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presents

EPA Financial Assurance Compliance

Legal Strategies to Anticipate and Meet Financial Requirements for Environmental Obligations

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Christopher M. Roe, Partner, **Fox Rothschild**, Exton, Penn.

Christian C. Semonsen, Partner, **Kirkland & Ellis**, Washington, D.C.

Granta Y. Nakayama, Partner, **Kirkland & Ellis**, Washington, D.C.

Tuesday, May 19, 2009

The conference begins at:

1 pm Eastern
12 pm Central
11 am Mountain
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USEPA'S Financial Assurance Requirements

Overview of Certain USEPA Financial Assurance Requirements

Presented by

Christopher M. Roe, Esquire

Strafford Publications CLE Seminar

May 19, 2009

Fox Rothschild LLP
ATTORNEYS AT LAW

OVERVIEW

- What are Financial Assurance obligations?
- When do they arise?
- How can they be satisfied?
- How can compliance be maintained?

What Are Financial Assurance Obligations?

- Requirement that responsible party demonstrate, or put aside, adequate financial resources to complete cleanup on closure obligations, and/or to cover third party liabilities that may arise from operations.
- Can be imposed in a permit, or an order, or by regulation.

Where Do Financial Assurance Obligations Arise?

- **Hazardous waste treatment, storage and disposal facilities**
  - Federal Resource Conservation and Recovery Act regulations, 40 CFR parts 264 and 265
  - Standardized Permit Rule regulations, 40 CFR part 267, subpart H
  - State equivalent statutes, programs
- **Excluded hazardous secondary material intermediate and reclamation facilities**
  - Federal RCRA regulations, 40 CFR 261, subpart H
- **Underground Storage Tanks**
  - Federal RCRA regulations, 40 CFR part 280, subpart H
  - State UST Programs

Where Do Financial Assurance Obligations Arise? (cont.)

- **Remedial Design/Remedial Action and similar clean-up related consent decrees**
  - Comprehensive Environmental Response Compensation and Liability Act model RD/RA Consent Decree
  - State clean-up programs
- **Underground injection wells**
  - Safe Drinking Water Act, 40 CFR part 144 subpart F
- **Offshore vessels and offshore drilling platforms**
  - Oil Pollution Control Act, 30 CFR parts 138 and 253
- **Mining Operations**
  - Surface Mining Control and Reclamation Act

How Satisfied: General Requirements

- **Resource Conservation and Recovery Act ("RCRA")**
  - Requirements for owners and operators of hazardous waste treatment, storage, and disposal facilities (under 40 CFR parts 264, 265 and 267)
  - Requirements for owners and operators of intermediate and reclamation facilities for excluded hazardous secondary materials (under 40 CFR part 261, subpart H)
  - Requirements for owners and operators of underground storage tanks (under 40 CFR part 280)

How Satisfied: General Requirements

- Requires submission of "detailed written estimate" of costs of:
  - Closure
  - Post-closure monitoring and maintenance
- Coverage for liability for sudden accidental occurrence and non-sudden accidental occurrences
- Financial insurance mechanism must equal estimated closure and post-closure costs

40 CFR 264, subpart H

How Satisfied: Mechanisms

- Wording and terms of instruments prescribed in the regulations
- Combination of mechanisms can be used with some limitations
- Instruments can cover more than one facility
- Agency is beneficiary

How Satisfied: Mechanisms

- Trust fund
- Surety bonds
- Irrevocable standby letters of credit
- Insurance
- Financial test

How Satisfied: Mechanisms

- Trust fund
  - Fully funded up front
  - Funded on an annual basis over remaining operating life

How Satisfied: Mechanisms

- Surety Bonds
  - Types:
    - Guaranteeing payment into trust fund
    - Guaranteeing performance
  - Must set up a stand-by trust fund to receive the funds
  - Can be expensive to obtain

How Satisfied: Mechanisms

- Letters of Credit
  - Irrevocable for at least one year
  - Bank assures payment
  - Must set up a stand-by trust fund to receive funds
  - Can be expensive

How Satisfied: Mechanisms

- Insurance
  - Insurance pays on instructions of the agency
  - Insuring an expected risk?

How Satisfied: Mechanisms

- Financial Test
  - No financial instrument involved
  - Owner/operator must demonstrate that it meets thresholds
    - Bond rating above Baa or BBB
    - Tangible net worth that is six times cost estimate
    - Tangible net worth equal to or greater than $10 million
  - Owner/operator must produce annual certification of CFO and outside auditor

How Maintained: General

- Amounts to be increased within 60 days of changes in closure or post-closure with increase in cost estimates
- Annual review of estimates
- Annual adjustments for inflation

How Maintained: Issues

- Incapacity of issuing institution for trust funds, surety bonds, letters of credit or insurance, 60 days to secure replacement
- Changes in cost estimates may trigger need for additional or different financial assurance
- Balance sheet changes may trigger need for additional or different financial assurance

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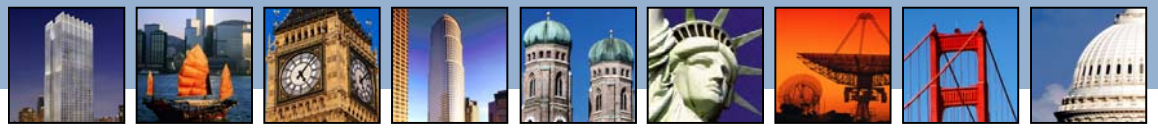

Environmental Financial Assurance Challenges in the Context of Bankruptcy

Chris Semonsen

Kirkland & Ellis LLP

May 19, 2009

Overview

- Current conditions
- F/A rules triggered by bankruptcy
- Basic “rules of road” in bankruptcy
- Background to recent regulatory developments

Current Conditions

- Rise of bankruptcies
- Changing balance sheets and net worth
- Fewer resources for compliance
- More site closures

Financial Assurance in Bankruptcy

- Many companies comply with F/A rules by using the "financial test" or a guarantee from a corporate affiliate
- Bankruptcy triggers reporting rules and need to set up alternate F/A mechanisms, such as a letter of credit or bond.
- Reporting requirements: F/A rules (for USTs, RCRA units) require notice to EPA within 10 days of bankruptcy petition by the owner/operator, or bankruptcy of 3rd party provider of F/A guarantee or other mechanism. 40 CFR 264.148; 265.148; and 280.114.

Financial Assurance in Bankruptcy (cont.)

- Bankruptcy does not create an immediate requirement to set up an alternate F/A mechanism.
- Alternate F/A mechanism required (e.g., 40 CFR 280.95):
  - within 30 days if EPA affirmatively requires it; or
  - "within 150 days of the end of the year for which financial statements have been prepared."
- Alternate mechanisms difficult for debtors to obtain.
- What if the debtor simply fails to comply?

Intersection of Bankruptcy and Environmental Laws

- Bankruptcy's "fresh start" concept; inherent conflict with environmental laws.
- Environmental matters not expressly addressed anywhere in the Bankruptcy Code.
- Environmental/bankruptcy rules largely court-made common law.

Bankruptcy ground rules: The Stay

- Bankruptcy Code §362 offers debtors an "automatic stay"
- Stay is subject to governmental "police or regulatory power" exception. Enforcement of environmental laws generally upheld as within the scope of this exception.
- Agency action to compel debtors to comply with F/A requirements is allowed as within the "police power" exception. See Safety-Kleen v. Wyche (4th Cir. 2001).
- But practicality of doing so in bankruptcy context is another issue, and in a liquidation case may be impossible.

Bankruptcy ground rules: Penalties

- Bankruptcy does not "stay" EPA from taking action to assess penalties for noncompliance with F/A rules.
- EPA's ability to actually collect penalties is another matter; depends on when the penalty arose.
- Pre-petition: treated as general unsecured claims that are paid (if at all) after other claims are paid.
- Post-petition: may be given administrative expense priority.

Bankruptcy ground rules: Discharge

- Key benefit of bankruptcy: Debtor may discharge pre-petition/confirmation debts.
- Environmental obligations may be dischargeable if they are "claims," defined in the bankruptcy code as (1) a "right to payment" or (2) a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."
- Ohio v Kovacs (S. Ct. 1985): cleanup orders dischargeable if they can be converted into a "right of payment."

Bankruptcy ground rules: Abandonment

- Bankruptcy Code §554 allows trustee to "abandon any property of the estate that is burdensome … or of inconsequential value…."
- Contaminated sites can be abandoned as well, as long as they do not pose an "imminent and identifiable harm." Midlantic v. NJDEP (S. Ct. 1986).

Implications

- F/A rules were intended as a “backup plan” to guarantee cleanup obligations in the event of bankruptcy, but not well designed to deal with actual bankruptcy scenarios.
- Widespread use of “financial test” and corporate guarantee provides limited security.
- EPA retains enforcement rights, but practical ability to force alternate mechanisms is compromised.
- Many sites ultimately abandoned and/or obligations discharged with no F/A backup.
- Some argue this unduly shifts a greater share of cleanup costs onto taxpayers.
- ASARCO bankruptcy was a “lighting rod” case

GAO Report to Congress:

"The extent to which liable parties cease operations or restructure—such as through bankruptcy—can directly affect the cleanup costs faced by taxpayers…. EPA faces significant challenges in holding bankrupt and other financially distressed businesses responsible for their cleanup obligations."

Sierra Club Notice of Intent to Sue EPA:

"Companies are using bankruptcy to clear their plate of all environmental cleanup responsibilities…. Approximately 38,500 businesses declare bankruptcy each year, and many of these companies leave substantial environmental liabilities."

GAO: Gaps in F/A Coverage

- No F/A required for sites that handle hazardous wastes but which are exempt from RCRA because, e.g., they are within the allowed accumulation time.
- No F/A required for sites that make products that may be hazardous but which are not “hazardous waste.”
- No F/A required for facilities that handle expressly excluded wastes under the “Bevill amendment” such as mining wastes.
- EPA consent decrees include F/A requirements, but if no settlement reached, there is nothing EPA can do to require F/A.

GAO: EPA Obstacles/Failures

- GAO cites use of "corporate asset protection measures" as a major obstacle to EPA, e.g., use of parent-subsidiary structures, limited liability corporations, and dispersion of assets among several entities to contain riskier activities and "provide multiple protective trenches around assets."
- Insufficient information available to EPA on environmental liabilities of companies that file for bankruptcy.
- Inability to handle case load of 1000s of bankruptcies filed each month, thus EPA fails to take action on many.
- Lack of followup on compliance with F/A requirements in RCRA and CERCLA consent orders.
- EPA failure to issue regulations for F/A under CERCLA 108(b).

CERCLA 108(b)

- Requires EPA to identify classes of industries for which F/A rules will be established within 3 years, and then in 5 years issue F/A rules, giving priority to classes of industries that present the highest risk.
- EPA never acted to adopt regulations under 108(b).
- EPA letter responding to GAO stated that "pursuing 108(b) rulemaking to the exclusion of other options is premature."

Sierra Club v. EPA

- Sierra Club filed "citizen suit" against EPA seeking to force the Agency to enact 108(b) regulations.
- Court in Sierra Club v. EPA (N.D. Cal. 2/25/09) held that EPA should publish a list of industries that would have to establish F/A for cleanups.
- BUT did not go as far as ordering EPA to issue regulations per se, holding that issue in abeyance pending EPA's publication of the list.

Wrap-up Points

- F/A rules not well suited to deal with bankruptcies.
- Bankruptcy code provides additional opportunities/obstacles.
- Regulatory approach to date has been (with limited exceptions) to require F/A at the “back end” after sites become contaminated, but new regulations may expand “prospective” F/A requirements for certain industries.
- Possible curtailment of use of financial test and guarantee?
- Current economy and rise in bankruptcies has put F/A rules into the spotlight. But what political appetite for imposing additional burdens on industry?

Financial Assurance - EPA's New National Enforcement Priority

Granta Y. Nakayama - Kirkland & Ellis LLP

Strafford Publications CLE Seminar

May 19, 2009

Historically Not An EPA Priority

- **Financial assurance previously viewed as a compliance assistance issue**
  - **focus on ensuring regulated entities aware of the requirements**
  - **perception that financial assurance requirements were not directly addressing actual pollution problems**
  - **limited Agency resources and personnel suited for managing financial issues**
- **Some administrative enforcement**
  - **Example: administrative order on consent that brings a company back into compliance**

Financial Assurance - Now An EPA Enforcement Priority

"EPA is stepping up its enforcement of the Resource Conservation and Recovery Act (RCRA) financial assurance requirements that ensure that persons handling hazardous wastes have adequate funds to close facilities, clean up any releases of those wastes, and compensate others that are harmed by the release of hazardous wastes."

EPA Enforcement Alert - April 2003 (emphasis added)

Cleanups Are Costly

- **Significant financial resources required to properly cleanup a site are**
- **Many inadequately funded sites where the cleanup cannot be completed**
- **Many “orphan” sites with no funding source**

Unaddressed Sites Are Serious Community Liabilities

- Visual/aesthetic impacts
  - blighted locations
  - abandoned sites with no activity
- Significant economic impact
  - prevent redevelopment
  - stymie economic revitalization
  - discourage new investment

Current Economic Distress

- Diminished company balance sheets
  - harder to meet the financial test
  - harder to use corporate guarantee
  - harder to obtain letter of credit/bond
  - availability of insurance affected
- More sites moving toward cleanup phase
  - companies no longer economically viable
  - inactive sites due to business conditions

Bankruptcy - A Forcing Event

- Bankruptcy filings increasing
- EPA often an unsecured creditor
- Large dollar amounts at risk (> $1 billion)
- EPA must quickly decide:
  - scope of the bankrupt party's cleanup obligations
  - appropriate cleanup/remedy and estimated cost
  - whether to file a proof of claim

Other Outside Pressures

GAO Report (GAO-05-658, August 2005 - Environmental Liabilities - EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations)

- report focuses on recoveries from bankrupt entities for cleanup costs
- acknowledged that "bankruptcy law presents a number of challenges to EPA's ability to hold parties responsible for their cleanup obligations, challenges that are largely related to the law's intent to give debtors a fresh start."

