



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

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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
Office of Site Remediation Enforcement

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.

Attachments

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