, elections, consents, approvals, demands, and requests required or permitted hereunder shall be given in writing to (unless updated from time to time) the addressees shown on the first page of this Payment Bond, identify the Site, and provide a contact person (and contact information). All such correspondence shall be: (a) effective for all purposes

if hand delivered or sent by (i) certified or registered United States mail, postage prepaid, return receipt requested or (ii) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, to the relevant address shown on the first page of this Payment Bond; and (b) effective and deemed received upon the earliest of (i) the actual receipt of the same by personal delivery or otherwise, (ii) one business day after being deposited with a nationally recognized overnight courier service as required above, or (iii) three business days after being deposited in the United States mail as required above. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given as herein required shall be deemed to be receipt of the notice, election, consent, approval, demand, or request sent.

11. The Surety hereby agrees that the obligations of the Surety under this Payment Bond shall be in no way impaired or affected by any winding up, insolvency, bankruptcy, or reorganization of the Principal or by any other arrangement or rearrangement of the Principal for the benefit of creditors.

12. No right of action shall accrue on this Payment Bond to or for the use of any person other than the Beneficiary or the executors, administrators, successors or assigns of the Beneficiary.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Principal and Surety have executed this Payment Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby represent, warrant, and certify that they are authorized to execute this Payment Bond on behalf of the Principal and Surety, respectively.

FOR THE PRINCIPAL:

Date: _____

By [signature]: _____

Printed name: _____

Title: _____

State of **[insert state]**

County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of PRP/Settling Defendant's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of PRP/Settling Defendant]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

FOR THE SURETY:

Date: _____

By [signature]: _____

Printed name: _____

Title: _____

State of **[insert state]**

County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of Surety's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Surety]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

CERCLA Financial Assurance Sample Performance Bond for Use in Connection with Settlements

NOTE: A surety bond guaranteeing performance or payment, as specified in the relevant settlement agreement, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. Case teams should make sure that provisions in the bond relating to EPA’s ability to either demand performance or access funds guaranteed by the bond (*see, e.g.*, paragraphs 3 and 5 below) are consistent with relevant settlement provisions.

[Letterhead of Bond Issuer]

PERFORMANCE BOND

Surety’s Performance Bond Number: **[insert number]**
Date of Execution of Performance Bond: **[insert date]**
Effective Date of Performance Bond: **[insert date]**
Total Dollar Amount of Performance Bond: **[\$[insert dollar amount]**

PRINCIPAL:

Legal Name: **[insert name of PRP/Settling Defendant]**
Address: **[insert address]**
Contact Person(s)/Information: **[insert name and contact information (phone, email)]**

SURETY:

Legal Name: **[insert name of surety providing the bond]**
Address: **[insert address]**
Contact Person(s)/Information: **[insert name and contact information (phone, email)]**

BENEFICIARY:

Legal Name: U.S. Environmental Protection Agency Region **[insert #]**
 c/o **[insert appropriate Regional official such as**
 “Superfund Division Director”]
Address/Contact Information: **[insert address and contact information (phone, email)]**

SITE INFORMATION:

Name and Location of Site: **[insert site name [operable unit] and location]** (“Site”)
EPA Identification Number: **[insert Site/Spill Identification Number]**
Agreement Governing Site Work: [That certain **[insert as appropriate: “Consent Decree,”**
 “Administrative Settlement Agreement and Order on
 Consent,” or **“Settlement Agreement”]** dated **[insert date]**,
 [insert as appropriate: civil action number for consent
 decrees or EPA docket number for administrative

agreements], between the United States of America and [insert settling parties] (the “Agreement”)]

KNOW ALL PERSONS BY THESE PRESENTS, THAT:

WHEREAS, said Principal is required, under the Agreement entered pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, to perform the “Work” as defined in such Agreement (hereinafter, the “Work”) and to fulfill its other obligations as set forth therein; and

WHEREAS, said Principal is required by the Agreement to provide financial assurance to ensure completion of the Work.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The Principal and Surety hereto are firmly bound to the United States Environmental Protection Agency (EPA or Beneficiary), in the above Total Dollar Amount of this Performance Bond, for the performance or payment of the Work, which we, the Principal and Surety, bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, subject to and in accordance with the terms and conditions hereof.

