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Superfund and Bankruptcy

Summary of Impacts, Issues and Risks Associated
with PRP Bankruptcy

ASTSWMO Remedial Action Focus Group, September 2018

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Executive Summary

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Remedial Action Focus Group (RAFG) is comprised of State and Territorial (State) members from all United States Environmental Protection Agency (U.S. EPA) regions. This document was prepared by the ASTSWMO RAFG, under Cooperative Agreement 83870001 with the U.S. EPA Office of Superfund Remediation and Technology Innovation (OSRTI) and Office of Site Remediation Enforcement. However, this document does not reflect EPA's position on the issues raised and is solely intended to help States identify and understand potential issues associated with settlement negotiations, especially financial assurance, and to consider the implications of PRP bankruptcy during the CERCLA remedial process. The ASTSWMO RAFG has prepared this document to assist States in addressing National Priorities List (NPL) sites where the Potential Responsible Party (PRP) files for bankruptcy protections during the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remedial process.

1.0 Introduction

The mission of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Remedial Action Focus Group (RAFG) is to research issues associated with the remediation of hazardous substances at State and federal Superfund sites and the infrastructure development needs of these State programs. This mission includes providing States with the information, research tools, and training necessary to develop and enhance their programs, and to carry out their responsibilities in the federal Superfund program. ASTSWMO and its various focus groups actively evaluate the potential impacts and relevance of Superfund program issues to the States and works closely with United States Environmental Protection Agency (U.S. EPA) staff to identify priority issues and approaches to resolving those issues.

The ASTSWMO RAFG has prepared this document to assist States in identifying and addressing potential concerns that may arise when a potentially responsible party (PRP) at a National Priorities List (NPL or Superfund) site files for bankruptcy protections during the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remedial process. Attached to this document is a table of information provided by States regarding PRP bankruptcies at Superfund sites in their States. Please note this document does not address NPL sites located at Federal Facilities, such as military installations.

When a site is added to the NPL, the funding for the cleanup might come from the Superfund itself (fund-lead), or from the party or parties responsible for the contamination (PRP-lead). If the site is fund-lead per 40 CFR 300.515, the State must enter into a Superfund State Contract (SSC) or Cooperative Agreement to make assurances required by CERCLA, including a cost share, before the EPA can expend funds at the facility for remedial action¹. If the site is identified as PRP-lead, a SSC is not needed as the PRP will be responsible for all of the costs associated with the CERCLA remedial action (RA). As discussed in the sections below, a PRP-bankruptcy at any point in the CERCLA process will significantly impact the progress at the site and require U.S. EPA and the State to coordinate on how best to meet the cleanup objectives identified in the Record of Decision (ROD).

2.0 Types of Bankruptcy

There are two specific types of bankruptcy protections afforded to entities within the United States, Chapter 7² and Chapter 11³. Chapter 7 provides an entity the ability to turn their operations over to a Chapter 7 Trustee, and that Trustee will wind down the business and discontinue operations. Moreover, Chapter 7 debtor companies do not get a discharge at the end of their bankruptcy case. Chapter 11 provides businesses the opportunity to reorganize their business structure while still operating. The two types of bankruptcies have different

¹ http://astswmo.org/files/policies/CERCLA_and_Brownfields/2016_SSC_Guidance_FINAL.pdf

² <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>.

³ <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>

implications at a PRP-lead Superfund site, and site-specific conditions may increase the impact that a PRP bankruptcy has at any individual site.

Most States have procedures in place to process bankruptcy notices and determine if there are any contaminated site liabilities that could be affected by the bankruptcy. If the State does not file a proof of claim within 180 days of the bankruptcy filing (or take other timely action), they may be left out and barred from any future court actions to compel remediation or cost recovery. Debtors in bankruptcy are required to notify any potential claimant of the bankruptcy. State agencies will typically have a designated contact, or “portal”, that is the recipient of these notices, which should be forwarded to the State’s environmental agency to evaluate the potential impacts to ongoing cleanups.

Additionally, U.S. EPA has developed a website to be used as a tool for collaboration with and the sharing of bankruptcy information with States⁴. The website may be accessed with permission from U.S. EPA. Additional details are provided in Section 6.

