



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY - 6 2016

MEMORANDUM

SUBJECT: OECA/OLEM response to OIG Management Alert: Significant Data Quality Deficiencies Impede EPA's Ability to Ensure Companies Can Pay for Cleanups (Report No. 16-P-0126)

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Inspector General

The Environmental Protection Agency (EPA)'s Office of Enforcement and Compliance Assurance (OECA) and the Office of Land and Emergency Management (OLEM) thank you for the opportunity to provide a response to the Office of Inspector General (OIG)'s *Management Alert: Significant Data Quality Deficiencies Impede EPA's Ability to Ensure Companies Can Pay for Cleanups*.

OECA and OLEM agree that management of the financial assurance programs under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is important to ensure environmental obligations are met. We agree with the OIG that data gaps exist in the RCRA and CERCLA financial assurance data systems. Although we do not believe that the data gaps rise to the level of a "material weakness" under the Federal Managers' Financial Integrity Act (FMFIA), OECA and OLEM do agree to use the existing FMFIA process to discuss and address OIG's concerns with the RCRA and CERCLA financial assurance data systems and to pursue opportunities to improve the Agency's financial assurance data systems.

At the same time, OLEM and OECA continue to disagree with the OIG's portrayal of health risk to communities attributable to data gaps in EPA's RCRA and CERCLA financial assurance data systems, and as noted in our earlier response, we remain concerned about some of the assumptions and analysis the OIG relied upon in the OIG report.

Background

The RCRA financial assurance program and CERCLA financial assurance required in settlements and orders both seek to ensure that parties responsible for hazardous waste treatment, storage, or disposal facilities (TSDFs) or contaminated sites, provide adequate financial assurance to cover the costs of addressing environmental obligations, (e.g., closure, clean-up of sites). In the event these parties become unwilling or unable to complete their obligations, the financial assurance generally allows EPA or other parties to perform such work without using limited public funding resources. In the event financial assurance is insufficient, EPA can use program resources, or invoke its enforcement authorities to enforce the terms of a permit, order, or settlement to protect human health and environment.

Financial assurance operates differently under the RCRA and CERCLA programs and we explain these differences in an appendix to this response.

Comments Regarding OIG's Conclusions

OIG's monetary projections of gaps in financial assurance are based on broad assumptions and, therefore, may have drawn potentially inaccurate conclusions. These assumptions, for example, may not reflect that EPA can take enforcement actions under both the RCRA and CERCLA programs. Specifically, EPA can undertake enforcement actions under RCRA to ensure that an owner or operator fulfills its regulatory obligations, or take a CERCLA response itself to protect human health and the environment. Should EPA need to take immediate action under CERCLA, the Agency has the authority to engage in cost recovery efforts, and often seeks and recovers costs.

Further, while certain data within the financial assurance data systems may not be up-to-date, that does not necessarily equate to a facility or site lacking valid financial assurance. Keeping these systems up-to-date is challenging because implementation of financial assurance depends on the regulatory authority, which is either the state (for most RCRA financial assurance) or EPA region (for CERCLA and certain RCRA programs). For example, generally under RCRA, the facility owner or operator submits the financial assurance instrument directly to the state and the state is the named entity on the instrument. Thus, any conclusions on the inadequacy of financial assurance necessitate a review of regional and state files to determine the extent to which financial assurance instruments require an annual update that has not been submitted, provide for an insufficient amount, or are missing.

OECA and OLEM also disagree with the OIG's statement that there is over \$6 billion of financial assurance that is expired, insufficient, or not provided, and believe there are flaws in the OIG's methodology. For example, in assessing RCRA financial assurance, it appears that the OIG included third party liability financial assurance in the total financial assurance estimate. This increases the potential for significant double counting as EPA's regulations allow those obligations (while they may appear for each facility in RCRAInfo) to rest at the company level, instead of at the facility level. *See e.g.*, 40 CFR 264.147(a). To further illustrate: company X may show an \$8 million third party liability requirement at each of its facilities (because each state may record that obligation in RCRAInfo), but, in reality, the company would only have one \$8

million third party liability requirement across all of its facilities. This double counting could affect all of the RCRA financial assurance figures reported in Table 2.