Financial Assurance - Enforcement Phase

"OECA is now entering the second phase of the financial assurance priority. . . the larger emphasis will be getting facilities into compliance or on the path to compliance."

"This includes EPA identifying and developing financial assurance enforcement cases and working with our co-regulators in the States to bring financial assurance cases."

EPA FY 2010 National Program Managers Guidance - February 2009 (emphasis added)

Enforcement Tools

Rulemakings - RCRA Subtitle C Financial Test

- **RIN: 2050-AC71 RCRA Subtitle C Financial Test Criteria (Revision)**
- **Rulemaking addressing financial assurance requirements (financial test) for Subtitle C facilities - does financial test need to be updated?**
- **Proposed relaxation in new proposal "under review" by new EPA leadership - with potential for significant strengthening**

Additional Rulemakings?

- Protracted struggle over whether EPA is required to list additional industries that need financial assurance requirements
- Recent decision (Sierra Club v. EPA, N.D. Cal., No. C08-1409) holding that CERCLA § 108(b)(1) requires EPA to prepare a list of types of facilities that need to demonstrate financial assurance
- July 10, 2009 court deadline for listing of priority industry sectors that will be reviewed for potential financial assurance requirements

EPA Trends - Implications

Current Activity

- More file reviews
- More investigations
- More enforcement

Future Activity

- More rulemakings
- More industries affected
- More requirements

August 2005

GAO
Accountability·Integrity·Reliability
Highlights

Highlights of GAO-05-658, a report to congressional requesters

ENVIRONMENTAL LIABILITIES

EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations

Why GAO Did This Study

The burden of cleaning up Superfund and other hazardous waste sites is increasingly shifting to taxpayers, particularly since businesses handling hazardous substances are no longer taxed under Superfund and the backlog of sites needing cleanup is growing. While key environmental laws rely on the "polluter pays" principle, the extent to which liable parties cease operations or restructure—such as through bankruptcy—can directly affect the cleanup costs faced by taxpayers. GAO was asked to (1) determine how many businesses with liability under federal law for environmental cleanups have declared bankruptcy, and how many such cases the government has pursued in bankruptcy court; (2) identify challenges the Environmental Protection Agency (EPA) faces in holding bankrupt and other financially distressed businesses responsible for their cleanup obligations; and (3) identify actions EPA could take to better ensure that such businesses pay for their cleanups.

What GAO Recommends

GAO's nine recommendations include EPA's (1) implementing a financial assurance mandate for businesses handling hazardous substances and (2) enhancing its oversight and enforcement of existing financial assurances and authorities. EPA generally agreed with many of the recommendations, stating its intent to further evaluate some of them.

www.gao.gov/cgi-bin/getrpt?GAO-05-658.

To view the full product, including the scope and methodology, click on the link above. For more information, contact John B. Stephenson at (202) 512-3841 or stephensonj@gao.gov.

What GAO Found

While more than 231,000 businesses operating in the United States filed for bankruptcy in fiscal years 1998 through 2003, the extent to which these businesses had environmental liabilities is not known because neither the federal government nor other sources collect this information. Information on bankrupt businesses with federal environmental liabilities is limited to data on the bankruptcy cases that the Justice Department has pursued in court on behalf of EPA. In that regard, the Justice Department initiated 136 such cases from 1998 through 2003.

In seeking to hold liable businesses responsible for their environmental cleanup obligations, EPA faces significant challenges that often stem from the differing goals of environmental laws that hold polluting businesses liable for cleanup costs and other laws that, in some cases, allow businesses to limit or avoid responsibility for these liabilities. For example, businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries. While many such actions are legal, transferring assets to limit liability may violate federal law in some cases. However, such cases are difficult for EPA to identify and for the Justice Department to prosecute successfully. In addition, bankruptcy law presents a number of challenges to EPA's ability to hold parties responsible for their cleanup obligations, challenges that are largely related to the law's intent to give debtors a fresh start. Moreover, by the time a business files for bankruptcy, it may have few, if any, assets remaining to distribute among creditors. The bankruptcy process also poses procedural and informational challenges for EPA. For example, EPA lacks timely, complete, and reliable information on the thousands of businesses filing for bankruptcy each year.

Notwithstanding these challenges, EPA could better ensure that bankrupt and other financially distressed businesses meet their cleanup obligations by making greater use of existing authorities. For example, EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to demonstrate their ability to pay for potential environmental cleanups—that is, to provide financial assurances. EPA has cited competing priorities and lack of funds as reasons for not implementing this mandate, but its inaction has exposed the Superfund program and U.S. taxpayers to potentially enormous cleanup costs at gold, lead, and other mining sites and at other industrial operations, such as metal-plating businesses. Also, EPA has done little to ensure that businesses comply with its existing financial assurance requirements in cleanup agreements and orders. Greater oversight and enforcement of financial assurances would better guarantee that cleanup funds will be available if needed. Also, greater use of other existing authorities—such as tax offsets, which allow the government to redirect tax refunds it owes businesses to agencies with claims against them—could produce additional payments for cleanups from financially distressed businesses.

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

MAR 13 2009

THE ADMINISTRATOR

The Honorable Senator Inhofe
United States Senate
Washington, DC 20510-8175

Dear Senator Inhofe:

Thank you for your letter of March 4, 2009. You requested information about the actions from the Bush Administration that EPA is reviewing or reconsidering, or reasonably expects to review or reconsider.

As you noted, on January 20, 2009, Rahm Emanuel, the President's Chief of Staff, sent a memorandum to the Heads of Executive Departments and Agencies concerning the management of the regulatory process in the Obama Administration. Additional guidance on implementing that memorandum was sent to Departments and Agencies by Office of Management and Budget (OMB) Director Peter Orszag on January 21, 2009.

EPA has complied with the directives contained in those memoranda. Specifically, we have not sent any regulations to the Office of the Federal Register (OFR) until they had been reviewed and approved by me or someone else appointed or designated by President Obama; we withdrew from the OFR regulations that had not been published; and we considered extending for 60 days the effective date of regulations that had been published but had not yet taken effect.

A total of 49 rules were affected by the Emanuel Memorandum. We completed review of thirty-three of these; the remainder are undergoing internal review. A list of the rules and their current status is attached for your reference.

EPA also withdrew all actions from OMB that were undergoing review under Executive Order 12866 at the time we took office. Of the actions withdrawn from OMB, three have been reviewed and resubmitted – the Endocrine Disruptor Screening Program, Polices and Procedures notice; the Renewable Fuels Standards Program proposed rule; and the Greenhouse Gas Mandatory Reporting proposed rule. I signed the latter on March 10, 2009, and it will be published in the Federal Register soon.

EPA has already publicly announced its intent to review several actions, either due to the Emanuel Memorandum or because of petitions for reconsideration from outside parties. For example, the effective date of the Oil Spill Prevention, Control and Countermeasure (SPCC) final rule was extended by 60 days to April 4, 2009, and an additional 30 days was made available for public comment. Similarly, in response to a petition for reconsideration we extended the effective date of the Prevention of Significant Deterioration and Nonattainment

New Source Review final rule to May 18, 2009. On March 12, 2009, I signed a proposal to further delay the effective date to allow for sufficient time to conduct the reconsideration proceeding. In response to a request from the President and a petition for reconsideration, EPA is reviewing and taking comment on the decision to deny the California waiver. We published a Federal Register notice on February 12, 2009 initiating this process. A public hearing was just held in Arlington, Virginia on March 5, 2009, to receive additional public input to that decision. As announced on February 17, 2009, EPA is also reviewing an interpretive memorandum issued by the previous Administrator that addresses when the Prevention of Significant Deterioration program applies to carbon dioxide. In each of these cases, the decision to review a previous action was publicly announced by EPA and additional comments from interested stakeholders are being solicited.

Courts have also remanded several major regulations completed during the last Administration to EPA for reconsideration. These include the Clean Air Interstate Rule (CAIR), the Greenhouse Gas Endangerment Finding, Maximum Achievable Control Technology (MACT) standards for Industrial Boilers, standards for Cooling Water Intake Structures, Construction and Development Effluent Guidelines, National Ambient Air Quality Standards for Particulate Matter, among others. Certain other significant rules, such as the Clean Air Mercury Rule, have been vacated altogether. EPA is in the process of developing new rules in response to these court actions.

In addition to these rules, the Bush Administration issued approximately four thousand final rules from the years 2001 through 2008, affecting virtually every environmental program. EPA took numerous other actions under the Bush Administration, including many by our regions. The review of previous rules and other actions is an ongoing process throughout the Agency and is influenced by many factors, including new technical or scientific information, legal developments, legislation, Administration priorities and the views of interested parties. I cannot state precisely which Bush Administration rules or other actions are or will be reviewed or reconsidered "for any reason" by me or the EPA staff. I can assure you, however, that, should we decide to reconsider such rules or other actions, I will conduct the process in a manner that is transparent, faithful to science, and guided by the law. This will of course include an "explanation of the statutory, regulatory and scientific basis" for the actions we take.

The President shares these goals and on January 21, 2009, in his Memorandum on Transparency and Open Government, directed Agency Heads to manage their Agencies based on a system of transparency, public participation, and collaboration. At EPA, whenever a new regulatory action is begun, the public is given notice via our website at http://www.epa.gov/lawsregs/search/ail.html. We also publish a Regulatory Agenda semi-annually that shows rules currently under development or recently completed (http://www.epa.gov/lawsregs/search/regagenda.html.). Should the Agency decide to modify an existing regulation, the public will be given the opportunity to provide their input during the public comment period. We will continue our current practice of providing notice to the Committee on those rules that we know are of high interest to Congress and the stakeholder community.

As to the scientific basis for future Agency actions, the President set out several principles in his March 9, 2009, Memorandum on Scientific Integrity to ensure that Agency Heads base their decisions on sound science. In that Memorandum, he directed that Agencies adopt appropriate rules and procedures to ensure the integrity of the scientific process used to generate the information supporting their decisions. Information used in fulfilling agency missions must be generated from well-established scientific processes, such as peer review. At EPA, we are committed to applying these principles in any future rulemaking.

In summary, I have every confidence that the record to support our reviews, and all our rules, will withstand scientific and legal scrutiny and be transparent to the public.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Jim Blizzard, in EPA's Office of Congressional and Intergovernmental Relations, at 202-564-1695.

Sincerely,

Lisa P. Jackson

Enclosure

EPA Attachment for Letter to Senators Inhofe and Barrasso
Status actions as of March 13, 2009

Actions Withdrawn from Office of Management and Budget Review

	Title of Action	Current Status
1	Endocrine Disruptor Screening Program – Policies and Procedures for Initial Screening	Resubmitted March 11, 2009
2	Modifications to RCRA Rules Associated with Solvent-Contaminated Wipes, Notice	Undergoing Review
3	RCRA Subtitle C Financial Test Criteria Regulatory Determination, Proposed Rule,	Undergoing Review
4	Greenhouse Gas Mandatory Reporting Rule, Proposed Rule	Resubmitted February 11, 2009, Cleared March 9, 2009 Publication Pending
5	Renewable Fuel Standards Program, Proposed Rule	Resubmitted February 6, 2009
6	Effluent Limitations Guidelines and Standards for Airport Deicing, Proposed Rule	Undergoing Review
7	Review of the Primary National Ambient Air Quality Standard for Nitrogen Dioxide. Advance Notice	Proposal To Be Issued

Rules Withdrawn from the Office of the Federal Register

	Title of Action	Current Status
1	Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Regulations Requiring Onboard Diagnostic Systems on 2010 and Later Heavy-Duty Engines Used in Highway Applications Over 14,000 Pounds; Revisions to Onboard Diagnostic Requirements for Diesel Highway Heavy-Duty Vehicles Under 14,000 Pounds, Final Rule	Published February 24, 2009
2	Operating Permit Programs; Flexible Air Permitting Rule, Final Rule	Undergoing Review
3	Oil Pollution Prevention; Non-Transportation Related Onshore Facilities Compliance Dates, Final Rule	Undergoing Review
4	Air Quality Designations for the 2006 24-Hour Fine Particle (PM2.5) National Ambient Air Quality Standards , Final rule	Undergoing Review
5	Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Ambient Air Quality Standards, Final Rule	Published February 10, 2009
6	Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Update to Materials Incorporated by Reference, Final Rule	Published February 10, 2009
7	Spiromesifen; Pesticide Tolerances, Final Rule	Published February 25, 2009