2.1 Chapter 7 Example- Crown Vantage

An example of a Chapter 7 Bankruptcy is the Crown Vantage Case in New Jersey. The company owned and operated three paper mills with associated waste water treatment systems and their own landfills and filed for Chapter 7 bankruptcy protections. The court appointed Trustee under Chapter 7 has a fiduciary duty to maximize the value of the remaining assets for the benefit of the estate, not to protect human health or the environment. In this case, the three paper mills were sold off to new operators, but the two industrial landfills and a former sludge lagoon were going to be left abandoned. The State was looking to have the proceeds from the sales be used for remediation before any other creditors were paid. Unfortunately, to the trustee and the court, the State was just another creditor. The State argued but ultimately was given insufficient funds to address the environmental liability. Two properties associated with the Crown Vantage bankruptcy eventually became Superfund sites.

2.2 Chapter 11 Example- General Motors

When General Motors (GM), a PRP at several Superfund sites, filed for Chapter 11 bankruptcy in 2009, the ensuing bankruptcy action created, among other entities, The Revitalize Auto Communities Environmental Response Trust (Trust) in March of 2011. The Trust was set up to fund the cleanup and administration of 89 former GM properties and return them to beneficial use. The mission was to clean up and revitalize these former GM locations across the country. The Trust was established with about \$500 million for the environmental cleanup based on some innovative remedial cost estimating including probabilistic expected-value techniques. The Trust was also given additional funds to cover administrative costs, and any proceeds from the sale or lease of the properties goes to the administrative account. The Trust’s efforts are still ongoing so it is too early to tell if this model is successful; however, cleanup and reuse of the sites continues and the “new” GM emerged from bankruptcy with a “fresh start”.

⁴ https://usepa.sharepoint.com/sites/OECA_Community/FA/SitePages/Home.aspx

3.0 Financial Assurance for Superfund Sites

Financial assurance (FA) requirements help to ensure the availability of adequate financial resources to conduct site cleanups⁵. In order to comply with these requirements, the following are the general FA mechanisms that a PRP may use:

1. Trust Funds
2. Letters of Credit
3. Surety Bonds
4. Insurance Policies
5. Corporate Financial Tests
6. Corporate Guarantees

Most of these mechanisms have model language available. PRPs work closely with the respective case team (U.S. EPA, U.S. Department of Justice, State representatives, etc.) to indicate which FA mechanism the PRPs intend to use. While the types of FA may differ, U.S. EPA must approve of whichever FA mechanism is proposed by the PRP. In the case of PRP bankruptcy, the State would be reliant on U.S. EPA to access the funds or direct the financial assurance provider to deposit the FA funds into the standby trust fund, some or all of which may then be provided to U.S. EPA, the State via a cooperative agreement, or another entity to complete the cleanup. U.S. EPA may require FA from PRPs pursuant to its enforcement authorities under CERCLA.

If there is insufficient FA to fund the remaining RA work and the site becomes fund-lead, the U.S. EPA may look to Section 104(c)(3) of CERCLA that requires the State to agree to share the costs of the RA with the U.S. EPA. The State would then also be obligated to fund operation and Maintenance (O&M) activities per CERCLA. Either an SSC or a Cooperative Agreement (CA) between the State and U.S. EPA would then be required to obligate federal Superfund monies to finance those actions. If FA or other monies are insufficient to fund the required O&M, RA, or are not provided to the State, State budgets can be significantly impacted if the State is expected to pick up where the PRP left off.

The 2015 EPA document titled “Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders” provides more information. In this guidance document there is a table of key aspects of FA requirements in CERCLA including:

1. The universe of entities subject to FA obligations for any given site: One or more PRPs could be obligated to comply with requirements in connection with site cleanup
2. Sources of FA requirements: Pursuant to a settlement agreement or unilateral administrative order
3. The time period that FA requirements are in place: Duration of a cleanup, including O&M

⁵ <https://www.epa.gov/sites/production/files/2015-04/documents/fa-guide-2015.pdf>

4. Language of FA mechanisms: Generally follow EPA model language, but could vary on case-by-case basis

The U.S. EPA uses its enforcement authorities to require PRPs to provide adequate FA for actions at all NPL sites and the amount of the FA depends on the type of work being conducted. EPA regional offices have discretion in approving the type and amount of FA proposed by the PRP for any given site, but may need to consult with the Office of Site Remediation Enforcement (OSRE).

