FINANCIAL ASSURANCE
U.S. EPA

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Office of Enforcement & Compliance Assurance

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IMPORTANCE OF FINANCIAL ASSURANCE

- Assures that funds are available to:
  - properly close a facility;
  - carry out post-closure care of a facility;
  - clean up any released waste;
  - cover any damages to adjacent property owners and persons who are harmed by a release;
  - pay for remediation at Superfund sites; and
  - protect taxpayers from paying in the event a company goes bankrupt or abandons a property.

- Promotes the proper handling and cleanup of waste or other substances.

- Promotes environmental safety in the design and operation of facilities.
Measure 1: Conduct Preliminary Financial Assessments on 50% of the entire RCRA closure/post closure universe of 2258 TSDs and 50% of the EPA targeted corrective action universe of 476 TSDs.

- Reviewed 57% of entire closure/closure universe (1293 TSDs and 1746 FA instruments) → 32% potentially out of compliance
- Reviewed 70% of targeted corrective action universe (334 TSDs and 417 FA instruments) → 19% potentially out of compliance

Measure 2: Ensure that 100% of the targeted closure/post-closure universe, or 1129 TSDs, and 50% of the targeted corrective action universe, or 238 TSDs, are in compliance or on the path to compliance.
FINANCIAL ASSURANCE NATIONAL PRIORITY 2006-2010

- **Measure 3**: Ensure that 90% of all targeted RCRA TSDs w/ corrective action obligations that have cost estimates over $1M are in compliance or subject to a formal administrative order or consent decree (83 TSDs).

- **Measure 4**: Ensure that 90% of identified non-compliant CERCLA PRPs are in compliance or on the path to compliance with CERCLA settlements (46 settlements).
OVER $5B IN FINANCIAL ASSURANCE OBLIGATIONS FOR TARGETED UNIVERSES

- Value of targeted RCRA Subtitle C obligations:
  - RCRA closure/post-closure: $4B
  - RCRA corrective action: $1B

- Value of targeted RCRA Subtitle C obligations covered by financial test/corporate guarantee:
  - RCRA closure/post-closure: 55% of total instrument value (39% of instruments)
  - RCRA corrective action: 70% of total instrument value (49% of instruments)

- Value of targeted non-compliant CERCLA PRP obligations:
  - $377M (46 settlements)
The National Priority helped EPA realize that EPA should focus its enforcement efforts on ensuring that companies using the financial test or corporate guarantee qualify to do so.

The financial test is the highest risk mechanism to EPA and states as no funds are set aside (no designated funds available in bankruptcy).

In 2009 the National Law Journal reported that bankruptcy filings increased 63% from the previous year.
In 2009, EPA HQ sent information requests to 22 RCRA TSDs using the financial test/corporate guarantee that had bonds that were rated junk or had a rating on the cusp of junk.

<table>
<thead>
<tr>
<th>Moody’s</th>
<th>Standard and Poor’s</th>
<th>Grade</th>
<th>Risk</th>
</tr>
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<tbody>
<tr>
<td>Aaa</td>
<td>AAA</td>
<td>Investment</td>
<td>Lowest Risk</td>
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<tr>
<td>Aa</td>
<td>AA</td>
<td>Investment</td>
<td>Low Risk</td>
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<tr>
<td>A</td>
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<td>Investment</td>
<td>Low Risk</td>
</tr>
<tr>
<td>Baa</td>
<td>BBB</td>
<td>Investment</td>
<td>Medium Risk</td>
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<tr>
<td>Ba or B</td>
<td>BB or B</td>
<td>Junk</td>
<td>High Risk</td>
</tr>
<tr>
<td>Caa or Ca or C</td>
<td>CCC or CC or C</td>
<td>Junk</td>
<td>Highest Risk</td>
</tr>
<tr>
<td>C</td>
<td>D</td>
<td>Junk</td>
<td>In Default</td>
</tr>
</tbody>
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EPA reviewed $571M in closure/post-closure instruments and $91M in corrective action instruments for a total of $662M.
### RESULTS OF EPA HQ FINANCIAL ASSURANCE INFORMATION GATHERING

<table>
<thead>
<tr>
<th>TSDs Using Bond Rating Test (Alt. II) in Junk Bond Status</th>
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<tbody>
<tr>
<td>• 2 had switched to third party instruments.</td>
</tr>
<tr>
<td>• 1 planned to switch to a third party instrument.</td>
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<tr>
<td>• 1 no longer met the requirements of Alt. II and EPA sent a no longer qualifies letter.</td>
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<tr>
<th>TSDs Using Bond Rating Test (Alt. II) One Level Above Junk</th>
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<tbody>
<tr>
<td>• 4 had switched some of their facilities to third party instruments.</td>
</tr>
<tr>
<td>• 5 had other FA violations or were no longer in compliance; EPA and the states sent no longer qualify letters, violation notices, and initiated enforcement actions.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>TSDs Using Ratios Test (Alt. I) in Junk Bond Status</th>
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<tr>
<td>• 1 no longer met the requirements of Alt. I and EPA sent a no longer qualifies letter.</td>
</tr>
<tr>
<td>• 1 failed to meet the requirements of Alt. I and the states sent violation notices.</td>
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</tbody>
</table>
LESSONS LEARNED FROM FINANCIAL ASSURANCE NATIONAL PRIORITY

- EPA Enforcement Actions for Failure to:
  - Provide cost estimate information.
  - Provide required documents (e.g., financial test/corporate guarantee documentation and standby trust agreements).
  - Timely submit the financial test/corporate guarantee within 90 days after the end of the company’s fiscal year.
  - Use compliant financial accounting for a financial test submission.
  - Follow required regulatory wording.
  - Timely submit alternate mechanisms.
  - Submit qualifying bonds for financial test Alt. II.