Efforts to Address Gaps in Financial Assurance Data and Systems

OECA and OLEM acknowledge and agree with the OIG that there are deficiencies in the data and in the data systems assigned to track financial assurance obligations under RCRA and CERCLA. Our offices acknowledge that the financial assurance databases are not 100% complete and some information has not been updated in a timely manner. This needs to be considered before using the information to draw facility specific, regional or national conclusions regarding the adequacy of financial assurance. We plan to take steps to improve data quality and we will work with the EPA regions and states to improve the quality of their data. We also plan to conduct a systems requirements/feasibility analysis of the financial assurance data systems, including the development of options to improve the functioning of the systems.

For RCRA, OECA and OLEM have implemented and will plan to continue appropriate efforts to ensure financial assurance data elements in RCRAInfo are maintained and updated. This includes the following activities:

- Formally communicating the need to address this issue via a memorandum from the Director of the Office of Resource Conservation and Recovery to the EPA Regional Directors
- Raising this issue directly with the states on various conference calls, such as the State Permit Writers, Financial Assurance, and RCRAInfo Data calls
- Discussing the issue at meetings with states, including meetings of the Association of State and Territorial Solid Waste Management Officials
- Producing periodic reports of data gaps in financial assurance to provide to EPA regions and states
- Engaging the RCRAInfo Financial Assurance Expert Group to identify other methods for improving data quality
- Evaluating the need and demand for RCRAInfo training on and guidance related to the financial assurance module
- Assessing possible improvements that can be made in the upcoming Version 6 update of RCRAInfo, as well as any subsequent versions

For CERCLA, OLEM and OECA plan to continue appropriate efforts to ensure financial assurance data elements in the Superfund Enterprise Management System (SEMS) are maintained and updated. This includes the following activities:

- Working to establish reasonable milestones throughout the year (e.g., the program's annual work planning process), to serve as checkpoints with each of the EPA regions regarding the review and accuracy of the CERCLA financial assurance data
- Evaluating options for developing processes for states and regions to enter and update financial assurance data

- Holding regular monthly calls with the states and EPA regions where various financial assurance topics are discussed, which may include the financial health of various organizations with financial assurance obligations
- Monitoring corporations and organizations that may be in danger of failing the financial test and determining if EPA will seek additional information from the entity and whether any change to the financial assurance is warranted

OLEM and OECA are also planning to conduct a systems requirements/feasibility analysis of the financial assurance data systems. Such analysis will be led by OLEM's Office of Superfund Remediation and Technology Innovation (OSRTI) and OECA's Office of Site Remediation Enforcement (OSRE), and will include participation from EPA's regional offices, the Agency's E-Enterprise team, as well as EPA's Office of Environmental Information (OEI). The feasibility analysis will identify data quality gaps and control deficiencies in the data systems, review existing systems for tracking financial assurance instruments, identify opportunities for communication among the financial assurance systems, and assess means to better monitor national compliance. These are issues of importance to the whole Agency, and we plan to take a one EPA approach, in assessing the situation and identifying options to address the issues raised in the OIG Management Alert. EPA is not trying to solve all financial assurance issues, but, as described more fully below, is focused on improving its ability to access reliable financial assurance information in a timely manner.

Ample time will be required to complete a thorough feasibility analysis and options development in this topic area for several reasons: first, OLEM and OECA are facing significant resources constraints; second, financial instruments and their evaluation/tracking are specialized areas; and many of the Agency's experts in this area will be focused in the coming years on substantial rulemakings that are subject to court-ordered deadlines, therefore limiting their availability. However, we have initiated discussion on these topics among the program offices and the e-Enterprise team, and believe that developing a Statement of Work for a feasibility analysis is an important next step. The review will then be conducted, at the conclusion of which, OECA/OSRE and OLEM/OSRTI will present the findings from the systems requirements/feasibility analysis to Agency leadership with options to improve the financial assurance data and systems. We are amenable to meet with the OIG to provide regular status updates every six months on our progress.