2. The conditions of the Surety’s obligation hereunder are such that if the Principal shall promptly, faithfully, fully, and finally complete the Work in accordance with the terms of the Agreement, the Surety’s obligation hereunder shall be null and void; otherwise it is to remain in full force and effect.

3. Pursuant to and in accordance with the terms of the Agreement, and except as specifically provided in Paragraph 5 below, the Surety shall become liable on the obligation evidenced hereby only upon the Principal’s failure to perform all or any portion(s) of the Work, EPA’s subsequent notice of a Work Takeover, and the Principal’s failure to remedy to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of such notice. At any time and from time to time upon notification by EPA (as specified in the Agreement) that a Work Takeover has commenced, the Surety shall, up to the Total Dollar Amount of the Performance Bond, promptly (and in any event within 15 days after receiving such notification):

- (a) Commence to complete the Work to be done under the Agreement in accordance with its terms and conditions; or
- (b) Pay to EPA funds in such amounts and to such person(s), account(s), or otherwise as EPA may direct.

If the Surety does not render such performance or payment set forth above within the specified 15-day period, the Surety shall be deemed to be in default of this Performance Bond and EPA shall be entitled to enforce any remedy available to it at law, in equity, or otherwise; provided, however, that if such default is susceptible of cure but cannot reasonably be cured within such 15-day period and provided further that Surety shall have commenced to cure such default within such 15-day period and thereafter diligently proceeds to perform the same, such 15-day period shall be extended for such time as is reasonably necessary for Surety in the exercise of due diligence to cure such default, such additional period not to exceed 90 days.

4. The liability of the Surety shall not be discharged by any performance, payment, or succession of payments hereunder, unless and until such performance, payment, or payments shall amount in the aggregate to the Total Dollar Amount of this Performance Bond, but in no event shall the aggregate obligation of the Surety hereunder exceed the amount of said sum.

5. The Surety may cancel this Performance Bond only by sending notice of cancellation to the Principal and to the Beneficiary, provided, however, that no such cancellation shall be effective during the 120-day period beginning on the date of receipt of the notice of cancellation by both the Principal and the Beneficiary, as evidenced by return receipts. If after 90 days of such 120-day period, the Principal has failed to provide alternative financial assurance to EPA in accordance with the terms of the Agreement, EPA shall have the right to (up to the Total Dollar Amount of this Performance Bond) demand performance of the Work or draw on the guaranteed funds.

6. The Principal may terminate this Performance Bond only by sending written notice of termination to the Surety and to the Beneficiary, provided, however, that no such termination shall become effective unless and until the Surety receives written authorization for termination of this Performance Bond by the Beneficiary.

7. Any modification, revision, or amendment that may be made to the terms of the Agreement or to the Work to be done thereunder, or any extension of the Agreement, or other forbearance on the part of either the Principal or Beneficiary to the other, shall not in any way release the Principal and the Surety, or either of them, or their heirs, executors, administrators, successors, or assigns from liability hereunder. The Surety hereby expressly waives notice of any change, revision, or amendment to the Agreement or to any related obligations between the Principal and the Beneficiary.

8. The Surety will immediately notify the Beneficiary of any of the following events: (a) the filing by the Surety of a petition seeking to take advantage of any laws relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; (b) the Surety's consent to (or failure to contest in a timely manner) any petition filed against it in an involuntary case under such bankruptcy or other laws; (c) the Surety's application for (or consent to or failure to contest in a timely manner) the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator, or the like of itself or of all or a

substantial part of its assets; (d) the Surety's making a general assignment for the benefit of creditors; or (e) the Surety's taking any corporate action for the purpose of effecting any of the foregoing.

9. Any provision in this Performance Bond that conflicts with CERCLA or any other applicable statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or legal requirement shall be deemed incorporated herein.