Rules In Federal Register Queue as of January 21*

	Title of Action	Current Status
1	Air Quality Index Reporting and Significant Harm Level for PM 2.5, Proposed Rule	Undergoing Review
2	North Carolina and South Carolina SIP; Final Rule for Finding of Failure to Submit State Implementation Plans Required for the 1997 8-Hour Ozone National Ambient Air Quality Standards, Final Rule	Undergoing Review
3	Connecticut SIP; Proposed Rule for Disapproval of Air Quality Implementation Plans, Connecticut; Attainment Demonstration for the Connecticut Portion of the New York-New Jersey-Long Island, NY-NY-CT 8-Hour Ozone Nonattainment Area, Proposed Rule	Undergoing Review
4	New Jersey SIP, Ozone Attainment Demonstration, Proposed Rule	Undergoing Review
5	Pennsylvania SIP; Approval and Promulgation of Air Quality Implementation Plans, Pennsylvania, Attainment Demonstration for the Philadelphia-Wilmington-Atlantic City Moderate 8-Hour Ozone Nonattainment Area, Proposed Rule	Undergoing Review
6	Maryland SIP; Approval and Promulgation of Air Quality Implementation Plans, Maryland, Attainment Demonstration for the Philadelphia-Wilmington-Atlantic City Moderate 8-Hour Ozone Nonattainment Area, Proposed Rule	Undergoing Review
7	Delaware SIP; Approval and Promulgation of Air Quality Implementation Plans, Delaware, Attainment Demonstration for the Philadelphia-Wilmington-Atlantic City Moderate 8-Hour Ozone Nonattainment Area, Proposed Rule	Undergoing Review
8	Maryland SIP; Approval and Promulgation of Air Quality Implementation Plans, Maryland, Attainment Demonstration for the Baltimore Moderate 8-Hour Ozone Nonattainment Area, Proposed Rule	Undergoing Review
9	NESHAP: Aluminum, Copper and Other Nonferrous Foundries, Proposed Rule	Published 2/9/2009
10	Amendments to 40 CFR Part 6: Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions, Direct Final Rule	Published 1/30/2009
11	Ohio SIP, Approval and Promulgation of Implementation Plans; Ohio New Source Review Rules, Final Rule	Undergoing Review
12	Kansas SIP, Approval and Promulgation of Air Quality Implementation Plans; Update to Materials Incorporated By Reference, Final Rule	Review Complete, Publication Pending
13	Alabama SIP; Approval and Promulgation of Air Quality Implementation Plans; Update to Materials Incorporated by Reference, Final Rule	Review Complete, Publication Pending
14	New Jersey SIP; Approval and Promulgation of Implementation Plans, New Jersey, Diesel Idling Rule Revisions, Final Rule	Review Complete, Publication Pending
15	Oklahoma SIP: Final Authorization of State Hazardous Waste Management Program Revision, Direct Final Rule	Published 2/4/2009
16	Nevada SIP: Approval and Promulgation of Implementation Plans: Revision to the Nevada State Implementation Plan: Updated Statutory and Regulatory Provisions: Rescission, Final Rule	Review Complete, Publication Pending
17	Stay of CAIR and CAIR FIP for Minnesota, Proposed Rule	Undergoing Review
18	Revised Exceptional Event Data Flagging Submittal and Documentation Schedule for 2008 Ozone Monitoring Data, Final Rule	Undergoing Review
19	Outer Continental Shelf Air Regulations Consistency Update for California, Proposed Rule	Review Complete, Publication Pending

* Some regional packages may have been signed before January 20th but not received in OPEI until a later date

Rules That Had Been Published But Were Not Yet Effective

	Title of Action	Current Status
1	Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements - Amendments, Part II, Final Rule	Effective Date Extended to April 4th, 2009
2	Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation, Final Rule	Effective Date Extended to May 18th, 2009, Issued Proposal to Further Extend Effective Date
3	Approval and Promulgation of Air Quality Implementation Plans; Illinois and Indiana; Finding of Attainment for 1-Hour Ozone for the Chicago-Gary-Lake County, IL-IN Area, Final Rule	Review Complete
4	Approval and Promulgation of State Implementation Plan; Georgia Nonattainment New Source Review Rules, Final Rule	Review Complete
5	Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Enhanced Vehicle Inspection and Maintenance Program, Direct Final Rule	Review Complete
6	Revisions to the California State Implementation Plan, Great Basin Unified Air Pollution Control District and Kern County Air Pollution Control District, Direct Final Rule	Review Complete
7	Revisions to the California State Implementation Plan, South Coast Air Quality Management District, Direct Final Rule	Review Complete
8	Regulation of Fuel and Fuel Additives: Gasoline and Diesel Fuel Test Methods, Direct Final Rule	Review Complete
9	Pesticide Regulations; Technical Amendments; Final Rule	Review Complete
10	Approval and Promulgation of Implementation Plans; Washington; Interstate Transport of Pollution, Final Rule	Review Complete
11	Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Nitrogen Oxides from Cement Kilns, Final Rule	Review Complete
12	Approval and Promulgation of Air Quality Implementation Plans; Texas; Attainment Demonstration for the Dallas/Fort Worth 1997 8-Hour Ozone Nonattainment Area, Final Rule	Review Complete
13	Air Quality: Revision to Definition of Volatile Organic Compounds – Exclusion of Propylene Carbonate and Dimethyl Carbonate, Final Rule	Review Complete
14	Approval and Promulgation of Implementation Plans; Nevada; Vehicle Inspection and Maintenance Program, Final Rule	Review Complete
15	Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007, Direct Final Rule	Review Complete
16	Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Recodification of Regulations, Direct Final Rule	Review Complete
17	Nebraska; Final Authorization of State Hazardous Waste Management Program Revisions, Final Rule	Review Complete
18	Approval and Promulgation of State Implementation Plans: Oregon; Salem Carbon Monoxide Nonattainment Area; Designation of Areas for Air Quality Planning Purposes, Direct Final Rule	Review Complete
19	Approval and Promulgation of Air Quality Implementation Plans; Utah's Emission Inventory Reporting Requirements, Direct Final Rule	Review Complete
20	Approval and Promulgation of Air Quality Implementation Plans; Arkansas, Emissions Inventory for the Crittenden County Ozone Non-Attainment Area, Emissions Standards, Direct Final Rule	Review Complete

	Title of Action	Current Status
21	Approval and Promulgation of Air Quality Implementation Plans; Texas; Approval of the Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for El Paso County, Direct Final Rule	Review Complete
22	Amendment to Standards and Practices for All Appropriate Inquiries Under CERCLA, Direct Final Rule	Review Complete
23	Rulemaking to Reaffirm the Promulgation of Revisions to the Acid Rain Program, Direct Final Rule	Review Complete

United States Environmental Protection Agency

Office of Enforcement and Compliance Assurance (2248A)

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Enforcement Alert

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Financial Assurance Requirements: A Fundamental Compliance Obligation

Failure to Comply with Financial Assurance Requirements Puts Human Health and the Environment at Risk

The Casmalia Resources Hazardous Waste Management Facility was a 252-acre commercial hazardous waste treatment, storage and disposal facility located in Santa Barbara County, California. Between 1973 and 1989, the facility accepted approximately 5.6 billion pounds of waste in its landfills, ponds, shallow wells, disposal trenches, and treatment units. The owners and operators of the Casmalia facility did not provide sufficient funds to close the facility and care for the site. In 1991, they abandoned their efforts to properly close the facility and clean up the site, which subsequently became known as the Casmalia Resources Superfund Site. The U.S. Environmental Protection Agency (EPA) estimates that it will cost at least $272 million to remediate this site. Casmalia is an example of how hazardous waste facilities' failure to adequately fulfill their financial assurance obligations can result in Superfund sites.

Given the importance of preventing situations like Casmalia, EPA is stepping up its enforcement of the Resource Conservation and Recovery Act (RCRA) financial assurance requirements that ensure that persons handling hazardous wastes have adequate funds to close facilities, clean up any releases of those wastes, and compensate others that are harmed by the release of hazardous wastes.

This *Enforcement Alert* focuses on the financial assurance requirements for RCRA hazardous waste facilities and highlights:

- Financial assurance requirements;
- Financial mechanisms available for complying with financial assurance requirements;
- Common violations of financial assurance requirements;
- Situations that may trigger an owner's or operator's duty to substitute the financial assurance mechanism; and
- Significant court decisions addressing financial assurance requirements.

Financial Assurance Requirements for Hazardous Waste Facilities

Financial assurance requirements address the cost of closing a hazardous waste facility in accordance with RCRA Subtitle C requirements; the annual cost required for post-closure monitoring and maintenance; liability coverage for sudden and non-sudden accidental occurrences; and corrective action required at solid and hazardous waste management units. Financial assurance requirements under Subtitle C cover permitted and interim status facilities. Financial assurance is required under RCRA Section 3004(a) and (t), and implementing requirements are found at 40 C.F.R. Part 264, Subpart H (for permitted facilities) and at 40 C.F.R.

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About Enforcement Alert

Enforcement Alert **is published periodically by the EPA's Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance to inform and educate the public and regulated community of important environmental enforcement issues, recent trends and significant enforcement actions.**

This information should help the regulated community anticipate and prevent violations of federal environmental law that could otherwise lead to enforcement action. Reproduction and wide dissemination of this publication are encouraged. ***For information on how you can receive this newsletter electronically, send an email to the editor.***

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Part 265, Subpart H (for interim status facilities).Where EPA has authorized a state to operate a hazardous waste program in lieu of the federal program, that state imposes financial assurance regulations that are at least as stringent as the federal regulations. Owners or operators of facilities located in an authorized state are required to comply with such state-issued financial assurance requirements, which are subject to enforcement by the state and EPA.

***Closure and Post-Closure Requirements*:** Owners or operators of hazardous waste facilities must provide financial assurance for closure and post-closure care. They can accomplish this through a trust fund, surety bond, letter of credit, insurance policy, or financial test and corporate guarantee. Owners or operators must maintain financial assurance until the required closure and post-closure tasks are completed, a certification of completion has been submitted to the appropriate agency, and the owner or operator has received a notification from that agency indicating that financial assurance is no longer required.

***Liability Requirements for Accidents*:** Owners or operators of hazardous waste facilities must be able to compensate third parties for bodily injury or property damage that might result from the accidental release of hazardous wastes. All hazardous waste facilities must demonstrate liability coverage for such sudden accidents. Hazardous waste facilities with land-based units such as landfills must also demonstrate liability coverage for non-sudden accidents, defined as events that take place over time and involve continuous or repeated exposure to hazardous waste.

Owners or operators may provide financial assurance for liability coverage through a trust fund, surety bond, letter of credit, insurance policy, or financial test and corporate guarantee. Owners or operators must maintain financial assurance until closure is completed, a certification of completion has been submitted to the appropriate agency, and the owner or operator has received a notification from the appropriate agency indicating that financial assurance is no longer required. Liability coverage is generally not required during the post-closure period.

Situations Triggering Need to Replace Financial Mechanisms

EPA's regulations require owners or operators of hazardous waste facilities

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Financial Mechanisms

- A **trust fund** allows an owner or operator to set aside money in increments according to a phased-in schedule (known as the pay-in period). At the end of the pay-in period, the facility will have enough money set aside to cover its financial assurance costs, and will have funds specifically earmarked for closure, post-closure care, and liability requirements.

- A **surety bond** is a guarantee by a surety company that the owner's or operator's financial assurance obligations will be fulfilled. If the owner or operator fails to pay or perform as specified in a bond, the surety company will become liable.

- A **letter of credit** is a guarantee by a financial institution that covers the owner's or operator's closure or post-closure care obligations. The appropriate agency may draw on the letter of credit if the owner or operator fails to perform.

- An **insurance policy** guarantees that funds will be available for closure or post-closure care in the event that the owner or operator fails to perform. Once closure or post-closure care begins, the insurer will be responsible for paying out funds, up to the face value of the policy, as directed by the appropriate agency.

- An owner or operator with the financial assets to absorb the costs of closure, post-closure care, and liability obligations may comply with financial assurance requirements by using the **financial test**. EPA's regulations set out the criteria that an owner or operator must meet to pass the financial test.

- An owner or operator may arrange a **corporate guarantee** by demonstrating that its corporate parent, grandparent, or sibling, or other firm with which it has a substantial business relationship, meets the financial test requirements on the owner's or operator's behalf. The corporate guarantor is required to perform closure or post-closure care, or to establish a trust fund, where the owner or operator fails to perform.

to replace the facility's financial mechanisms in certain situations. The most common situations, which involve the incapacity of the institution issuing the financial mechanism, are discussed below:

• If the institution issuing a **letter of credit** declares bankruptcy or has its issuing authority suspended or revoked by the relevant state or federal agency, the owner or operator of the hazardous waste facility has 60 days to establish other financial assurance.

• The financial institution issuing a **surety bond** must be listed as an acceptable surety of federal bonds in Circular 570 of the U.S. Department of the Treasury. If the surety company enters bankruptcy or has its authority to issue surety bonds suspended or revoked by Treasury, the owner or operator of the hazardous waste facility has 60 days to establish other financial assurance. Copies of Circular 570 and interim changes may be obtained directly from the Government Printing Office by calling (202) 512-1800. Interim changes are published in the Federal Register and at http://www.fms.treas.gov/c570/c570.html as they occur.

• An **insurance company** must be licensed to transact the business of insurance, or must be eligible to provide insurance as an excess or surplus lines insurer, in one or more states. If the insurance company becomes bankrupt or has its authority to issue insurance suspended or revoked, the owner or operator of the hazardous waste facility has 60 days to establish other liability coverage.

