RCRA SUBTITLE C FINANCIAL ASSURANCE:
INSTRUMENT REVIEW

ASTSWMO TRAINING CONFERENCE
OKLAHOMA CITY, OK
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Pertinent Sections of 40 CFR Parts 264 & 265

- Subpart G – Closure and Post-Closure
  - Closure & Post-Closure Plans 264.112, 264.118, 265.112 & 265.118

- Subpart H – Financial Requirements
  - Applicability of Subpart H 264.140 & 265.140
  - Definitions 264.141 & 265.141
  - Cost Estimates 264.142, 264.144, 265.142, 265.144
  - Closure FA 264.143 & 265.143
  - Post-Closure FA 264.145 & 265.145
  - Third-Party Liability 264.147, 265.147
  - Wording of Instruments 264.151
  - Incapacity of owner/operator, guarantor, financial institution 264.148 & 265.148
Under Corrective Action Regulations of 40 CFR 264.101:

- 264.101(b) & (c)

Guidance:


- Model 3008(h) AOC language available at https://www.epa.gov/enforcement/model-provisions-rcra-3008h-aoc-financial-assurance-provisions
Listed mechanisms in 40 CFR 264 and 265 Subparts H:

- Trust Fund (TF)
- Surety Bonds (SB) – payment or performance (Part 264 only)
- Letter of Credit (LOC)
- Insurance
- Financial Test (FT)
- Corporate Guarantee (CG)

Depending on the authorized RCRA state programs, the availability and use of financial assurance instruments may vary in each state.
What is a Trust Fund? Standby Trust Fund?

Parties
- Grantor = Owner or Operator
- Trustee = Financial Institution
- Beneficiary = Regulator

Pay-in options
- Company sets aside money in increments according to a pay-in schedule
- Trust Fund for liability must be fully funded (i.e., no pay-in period is allowed)
The financial institution must be authorized to act as a Trustee

Trust operations must be regulated and examined by federal or state agency (e.g., Office of the Comptroller of the Currency)

The Trust Fund must be irrevocable; it cannot be recalled or revoked without the written consent of the Regulator

Wording must be identical to regulations in:

- 40 CFR 264.151(a) for closure/post-closure
- 40 CFR 264.151(m) for third-party liability
- 40 CFR 264.151(n) for standby trust funds for third party liability letters of credit
TRUST FUND: REQUIRED DOCUMENTS

- Originally signed copy of the Trust Agreement;
- Exhibit A, which lists the Grantor’s designees that are allowed to provide instructions to the Trustee;
- Schedule A, which lists the facilities covered by the fund with current closure/post-closure cost estimates;
- Schedule B, which lists all transfer of funds (or property) to establish the trust fund; and
- A certification of acknowledgement.

Also, the Trustee must send an annual statement to the Regulator confirming the value of the trust fund.

Best Practice: Place original, signed document(s) in a safe place (e.g., a fire-proof safe)
SURETY BOND

- What is a Surety Bond?
- Parties
  - Provider = Surety Company
  - Principal = Owner/Operator
  - Obligee = Regulator
- Types
  - Financial Guarantee (or Payment) Bonds
    - Wording must be identical to wording under 40 CFR 264.151(b) for closure/post-closure and 264.151(l) for third party liability
  - Performance Bonds
    - Wording must be identical to wording under 40 CFR 264.151(c)
    - May not be used at interim status facilities
    - Cannot be combined with other FA mechanisms
SURETY BOND

- A Surety must be listed on U.S. Treasury’s Circular 570, available at [https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm](https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm).

- Established with a standby trust fund for closure and post-closure.

- Optional rider for closure and post-closure surety bonds automatically increases the face value of the bond to reflect current cost estimates.
SURETY BOND: REQUIRED DOCUMENTS

- The Surety Bond, signed both by the Surety and the Principal and listing:
  - All covered facilities with EPA ID Numbers and current estimated closure and/or post-closure costs.
  - The effective date of the bond.
  - The total penal sum of the bond.
  - The bond number, premium amount, and liability limits.

- A originally signed copy of a Standby Trust, established with a qualified financial institution (not required for third-party liability).

- Best Practice: Place original, signed document(s) in a safe place (e.g., a fire-proof safe)
A document issued by a financial institution that guarantees the payment of a customer’s obligations up to a stated amount for a specified period of time.

Issuer must have authority to issue LOCs and LOC operations must be regulated and examined by a Federal or state agency.

Must be irrevocable.

Issued for at least one year, automatically renewing.

Established with a standby trust fund (optional for third-party liability).
LETTER OF CREDIT: REQUIRED DOCUMENTS

- The Letter of Credit worded as specified in regulations at 40 CFR 264.151(d) for closure/post-closure and 40 CFR 264.151(k) for third party liability

- For closure and post-closure, a letter from the Company:
  - Referring to the LOC by number;
  - Listing the issuing financial institution and date;
  - Providing EPA identification number(s) for all covered facilities;
  - Listing the Company’s name and address; and
  - Listing the amount of funds secured by the LOC.

- A originally signed copy of a Standby-Trust, established with a qualified financial institution. (Optional for third-party liability)

- Best Practice: Place original, signed document(s) in a safe place (e.g., a fire-proof safe)
Closure/Post-Closure Insurance guarantees funds will be available for closure or post-closure in the event the owner/operator fails to perform.