3.1 State Exposure

As noted above, the goal of FA is to ensure that response actions are completed without the need for public funding sources. The FA provisions included in U.S. EPA enforcement instruments require PRPs to demonstrate that adequate financial resources are available to perform the required work, including both the capital costs of RA and the long-term costs for remedial system O&M and monitoring. FA provisions in CERCLA enforcement instruments include the requirement for the PRP to establish a FA mechanism, as well as a U.S. EPA “work takeover” provision in the event the required work is not performed or is not performed in accordance with the established schedule.

While EPA has established an effective program and guidance for establishing and using FA mechanisms at Superfund sites, several potential issues have been identified. These issues, outlined below, can have significant impacts on both U.S. EPA and on the States and their environmental programs:

1. Sites with single/limited number of PRPs
2. U.S. EPA and State communication on the establishment or reduction of FA coverage
3. Relevant technical information to ensure adequate PRP FA coverage.

3.1.1 Sites with Single/Limited Number of PRPs

The number of PRPs subject to U.S. EPA enforcement at PRP-lead sites can range from 1 to over 100 parties. In the infancy of CERCLA, a majority of the sites had multiple PRPs (e.g. landfills) while today most sites have a limited number of PRPs. When a site order has a large number of signatory PRPs, the FA may be of less relative importance in comparison to sites with a single or a limited number of PRPs. Further, FA for site capital costs such as remedial design and remedial action (RD/RA) is somewhat less important to States relative to the FA portion of the long-term O&M/monitoring costs. This assumes that PRPs are signing RD/RA orders in good faith, with both the PRPs and U.S. EPA having the expectation that the PRPs will have the financial ability to complete the RD/RA.

Per CERCLA, the O&M activities at Superfund sites are to be performed by the PRPs or by the States, and not by U.S. EPA. Shortly after the filing of a bankruptcy at a site with a single or limited number of PRPs, U.S. EPA will evaluate options to ensure O&M continues at the site. At this point, sites typically become fund-lead if they are in the O&M stage, with States picking up 100% of the costs for O&M per CERCLA. Annual O&M costs could be as high as \$200,000 to over \$1 million, and system O&M can be necessary for many years, often exceeding the 30-year default

system run-times assumed in site RODs, therefore early communication between EPA and States is a vital first step in this situation.

The FA requirements do not appear to differ based on the number of PRPs at a site, however EPA's standard approach is to require an FA amount that is at least equal to the most recent cost estimate for the applicable work and is not offset by FA required pursuant to other authorities

3.1.2 Interagency Communication on Establishment or Reduction of FA amounts

Sometimes a PRP may agree to perform a portion of the work, such as construction of the remedy and a portion of O&M, but not all of it. This may be a negotiation tool for reaching a settlement and there may be a Consent Decree, signed by all parties including U.S. EPA and the State, that details the work to be performed by the PRPs and work they will not perform for which U.S. EPA and the State may be responsible. States should consider the possibility of inserting language into the Consent Decree that limits the exposure for the State by stating specifically which activities the State will perform (such as limiting their responsibility to the remedy as defined in the existing ROD, rather than any new remedy identified in a future ROD Amendment or Explanation of Significant Differences).

Consent Decrees will often contain language allowing the settling parties to reduce their financial assurance based on the cost of work remaining to be completed at a site. Recommendation number 17 in the Superfund Task Force Recommendations references the ability to provide flexibility to PRPs for FA. It is important that States have knowledge of and input on FA reductions requested by PRPs so that if a PRP files for bankruptcy protection, there are sufficient funds to cover the remaining work, including O&M.