• An owner or operator using the **financial test** must send updated information to the appropriate agency within 90 days after the close of each fiscal year to provide alternate financial assurance.

Common Violations of the Financial Assurance Requirements

• Failure to obtain financial assurance.

• Failure to substitute financial assurance based on the issuing financial institution's incapacity, through, for example, bankruptcy, rehabilitation, or removal from the U.S. Department of Treasury's Circular 570.

• Failure to maintain current cost estimates for closure and post-closure care.

• Failure to adjust closure or post-closure care costs for inflation. An owner or operator is required to adjust the estimated closure or post-closure care costs for inflation 60 days prior to the anniversary date of the establishment of the financial mechanism.

• Failure to adjust financial assurance coverage within 60 days after an increase in the adjustment to closure or post-closure care cost estimates.

• Failure to notify the appropriate agency, within 10 days, of the commencement of a bankruptcy proceeding naming the owner or operator as debtor.

• Failure of an owner or operator relying on the financial test to: (1) update the facility's financial information annually; (2) notify the appropriate agency of the owner's or operator's intent to obtain alternate financial assurance; or (3) obtain alternate financial assurance within 90 days after the end of the fiscal year in which the owner or operator no longer meets the financial test requirements.

Significant Court Decisions Address Financial Assurance Requirements

Owners and operators of RCRA hazardous waste facilities that fail to obtain or maintain acceptable financial assurance are in violation of the law. EPA and authorized states have taken enforcement actions against persons and entities not in compliance with financial assurance requirements.

In ***Safety-Kleen, Inc. (Pinewood) v. Wyche***, 274 F. 3d 846 (4th Cir. 2001), the court held that financial assurance requirements are exempt from the automatic stay provisions under the Bankruptcy Act. The court held that South Carolina, a state authorized to run the program under RCRA, can issue and enforce orders to force companies to comply with financial assurance requirements during bankruptcy. The court concluded that the RCRA financial assurance requirements fall within the government's "regulatory exception" from the bankruptcy automatic stay provision because the financial assurance regulations serve the primary purpose of deterring environmental misconduct. "Stated more positively, the [financial assurance] regulations serve to promote environmental safety in the design and operation of hazardous waste facilities. The incentive for safety is obvious: the availability and cost of a bond will be tied directly to the structural integrity of a facility and the sound-

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ness of its day-to-day operations." Id. at 866.

In ***U.S. v. Power Engineering Co.,*** 191 F.3d 1224 (10th Cir. 1999), the Tenth Circuit Court of Appeals upheld a district court decision granting EPA's request for an injunction requiring the Power Engineering Company to immediately comply with financial assurance requirements to ensure funds would be available to close its hazardous waste management units and to abate releases of hazardous waste from its facility. Power Engineering had illegally disposed of and managed hazardous waste for many years, and the hazardous waste, in some instances, had migrated into the groundwater and released into a nearby river. The 10th Circuit, in affirming the district court decision, required the company to immediately provide $3.5 million in financial assurance.

Self-Disclosure of Financial Assurance Violations

The use of effective financial assurance mechanisms is necessary to ensure the protection of human health and the environment.

EPA encourages owners or operators who believe they may be in violation of these requirements to take advantage of the Agency's Audit Policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 F.R. 66,706 (Dec. 22, 1995). The Audit Policy eliminates gravity-based penalties for owners or operators that voluntarily discover, promptly disclose, and expeditiously correct violations of federal environmental law.

Further information about the Policy may be found at http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html. Owners or operators interested in conducting an audit or disclosing violations should contact the appropriate EPA Regional office. Owners or operators with facilities located in more than one Region should contact Phil Milton, EPA's Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, (202) 564-5029, or email: milton.philip@epa.gov.

For more information on RCRA financial assurance requirements, contact Lynn Holloway, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, (202) 564-4241 or email: holloway.lynn@epa.gov.

For compliance assistance information, contact Sharie Centilla, (202) 564-0697, Email: centilla.sharie@epa.gov.

Useful Compliance Assistance Resources

Office of Enforcement and Compliance Assurance:
http://www.epa.gov/compliance

RCRA Enforcement Division:
http://www.epa.gov/compliance/civil/programs/rcra/index.html

RCRA Financial Assurance Website:
http://www.epa.gov/osw/hazwaste.htm#finance

RCRA Online:
http://www.epa.gov/rcraonline

National Compliance Assistance Clearinghouse:
http://www.epa.gov/clearinghouse

Compliance Assistance Centers:
http://www.assistancecenters.net

Small Business Gateway:
http://www.epa.gov/smallbusiness

EPA's Audit Policy:
http://oecaftp.sdc-moses.com/compliance/incentives/auditing/

September 30, 1997

MEMORANDUM

SUBJECT: Guidance on EPA Participation in Bankruptcy Cases

FROM: Steven A. Herman
Assistant Administrator

TO: Addressees listed below

This memorandum transmits guidance entitled "EPA Participation in Bankruptcy Cases." This guidance supersedes the "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties," OSWER Directive #9832.7 (May 24, 1984) and the "Revised Hazardous Waste Bankruptcy Guidance," OSWER Directive #9832.8 (May 23, 1986).

This guidance identifies the factors to be considered by EPA in determining whether to participate in a bankruptcy case, including whether to pursue collection of costs or penalties against debtors who have liability under CERCLA or other environmental statutes.

This guidance was prepared with the assistance of EPA's National Bankruptcy Lead Region Work Group and the Department of Justice. If you have questions about this guidance, you may contact Andrea Madigan of Region IV, chair of the bankruptcy work group, at (404) 562-9518.

Attachment

Addressees:

Regional Counsel, Regions I-X, EPA
Director, Office of Site Remediation & Restoration, Region I, EPA
Director, Emergency & Remedial Response Division, Region II, EPA
Director, Hazardous Waste Management Division, Regions III & IX, EPA
Director, Waste Management Division, Region IV, EPA
Director, Superfund Divisions, Regions V, VI & VII, EPA
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII, EPA
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EPA PARTICIPATION IN BANKRUPTCY CASES

I. Introduction.

This guidance is issued to assist the Regions in evaluating how to respond when a potentially responsible party or the owner or operator of a regulated facility files for bankruptcy.[1]

This guidance supersedes the "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties," OSWER Directive #9832.7 (May 24, 1984) and the "Revised Hazardous Waste Bankruptcy Guidance," OSWER Directive #9832.8 (May 23, 1986).

II. Purpose and Scope of Guidance.

It is not always appropriate for the Agency to file a claim for cost recovery or penalties or to otherwise participate in a bankruptcy case. The purpose of this guidance is to identify the factors to be considered by EPA in determining whether to participate in a bankruptcy case, including whether to pursue collection of costs or penalties against debtors who have liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or other environmental statutes. This guidance also addresses issues in bankruptcy cases relating to the abandonment of contaminated property, cleanup activities under CERCLA on property included in the bankruptcy estate, and the impact of the automatic stay on different types of administrative and judicial enforcement activities.

This guidance does not address or otherwise change procedures relating to the referral of bankruptcy matters to the Department of Justice. Requests for filing proofs of claim or other participation before a Bankruptcy Court are made by referral to the Department of Justice. Requests should be made as far in advance of any deadline as possible.

Issues that arise when a regulated entity or a potentially responsible party files or has filed for bankruptcy are complex. In many instances, applicable law is unsettled or may vary depending upon the judicial court of appeals circuit. This guidance is based upon the state of the law as it now exists; an independent case by case analysis should be undertaken with respect to any bankruptcy issues that arise in future cases.

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[1] **For an overview of the Bankruptcy Code as it relates to enforcement, cost recovery, and other actions under environmental statutes, see "A Bankruptcy Primer for the Regional Attorney" issued by EPA's National Bankruptcy Lead Region Work Group in February 1994.**

III. When to File a Proof of Claim in a Bankruptcy Case.

In evaluating whether to proceed with the filing of a proof of claim for liability arising under environmental laws and regulations, the following factors should be considered:[2]

A. Potential for Recovery.

In deciding whether to file a proof of claim, the potential for recovering payment on the claim should be considered. This involves an analysis of the amount and priority of EPA's claim in relation to the assets and liabilities of the bankruptcy estate.

1. Amount and Priority of EPA's Claim. In analyzing the potential for recovery, the amount and priority of EPA's claim should be considered. Under the Bankruptcy Code, claims are organized into classes and paid in accordance with the bankruptcy priority scheme.[3] Generally, classes of claims that have a higher priority must be paid in full before any payment is made to creditors holding claims of a lower priority.[4] Within each class of claims, if there are insufficient funds to pay all claims in full, payment is pro rata.

Environmental claims are likely to fall into one of the following categories:

Secured claims. If EPA perfected a CERCLA lien prior to the bankruptcy filing against property owned by the debtor, the

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[2] It is important to distinguish an EPA claim for reimbursement of response costs or for penalties from the Agency's injunctive authority to issue cleanup orders. Only "debts" which are liabilities on a "claim" may be discharged in bankruptcy. The obligations imposed by a cleanup order issued to an owner of contaminated property which orders the respondent to cease threatened or ongoing pollution are not dischargeable claims in bankruptcy. See State of Ohio v. Kovacs, 469 U.S. 274, 284-5 (1985); United States v. LTV Corporation (In re Chateaugay), 944 F.2d 997, 1008 (2nd Cir. 1991); In re CMC Heartland Partners, 966 F.2d 1143, 1146-47 (7th Cir. 1992); In re Torwico Electronics, Inc., 8 F.3d 146, 148 (3rd Cir. 1993); In re Motel Investments, Inc., 172 Bankr. 105 (Bankr. M.D. Fla. 1994).

[3] The priority scheme is set forth in 11 U.S.C. §507.

[4] Under Chapter 11, certain priority claims can be paid over time under a plan of reorganization. See 11 U.S.C §1129.

Agency may have a secured claim.[5] EPA may also have a secured claim if it obtained a judgment against the debtor and perfected a judgment lien against property of the debtor prior to the bankruptcy filing.[6] In addition, EPA may have a secured claim to the extent that such claim is subject to a setoff against a claim of a debtor against EPA or another agency of the United States.[7] Secured claims will be paid in bankruptcy to the extent of the value of the collateral securing such claim. If the amount of the claim exceeds the value of the collateral, the deficiency will be treated as an unsecured claim.

Administrative expense claims. Response costs incurred by EPA after the bankruptcy filing to clean up property owned or operated by the debtor during the bankruptcy case, or property at which the debtor's wastes were disposed of or transported to for disposal during the bankruptcy case, may qualify as administrative expenses having priority and paid before general unsecured claims.[8]

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[5] Section 107(l) of CERCLA provides that all costs and damages that are recoverable from a liable party under CERCLA constitute a lien in favor of the United States against real property owned by such liable party that was subject to or affected by a removal or remedial action. For information on how to perfect a CERCLA lien, see EPA's "Guidance on Federal Superfund Liens", OSWER Directive No. 9832.12 (September 22, 1987) and "Supplemental Guidance on Federal Superfund Liens", OSWER Directive No. 9832.12-1a (July 29, 1993).

[6] Once the debtor files for bankruptcy, any act to create, perfect, or enforce a lien against property of the bankruptcy estate is prohibited by the automatic stay of Section 362(a)(4) of the Bankruptcy Code. Any act to create, perfect, or enforce a lien against property of the debtor is likewise prohibited to the extent that such lien secures a claim that arose prior to the bankruptcy filing. See Section 362(a)(5) of the Bankruptcy Code.

[7] Section 506 of the Bankruptcy Code.

[8] Section 503(b)(1)(A) of the Bankruptcy Code defines administrative expenses to include the "actual, necessary costs and expenses of preserving the estate." Section 507(a) of the Bankruptcy Code grants first priority to the payment of administrative expenses. For cases holding that response costs incurred post-petition to cleanup property of the estate are entitled to administrative priority see Pennsylvania v. Conroy, 24 F.3d 568 (3rd. 1994); In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993); In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991); In re Smith Douglass, Inc., 856 F.2d 12 (4th Cir. 1988).

General unsecured claims. Cleanup costs that are not secured and that do not qualify as an administrative expense constitute a general unsecured claim and are paid only after all secured and priority claims are paid in full or otherwise satisfied.

Penalties. Penalties assessed under environmental laws for violations that occurred prior to the bankruptcy filing are subordinated in Chapter 7 cases and paid only after all other general unsecured claims are paid in full. Pre-petition environmental penalties are subordinated in Chapter 7 cases even if they have been reduced to judgment and secured by a perfected judgment lien.[9] Pre-petition penalties in many Chapter 11 reorganization cases are treated as non-subordinated general unsecured claims in recognition of the fact that such claims are not likely to be subordinated where the debtor is reorganizing.[10] Penalties that arise post-petition from the debtor's continued operation of its business, may be treated as administrative expenses and paid as a priority claim.[11]

Accordingly, first priority administrative claims, such as a claim for post-petition penalties or for response costs incurred post-petition, are more likely to be paid than general unsecured claims. A claim under CERCLA for reimbursement of all past and future response costs may constitute the largest general unsecured claim and would, therefore, receive a high proportion of the available funds in a pro rata distribution. Recovery on a pre-petition penalty claim could be remote in light of the low priority afforded this type of claim.

2. Assets and Liabilities of the Bankruptcy Estate.

The other factor in evaluating the likelihood of recovery is the amount, if any, of funds available for distribution in the bankruptcy case and the priority and amount of other claims against the bankruptcy estate. In a no-asset Chapter 7 case, there are no funds available for distribution and no possibility of recovery; there is no need to file a proof of claim in such cases.