10. All notices, elections, consents, approvals, demands, and requests required or permitted hereunder shall be given in writing to (unless updated from time to time) the addressees shown on the first page of this Performance Bond, identify the Site, and provide a contact person (and contact information). All such correspondence shall be: (a) effective for all purposes if hand delivered or sent by (i) certified or registered United States mail, postage prepaid, return receipt requested or (ii) expedited prepaid delivery service, either commercial or United States Postal Service, with proof of attempted delivery, to the relevant address shown on the first page of this Performance Bond; and (b) effective and deemed received upon the earliest of (i) the actual receipt of the same by personal delivery or otherwise, (ii) one business day after being deposited with a nationally recognized overnight courier service as required above, or (iii) three business days after being deposited in the United States mail as required above. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given as herein required shall be deemed to be receipt of the notice, election, consent, approval, demand, or request sent.

11. The Surety hereby agrees that the obligations of the Surety under this Performance Bond shall be in no way impaired or affected by any winding up, insolvency, bankruptcy, or reorganization of the Principal or by any other arrangement or rearrangement of the Principal for the benefit of creditors.

12. No right of action shall accrue on this Performance Bond to or for the use of any person other than the Beneficiary or the executors, administrators, successors, or assigns of the Beneficiary.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Principal and Surety have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby represent, warrant, and certify that they are authorized to execute this Performance Bond on behalf of the Principal and Surety, respectively.

FOR THE PRINCIPAL:

Date: _____

By [signature]: _____

Printed name: _____

Title: _____

State of **[insert state]**

County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of PRP/Settling Defendant's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of PRP/Settling Defendant]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

FOR THE SURETY:

Date: _____

By [signature]: _____

Printed name: _____

Title: _____

State of **[insert state]**

County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of Surety's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Surety]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

CERCLA Financial Assurance Sample Trust Fund for Use in Connection with Settlements

NOTE: A trust fund, as specified in the relevant settlement agreement, may be worded as follows, except that instructions in brackets should be replaced with the relevant information and the brackets deleted. Case teams should make sure that provisions in the trust fund relating to EPA’s ability to access funds guaranteed by the trust fund are consistent with relevant settlement provisions.

TRUST AGREEMENT
[Insert site name [operable unit]]
Dated: **[Insert date]**

This Trust Agreement (the “Agreement”) relating to **[insert trustee-provided trust account number]** is entered into as of **[insert date]** between **[insert name of PRP/Settling Defendant]**, a **[insert name of state]** **[insert as appropriate: “corporation,” “limited liability company,” “partnership,” etc.]** (the “Grantor”), and **[insert name of trustee]**, **[insert as appropriate: “incorporated in the state of [insert name of state]” or “a national bank”]** (the “Trustee”).

Whereas, the United States Environmental Protection Agency (EPA) and the Grantor have entered into a **[insert as appropriate: “Consent Decree,” “Administrative Settlement Agreement and Order on Consent,” or “Settlement Agreement”]** dated **[insert date]**, **[insert as appropriate: civil action number for consent decrees or EPA docket number for administrative agreements]** (hereinafter, the “Settlement Agreement”), pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675;

Whereas, the Settlement Agreement provides that the Grantor shall provide assurance that funds will be available as and when needed for performance of the Work required by the Settlement Agreement;

Whereas, in order to provide such financial assurance, Grantor has agreed to establish and fund the trust created by this Agreement; and

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee has agreed to act as trustee hereunder.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term “Agreement” shall have the meaning assigned thereto in the first paragraph of this Agreement.

(b) The term “Beneficiary” shall have the meaning assigned thereto in Section 3 of this Agreement.

(c) The term “CERCLA” shall have the meaning assigned thereto in the second paragraph of this Agreement.

(d) The term “Claim Certificate” shall have the meaning assigned thereto in Section 4(a) of this Agreement.

(e) The term “EPA” shall have the meaning assigned thereto in the second paragraph of this Agreement.

(f) The term “Fund” shall have the meaning assigned thereto in Section 3 of this Agreement.