One situation where a reduction in FA may be requested is when property subject to PRP-lead cleanup under CERCLA is proposed for re-use. The re-use may include a land use that mitigates potential exposure to contaminants, such as placing a solar array on a landfill or contaminated area. The re-use however comes with certain O&M requirements of its own and if the construction is not completed or if the re-use venture fails, States may be left with an obligation to mitigate exposure or clean up the site. When U.S. EPA and States are faced with such a proposal, they should try and provide for other avenues of FA and consider future land use when evaluating a reduction in FA.

3.1.3 Underestimation of FA

A key factor in establishing FA for a site is the initial calculation of the amount of FA to be provided by the PRPs. The standard approach is to require FA in an amount equal to the most recent cost estimate for the required work at the site. Cost estimates are included in each ROD, though these projections frequently have a significant margin of error due to uncertainty. Cost estimates are typically refined in the Remedial Design (RD) phase, and it is the final RD cost estimates that should be used to refine FA amounts to be included in a consent decree between U.S. EPA and a PRP⁶ when this information is available at the time of settlement. However, ROD cost estimates are often used for initial FA purposes, given that the timeline for establishment of FA in

⁶ <http://semspub.epa.gov/src/document/HQ/174890>

associated orders often precedes RD completion. The FA amount should be updated pursuant to the most recent cost estimate for the required work at the site.

A second issue regarding FA coverage arises after remedy construction during the O&M and monitoring period. While the ROD and/or RD include both capital and O&M/monitoring cost estimates, these are only estimated costs, and not actual costs. As time passes, the costs for equipment, materials, and labor can increase, and oftentimes remedial system components and/or processes are modified, and actual costs frequently increase beyond original projections. U.S. EPA model enforcement instruments provide that PRPs are to diligently monitor the adequacy of the financial assurance. This includes ensuring the FA mechanism and amount are in compliance with the enforcement instrument. Unfortunately, PRP FA often covers only the originally projected annual O&M cost, and not the actual cost. It is assumed that if a PRP was expending a significantly lower amount on their annual O&M activities (than the annual cost established for the original FA mechanism), they would submit a request to EPA for a reduction in their overall FA amount. But it is a near certainty that a PRP would not provide information to EPA indicating that their annual O&M costs were exceeding the originally projected annual total as this could necessitate an increase in FA coverage. Additionally, the interest rates used in net present value calculations for FA are most likely different for private companies than for government entities. Private companies will earn a higher interest rate than a government can earn. Therefore, the present worth calculation used for FA will result in a funding shortfall when the State becomes the lead. If the FA net present value was calculated on a 4% interest rate, and the State is only getting less than 1% on its cash funds, there will be a shortfall if the money is transferred to the State treasury.

Another issue concerns the lack of data and modeling to determine the length of time the remedial system O&M/monitoring will need to continue. Most RODs include a rough projection of the number of years a system will need to be in operation before reaching the applicable cleanup levels. It is a common practice to use 30 years in RODs for this purpose, however U.S. EPA guidance⁷ discourages the use of default time periods. Unfortunately, while periodic site sample analytical data is collected and available to update cost projections, such updated projections are not consistently required by U.S. EPA as a function of periodic reporting or five-year reviews. The uncertainty regarding the length of time needed to meet cleanup goals combined with a lack of accurate O&M costs may result in considerable underestimation of the actual FA needed for remaining work at the site.

4.0 PRP Bankruptcy at Superfund Sites- A Cautionary Tale

A PRP bankruptcy at an active Superfund site can have profound effects on the progress of the cleanup and significant financial impacts to both U.S. EPA and States. A recent example is the Vertellus Specialty Chemicals, Inc. (Vertellus) bankruptcy, which impacted Superfund cleanups in Ohio and Minnesota in different ways.

In May 2016, Vertellus filed for Chapter 11 bankruptcy protection. Reilly Industries and Rutherford Chemicals merged in 2006 to form Vertellus. Reilly previously owned and operated

⁷ <http://semspub.epa.gov/src/document/HQ/174890>

facilities in Dover, Ohio and in St. Louis Park, Minnesota, both of which became PRP-lead Superfund sites prior to bankruptcy. Vertellus sold most of its assets in October 2016. The United States (and other individual States) had objected to the Vertellus motion to sell substantially all of its assets, arguing that it would leave behind an under-funded Estate that would be unable to address the environmental/remedial needs of a number of sites.