In bankruptcy cases where there are assets, evaluating the amount of funds that may be recovered for the benefit of

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[9] See Section 726(a) of the Bankruptcy Code.

[10] See Schultz Broadway Inn v. United States, 912 F.2d 230, 233 (8th Cir. 1992).

[11] See In re Hemingway Transport, Inc., supra; In re Chateaugay Corp., supra; In re N.P. Mining Co., 963 F. 2d 1449 (11th Cir. 1992).

creditors and the amount and priority of other creditors' claims may not be possible until late in the bankruptcy case and after the deadline for filing a proof of claim. While the debtor's bankruptcy schedules list assets and liabilities, they are sometimes misleading. Values assigned to assets are sometimes speculative. The equity in property subject to a lien could be unrecoverable if such property cannot be sold in a timely manner. Intangible assets such as preference claims and fraudulent transfer claims are sometimes unscheduled. Accounts receivable can be difficult to collect or subject to bona fide dispute. Proofs of claim filed by other creditors may be subject to bona fide dispute. It should be recognized, therefore, that the likelihood of recovery is sometimes speculative and subject to change.

B. Impact on Agency Resources.

Once a proof of claim is filed, EPA must be prepared to substantiate the claim before the bankruptcy court on a potentially accelerated schedule. In addition, EPA may have to respond to discovery requests and develop expert testimony on the estimate of future response costs on relatively short notice. The need to allocate resources for such matters should be measured against the potential gain in filing a claim. For example, in a CERCLA case where there are other viable PRPs, or where other viable PRPs are already committed to undertake the cleanup pursuant to an administrative order or consent decree, the resources needed to pursue a claim in bankruptcy against a debtor PRP may outweigh any anticipated return. Further, in CERCLA cases where the Agency has not yet selected a remedy, the resources needed to establish the likely remedy, and the estimated cost of such remedy before the bankruptcy court may outweigh any anticipated return.

C. Fairness to Other Liable Parties.

The decision to forego filing a proof of claim need not be based solely upon EPA's ability to recover costs from other liable parties. The interests of justice or other policy considerations may also be considered. For example, private cost recovery claims for future response costs are treated as contingent claims for contribution and are disallowed in bankruptcy pursuant to 11 U.S.C §502(e)(1). Therefore, other PRPs may be foreclosed from recovering any portion of the debtor's fair share of the cleanup costs. In such a case, the Region may elect to proceed with the filing of a claim against the debtor PRP.[12]

[12] Even if EPA elects not to file a proof of claim, Section 501 of the Bankruptcy Code may permit the debtor, trustee, or a co-PRP to file a claim on behalf of the Agency. See In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993).

D. Other Considerations.

All the factors that are taken into account in deciding whether to take enforcement action in a non-bankruptcy case should also be considered, such as the culpability of the debtor, the strength of the evidence against the debtor, the deterrence value of such action, the precedential value of such action and the interests of justice and equity.

IV. Abandonment.

Section 554 of the Bankruptcy Code, 11 U.S.C §554, provides that upon the request of the trustee or other party in interest, the bankruptcy court may allow abandonment of property of the estate when the property is "burdensome" or "of inconsequential value and benefit to the estate". The power to abandon property is not unlimited and may not be allowed in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.[13]

If abandonment is allowed, the property is no longer property of the estate and it is abandoned to the debtor and any other party with an interest in property; in essence, the property assumes its pre-bankruptcy status. If abandonment of

[13] In Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), the Supreme Court established that the trustee's abandonment power is limited and may not be exercised in contravention of laws designed to protect the public health or safety. The Court went on to note that this exception to the trustee's abandonment power is narrow and does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment and that the abandonment power is not to be fettered by laws or regulation not reasonably calculated to protect the public health or safety from imminent and identifiable harm. Since the Midlantic decision, a number of courts have addressed the issue of when abandonment of contaminated property may be allowed. While no uniform standard has as yet emerged from these cases, courts generally consider the nature of the environmental threat, and the amount of money available to the estate to fund any cleanup in determining whether abandonment should be allowed. See, In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir, 1988); In re Wall Tube & Metal Products Co., 831 F.2d 118 (6th Cir. 1987); In re FCX, 96 Bankr. 49 (Bankr. E.D.N.C. 1989); In re Peerless Plating Co., 70 Bankr. 943 (Bankr. W.D. Mich 1987); In re Anthony Ferrante & Sons, Inc., 119 Bankr. 45 (D. N.J. 1990); In re Franklin Signal Corp., 65 Bankr. 298 (D. Minn. 1986).

contaminated property is allowed, the trustee or debtor may contend that response costs incurred after the abandonment no longer have administrative priority status under 11 U.S.C. §507, because the cleanup was not necessary to "preserve property of the estate."

Section 554 provides that property of the estate may be abandoned only after notice and a hearing. Usually, creditors and other parties in interest are served with a notice that identifies the property sought to be abandoned. However, notice that a debtor or trustee may seek to abandon unspecified property at the Section 341 meeting may be included in the notice for such meeting.[14] In such instances, EPA may consider requesting the trustee or debtor to identify, prior to the Section 341 meeting, all property that may be abandoned so that the Agency can determine whether to take any action regarding the proposed abandonment.

In evaluating whether to oppose a motion to abandon contaminated property filed by a trustee or other party in interest in a bankruptcy case, the following factors should be considered:

A. Whether There Are Unencumbered Assets in the Bankruptcy Estate that Could Be Used to Fund Response Actions.

In a bankruptcy case with few or no unencumbered assets, it is unlikely that there would be sufficient funds in the bankruptcy estate to finance a cleanup of the contaminated property. In such cases there may be no reason to oppose a motion for abandonment. In cases where there are some funds in the estate but not enough to pay for all cleanup costs, it may be appropriate to ask the bankruptcy court to condition the abandonment upon the trustee undertaking certain tasks such as maintenance of site security or performing a discrete portion of the cleanup necessary to protect public health or the environment.[15] Even if the estate has limited assets, EPA may consider negotiating conditions upon which the Agency would not

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[14] See In re Southern International Co., 165 Bankr. 815 (Bankr. E.D. Va. 1994).

[15] See, e.g., In re FCX, Inc., 96 Bankr. 49 (Bankr. E.D.N.C. 1989) (as a condition to allowing the debtor to abandon contaminated property, the court required the debtor to set aside $250,000 to pay for cleanup of the abandoned property as an administrative expense); In re Franklin Signal Corp., 65 Bankr. 268 (Bankr. D. Minn 1986) (prior to abandonment, the trustee was required to investigate the presence of hazardous substances on property and inform federal and state environmental agencies of the results and any intent to abandon).

oppose the proposed abandonment, such as EPA's access to the contaminated property, that the abandonment is without prejudice to the priority of EPA's claim against the estate, or that the abandonment is without prejudice to EPA's right to file a lien against the contaminated property after the abandonment is approved.

B. Nature of Environmental Threat.

Consideration should be given to the nature and extent of the environmental problems posed by the site. In opposing an abandonment motion, EPA should be prepared to present evidence about the environmental conditions at the site and the threat that they pose to public health and safety. Consideration should also be given to whether abandonment would constitute a release under applicable state law or whether the site is subject to a pre-petition state or federal cleanup order.[16]

C. Need for Access to Conduct Future Cleanup Activities.

It is important to consider the need of EPA for access to contaminated property in order to conduct future cleanup activities. Without a court order allowing EPA access to abandoned property, there may be no one to contact to obtain access once the property is abandoned to a debtor that is nothing more than a corporate shell. EPA has been able to obtain a court order allowing such access as a condition to the court's approval the proposed abandonment.[17]

V. Cleanup Activities Under CERCLA on Property Included in the Bankruptcy Estate.

When EPA is conducting a cleanup of property that is owned by a debtor in bankruptcy, there are issues that merit special attention. In cases where a trustee has been appointed, it is the trustee rather than the debtor who has the authority to grant access.[18] It is not necessary for the trustee to obtain approval

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[16] See Pennsylvania v. Conroy, 24 F.3d 568 (3rd Cir. 1994) and In re Motel Investments, Inc., 172 Bankr. 105 (Bankr. M.D. Fla. 1994).

[17] See In re Mowbray Engineering Co., 67 Bankr. 34 (Bankr. M.D. Ala. 1986).

[18] A trustee is appointed in every Chapter 7 case. 11 U.S.C. §701. In Chapter 11, the debtor usually retains possession and control of its assets as a debtor in possession. 11 U.S.C §1107. A trustee may be appointed in a Chapter 11 case only if a party in interest establishes cause, such as fraud or gross mismanagement, or that such appointment would be in the best interest of creditors. 11 U.S.C. §1104.

of the bankruptcy court before granting access to EPA. However, sometimes trustees are unfamiliar with CERCLA and EPA's access authority and may be initially hesitant to grant access. The regional counsel bankruptcy contact should contact the trustee, provide appropriate information about Superfund and EPA's access authority, and seek to establish a good working relationship with the trustee. If the trustee continues to deny access, EPA regional counsel should consult with DOJ to obtain access through an order or a warrant as appropriate.

EPA should keep the trustee informed about cleanup activities. If there is personal property at the site that is contaminated and must be disposed of or destroyed in the course of the cleanup, or is in the way and must be removed, EPA should so advise the trustee. If there are unresolved conflicts between EPA's obligation to take appropriate action to protect human health and the environment and the trustee's obligation to protect and preserve assets of the bankruptcy estate, regional counsel should be consulted, and regional counsel may want to consult DOJ. Potentially valuable property, such as equipment, or tanks or drums of saleable chemicals, should not be removed without such consultation so that any potential claim by the trustee or creditors that such removal violates the bankruptcy automatic stay, 11 U.S.C. §362(a)(3), can be evaluated.

VI. Impact of the Automatic Stay on Administrative and Judicial Proceedings.

Section 362(a) of the Bankruptcy Code, 11 U.S.C. §362(b), provides for a broad stay of litigation, lien enforcement and certain other actions which would affect or interfere with the bankruptcy process. This stay arises automatically upon the filing of the bankruptcy petition and applies in all bankruptcy cases. The automatic stay is a fundamental part of the bankruptcy process intended to protect the status quo during the pendency of the bankruptcy case.

There are certain exceptions to the automatic stay which are set forth in Section 362(b). Actions by a governmental unit to enforce its police or regulatory powers and the enforcement of non-monetary judgments obtained by a governmental unit to enforce its police or regulatory powers are excepted and, therefore, are not automatically stayed at the commencement of a bankruptcy case. However, attempts to enforce monetary judgments, perfect liens, or to obtain possession or control over property of the estate do not fall within this exception and are subject to the automatic stay. See 11 U.S.C. §362(b)(4),(5).

It is important to understand what types of enforcement activities are prohibited by the automatic stay. It is equally important to understand what types of enforcement activities are not stayed.

A. Regulatory Compliance and Enforcement Actions.

While a company may continue to operate its business during a Chapter 11 reorganization proceeding, the Bankruptcy Code does not excuse such a company from its obligation to comply with environmental laws and regulations.[19] Environmental enforcement actions seeking injunctive relief against companies in bankruptcy are generally excepted from the automatic stay pursuant to the "police power" exemption of 11 U.S.C. §362(b)(4), (5).[20] Administrative or judicial proceedings to fix the amount of a penalty or establish the amount of cost recovery owed are also exempt from the automatic stay.[21] Note, however, that once a

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[19] 28 U.S.C. §959(b) provides ". . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." See State of Ohio v Kovacs, 469 US 274, 285 (1985) ("we do not question that anyone in possession of the site . . . must comply with the environmental laws and regulations of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."); Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) ("Congress did not intend for the Bankruptcy Code to preempt all state laws that otherwise constrain the exercise of a trustee's powers.")

[20] See In re Commonwealth Oil Refining Co., 805 F.2d 1175 (5th Cir. 1986) (RCRA §3008(a) compliance order issued by EPA not stayed by virtue of 11 U.S.C. §362(a) even though compliance with order would require debtor to spend money); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986) (proceeding to modify consent decree relating to debtor's violations of Clean Water Act and Clean Air Act not stayed by bankruptcy filing). See also In re Torwico Electronics, Inc., F.3d 146 (3rd Cir. 1993), cert. denied, 114 S. Ct. 1576 (1994).

[21] Board of Governors of the Federal Reserve System v. Corp. Financial, Inc., 502 U.S. 32 (1991); In re Commerce Oil Co., 847 F.2d 291 (6th Cir. 1988); United States v. Nicolet, Inc., 857 F.2d 202 (3rd Cir. 1988); City of New York v. Exxon Corp., 932 F. 2d 1020 (2d Cir. 1991).

penalty is assessed or a judgment is obtained, the automatic stay prohibits collection activities other than through the bankruptcy process.

Accordingly, enforcement actions seeking injunctive relief and/or the assessment of a penalty against operating facilities for non-compliance with applicable environmental laws and regulations should not ordinarily be delayed or postponed due to the filing of a bankruptcy petition involving the facility's owner or operator.[22] However, debtors may contend that an action for injunctive relief that will inevitably cost money is an attempt to enforce a money judgment that is not excepted from the automatic stay. Therefore, it is important to consult with legal counsel on this issue before proceeding.