- Companies using non-compliant financial test/corporate guarantee submissions were required to obtain compliant financial assurance, including third party mechanisms.

- Penalties have ranged from several thousand dollars to a million plus dollars.
LESSONS LEARNED FROM FINANCIAL ASSURANCE NATIONAL PRIORITY

- **Trust Funds**
  - Companies have failed to submit standby trust agreements with surety bonds and letters of credit.

- **Surety Bonds**
  - Track that providers are qualified to provide bonds (ex: Surety went into receivership; no longer qualified on U.S. Treasury Circular 570).

- **Letters of Credits**
  - Be prepared to draw down on the LOC if no new instrument put in place by the owner/operator within 90 days following cancellation of LOC by issuing institution.
  - Ensure cancellation follows regulatory requirements (ex: Bank attempted to cancel without required 120 day notice).

- **Insurance**
  - Review of the insurance policy can be very helpful.
  - Non-compliant terms have been added.
  - Terms required by regulation have been left out, such as the assignability clause.
LESSONS LEARNED FROM FINANCIAL ASSURANCE NATIONAL PRIORITY

Financial Test/Corporate Guarantee
- Check bond ratings on Standard & Poor’s or Moody’s (ex: Companies have tried to use non-compliant financials and bonds, including matured bonds, bonds that belonged to another company, industrial development bonds, revolving credit facilities).

Multiple Mechanisms
- Companies can use multiple mechanisms, but make sure that the financial test or corporate guarantee are not being combined with other mechanisms at a single facility.

Multiple States
- States prefer their own mechanisms, even though regulations allow the same mechanism in multiple states.
ENFORCEMENT OF FINANCIAL ASSURANCE IN CURRENT ECONOMIC CLIMATE

- EPA finalized the closure/post-closure financial assurance rules during a deep economic recession.
- In the current financial climate, it is important that facilities are in compliance with the financial assurance requirements.
- Without financial assurance, it may be difficult to properly close, conduct post-closure care, and to clean-up facilities and sites.
- Neither the states nor the Federal Government have sufficient funds to undertake these activities if there is no financial assurance.
ENFORCEMENT IN BANKRUPTCY

- In 2010 Chapter 11 filings fell 10% from 2009 levels.
  - 2010 filings are still higher than 2006 – 2008 period.
- Companies are required to have compliant RCRA FA while in bankruptcy.
- Enforcement actions for FA may proceed in bankruptcy. (Safety-Kleen v. Wyche, 274 F.3d 846 (4th Cir. 2001))
- Penalties may be assessed for failure to have FA while company is in bankruptcy. (Cumberland Farms Inc. v. Florida Department of Environmental Protection, 116 F.3d 16 (1st Cir. 1997))
EXAMPLE OF ENFORCEMENT IN A RECENT BANKRUPTCY - GM

- EPA included financial assurance violations in the U.S. Proof of Claim filing.
- Settlement Agreement included assessment of RCRA FA penalties.
- FA violations prior to bankruptcy for facilities in 8 states (closure, post-closure, third party liability).
- Violations included failure to put in place new FA, no standby trust agreements, failure to provide third party liability.
FINANCIAL ASSURANCE TRAINING PROVIDED AS PART OF THE NATIONAL PRIORITY

- 21 Training Sessions on RCRA Financial Assurance
  - Regions: 1, 3, 4, 5 (twice), 6, 7, 8, 10
  - States: AZ, CA, LA (twice), ND, NM, NY, SC, VA, WA
  - HQ (twice)
- 3 Training Sessions on CERCLA Financial Assurance
  - Regions: 5, 10
  - HQ
- EPA has also included financial assurance as a component of other trainings.
- EPA provided training on cost estimation software for corrective action and closure/post-closure to each Region and several States.
RETURN OF FINANCIAL ASSURANCE TO THE CORE RCRA PROGRAM

- Annual Commitment System commitments for Regions to review financial test/corporate guarantee submissions and instruments that were not reviewed during the National Priority.
- EPA has initiated determination actions finding companies no longer qualified to use the financial test during the course of the submission year, and required new instruments within 30 days.
- EPA has sent violation notices to companies using non-compliant financial test/corporate guarantee submissions requiring them to switch to compliant mechanisms; EPA has assessed penalties against violators.
- Data entry in RCRAInfo is important because it allows regulators to assess exposure and quickly move to compel facilities to switch mechanisms if problems are encountered with a financial assurance instrument. Only 3 data elements are required for RCRAInfo: type, amount, and issuer.
RESOURCES AVAILABLE TO STATE REGULATORS

• Financial Responsibility Enforcement Tool
  • Interactive training tool and data depository for federal and state regulators.
  • Includes how-to guidelines on FA instruments; regulations; and resources.
  • Tutorial this afternoon at 1:45 p.m (State, Territorial, and Federal representatives only).
  • EPA webinar on how to use the tool July 20, 2011 (government regulators only) https://www1.gotomeeting.com/register/843835384.

• Monthly conference calls with EPA and the states.
• Contractor support available from both the EPA RCRA program and enforcement offices.
• CostPro and RACER available for cost estimating.
• Online financial assurance Fact Sheets (http://www.epa.gov/osw/hazard/td/tf/ldu/financial/fatools.htm).
• EPA needs the assistance of the states to conduct timely review of instruments and ensure that adequate financial assurance is in place.