Summary and Conclusion

OECA and OLEM agree to use the existing FMFIA process to discuss and address concerns with the RCRA and CERCLA financial assurance data systems. However, we continue to disagree that the data gaps in our data systems rise to the level of a material weakness. We will continue to study and evaluate the issue of financial assurance coverage raised in the OIG's report, and believe there are opportunities to improve EPA's RCRA and CERCLA financial assurance data systems.

OECA and OLEM commit to improving data quality, as indicated above, through improving outreach to the EPA regions and states, providing periodic reports of data gaps, enabling better access to training, and assessing improvements to the financial assurance database via the

Version 6 update of RCRAInfo. OLEM/OSRTI and OECA/OSRE also commit to leading a systems requirements/feasibility analysis for the financial assurance systems, as described above.

Regarding each OIG recommendation, the Agency responds as follows:

- *OIG Recommendation #1: Comply with the material weakness reporting requirements as prescribed by FMFIA and Office of Management and Budget Circular A-123 by identifying the weaknesses from, and data quality and control deficiencies in, RCRA and Superfund financial assurance in the EPA's FMFIA reports for 2016.*

We agree that management of the RCRA and CERCLA financial assurance programs is important to ensure environmental obligations are met. We agree to use the existing FMFIA process to discuss and address OIG's concerns with the financial assurance data systems. However, we continue to disagree that the data gaps rise to the level of a material weakness.

- *OIG Recommendation #2: Develop and, as required, include in the EPA's FMFIA reports corrective actions that have been taken, are underway, or are planned to address the material weakness.*

We agree to use the FMFIA process to determine what corrective actions should be taken to address this issue.

- *OIG Recommendation #3: Periodically assess and report to agency management progress against FMFIA corrective action plans for RCRA and Superfund financial assurance weaknesses.*

We agree to periodically assess and report to agency management progress against FMFIA corrective action plans, as applicable, to RCRA and CERCLA financial assurance data system weaknesses.

Appendix: Overview of the RCRA and CERCLA Financial Assurance Programs

Financial Assurance under RCRA

It is important to begin with the framework of what financial assurance RCRA requires and does not require.

Specifically, under EPA's RCRA Subtitle C regulations, owners and operators of permitted or interim status hazardous waste TSDFs must provide financial assurance to conduct closure and post-closure care (when necessary). In addition, RCRA 3004(u) requires that facilities seeking a RCRA permit provide for financial assurance for corrective action (cleanup) in specified circumstances. EPA also typically requires financial assurance for corrective action under its RCRA 3008(h) orders. Finally, owners and operators of TSDFs must provide financial assurance for third-party liability, for sudden and non-sudden accidental occurrences. Certain financial assurance instruments, such as the financial test and corporate guarantee, require owners and operators to submit updated information annually to the regulatory authority. Additionally, underlying cost estimates are regularly updated to adjust for inflation.

However, certain parties and facilities are exempt from RCRA and RCRA's financial assurance requirements. For instance, generators of hazardous waste are not required to maintain financial assurance. In addition, certain mining activities and waste streams that are exempted from RCRA Subtitle C regulation as hazardous waste pursuant to the Bevill exemption are not required to have RCRA financial assurance.

The obligation to secure financial assurance under RCRA for TSDFs is a statutory and regulatory obligation that is additionally often embodied in a facility's operating RCRA permit. Pursuant to the regulations, these financial assurance instruments are designed to be evergreen, meaning the instrument and obligation remains in place and the facility is required to provide annual cost updates during the active life of the facility, to ensure cost estimates and the instrument value correspond. While the financial test and corporate guarantee are not liquid instruments, the state or EPA receives audited financial statements indicating that the owner or operator (or guarantor) has the required current financial strength. The obligation to perform and to maintain the financial assurance does not expire.

Forty-eight states are authorized to implement major portions of the Subtitle C program.¹ This means that states typically have primary implementation responsibility of the RCRA financial assurance requirements, including review of financial assurance instruments. Thus, states are the primary recipient of financial assurance data and have primary responsibility for entering and updating data into the national RCRAInfo system. (Where applicable, EPA regions with responsibility for implementing financial assurance requirements are also responsible for entering and updating that data.²)

¹ Iowa and Alaska are not authorized for the RCRA program and thus EPA implements the RCRA program in those states. Additionally, 43 states are authorized for RCRA corrective action.