(g) The term “Grantor” shall have the meaning assigned thereto in the first paragraph of this Agreement, along with any successors or assigns of the Grantor.

(h) The term “Objection Notice” shall have the meaning assigned thereto in Section 4(b) of this Agreement.

(i) The term “Settlement Agreement” shall have the meaning assigned thereto in the second paragraph of this Agreement.

(j) The term “Site” shall have the meaning assigned thereto in Section 2 of this Agreement.

(k) The term “Trust” shall have the meaning assigned thereto in Section 3 of this Agreement.

(l) The term “Trustee” shall mean the trustee identified in the first paragraph of this Agreement, along with any successor trustee appointed pursuant to the terms of this Agreement.

(m) The term “Work” shall have the meaning assigned thereto in the Settlement Agreement.

(n) The term “Work Takeover” shall have the meaning assigned thereto in the Settlement Agreement.

Section 2. Identification of Site and Cost Estimate. This Agreement pertains to costs for Work required at the [insert site name [operable unit]] in [insert name of city, county, and/or state] (the “Site”), pursuant to the Settlement Agreement.

Section 3. Establishment of Trust Fund. The Grantor and the Trustee hereby establish a trust (the “Trust”), for the benefit of EPA (the “Beneficiary”), to ensure that

funds are available to pay for performance of the Work in accordance with the terms of the Settlement Agreement. The Grantor and the Trustee intend that no third party shall have access to monies or other property in the Trust except as expressly provided herein. The Trust is established initially as consisting of cash and/or cash equivalents in the amount of \$[insert dollar amount], which is acceptable to the Trustee and described in Schedule A attached hereto. Such funds, along with any other cash and/or cash equivalents hereafter deposited into the Trust, and together with all earnings and profits thereon, are referred to herein collectively as the "Fund." 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 owed to the United States.

Section 4. Payment for Work Required Under the Settlement Agreement.

The Trustee shall make payments from the Fund in accordance with the following procedures.

(a) From time to time, the Grantor and/or its representatives or contractors may request that the Trustee make payment from the Fund for Work performed under the Settlement Agreement by delivering to the Trustee and EPA a written invoice and certificate (together, a "Claim Certificate") signed by an officer of the Grantor (or the relevant representative or contractor). Any Claim Certificate should be in a form substantially identical to the sample provided in Exhibit A and, at a minimum, should:

- (i) Include a certification that the invoice is for Work performed at the Site in accordance with the Settlement Agreement;
- (ii) Describe the Work that has been performed;
- (iii) Specify the amount of funds requested from the Trust; and
- (iv) Identify the payee(s) of the funds request.

(b) EPA may object to any payment requested in a Claim Certificate submitted by the Grantor (or its representatives or contractors), in whole or in part, by delivering to the Trustee a written notice (an "Objection Notice") within 30 days after the date of EPA's receipt of the Claim Certificate as shown on the relevant return receipt. An Objection Notice sent by EPA shall state (i) whether EPA objects to all or only part of the payment requested in the relevant Claim Certificate; (ii) the basis for such objection, (iii) that EPA has sent a copy of such Objection Notice to the Grantor and the date on which such copy was sent; and (iv) the portion of the payment requested in the Claim Certificate, if any, which is not objected to by EPA. EPA may object to a request for payment contained in a Claim Certificate only on the grounds that the requested payment is either (x) not for the costs of Work under the Settlement Agreement or (y) otherwise inconsistent with the terms and conditions of the Settlement Agreement.

(c) If the Trustee receives a Claim Certificate and does not receive an Objection Notice from EPA within the time period specified in Section 4(b) above, the Trustee shall, after the expiration of such time period, promptly make the payment from the Fund requested in such Claim Certificate.

(d) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, but which Objection Notice objects to only a portion of the requested payment, the Trustee shall, after the expiration of such time period, promptly make payment from the Fund of the uncontested amount as requested in the Claim Certificate. The Trustee shall not make any payment from the Fund for the portion of the requested payment to which EPA has objected in its Objection Notice.

