PRP BANKRUPTCIES AND FINANCIAL ASSURANCE

August 21, 2018

Superfund / Brownfields Symposium

ASTSWMO – Remedial Action Focus Group

MARK RICKRICH, CERCLA MANAGER
OHIO EPA
PRP Bankruptcies and Financial Assurance

➢ PRP Bankruptcies can occur at any point in the remedial process (RI, FS, RD, RA, O&M) and often have immediate and significant impacts to EPA and states

➢ Financial assurance (FA), established in EPA settlement agreements with PRPs, helps to ensure the availability of adequate financial resources to conduct site cleanups
CERCLA and RCRA Financial Assurance

➢ EPA has not established FA regulations under CERCLA, but has established FA policies, procedures and guidance

➢ RCRA subtitle C FA regulations are used as a point of comparison for establishing CERCLA FA requirements in PRP settlement agreements at NPL sites
CERCLA Financial Assurance

- EPA typically secures FA from the PRP(s) for Remedial Action and Operation and Maintenance (O&M) activities.

- However, O&M can only be conducted by the PRP(s) or by the states, not by EPA.

- Neither CERCLA nor the NCP include any formal requirement that EPA share liquidated FA funds with the states.
Financial Assurance Mechanisms

- Trust Fund
- Irrevocable Letter of Credit
- Surety Bond
- Insurance Policy
- Corporate Financial Test
- Corporate Guarantee

- EPA has established model language for each of these FA mechanisms for use at CERCLA sites
State FA Exposure

➢ Signatory PRPs can range from 1 to 100+

➢ In the earlier years of CERCLA, a significant number of sites had many signatory PRPs (e.g., landfills)

➢ Over the past 10-15 years, an increasing number of sites have only 1 or a limited number of PRPs
State FA Exposure

- FA may be of less relative importance for a site with many PRPs as a PRP bankruptcy may not be as disruptive to the process as it would be in comparison to a site with only 1 or a limited number of PRPs.

- A bankruptcy associated with a site in O&M and with only 1 or a limited number of PRPs is likely to have a significant impact, particularly on the states.

- Most PRP bankruptcies result in recoveries in pennies on the dollar, making strong FA mechanisms and adequate FA amounts all the more important.
State FA Exposure

➢ Soon after a PRP bankruptcy for a site in O&M with only 1 PRP, EPA will contact the state(s) to transition the O&M work and costs from the PRP to the state(s), typically involving a Superfund State Contract

➢ Annual O&M costs can range from $50K to $500K+ per year

➢ Annual O&M work and costs can be necessary for many years, and must be added to already fixed (and strained) state budgets
Inter-Agency FA Communication

➢ In many instances, states are not signatories to multi-party settlement agreements between EPA and the PRP(s)

➢ As such, no formal FA communication between EPA and the states is required, and informal communication is often sporadic

➢ States often have little notice of the initial PRP FA mechanism and amount, nor notice of PRP-requested changes in FA mechanisms or FA amounts, and limited opportunity for input
Underestimation of FA

- EPA settlement agreements with the PRP(s) have typically used the ROD capital (construction) and O&M cost projections for use in establishing FA amounts.

- ROD cost projections are coarse and typically cite a +50/-30% margin of error.

- More accurate cost projections are included in latter phases of Remedial Design.
Underestimation of FA

➢ As years go by in O&M, annual O&M costs (including labor, component updates and replacement, disposal costs, etc.) can and do increase, sometimes significantly

➢ PRPs may occasionally provide EPA with their actual annual O&M costs, but are not required to do so

➢ PRPs have no incentive to provide their actual annual O&M costs, as EPA could require them to increase their FA amount
Underestimation of FA

➢ For GW remediation sites, RODs often include a “default” 30-year system O&M period, but O&M can and does exceed 30 years.

➢ However, neither the PRP(s) nor EPA regularly conduct periodic GW modeling during the O&M phase for the specific purpose of determining the number of years of O&M remaining such that the existing required FA amounts can be verified and increased if necessary.
State FA Exposure Summary

- Some FA mechanisms are stronger in the face of bankruptcy
- Sites in O&M with 1 or few PRPs may be a higher risk for states
- RODs with +50/-30% MOE cost projections used for FA amount
- Sporadic EPA-State FA communication and opportunity for input
- Uncertainty as to actual annual PRP O&M costs
- Uncertainty as to the number of years of O&M remaining
A Cautionary Tale

- The Reilly Tar & Chemical Superfund site is located in eastern Ohio near the Tuscarawas River
- Former operations included molten blast furnace manufacturing and slag disposal by others, then coal tar refining by Reilly Industries
- NPL Listing: 1989; RIFS conducted and ROD issued in 1997
- RDRA Consent Decree w/ Reilly in 1998 (Ohio EPA not a signatory)
- ROD construction completed in 2000; O&M ongoing
A Cautionary Tale

- Remedy: Soil removal and capping, hydraulic plume containment and monitoring, and institutional controls
- Tar recovery via sumps and belt skimmers added in 2011
- 3rd FYR in 2015 included annual PRP O&M costs of ~$150,000 per year, not including tar recycling/disposal
A Cautionary Tale

- Reilly established FA via a $2.8M letter of credit (capital and O&M)
- EPA later approved a 2006 Reilly request for FA reduction to $1.2M, with no notice to Ohio EPA
- Vertellus (Reilly) filed bankruptcy in 2016; little recovery expected
- Several months later, EPA contacted Ohio EPA to discuss O&M
A Cautionary Tale

- EPA and Ohio EPA agreed on a path forward:
  - EPA and Ohio EPA split $1.2M FA and bankruptcy proceeds
  - EPA completes a Remedy Optimization and ROD reevaluation
  - EPA conducts an EE/CA and updates system, creates an O&M plan, and operates system during 1 year shakedown period (Removal)
  - Ohio EPA takes on O&M work and costs after 1 year
  - System in disrepair; EPA handoff to Ohio EPA in 2 years (7/2019)
A Cautionary Tale

- Given tar recovery (still substantial), original ROD 30-year system run-time (thru 2030) very likely to be exceeded

- $600K in FA funds, and nominal expected bankruptcy recovery will run significantly short of LT O&M and monitoring costs

- Ohio EPA plans to conduct O&M in house via Field Office staff to stretch FA/bankruptcy funds and minimize LT budget impacts
A Cautionary Tale: State FA Exposure Review

- ROD (+50/-30%) cost projections used for FA
- Single PRP, in O&M, filed bankruptcy
- Solid FA mechanism (letter of credit) withstood 2016 bankruptcy
- FA amount reduced ($2.8M to $1.2M) w/o notice to Ohio EPA
- Annual PRP O&M costs were included in 2015 FYR
- No modeling of GW to project system run-time/adjust FA amount