B. Issuing Cleanup Orders Against Debtors or Trustees.

The automatic stay prohibits most debt collection activities. EPA's injunctive authority to issue orders for the cleanup of contaminated property[23] is distinguished from the Agency's claim as a creditor for reimbursement of response costs and is not prohibited by the automatic stay.[24] However, the debtor or trustee may contend that compliance with a cleanup order will cost money and, therefore, is an attempt to enforce a money judgment that is not excepted from the automatic stay. In addition, the enforcement of such orders may involve litigation before the bankruptcy court on an accelerated time schedule. Accordingly, regional counsel should be consulted before such orders are issued, and the regional attorney may want to confer with DOJ.

C. Information Gathering.

There are numerous statutory authorities under which EPA may seek information from a variety of parties, including Section 104(e) of CERCLA, 42 U.S.C. §9604(e), Section 3007 of RCRA, 42

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[22] In cases where the Agency is seeking to assess a penalty, it has the option of either commencing the administrative or judicial proceeding that would be appropriate absent the bankruptcy, or filing a proof of claim with the bankruptcy court in the amount the Agency believes is appropriate under the applicable environmental statute or penalty policy.

[23] EPA has the authority to issue orders requiring cleanup activities under several environmental statutes including CERCLA §§ 104 and 106, RCRA §§ 3008, 3013, and 7003, and CWA §311. The bankruptcy analysis set forth above would generally apply to orders issued under any of these authorities.

[24] See footnotes 2, 15.

U.S.C. §6927, Section 308 of the Clean Water Act, 33 U.S.C. §1318, and Section 114 of the Clean Air Act, 42 U.S.C. §7414. The automatic stay in bankruptcy does not apply to or otherwise prohibit EPA from issuing information request letters under these authorities. Nonetheless, it is important to recognize that financial information regarding the debtor is included in documents filed with the clerk of the bankruptcy court. The bankruptcy schedules and statement of affairs, which every debtor is required to file under penalty of perjury, list the debtor's assets and liabilities and include additional information about the debtor and its business operations. These documents are publicly available and can be obtained from the bankruptcy court.

It is also important to recognize that the Bankruptcy Code and Bankruptcy Rules provide additional methods of obtaining information about a debtor. Section 343 of the Bankruptcy Code requires the debtor to attend the first meeting of creditors and to submit to examination under oath at such meeting. In addition, under Bankruptcy Rule 2004, the bankruptcy court may allow the examination of any entity relating to the acts, conduct or property or to the liabilities or financial condition of the debtor, or to any matter that may affect the administration of the bankruptcy estate.

In Chapter 7 cases, the trustee should be able to provide access to the debtor's operating records. However, the Chapter 7 trustee will probably not have extensive knowledge regarding the debtor's waste management practices.

D. Issuing General or Special Notice Letters Under CERCLA.

To the extent that a notice letter simply advises a party that EPA believes that it may have liability for cleanup of a site and offers the debtor or trustee an opportunity to engage in settlement discussions, it would not violate the automatic stay to send such a letter to a debtor or trustee in bankruptcy. However, a demand for payment, which is often included in a notice letter, may be alleged to be an act to collect payment of a pre-petition debt and, therefore, may be prohibited by the automatic stay. Accordingly, it is preferable to eliminate the demand for payment in any notice letter sent to a debtor or bankruptcy trustee.

It is important to recognize that any settlement must be approved by the bankruptcy court after notice and hearing. This factor must be taken into account in establishing settlement deadlines. It is unlikely that a bankruptcy settlement will coincide with special notice procedures of CERCLA § 122. Accordingly, the impact of the bankruptcy should be considered before issuing a notice letter to a debtor or trustee to determine whether a notice letter is appropriate or otherwise worthwhile.

E. CERCLA Liens.

Any act to create, perfect, or enforce a lien against property of the debtor may violate the automatic stay.[25] Accordingly, EPA should not attempt to perfect its lien under Section 107(l) of CERCLA where the owner of the subject property is in bankruptcy.

Violations of the automatic stay may be punishable by a contempt judgment.[26] Accordingly, the regional counsel bankruptcy contact should be consulted on any matters that may raise automatic stay issues, and the regional attorney may want to confer with DOJ.

VII. Other Bankruptcy Issues.

While this guidance is focused primarily toward more commonly recurring bankruptcy matters, it is important to recognize that there are other issues that may arise requiring EPA to become involved in a bankruptcy proceeding. Such actions may include but are not limited to: (1) objecting to a plan of reorganization that purports to discharge or impair future environmental claims with respect to property owned by the reorganized debtor; (2) objecting to a proposal to sell property of the debtor free and clear of EPA's legal rights against the purchaser of such property; (3) objecting to an improper attempt to impair or release EPA's rights against a non-debtor; (4) objecting to improper exemptions claimed by an individual debtor; (5) responding to fraudulent conveyances or preferences actions; (6) seeking the appointment of a trustee or an examiner to take over and/or investigate the affairs of a Chapter 11 debtor; (7) objecting to discharge based upon a debtor's willful and malicious conduct, fraud, or failure to provide appropriate notice to EPA; (8) filing of an involuntary bankruptcy petition by the United States; and (9) the filing of and/or voting on a plan of reorganization.

In those instances where EPA wishes to take legal action against a party that went through a bankruptcy, the Agency should consider whether such action was discharged, barred, or otherwise impacted by such prior bankruptcy.

VIII. Use of this Guidance.

This guidance is not a rule and does not create any legal obligations. The extent to which EPA applies this guidance will depend upon the facts of each case.

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[25] **See Section 362(a)(5) of the Bankruptcy Code.**

[26] **28 U.S.C. §1481.**

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

OFFICE OF
SOLID WASTE AND EMERGENCY RESPON

MEMORANDUM

SUBJECT: Enforcement of Financial Responsibility Requirements for RCRA Treatment, Storage, and Disposal Facilities That Are Closing

FROM: J. Winston Porter,
Assistant Administrator

TO: Waste Management Division Directors
Regions I - X

This memorandum describes the Environmental Protection Agency's approach to enforcing regulatory requirements for both financial assurance for closure and post-closure care and liability coverage under the Resource Conservation and Recovery Act (RCRA) at treatment, storage, and disposal facilities that are closing.

A. Closure and Post-Closure Financial Assurances

1. Regulatory Requirements

Facilities are required under 40 CFR §265 Subpart H to establish financial assurance during their operating life for closure and post-closure care (§§265.143 and 265.145). Authorized states have established equivalent or more stringent requirements. In order to implement this regulation, Regions and states must review closure and post-closure plans for adequacy during the operating life of the facility to ensure that the amount of the financial assurance instruments is adequate. Close review of operating facilities will limit situations where facilities are in closure but have not established adequate financial assurance for closure or post-closure. When a facility closes, the Agency's goal is to ensure that closure is completed in an environmentally sound manner. In order to accomplish this, it is imperative that we carefully review closure and post-closure plans, cost estimates, and financial assurances when we know that the facility will be closing. If the owner or operator has not adequately addressed closure and post-closure activities and/or cost estimates and financial assurance for closure and post-closure, this must be addressed before closure plan and post-closure plan approval.

2. Economically Marginal Facilities Without Financial Assurance

Generally, violations of financial assurance requirements should be addressed by a formal enforcement action, with penalties. In the situation where a firm is "economically marginal," strict enforcement of the regulations, i.e., establishing financial assurance during the operating life of the facility, could drive such a company into bankruptcy with no guarantee that necessary corrective action will be assumed by Federal or state Superfund programs. It may be appropriate to allow economically marginal firms that did not establish financial assurance during their operating lives to meet their closure and/or post-closure obligations on a more flexible schedule. Regions and states should follow the principles outlined below when considering such an arrangement:

(1) Any agreement must be formalized in an order. Owner/operators should be informed that failure to adhere to the terms of the order will subject them to further enforcement action.

(2) A firm must supply information to substantiate its financial status and demonstrate legitimate financial need. Please note that the burden of proof in establishing financial need lies with the owner or operator, who should volunteer the information in this situation. Evaluation of company financial strength should be made by qualified personnel. */

(3) A more flexible pay-in period for a trust fund should only be considered when all other options for financial assurance have been exhausted, A firm should demonstrate that a flexible pay-in period will substantially increase its ability to pay closure and post-closure costs.

(4) Alternate financial mechanisms or a combination of mechanisms (see §265.143(f)) should be considered, as well as other options, such as low interest loans for closure or post-closure costs available through the Small Business Administration.

(5) The length of time allowed to pay costs of closure or post-closure care using an installment plan schedule must be as short as the financial situation of the firm will allow. The actual rate of funding should be determined using ABEL or cash flow projections.

* If Regions and states require assistance with financial evaluations they should consider the following: 1) Contractor assistance is available for this purpose; please inform your RCRA enforcement regional coordinator if you need assistance. 2) The computer program "ABEL" can also be used to determine the ability of a firm to pay closure costs, post-closure costs, and/or penalties.

B. Liability Coverage

Under the RCRA regulations, an owner or operator must continuously provide liability coverage for a facility as required until the certification of closure of the facility, as specified in §§264.115 and 265.115, is received by the Regional Administrator. Authorized states' regulations include equivalent or more stringent requirements.

The related memorandum, "Enforcement of Liability Requirements for Operating Facilities," dated October 29, 1986, advises that an operating interim status facility that cannot meet the liability requirement is to be placed on a compliance schedule, and if it does not comply in the time frame stated therein, must be compelled to close. It must be recognized, however, that the situation for closing interim status facilities without liability coverage is very different from that of operating facilities without liability coverage. While we may seek to compel a noncomplying operating facility to close, this sanction is not meaningful at a facility that is already closing.

We expect closing facilities to continue to make efforts to obtain liability coverage. However, the closing universe subject to liability requirements is diverse, and the ability of the owners and operators of these facilities to satisfy liability requirements varies. Enforcement personnel should consider the circumstances of the closing facility without liability coverage carefully. Closing facilities with violations of ground-water monitoring, closure/post-closure or financial assurance requirements must be accorded higher priority than facilities whose only violation is lack of liability coverage. In addition, when considering the priorities of the program, enforcement personnel may choose to defer enforcement action against a closing facility regarding a violation of liability requirements. Finally, closing facilities whose only violation is lack of liability coverage will not be regarded as significant noncompliers for SPMS purposes.

There will be instances where formal enforcement actions should be filed against closing facilities for violations of liability requirements, even if this is the facility's only violation. For example, a facility's parent may be able to pass the financial test for a corporate guarantee but may fail to submit the corporate guarantee or may fail to continue an insurance policy until certified closure. Once an enforcement action has been initiated, we also encourage enforcement personnel to consider requiring the noncomplying facility to have an alternative mechanism (i.e., a letter of credit) to assure payment of liability judgments. If the owner or operator agrees to obtain an alternative mechanism, the agreement must be formalized in an order. It may be appropriate under certain circumstances to include a penalty for failure to comply with the liability requirement, as well as appropriate penalties for other violations.

If you have any questions about this policy, or wish additional information or assistance, please call Jackie Tenusak, Office of Waste Programs Enforcement (FTS 475-8729).

U.S. Environmental Protection Agency - October 2007
FY08 – FY10 Compliance and Enforcement National Priority: Financial Responsibility Under Environmental Laws

What is the Environmental Problem?

Many environmental statutes contain financial responsibility provisions. Generally, financial responsibility requires regulated entities to set aside funds, obtain, or otherwise guarantee that funds will be available to address short and long term risks associated with the management and permanent disposal of hazardous materials, substance and wastes so as not to adversely affect human health and the environment.

Financial responsibility protects human health and the environment by preventing improper handling and release of hazardous materials and wastes, ensuring funds will be available to address contamination, preventing the shift of cleanup costs from the responsible party to the taxpayer or other parties; and making facilities and land available to the public for reuse. These benefits are lost unless there is compliance with the financial responsibility requirements and enforcement where there is a failure to maintain sufficient financial assurances. Absent financial assurance, protection of human health and the environment would depend on available governmental financial resources. Compliance and enforcement of financial responsibility requirements is consistent with EPA's mandate to prevent harm to human health and the environment, deter illegal activities, and the Agency's long-standing "polluter pays" principle.

The Office of Enforcement and Compliance Assurance (OECA) is concerned that entities are not providing adequate financial responsibility in accordance with their obligations under federal environmental laws. Recent studies and inquiries by the EPA Office of Inspector General (IG) and the Government Accountability Office (GAO) have noted issues regarding compliance with the financial responsibility requirements under RCRA closure/post-closure, RCRA corrective action, CERCLA cleanups and SDWA UIC program. Also, ongoing EPA Regional assessments of owner's or operator's compliance with RCRA Subtitle C closure and post-closure financial responsibility requirements, for example, have identified a wide range of violations. These violations place the public at risk because of the potential financial inability to close or clean-up the site.

Why Are We Addressing this Problem?

Prior to the designation of financial responsibility as an enforcement priority, OECA and the States noted compliance concerns and engaged in discussions and activities to address these

issues. Several of the environmental laws with financial responsibility requirements do not provide for authorization of State programs (e.g., CERCLA, TSCA) and EPA must take the lead in addressing financial responsibility issues. In programs that have a state and federal component, EPA plays a crucial role by providing national leadership regarding the implementation and enforcement of the financial responsibility requirements.