(e) If the Trustee receives a Claim Certificate and also receives an Objection Notice from EPA within the time period specified in Section 4(b) above, which Objection Notice objects to all of the requested payment, the Trustee shall not make any payment from the Fund for amounts requested in such Claim Certificate.

(f) If, at any time during the term of this Agreement, EPA implements a “Work Takeover” pursuant to the terms of the Settlement Agreement and intends to direct payment of monies from the Fund to pay for performance of Work during the period of such Work Takeover, EPA shall notify the Trustee in writing of EPA’s commencement of such Work Takeover. Upon receiving such written notice from EPA, the disbursement procedures set forth in Sections 4(a)-(e) above shall immediately be suspended for costs of Work taken over by EPA, and the Trustee shall thereafter make payments from the Fund only to such person(s) as the EPA may direct in writing from time to time for the sole purpose of providing payment for performance of Work required by the Settlement Agreement. Further, after receiving such written notice from EPA, the Trustee shall not make any disbursements to Grantor for costs of Work taken over by EPA from the Fund at the request of the Grantor, including its representatives and/or contractors, or of any other person except at the express written direction of EPA. If EPA ceases such a Work Takeover in accordance with the terms of the Settlement Agreement, EPA may so notify the Trustee in writing and, upon the Trustee’s receipt of such notice, the disbursement procedures specified in Sections 4(a)-(e) above shall be reinstated.

(g) While this Agreement is in effect, disbursements from the Fund are governed exclusively by the express terms of this Agreement.

Section 5. 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 directions 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 its duties with respect to the Trust 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:

(a) securities, notes, and other obligations of any person or entity shall not be acquired or held by the Trustee with monies comprising the Fund, unless they are securities, notes, or other obligations of the United States federal government or any United States state government or as otherwise permitted in writing by EPA;

(b) the Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent such deposits are insured by an agency of the United States federal or any United States state government; and

(c) 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 6. Commingling and Investment. The Trustee is expressly authorized in its discretion 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 hereof and thereof, to be commingled with the assets of other trusts participating therein.

Section 7. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) 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;

(b) 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 depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States federal government or any United States state 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; and

(c) 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 United States federal government.

Section 8. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund shall be paid from the Fund. All other expenses and charges incurred by the Trustee in connection with the administration of the Fund and this Trust shall be paid by the Grantor.

Section 9. Annual Valuation. The Trustee shall annually, no more than 30 days after the anniversary date of establishment of the Fund, furnish to the Grantor and to the Beneficiary a statement confirming the value of the Trust. The annual valuation shall include an accounting of any fees or expenses levied against the Fund. The Trustee shall also provide such information concerning the Fund and this Trust as EPA may request from time to time.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder; provided, however, that any counsel retained by the Trustee for such purposes may not, during the period of its representation of the Trustee, serve as counsel to the Grantor.

Section 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing with the Grantor and as notified in writing to the Beneficiary [insert as appropriate: ; provided, however, that the Trustee shall have minimal duties and shall be entitled to minimal compensation, if any, for time periods in which the Trustee does not make payments from the Fund for Work performed under the Settlement Agreement].

Section 12. Trustee and Successor Trustee. The Trustee and any replacement Trustee must not be affiliated with the Grantor. 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 such 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 cash and/or cash equivalents 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 Fund and the Trust in a writing sent to the Grantor, the Beneficiary, and the present Trustee by certified mail no less than 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 8.

Section 13. Instructions to the Trustee. All orders, requests, and instructions to the Trustee shall be in writing, signed by such persons as are empowered to act on behalf of the entity sending such orders, requests, and instructions to the Trustee, including those designated in the attached Exhibit B or such other designees as the Grantor may

designate by amendment to Exhibit B. The Trustee shall be fully protected in acting without inquiry on such written instructions given in accordance with the terms of this Agreement. The Trustee shall have no duty to act in the absence of such written instructions, except as expressly provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, and with the prior written consent of EPA, or by the Trustee and EPA if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. This Trust shall be irrevocable and shall continue until terminated upon the earlier to occur of (a) the written direction of EPA to terminate, consistent with the terms of the Settlement Agreement and (b) the complete exhaustion of the Fund comprising the Trust as certified in writing by the Trustee to EPA and the Grantor. Upon termination of the Trust pursuant to Section 15(a), all remaining Trust property (if any), less final Trust administration expenses, shall be delivered to the Grantor.

