Overview of Financial Assurance and Bankruptcy

ASTSWMO

Superfund and Brownfields Symposium

August 21, 2018

Ben Lammie, Deputy Division Director,
Regional Support Division
Office of Site Remediation Enforcement
U.S. Environmental Protection Agency
EPA Superfund FA Overview

• FA should be pursued for all enforcement instruments (e.g., AOC, UAO, CD)
• EPA Regions are required to seek HQ approval if FA is not to be included in an RD/RA CD
• Model language for FA sections within enforcement instruments and most FA mechanisms are well established
FA Mechanisms

- Trust Fund
- Letter of Credit
- Payment Bonds
- Performance Bonds
- Financial Test (FT)
- Corporate Guarantee (CG)
- Insurance Policies
- Other (e.g., Escrow)

PRPs cannot automatically choose FA mechanisms. Such mechanisms are requested and the requests are then reviewed by the case team against the requisite criteria of a particular mechanism.

For example, to use the FT, a party needs to demonstrate their financial health by meeting one of two tests: one focuses on a PRP’s ability to pass a series of ratios; and the other by demonstrating a certain credit rating.
General Settlement FA Timeline

1. **Determine cost estimate for enforcement instrument**
2. **PRP negotiations including FA provisions**
3. **PRP submits form of FA to EPA**
4. **Case team reviews whether the FA is adequate**
5. **FA in place within 30 days from effective date of enf. instrument**
Development of FA Provisions

• FA is one of many components of the enforcement instrument and one of many subjects covered during negotiations
• The facts of each case are evaluated when determining FA
  – Site-specific considerations may include: evidence, remedy risk factors, estimated cost of performing response action, estimated time to complete response action, etc.
• Case teams, which may include state partners, will confer on the development and subsequent compliance of such provisions
Safeguards in Model Documents

- The RD/RA CD provides language that PRPs need to ensure FA is obtained consistent with the provisions of the FA section (e.g., if the cost estimate goes up, then the FA needs to go up).
- PRPs are required to monitor the adequacy of the financial assurance and provide notice if their FA instrument becomes inadequate (e.g., failure to pass the FT).
Additional Efforts to Track, Monitor, and Share FA Information

• Recurring EPA-States FA Monthly Call (2nd Wed. of each month, 2:30pm-3:30pm)
• Updated data fields in Superfund data management system (SEMS) to improve data tracking, compliance, and reporting of CERCLA FA
• Ongoing monitoring of the financial test and corporate guarantee, EPA HQ -- random sample of publicly and privately held entities are selected for additional financial review
Additional Efforts to Track, Monitor, and Share FA Information (cont.)

- FA Community SharePoint Site (FACSS) is available for EPA and State regulators:
  https://usepa.sharepoint.com/sites/OECA_Community/FA
  - Includes Decision Tree Tools designed to assist regulators in evaluating compliance of financial assurance submissions
  - Please send an email to FASupport@epa.gov to request access

- CERCLA FA Website with guidance, sample mechanisms, and model language:
General Bankruptcy Timeline

1. **Debtor files motion for bankruptcy protection**
2. **EPA reviews bankruptcy notice, determines what EPA claims are involved**
3. **Bankruptcies impacting more than one EPA Region are managed out of HQ**
4. **EPA submits a proof of claim (POC) referral to DOJ**
5. **DOJ files POC; settlement negotiations continue or commence**
A few Bankruptcy Scenarios

• Multiple PRPs at relevant Superfund Site(s)
  – If one PRP goes bankrupt, expect other PRPs to take up the slack due to Joint and Several Liability

• Single PRP at a Superfund Site (or multiple sites)
  – Early in the remedial action cleanup stage
  – FA in the EPA enforcement instrument based on
    • Financial test or corporate guarantee or other instrument insufficient to cover remedial action and operation and maintenance (O&M)
  – O&M is a groundwater pump and treat remedy expected to last 30 years (or longer)
Two bankruptcy cases where significant financial impacts were limited

• **ASARCO Bankruptcy**
  – $1.79B recovery, 100 cents on dollar plus interest
  – Department of Justice coordinated with all government entities impacted
  – When active, held weekly meetings with all state and federal stakeholders

• **General Motors Bankruptcy**
  – $773M environmental response trust, $500M for cleanup of 89 sites
  – RACER Trust continues to look to sell properties
  – Without TARP funding from Treasury, this bankruptcy could have been a similar outcome to Vertellus.
EPA Efforts to Track, Monitor, and Share Bankruptcy Information

• HQ holds monthly coordination call with Regions
  – EPA available to begin holding periodic EPA-State bankruptcy calls as needed

• National Association of Attorneys General (NAAG) has an annual seminar for bankruptcy

• In development – EPA SharePoint site for EPA-State information sharing to include: current bankruptcy information, educational materials, and models/examples. Projected “Go Live” date March 31, 2019.
Early State Involvement Opportunities

• EPA’s Record of Decision
  – Remedy focus, but it is also an opportunity to identify expected operation and maintenance costs and potential FA burden on the state, if a PRP lead cleanup, what is level of risk?

• EPA Notice Letters – planning for negotiations
  – Sent to the respective state trustees/state officials

• Contact Regional Counterpart
  – About the status of negotiations, address questions related to FA/O&M
  – If known, States should inform EPA of entities which may be experiencing financial distress
  – Ask about the status of a bankruptcy (multi-regional will handled in HQ)
EPA Contacts

Financial Assurance
Jacquie T. Huynh-Linenberg
Attorney-Advisor, Regional Support Division
Office of Site Remediation Enforcement
Phone: (202)564-0547
E-mail: Huynh-Linenberg.Jacquie@epa.gov

Bankruptcy
Bob Roberts
Attorney-Advisor, Regional Support Division
Office of Site Remediation Enforcement
Phone: (202)564-4267
E-mail: Roberts.Robert@epa.gov
Benjamin J. Lammie

Deputy Director of the Regional Support Division in the Office of Site Remediation Enforcement in the U.S. Environmental Protection Agency. Mr. Lammie has been with EPA for more than twenty years, primarily working on Superfund enforcement actions related to liability, cost recovery, and negotiation issues. Prior to working at EPA, Mr. Lammie worked as a Solid Waste Specialist for the (then) Department of Environmental Resources in Pennsylvania.

Mr. Lammie earned his J.D. in 1990 from the Northwestern School of Law of Lewis & Clark College, and his M.P.A. in 1987 and his B.S. in 1984 from the Pennsylvania State University. He a member of the Washington State Bar Association.

Email: lammie.benjamin@epa.gov; Phone: 202.564.7126