With the emergence in 2005 of financial responsibility as a potential OECA national priority, support for OECA's decision to undertake this area as a national priority came from EPA's IG and the States. Areas that have been identified by OECA, the IG and GAO where EPA can provide leadership are capacity building, revising national databases to incorporate and better track financial responsibility, additional guidance and oversight regarding enforcement of financial responsibility requirements and highlighting the importance of financial responsibility nationally.

Since a portion of the non-compliances attributed to national companies are systemic, EPA has an important role to play as it is better able to address the violations corporate-wide. Moreover, some of the legal issues associated with the non-compliance are being encountered for the first time in case development, settlement negotiations and litigation. EPA's national focus on financial responsibility will lead to national consistency, highlight the importance of financial assurance, ensure the proper and safe management of hazardous substances, wastes and pollutants, and assures that the billions of dollars needed to properly close and clean-up hazardous wastes and substances will be available.

How is OECA Addressing the Problem?

EPA initiated a phased approach in the examination of compliance and enforcement issues. OECA has initiated its review by looking at RCRA Subtitle C closure/post-closure, RCRA corrective action, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Toxic Substances Control Act (TSCA). OECA then plans to evaluate the Safe Drinking Water Act (SDWA) and RCRA Subtitle I to determine if the financial assurance programs under these laws should be included in this priority. The phased approach allows OECA the ability to assess the information as it is gathered and focus its activities on significant environmental or compliance problems as well as adjusting its responses (e.g., enforcement, compliance assistance, etc.) when dealing with several environmental statutes that may have uniquely associated compliance and environmental concerns.

Highlights from the FY 2005-2007 Planning Cycle

OECA has been able to identify some trends from the work undertaken during FY'06-FY'07. This work was focused primarily on the preliminary review of financial instruments and compliance determinations under the RCRA, TSCA and CERCLA requirements and obligations. As the priority has progressed, concerns regarding cost estimates have been raised and OECA is placing additional focus on cost estimates (particularly for RCRA corrective action). Though this information is generally still preliminary and under review, it gives OECA a basis to make informed decisions regarding prioritization of and type of enforcement activity it will initiate to

address the identified non-compliance EPA anticipates during FY'08 to focus its resources on addressing the identified non-compliances with the financial responsibility requirements.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, GREAT BASIN RESOURCE WATCH, AMIGOS BRAVOS, and IDAHO CONSERVATION LEAGUE,

Plaintiffs,

v.

STEPHEN JOHNSON, Administrator, United States Environmental Protection Agency, and MARY E. PETERS, Secretary, United States Department of Transportation,

Defendants,

and

SUPERFUND SETTLEMENTS PROJECT, RCRA CORRECTIVE ACTION PROJECT, AMERICAN PETROLEUM INSTITUTE, and TREATED WOOD COUNCIL,

Defendant-Intervenors.
_____/

No. C 08-01409 WHA

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

In this environmental action alleging failure to perform nondiscretionary duties required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the parties have filed cross-motions for summary judgment. For the reasons stated below, all motions are **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

Plaintiffs Sierra Club, Great Basin Resource Watch, Amigos Bravos, and Idaho Conservation League brought this action against defendants Stephen L. Johnson, sued in his official capacity as Administrator of the Environmental Protection Agency, and Mary E. Peters, sued in her official capacity as Secretary of the Department of Transportation.[1] Intervenors in this action include the Superfund Settlements Project, RCRA Corrective Action Project, American Petroleum Institute, and Treated Wood Council.

Plaintiffs' claim arises under Section 310(a)(2) of CERCLA, codified as 42 U.S.C. 9659(a)(2), which authorizes citizen suits against federal officials for failure to perform any nondiscretionary act or duty mandated by CERCLA. Congress enacted CERCLA, also known as "Superfund," in 1980 to address the cleanup of improperly disposed hazardous substances. Section 108(b) mandated that the President promulgate regulations to ensure that facilities involved in any way with hazardous substances would remain financially responsible for cleaning up any substances that were improperly disposed. 42 U.S.C. 9608(b).

By executive order, all functions vested in the President under Section 108(b) were delegated to the Administrator of the EPA, except for functions having to do with transportation-related facilities, which were delegated to the Secretary of the DOT. Defendants EPA and DOT concede they have not carried out the actions required by Section 108(b), namely to: (i) publish notice of the classes of facilities for which financial responsibility requirements would be required not later than three years after December 11, 1980; (ii) promulgate requirements that classes of facilities 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 beginning not earlier than five years after December 11, 1980; and (iii) incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than four years after the date of promulgation. 42 U.S.C. 9608(b)(1), (b)(3). Because defendants have taken

[1] The named defendants were the former officials. The current Administrator of the Environmental Protection Agency is Lisa Jackson and the current Secretary of Transportation is Ray LaHood.

none of these steps, plaintiffs assert that defendants are currently in violation of Section 108(b) and that failure, plaintiffs claim, increases the likelihood that plaintiffs' members and their environment will be exposed to unremediated releases of hazardous substances.

Defendants previously moved to dismiss plaintiffs' CERCLA claim for lack of subject-matter jurisdiction. That motion was denied in an order dated July 23, 2008. Defendants also moved to dismiss plaintiffs' second claim for relief under the Administrative Procedure Act. Defendants argued in their motion to dismiss that jurisdiction over the APA claim was proper only in the Court of Appeals for the District of Columbia Circuit. This Court agreed, and defendants' motion to dismiss was granted, and an order dated August 8, 2008 dismissed the APA claim in its entirety without prejudice for plaintiffs to refile in the Court of Appeals for the D.C. Circuit.

All parties now have filed cross motions for summary judgment.

ANALYSIS

1. STANDING.

Defendants EPA and DOT and intervenors moved for summary judgment on the grounds that plaintiffs lack standing to challenge defendants' failure to act under CERCLA. To evaluate standing, a court must ask whether a plaintiff has suffered injury to satisfy the "case or controversy" requirement of Article III. To satisfy the case and controversy requirement of Article III standing, a plaintiff "must show that: (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt. Sys., Inc.*, 528 U.S. 167, 180–81 (2000).[2]

When an organization brings suit, there is yet another layer of analysis. An organization has standing to bring suit on behalf of its members when: (1) its members would otherwise have Article III standing to sue in their own right; (2) the interest it seeks to protect are germane to the organization's purposes; and (3) neither the claim asserted nor relief requested requires

[2] Unless otherwise noted, internal citations have been omitted from quotations.

the participation of individual members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In environmental cases, members have suffered an injury in fact by showing that they have an aesthetic or recreational interest in a particular place, or animal, or plant species, that interest is impaired by defendants' conduct, and that the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972); *NRDC v. EPA*, 542 F.3d 1235, 1246 (9th Cir. 2008).

A. DOT.

Defendants argue that plaintiffs lack standing to sue defendant DOT. Intervenors join this argument. This order agrees that plaintiffs do not have standing to bring this action against defendant DOT. Plaintiffs have not established they have suffered an injury that is fairly traceable to DOT's action or inaction and is likely to be redressed by a order in their favor. DOT only has Section 108(b) authority over transportation-related facilities, including transportation-related pipelines, while EPA has authority over all other facilities. Pointing to member declarations, plaintiffs argue they have provided evidence that members have been personally harmed by the release of hazardous substances from facilities, particularly the Molycorp mining facility. The declarations of members Shields and Eagle, for example, allege they suffered injury from exposure to releases of hazardous substances from pipelines at the Molycorp mine. Plaintiffs assert the release of hazardous substances from these pipelines should be addressed through DOT's financial assurances regulations. Plaintiffs, however, do not address the DOT's assertion that it is not responsible for financial assurance requirements for the Molycorp mine pipeline because it is not related to transportation. Plaintiffs do not point to any evidence that the Molycorp mine is a transportation-related facility. Instead, plaintiffs just make a circular argument that injury from the leaking of hazardous substances from pipelines are sufficient to demonstrate injury in fact from transportation-related facilities. Plaintiffs have not established any injury due to DOT's inaction regarding financial assurance regulations for transportation-related facilities. Plaintiffs lack standing against DOT and summary judgment for defendant DOT is **GRANTED**.

B. EPA.

Only intervenors challenge plaintiffs' standing as to claims against defendant EPA. This order first addresses whether the members of the organization have suffered an "injury in fact." Plaintiffs' have submitted declarations from their members showing they have suffered an injury in fact. The declarations state that plaintiffs' members have been harmed by the release of hazardous substances from facilities that are not currently subject to financial assurance requirements under CERCLA and their enjoyment has been diminished as a result of the release of hazardous substances. For example, the members have expressed concern about the effect of hazardous substances on recreational interests such as fishing, bird watching, hiking, biking, and kayaking, aesthetic interests such as the beauty of the national forest, and economic interests including the diminution in value of a family farm. These statements are sufficient to establish injury in fact. *See NRDC v. EPA*, 542 F.3d 1235, 1245 (9th Cir. 2008) (noting that evidence of reasonable concerns about the effects of alleged harm that directly affected recreational, aesthetic, and economic interests is sufficient to establish injury in fact).

Intervenors contend that plaintiffs cannot establish an injury in fact to support a claim for nationwide relief based upon declarations alleging localized injuries at six sites in five states. In *Alaska Center for Environment v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994), the court stated that plaintiffs seeking relief that may encompass areas beyond those locations in which they individually have suffered harm need not establish standing by demonstrating harm over the entire area in which the remedy they seek may affect but are only required to establish that a representative number of areas were adversely affected by the government's action or inaction. Similarly in this case, plaintiffs need not establish injury in every state and at every facility that produces hazardous waste to establish injury in fact in order to seek nationwide relief. Plaintiffs have been injured in fact if they or their local environments are perceptibly affected by the unlawful inaction in question. Plaintiffs' declarations aver specific facts demonstrating that individual harm has occurred in a number of representative locations, and plaintiffs' showing is sufficient to establish injury in fact. Furthermore, nationwide relief should not be limited by this order to the specific sites identified by plaintiffs in this action

because that would entail imposing a prioritization upon EPA when the statute itself does not limit the scope to specific facilities that EPA may ultimately decide to include in the notice of priority of classes of facilities.

To support their contention that the facilities plaintiffs point to are not sufficient to establish nationwide relief, intervenors rely on *Conservation Law Found. of New England v. Reilly*, 950 F.2d 38 (1st Cir. 1991). That decision is distinguishable. In *Reilly*, the plaintiffs relied on member declarations showing injury at ten sites in New England, but the court found that the absence of plaintiffs from the majority of regions in the country did not support an entitlement to nationwide relief. In contrast, plaintiffs here have not pointed to just one area of the country but have relied on member declarations demonstrating injuries in varying parts of the country, including Texas, Colorado, New Mexico, Nevada, and Idaho.

Intervenors also contend that because three declarations allege no personal injury at all, an injury in fact cannot be established for those plaintiffs. To survive summary judgment, the injury-in-fact test requires that an association need only aver that at least one member would be directly affected apart from their special interest in the subject. *See Lujan*, 504 U.S. at 563. Even if three of plaintiffs' declarants fail to claim individual harm sufficient to establish injury in fact, the other declarations and evidence submitted are sufficient to find injury in fact. The other declarations aver specific facts of individual harm distinct from the harm that plaintiffs as a whole claim. Plaintiffs aver enough facts to show an injury in fact to establish standing.

Intervenors next argue that plaintiffs cannot establish that their injuries are fairly traceable to the challenged conduct or are redressable. Plaintiffs rely on *NRDC v. EPA* to argue this is a procedural case and a relaxed standard applies for causation and redressability; whereas, intervenors contend the case is substantive. While the Ninth Circuit in *NRDC v. EPA* did not explicitly hold that a failure to promulgate is a procedural injury, the court noted that plaintiffs' claim regarding the EPA's failure to promulgate certain guidelines was similar to cases where the plaintiffs' claim is procedural and concluded that a precise showing for causation and redressability is not required in such cases. 542 F.3d at 1246 n.6. As in *NRDC v. EPA*, plaintiffs' here have challenged EPA's failure to promulgate; therefore, plaintiffs'

showing for these two standing factors, *i.e.*, whether their injuries are traceable to EPA's failure to publish notice of priority and promulgate financial assurance regulations and are redressable by publication and promulgation cannot be entirely precise without knowledge of the substance of the notice and regulations EPA would promulgate if required to do so. "[T]o require a precise showing would mean that *no* plaintiff would have standing to bring such a suit, as one cannot demonstrate the efficacy of regulations that have yet to be issued." *Id.* at 1246. In a citizen suit addressing whether the EPA had discretion to promulgate guidelines and standards for storm water runoff, the Ninth Circuit in *NRDC v. EPA* concluded plaintiffs can satisfy the "traceability" and "redressability" factors if they showed the type of "storm water discharge causing their injury is that which ELGs and NSPs aim to address, and that [the guidelines and standards] are likely to reduce the risk of pollution causing their injury." *Id.* As discussed below, plaintiffs have submitted evidence that their injuries are of the type the financial assurance regulations aim to address and are likely to reduce the risk of pollution. For example, plaintiffs have submitted member declarations which state that hazardous waste substances are causing pollution and harm plaintiff's health, enjoyment, property and the environment (*e.g.*, Cargill Decl. ¶¶ 5–6, 14) (stating he observed personnel from a cement plant dumping waste product in an open field and the wind gusts sent the substances airborne into the road, residences, and community causing him concern about a negative impact on his health).