Parties:
- Insurer = Insurance Company
- Insured = Owner or Operator

Language required by RCRA for closure and post-closure insurance policies gives regulator control in the release of insurance proceeds.
INSURANCE

- Insurer must be licensed in at least one state to transact the business of insurance or be eligible as an excess or surplus line insurer.
- For C/PC, policy must provide that the insurer may not cancel except for failure to pay the premium. Automatic renewal must provide owner/operator with the option of renewal at the face amount of the expiring policy.
- For C/PC, cancellation may not occur if: (1) regulator deems facility abandoned; (2) permit is terminated or new permit denied; (3) closure is ordered by regulator or court; (4) owner/operator filed for Ch. 11 bankruptcy; (5) premium is paid.
- Wording of Certificate of Insurance/Endorsement must be identical to wording in
  - 40 CFR 264.151(e) for closure/post-closure certificate
  - 40 CFR 264.151(i) for third-party liability endorsement
  - 40 CFR 264.151(k) for third-party liability certificate
INSURANCE: REQUIRED DOCUMENTS

- Certificate of Insurance for closure or post-closure insurance
- Certificate of Insurance or Endorsement for third-party liability insurance
- Regulator may request copy of complete policy, including all schedules, endorsements, and exclusions
An owner or operator with adequate resources can comply with financial assurance requirements by using one of two prescribed financial tests (Alternative I or Alternative II).

The owner or operator may not use other mechanisms in combination with the Financial Test to cover closure costs or to cover post-closure care costs.
<table>
<thead>
<tr>
<th>Part 1</th>
<th>Alternative 1</th>
<th>Alternative 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pass 2 of 3 Ratios:</strong></td>
<td>Total Liabilities to Net Worth &lt; 2.0</td>
<td>Rating for “most recent bond issuance”</td>
</tr>
<tr>
<td></td>
<td>Ratio of Net Income plus Depreciation, Depletion, and Amortization to Total Liabilities &gt; 0.10</td>
<td>S&amp;P ≥ BBB-</td>
</tr>
<tr>
<td></td>
<td>Net Working Capital Ratio &gt; 1.5</td>
<td>Moody’s ≥ Baa3</td>
</tr>
<tr>
<td><strong>Part 2</strong></td>
<td>Net Working Capital and Tangible Net Worth each at least 6 times the sum of current cost estimates.</td>
<td>Tangible Net Worth at least 6 times the sum of current cost estimates.</td>
</tr>
<tr>
<td><strong>Part 3</strong></td>
<td>Tangible Net Worth &gt; $10 million</td>
<td>Tangible Net Worth &gt; $10 million</td>
</tr>
<tr>
<td><strong>Part 4</strong></td>
<td>Assets located in the U.S. of at least 90% of total assets OR at least 6X the sum of closure and post-closure cost estimates (and UIC plugging &amp; abandonment).</td>
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</tr>
</tbody>
</table>
FINANCIAL TEST: REQUIRED DOCUMENTS

- CFO letter with current cost estimates for all relevant facilities worded identically to:
  - 40 CFR 264.151(f) for closure/post-closure
  - 40 CFR 264.151(g) for third-party liability or combination C/PC and third-party liability
- Independent certified public accountant's report
- Special report from O/O’s independent certified public accountant

*Note, these three documents are ANNUAL submittals, due each year within 90 days of the close of the Company’s fiscal year.
FINANCIAL TEST: CONSIDERATIONS

- Requires annual re-evaluation even if there has been no change in cost estimates
- Regulator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of the financial test, require reports on financial condition at any time
  - 40 CFR 264.143(f)(7) & 264.145(e)(7)
- Best Practices:
  - monitoring business press
  - alert the FA community about company updates
CORPORATE GUARANTEE

- An O/O may arrange a corporate guarantee by demonstrating its corporate parent, grandparent, or sibling, or other firm with which it has a “substantial business relationship,” meets the financial test requirements on the O/O’s behalf.

- “A ‘substantial business relationship’ must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.” 40 CFR 264.141(h).

- Wording of corporate guarantee must be identical to wording in:
  - 40 CFR 264.151(h)(1) for closure/post-closure
  - 40 CFR 264.151(h)(2) for third-party liability
CFO letter with current cost estimates for all relevant facilities
Independent certified public accountant's report
Special report from O/O’s independent certified public accountant
Signed, certified copy of the written guarantee between the Guarantor and the O/O
A letter from the Guarantor's CFO, detailing the value received by the Guarantor from the O/O for the Corporate Guarantee, and as applicable, describing the “substantial business relationship” between the O/O and the Guarantor
CORPORATE GUARANTEE: TRIGGERING EVENTS

- If the O/O fails to perform closure or post-closure requirements, the Guarantor is required to perform closure or post-closure care, or to establish a trust fund in the name of the O/O

- If intending to cancel the Corporate Guarantee, the Guarantor must send written notice both to the O/O and to the Regulator by certified mail and cannot cancel the Guarantee within 120 days of receipt of written notice by the Regulator
  - O/O has 90 days to provide the Regulator alternative financial assurance; or
  - If the O/O fails to provide within the 90 days, the Guarantor must provide an alternate instrument
CORPORATE GUARANTEE: CONSIDERATIONS

- Foreign Guarantors
- Requires annual re-evaluation even if there has been no change in cost estimates
- Regulator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of the financial test, require reports on financial condition at any time
  - 40 CFR 264.143(f)(7) & 264.145(e)(7)
- Best Practices:
  - monitoring business press
  - alert the FA community about company updates