² For example, EPA does not authorize states to issue 3008(h) orders in lieu of EPA. Thus, those orders and any associated financial assurance are overseen by EPA.

RCRA financial assurance instruments are updated by the facility owner and operator and sent directly to the RCRA authorized state. EPA's RCRAInfo is a data repository for states and regions to provide information on financial assurance submissions but the financial assurance module of RCRAInfo is neither the exclusive, nor the primary, method for managing the financial assurance program. RCRA permits require the demonstration of financial assurance as a condition for operation. States and regions implementing the program regularly review and modify RCRA permits, and simultaneously evaluate and update financial assurance, as necessary. A RCRA Compliance Evaluation Inspection of a RCRA TSDF includes an evaluation of the facility's financial assurance.

OECA and OLEM also conduct regular conference calls with states and EPA regions regarding permits, orders, settlements, and financial assurance issues. These venues allow states and EPA to raise issues, seek resolution, and share best practices, which enable oversight of the financial assurance program. The Agency considers further steps where issues with financial assurance are identified, which could include consultation and advice on specific cases, requests to modify financial assurance instruments, potential enforcement actions, or development of national guidance or policy.

In the event financial assurance is insufficient, EPA can invoke its enforcement authorities and enforce the terms of the permit or order to protect human health and the environment. For example, EPA can issue a Unilateral Administrative Order under section 3008 of RCRA to enforce compliance with the permit or financial assurance regulations. Even in authorized states, EPA retains its enforcement authority. Moreover, it is important to understand that, because the obligations to conduct closure, post-closure, and/or corrective action are independent of the obligation to provide financial assurance for those activities, even if an owner or operator does not comply with the latter, it does not necessarily reflect a deficiency in conduct of the former.

The OIG management alert indicates that EPA cannot secure necessary cleanup funds when a company files for bankruptcy. This statement is inaccurate for several reasons. First, EPA has taken the position that if a liable company files for bankruptcy and has injunctive obligations, such as performance of closure and post-closure at hazardous waste management units, or the obligation to provide financial assurance, they are required to comply with those obligations throughout the bankruptcy process. Second, bankruptcy courts do not treat some financial assurance instruments, such as letters of credit, as part of the bankruptcy estate and thus do not distribute those instruments as an asset through the bankruptcy process. The existence of other third party liquid instruments may improve EPA's standing to a higher priority tier, such as secured creditors. EPA has enforcement authorities to pursue companies to maintain financial assurance and perform closure. Third, the obligations under RCRA to maintain financial assurance and to perform closure or post-closure survives bankruptcy and cannot be discharged for a reorganizing company.

Financial Assurance under CERCLA

Under CERCLA, financial assurance is secured after discovery of contamination and EPA undertaking of an enforcement action. The Agency negotiates financial assurance requirements for Potentially Responsible Parties (PRPs) of contaminated sites through settlements and enforcement orders. Once the financial assurance obligations are finalized, EPA regions are responsible for entering, and updating, the financial assurance information into the Superfund Enterprise Management System (SEMS).

The financial assurance module of SEMS is not the exclusive method for managing the financial assurance required in settlements and orders. CERCLA enforcement documents - consent decrees, administrative orders on consent and unilateral administrative orders - require PRPs to provide adequate financial assurance to ensure the remediation of, or removal action at, a hazardous waste site is completed. Regions negotiating these enforcement documents generally base the adequacy of the amount of financial assurance on the estimated cost of the remedy presented in a Record of Decision for a remedial action, or an Action Memo for a removal action.

In addition, OECA and OLEM conduct regular conference calls with the states and EPA regions to discuss implementation of financial assurance via these CERCLA enforcement instruments. These calls allow states and EPA to raise issues, seek solutions, and share best practices, to provide oversight of the financial assurance program.

In the event financial assurance is insufficient, EPA can invoke its enforcement authorities and enforce the terms of the settlement or order to protect human health and environment.

Financial assurance instruments may also give EPA some priority for CERCLA bankruptcy claims. Although generally EPA's CERCLA bankruptcy claims are given general unsecured status in bankruptcy, the existence of third party liquid instruments may improve EPA's standing to a higher priority tier, such as secured creditors.