

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).