Intervenors further argue that plaintiffs failed to show that it is likely that the promulgation of new financial assurance regulations will redress their specific alleged injuries because plaintiffs present no evidence that regulations would cover any of the sites or substances affecting plaintiffs. Intervenors' argument is unpersuasive. As previously stated, plaintiffs do not have to provide so precise a showing. While plaintiffs arguably have not established with absolute precision that the sites or substances affecting each individual declarant will be remedied if EPA is required to act, if plaintiffs are provided with a favorable decision, EPA would have to take action regarding the financial assurance requirements and require facilities that produce hazardous waste to comply with those requirements. While EPA might not address those sites or facilities affecting plaintiffs' declarants immediately, EPA

inevitably would promulgate financial assurance regulations that affect the type of facilities plaintiffs have specified.

According to intervenors, plaintiffs failed to establish causation because their alleged injuries are dependent on the actions of third parties not before the court. The "causation question concerns only whether plaintiffs' injury is dependent upon the agency's policy, or is instead the result of independent incentives governing [a] third part[y's] decision-making process." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992). Plaintiffs claim their injury results from EPA's inaction while intervenors claim plaintiffs' injury results from the actions of third parties whose decision-making process may or may not be affected by EPA's failure to promulgate financial assurance requirements. Plaintiffs have the better argument and they are supported by evidence from the GAO, EPA and other government agency reports. In support of their summary judgment motion, plaintiffs submitted the August 2005 United States Government Accountability Office report ("GAO report"), which found that bankruptcy laws and laws meant to force polluting facilities to be responsible for cleaning up hazardous waste conflict, allowing some facilities to escape responsibility for cleaning up their hazardous waste. The GAO report also found that if EPA began promulgating financial assurance requirements, then businesses would not be able to limit environmental cleanup liability through bankruptcy or reorganization because they would have to meet assurance requirements through a bond, trust fund, or other financial guarantee. The GAO report stated:

> EPA has not yet implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to maintain financial assurances that would provide evidence of their ability to pay to clean up potential spills or other environmental contamination that could result from their operations. By its inaction on this mandate, EPA has continued to expose the Superfund program, and ultimately the U.S. taxpayers, to potentially enormous cleanup costs at facilities that currently are not required to have financial assurances for cleanup costs . . . Although implementing the requirement could help avoid the creation of additional Superfund sites and could provide funds to help pay for cleanups, EPA has cited, among other things, competing priorities and lack of funds as reasons for having made no progress in this area for nearly 25 years.

GAO Rep. No. 05-658 at 5 (August 2005). The GAO report found that EPA does not dispute the potential effectiveness of promulgating financial assurance requirements but that they lack resources to implement such a program. CERCLA was enacted in order to make the producers of hazardous waste responsible for cleaning up their waste. Section 108 was created to make sure that those facilities maintain evidence of financial assurance commensurate with the level of risk they pose. By not promulgating financial assurance requirements, EPA has allowed companies that otherwise might not have been able to operate and produce hazardous waste to potentially shift the responsibility for cleaning up hazardous waste to taxpayers. GAO Rep. No. 05-658 (August 2005).

Intervenors also attack plaintiffs' standing by arguing that plaintiffs failed to show redressability because plaintiffs rely on a number of speculative assumptions: (i) that any financial assurance regulation issued under CERCLA would cover all of the sites and all of the substances mentioned in their declarations; (ii) that the companies managing the sites mentioned in their declarations will become insolvent; (iii) that if companies involved at these sites actually become insolvent, new financial assurance requirements would result in more complete cleanups at these sites than would otherwise occur; (iv) that new financial assurance regulations will be responsive to a company's environmental management practices, thereby creating an incentive for better management; and (v) that the companies involved at their sites will change their environmental management practices due to the issuance of financial assurance regulations, rather than continue the management practices that they had developed in response to other legal and regulatory factors. Plaintiffs claim that EPA's failure to publish notice and promulgate financial assurance requirements caused their injury and that if EPA did so, their injuries would be redressed. The injuries that plaintiffs have suffered are those to their health, property, and local environments from the release of hazardous substances by facilities not covered by financial assurance requirements. EPA has recognized that financial assurances are intended to address pollution from hazardous substances. For instance, EPA has acknowledged "[h]aving the financial wherewithal to perform closure and/or cleanup is critical to protecting human health and the environment from toxic and hazardous waste and substances

that are polluting the land, air, and water." EPA, *Compliance and Enforcement National Priority: Financial Responsibility Under Environmental Laws* 2 (2005).

Plaintiffs have shown they have been injured as a result of EPA's inaction and stand to expect to have their injury redressed by prevailing in this lawsuit. Accordingly, intervenors' motion for summary judgment asserting plaintiffs lack standing to sue defendant EPA is **DENIED.**

C. EVIDENTIARY OBJECTIONS.

Finally, intervenors also contend that plaintiffs' declaration testimony regarding financial assurances must be stricken for failure to comply with FRCP 56(e), Local Rule 7-5 and FRE 702. FRCP 56(e) states that an affidavit or declaration must be made on personal knowledge, set on facts that would be admissible in evidence, and show that the affiant is competent to testify. FRE 702 states that if scientific, technical or "other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Intervenors contend that because knowledge of financial assurances is specialized knowledge and declarants lack personal knowledge, declarants are not competent to testify that if companies were required to have financial assurances to clean up their pollution, then they would not have been polluted and the companies would have greater incentive to safely manage and dispose of their pollution. To the extent that plaintiffs rely on their declarations to establish standing, intervenors argue that those declarations must be stricken according to Local Rule 7-5, which allows a court to strike in whole or in part declarations that are not in compliance with the requirements of FRCP 56(e).

Because this order does not rely on the portions of the declarations that intervenors raise objections about, this issue is moot. Besides, standing can be established with affidavits or other evidence. *See Lujan*, 504 U.S. at 563. Plaintiffs have presented enough other admissible evidence, such as the GAO report, upon which this Court may rely in making its determination of whether plaintiffs have standing that determining whether plaintiffs' declaration testimony is admissible to establish standing is not necessary.

2. NONDISCRETIONARY DUTIES UNDER 42 U.S.C. 9608

CERCLA allows citizens to commence a civil action against EPA for failure to perform any act or duty under the Act which is not discretionary. 42 U.S.C. 9659. Thus, citizen suits may not be brought to enforce actions when the agency has discretion. EPA has admitted that the acts at issue here — to publish notice of classes, and promulgate and implement regulations pursuant to Section 108(b) of CERCLA — have not been done. Plaintiffs allege that these three obligations are nondiscretionary duties. EPA does not dispute that the requirement to identify and publish notice of classes was a nondiscretionary duty with a date-certain deadline. Instead, EPA argues plaintiffs' notice claim is time-barred by a six year statute of limitations. This order disagrees and finds that plaintiffs' claim regarding EPA's nondiscretionary duty to identify and publish notice of classes is not time-barred.

Plaintiffs assert that EPA has a nondiscretionary duty to publish notice under Section 108(b)(1). Section 108(b)(1) states:

> Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

42 U.S.C. 9608(b)(1). EPA concedes they have not published notice as described in Section 108(b)(1), but they contend plaintiffs brought their suit too late. EPA argues that plaintiffs' notice claim is time-barred by the six-year statute of limitations set forth in 28 U.S.C. 2401(a), which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

As stated in Section 2401(a), the point when the statute of limitations begins to run depends on when plaintiffs' cause of action first accrues. The parties do not dispute that there is a six-year limitation, but rather they dispute the relevant starting date for the limitations period. EPA contends the relevant date is sixty days after the deadline for publication of notice; whereas, plaintiffs argue that every day is a continuing violation. EPA asserts that plaintiffs' claims are time-barred because they filed their complaint on March 12, 2008, which is almost

two decades after their notice of priority claim first accrued. EPA did not publish a notice of priority in the Federal Register "not later than three years after December 11, 1980," or in other words by December 11, 1983. 42 U.S.C. 9608(b)(1). Plaintiffs could not initiate a citizen suit until the nondiscretionary citizen suit provision in Section 310(a)(2) of CERCLA was enacted as part of the 1986 SARA amendments. *See* SARA, Pub. L. No. 99-499, § 206. A nondiscretionary citizen suit could not start until the plaintiffs provided sixty-day notice of its intent to sue. 42 U.S.C. 9659. EPA asserts a person, therefore, could have first brought suit sixty days after the October 17, 1986 passage of the SARA amendments, *i.e.*, December 16, 1986, and this is when the Section 2401(a) limitations period started. Based on EPA's argument, plaintiffs were required to bring their claim by December 16, 1992, making the present action untimely. Plaintiffs counter that they are within the six-year statute of limitations, because with each day that EPA fails to perform the nondiscretionary duty required by Section 108(b) the statute is violated anew.

Relying on *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), EPA argues that the statute of limitations in Section 2401(a) is a jurisdictional bar to plaintiff bringing suit and it cannot be waived. In *Sand*, the Supreme Court held 28 U.S.C. 2501 is jurisdictional in nature. EPA argues that the language of Sections 2501 and 2401(a) are almost identical, and this supports a conclusion that Section 2401, like Section 2501, is jurisdictional. *Compare* 28 U.S.C. 2501 ("[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues"); 28 U.S.C. 2401(a) ("every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues").

The Ninth Circuit has not yet addressed the applicability of *Sand* to Section 2401(a). The Ninth Circuit, however, has previously stated "section 2401(a)'s six-year statute of limitations is not jurisdictional, but is subject to waiver." *See Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765 (9th Cir. 1997). In any event, *Sand* is distinguishable. That decision addressed a different six-year statute of limitations, *i.e.*, Section 2501, and as the Supreme Court

noted, Section 2501 is a "special statute of limitations governing the Court of Federal Claims." *John R. Sand & Gravel Co.*, 128 S. Ct. at 752. While that decision referred to Section 2401(a), it was referenced only in dicta in a dissenting opinion stating that the courts of appeals are divided on the waivable nature of Section 2401(a). *Id.* at 760–61. This order declines to find that *Sand* alters the Ninth Circuit's pronouncement that Section 2401(a) is not jurisdictional. In the absence of guidance to the contrary, this order holds that Section 2401 is not jurisdictional.

Plaintiffs argue that the continuing-violations doctrine applies to EPA's failure to act. "The continuing-violations doctrine serves to bar the application of the statute of limitations defense when a single violation exists that is continuing in nature. Under the continuing-violations doctrine, the court can consider as timely all relevant violations including those that would otherwise be time barred." *See Pub. Citizen, Inc. v. Mukasey*, 2008 U.S. Dist. LEXIS 81246, *26 (N.D. Cal. Oct. 9, 2008). While the Ninth Circuit has applied the continuing-violations doctrine in employment and civil rights cases, the Ninth Circuit has not addressed whether the continuing-violation doctrine applies in the environmental context, and other courts are split on this issue.

Recently, several district courts in this circuit, including the District Court of the Northern District of California and the District Court of Oregon, have considered this issue in the environmental context and have decided the claims at issue were not time barred under the six-year statute of limitations. *See id.; Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 85197 (D. Or. Nov. 16, 2007). In deciding whether to apply the continuing-violations doctrine, the District Court of Oregon, for example, examined the underlying purpose of statutes of limitations and concluded such limitations are "grounded in equity and based on the principles of avoiding stale claims, achieving finality, and protecting those who rely on the law. When the statutory violation is a continuing one the staleness concern disappears." *See Inst. for Wildlife Prot.*, 2007 U.S. Dist. LEXIS 85197, at *13. This order agrees and declines to apply the six-year limitation of Section 2401(a) to EPA's failure to perform a nondiscretionary duty. Applying Section 2401(a) would circumvent defendant's

accountability to comply with a statutory obligation to publish notice. EPA's failure to publish notice of classes of facilities is a continuing violation, and thus the action is timely.

EPA's reliance on *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006) is not only misplaced but also is against the weight of authority. In *Hamilton*, the Eleventh Circuit concluded plaintiffs' claim to compel agency compliance with ESA's critical habitat designation requirements were time barred after ten years of agency noncompliance had elapsed. Narrowly construing Section 2401(a), the Eleventh Circuit declined to apply the continuing-violation doctrine in the environmental context and determined the agency's failure to act was a one time violation triggering the statute of limitations on the first day of the agency's violation. *Id.* at 1334–35. The Eleventh Circuit relied on their view that Section 2401 is jurisdictional. As discussed above, the Ninth Circuit has not adopted this view and has stated Section 2401 is not jurisdictional and can be waived. In the absence of guidance from the Ninth Circuit to the contrary, this order applies the continuing-violation doctrine and concludes that plaintiffs' nondiscretionary duty claim regarding publication of notice of classes is not time-barred by the six-year statute of limitations.

As for the requirements to promulgate and implement financial assurance, EPA argues these obligations are discretionary, because Section 108(b) does not specify a date-certain deadline for completion of these requirements. At this time, this order declines to address the merits of EPA's argument regarding their duty to promulgate and implement financial assurance requirements. Instead, the Court will hold these issues in abeyance pending EPA's publication of notice of classes of facility as the Court believes this will shed light on the merits of the other challenged duties under Section 108(b).

CONCLUSION

For the foregoing reasons, plaintiffs lack standing to sue defendant DOT, plaintiffs have standing to sue defendant EPA, and plaintiffs' claim regarding publication of notice of classes is timely. Defendant EPA must identify and publish notice of classes as specified in Section 108(b)(1) by **MAY 4, 2009.**

IT IS SO ORDERED.

Dated: February 25, 2009

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE