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Environmental Law Alert - Another New Arrangement From EPA Designed To Settle Some Older Scores

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When a company or other potentially responsible party (PRP) takes on a hazardous waste cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), it typically does so pursuant to some agreement with – or order from – the U.S. Environmental Protection Agency (EPA) or state environmental agency. There are dozens of key terms in play when negotiating a judicial consent decree (CD) or administrative settlement agreement and order on consent (AOC) that will govern cleanup obligations and structure a respondent's ongoing relationship with the EPA, however the most important question, from a business perspective, is often the simplest: how much will this all cost?

If you are on the receiving end of a Unilateral Administrative Order (UAO) from the EPA, requiring you to undertake a remedial or removal action, the stakes can be even higher in terms of the environmental threats and potential legal repercussions. Still, for a UAO respondent, the bottom line may be the bottom line: how much will it cost to do the work required?

The "work," of course, doesn't just cost whatever is quoted by a remediation consultant or estimated for bookkeeping by in-house environmental project managers. CERCLA cleanups under CDs, AOCs or UAOs often implicate a host of other costly requirements: maintaining insurance minimums, securing property access, and costs of working with other potentially responsible parties. The EPA policy imposes another costly requirement that can be perceived as the company being forced to pay twice for the same cleanup: financial assurance.

"Financial assurance" refers to the general requirement that a respondent performing a CERCLA cleanup also provide an enforceable financial commitment to provide a sum of money equal to the estimated cost of performing the cleanup work required, which the EPA can access and use to complete the cleanup if the respondent becomes insolvent or uncooperative. There are two types of financial assurance mechanisms available to CD defendants, or AOC and UAO respondents: self-insurance mechanisms, such as the financial test or corporate guarantee (which call for initial and periodic submissions to the EPA to demonstrate the relevant entity's financial strength vis-à-vis its environmental obligations), and third-party provided mechanisms, such as trust funds, letters of credit, surety bonds, and insurance policies (which usually involve an initial submission of the mechanism to EPA and subsequent submissions to account for any necessary changes).

It is important to note that this type of site-specific "Financial Assurance" in cleanup agreements is distinct from industry-wide "financial

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responsibility" regulations, pursuant to CERCLA § 108(b), which USEPA is currently developing in response to public interest groups' litigation and will require "classes of facilities [to] establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances" inherent in the operations. 42 U.S.C. § 9608(b).

On April 6, the EPA's Office of Site Remediation Enforcement and Office of Enforcement and Compliance Assurance issued "Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders" to instruct regional and enforcement personnel on how to adapt financial assurance requirements to specific CERCLA CDs, AOCs, and UAOs (the FA guidance). According to an EPA spokesperson, the FA guidance is the "first comprehensive document issued by the EPA's Office of Site Remediation Enforcement to assist its regional offices with financial assurance issues and requirements at sites subject to enforcement actions under CERCLA." In the FA guidance, USEPA explains its focus on clearly stated and robustly implemented financial assurance requirements as a "safeguard against the effect of financial distress" of a performing party, "[e]specially given the multi-year timeline of many Superfund cleanups." The EPA goes on to emphasize that the FA guidance is designed to "accomplish the 'polluter pays' principle underpinning of CERCLA" and "protect limited Superfund resources" by guaranteeing that performing parties "bear the financial burden of completing Superfund cleanups," regardless of how the respondents' finances or compliance positions change over time.

The FA guidance, much like the Agency's recent SEP Policy Update, is primarily a compilation of prior financial assurance policy documents. However, this FA guidance also contains a number of new items that account for heightened agency concerns about assuring that specific financial assurance commitments are in sufficient amounts and in enforceable and readily accessible forms.

A few specific points of emphasis in the FA guidance bear highlighting here:

- The FA guidance repeatedly reminds EPA case teams to account for all of a respondent's financial assurance obligations entity-wide – not just its obligations for the particular site – in determining the strength of a particular mechanism proposed. Respondents can expect more searching reviews of their financial condition and overall environmental liabilities when negotiating financial assurance provisions and mechanisms.

- While still available as financial assurance mechanisms, the "financial test" and "corporate guarantee" alternatives are clearly discouraged and complicated by the FA guidance. The agency considers these means of financial assurance to be relatively less liquid and accessible and does not offer any benefits to their use. A separate appendix outlines "practical considerations" related to these types of mechanism, the FA guidance provides a litany of detailed questions and concerns related to a company's financial information that case teams should consider. Though the agency recommends working with financial experts at headquarters, these considerations are phrased in strong and detailed terms and could lead to unpredictable conclusions when applied by case teams that

may not have business experience to fully understand corporate financial statements or practices. Companies interested in employing these mechanisms will certainly be pressed for more specific and voluminous business information to persuade USEPA case teams that they are appropriate.

- Specific instructions are provided related to multi-party settlement documents and sites where multiple forms of financial assurance may be desirable. The FA guidance will provide structure to negotiations in these more complex scenarios, however it will also likely prompt EPA case teams to require overlapping and redundant financial assurance and enforcement terms in such CDs and AOCs. The FA guidance also specifically notes that where multiple respondents elect to provide separate financial assurance, they can expect higher oversight cost bills from the agency.

- The FA guidance emphasizes that all violations of financial assurance provisions are violations of the clean-up agreement or UAO and therefore should be subject to stipulated or statutory penalty provisions, even providing model CD or AOC language for inclusion of a specific, financial assurance-related stipulated penalty term.

- The FA guidance recommends detailed internal agency tracking and record- keeping procedures for financial assurance materials managed at Regional offices. It is reasonable to expect more regular information update requests from EPA site project managers.

Additionally, the FA guidance conveys and explains new or updated sets of model language of financial assurance terms for inclusion in CDs, AOCs and UAOs. This new model language includes provisions for UAOs specifically that address “work takeover” situations, where the EPA deems the respondent to be in violation of the UAO and therefore undertakes to conduct the work itself, using funds drawn from the financial assurance mechanism. Financial assurance requirements for UAOs had been highly variable in the past, because of questions related to the EPA authority to require such financial assurance unilaterally and outside the context of a settlement to which the respondent agrees. It will be interesting to see how challenges to this unified approach to FA for UAOs unfold.

To address practical accounting and transactional delays and difficulties related to making financial assurance funds available for agency use (either itself or to reimburse other parties that may have to perform in the event of the first respondent’s failure to do so), the agency is also now requiring establishment of a “Standby Trust” in all cases. Previously used in some cases where the agency had site-specific funds available to implement a remedy (i.e., when it recovered funds from a bankrupt responsible party at the site) Standby Trusts will now be created in all instances as part of the initial CD, AOC or UAO and any financial assurance funds ultimately drawn by the EPA will be deposited into the trust for immediate use at the specific site.

So the EPA has updated and consolidated its financial assurance policies in one document, a conductor’s master set of all the interrelated sheet music that previously provided parts for the agency’s various players. What does that mean for you if faced with cacophonous hazardous waste site cleanup obligations? Perhaps unsurprisingly, the answer to that

question depends on the agency's live performance of this sheet music at your venue – but, hey, at least now we've all got the score.

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