Section 16. 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 EPA issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of **[insert name of state in which the Site is located]**.

Section 18. 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.

Section 19. Notices. All notices and other communications given under this Agreement shall be in writing, identify the Site, provide a contact person (and contact information), and be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantor, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)]**.

(b) If to the Trustee, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.)]**.

(c) If to EPA, to **[insert name(s), title(s), address(es), and contact information (phone number(s), email address(es), etc.) of appropriate EPA official/staff (e.g., Superfund Division Director, Remedial Project Manager, and/or Office of Regional Counsel contact)]**.

Section 20. Other. The Grantor shall provide a copy of the Settlement Agreement to the Trustee, and the Grantor shall submit an originally-signed duplicate of the executed Agreement to EPA.

[SIGNATURES ON FOLLOWING PAGE]

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their respective officers duly authorized and attested as of the date first above written:

FOR THE GRANTOR:

Date: _____ By [signature]: _____
Printed name: _____
Title: _____

State of **[insert state]**
County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of PRP/Settling Defendant's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of PRP/Settling Defendant]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

FOR THE TRUSTEE:

Date: _____ By [signature]: _____
Printed name: _____
Title: _____

State of **[insert state]**
County of **[insert county]**

On this **[insert date]**, before me personally came **[insert name of Trustee's signatory]** to me known, who, being by me duly sworn, did depose and say that she/he is **[insert title]** of **[insert name of Trustee]**, the entity described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

Schedule A
Initial Trust Funding

DATE	FUNDING VALUE FOR WORK
[Insert relevant initial date (e.g., within 30 days of the Effective Date of the settlement)]	[Insert initial funding amount]

Exhibit A
Sample Claim Certificate

[Insert date]

[Insert Trustee's name pursuant to trust agreement's preamble]

[Insert Trustee's address pursuant to Section [19(b)] of trust agreement]

[Insert authorized EPA official pursuant to Sections [19(c)] of trust agreement]

[Insert address pursuant to Sections [19(c)] of trust agreement]

Re: Request for payment from the Trust **[insert trust account number or other identifying information]** established as financial assurance for the **[insert site name]** Site

Dear **[insert name of Trustee and authorized EPA official]**:

Pursuant to Section [4(a)] of the subject trust, the Grantor (as defined therein) and/or its representatives or contractors are authorized to request that the Trustee (as defined therein) make payment from the trust for Work (as defined therein) performed under the Settlement Agreement (as defined therein) by delivering to the Trustee and EPA (as defined therein) a written request for payment signed by an officer of the requesting entity. By this letter, **[insert requesting entity]** requests payment from the trust. The bases for the payment request are more fully described below.

1. Certification: **[insert certification from officer of requesting entity that the request is submitted for Work performed in accordance with the Settlement Agreement]**.
2. Description of Applicable Work: **[insert description of the Work that has been performed]**.
3. Amount of Payment Request: **[insert amount of funds requested from trust]**.
4. Proposed Payee: **[insert identification of payee(s) of the funds requested]**.

Please let me know if you have any questions. I can be reached at **[insert telephone number and email address]**.

Sincerely,

[insert name of officer of the requesting entity]
[insert address of the requesting entity]

[cc: **[Insert other EPA staff to receive payment requests pursuant to Section [19(c)] of trust agreement]]**

Exhibit B
**Grantor-Designated Individuals Authorized for Orders, Requests, and
Instructions**

**[Grantor to insert person(s) (and relevant contact information) designated to
provide/make orders, requests, and instructions to the Trustee pursuant to Section
[13] of trust agreement]**

Sample Financial Assurance Mechanisms for UAOs