But part of this cautionary tale is the fact that, in most cases, the bankruptcy court will likely approve a debtor's motion to sell most of its assets early in the bankruptcy process because it will be in the best interest of the Estate. The United States, as well as some individual States resolved the objection to the sale by reaching an agreement with Vertellus for work to be performed at certain sites, as well as a recovery of approximately \$1 million for environmental expenses. The agreement called for the creation of an environmental response trust to conduct or pay for work at the properties in the trust, as well as to pursue insurance recoveries. The Dover site was one site for which a segregated account was to be created to receive insurance proceeds.

Unfortunately, the recovery of insurance proceeds can be a slow process resulting in overall recoveries that are substantially less than what are necessary to effectively remediate the large number of sites typically included in environmental response trusts.

Dover Ohio Site

This ~4-acre Superfund site is located in eastern Ohio, near the Tuscarawas River, and was listed on the NPL in 1989. The property was used for molten blast furnace manufacturing (and slag disposal) from the 1850s to the 1920s, and then by Reilly as a coal tar refinery until 1956 when the operations were halted and the property sold. The current owner is an individual, and no other PRPs have been identified. The ROD was issued in 1997 and remedy construction was completed in 2000 under a 1998 consent decree between U.S. EPA and Reilly. The remedy included soil removal and capping, institutional controls, and hydraulic containment and monitoring of groundwater. Tar recovery was added in 2011 via belt skimmers in two sumps. The 3rd Five Year Review (2015) indicated that O&M costs averaged ~\$150,000 per year, not including tar disposal. The 1998 consent decree included \$2,800,000 in financial assurance. At the request of Reilly, U.S. EPA reduced the financial assurance to \$1,200,000 in 2006, without input from or notice to Ohio EPA. Ohio EPA was not signatory to the EPA order with Reilly Tar, so input/notice was not formally required. The O&M activities have been ongoing since 2000, and are highly likely to be necessary for many years into the future and well past the 30 years identified in the 1997 ROD.

As the site was not owned by Reilly and was in the O&M phase at the time of the 2016 Vertellus bankruptcy filing, U.S. EPA contacted Ohio EPA to determine when the State could take over the O&M and monitoring activities and associated costs. While Vertellus indicated that they would work toward a smooth transition of the O&M work to U.S. EPA, they abandoned the cleanup effort shortly after bankruptcy. The system was found by U.S. EPA to be in a state of disrepair in 2017 and U.S. EPA has been working to replace system equipment and to upgrade the O&M components and procedures. Since the 2016 bankruptcy, Ohio EPA and U.S. EPA agreed to the

following: 1) the \$1,200,000 in FA would be liquidated and split evenly between U.S. EPA and Ohio EPA; 2) U.S. EPA would conduct a Remedial Optimization for the site remedy in coordination with Ohio EPA; 3) U.S. EPA and Ohio EPA would re-evaluate the ROD to identify other potential remedial alternatives and 4) Ohio EPA would take over O&M in July, 2019 (U.S. EPA is temporarily addressing O&M under the Removal program)

Ultimately, given that U.S. EPA cannot conduct O&M through the Remedial program, Ohio EPA is left to cover the O&M and monitoring activities and associated costs for the site. The legal outcome is unknown if Ohio EPA had not agreed to take over O&M at the site. The O&M costs (\$150,000 per year not including tar disposal) were not a part of Ohio EPA's long-term budget plans and will impact the already tight Ohio EPA budget in a negative manner.

Since the early 1990's, Reilly paid for and conducted the Remedial Investigation/Feasibility Study (RI/FS), RD/RA and O&M site work under multiple orders with U.S. EPA, which included standard provisions for the recovery of U.S. EPA response costs. Prior to the Vertellus bankruptcy and the subsequent contact from U.S. EPA to conduct and pay for O&M and monitoring activities at the Reilly site, Ohio EPA was in a regulatory support role and was unaware that a substantially inadequate amount of FA was in place to address future site work.

As is standard for PRP-lead sites, a Long-Term Response Action (LTRA) period and a Remedial Optimization were not required for the Reilly site. While the Reilly site did not involve a groundwater restoration remedy, consideration should be given by U.S. EPA to establishing LTRA periods and conducting or requiring Remedial Optimizations for PRP-lead sites with restoration remedies with an eye toward potential future PRP bankruptcies and the necessity for States to take over O&M and monitoring activities from the PRPs.

There are several additional companion issues that arise out of this scenario. Given that Ohio EPA was not party to the consent decree, and that this was a PRP-lead site, an SSC was not established between U.S. EPA and Ohio EPA. Yet, U.S. EPA entered into a consent decree with Reilly that provided for the establishment and modification of FA for not only RD/RA activities, but also for O&M activities which they'd need the State to perform in the event of a bankruptcy. There is also some uncertainty as to whether Ohio EPA, after transitioning into the lead regulatory role for the site, would then have the authority to amend the original ROD, with U.S. EPA concurrence.

St. Louis Park Minnesota Site

This ~80-acre Superfund site was listed on the NPL in 1984 and is located in a suburb west of Minneapolis. The initial ROD was signed in 1984, with amendments in subsequent years. Reilly, U.S. EPA, Minnesota and the City of St. Louis Park were parties to a 1986 consent decree for RI/FS and RD/RA. The City had purchased the property from Reilly for redevelopment purposes in 1972. A separate agreement between the City and Reilly required the City to conduct O&M for the site remedy. Neither the EPA nor the Minnesota Pollution Control Agency (MPCA) were party to this agreement. The O&M costs currently total ~\$600,000 per year. Financial assurance was never established with Vertellus to cover the cost of the long term operation and maintenance of the remedial systems.

Given the Vertellus bankruptcy, the U.S. EPA and Department of Justice along with the MPCA are negotiating a 3-party consent decree with U.S. EPA and the City to memorialize the O&M and monitoring activities, which will be ongoing for many more years, to be continued by the City. Future bankruptcy recoveries, if any, will be provided to the City to assist with the O&M and monitoring activities. Without the early redevelopment interaction at the site property by the City, the Minnesota site would have been in much the same situation as the Ohio site, in that the ~\$600,000/year in O&M and monitoring costs are likely to have fallen primarily on the MPCA as a result of the Vertellus bankruptcy.

While this cautionary tale is limited to a scenario with only one PRP that filed bankruptcy during the O&M phase of work, the identified issues may be realized in a broader context at other sites and warrant further discussion and resolution by U.S. EPA in coordination with the States and associated parties (*e.g.*, ASTSWMO).

5.0 Mitigating the Impacts of Future Bankruptcies at Superfund Sites

States should be involved during the time of the RI/FS, and certainly need to identify State ARARs prior to the selection of a remedy for a site. U.S. EPA has recently started conducting reuse evaluations for sites as part of the RI process because the reuse scenarios for sites may impact the extent to which they are cleaned up (commercial use standards rather than residential use standards for example). State and local involvement in this process could influence the reuse potential by re-zoning or by implementing institutional controls. A State may have grants for redevelopment that could provide financial incentives to a PRP to perform the cleanup and also provide some assurance that the PRP would have the funds to perform the cleanup.

Throughout the CERCLA process, States should have input into the remedy and should pay particular attention to any action that may result in long-term O&M requirements. This is also true for any remedy design that may lessen the cost of the up-front remedy components resulting in an increased likelihood that major repairs (costs) will be necessary during the O&M period. As the State would become responsible for O&M if the PRP becomes bankrupt, it is imperative to make sure the remedy requires as minimal O&M as feasible.

5.1 State Involvement in Settlement Negotiations

States should be involved, formally or informally, in any negotiations between U.S. EPA and PRPs. U.S. EPA may provide a Cooperative Agreement to the State environmental or public health agency to assist the State in its “Support Agency” role. This funding can be used to help the State review and comment on documents prepared by the PRPs for investigations and cleanup actions at sites.

States should keep in mind during settlement negotiations that at any time, a PRP could declare bankruptcy. When FA mechanisms are discussed between U.S. EPA and the PRPs, the State should be involved in those discussions to ensure that there are sufficient funds to cover long term O&M following remedy construction. The State should insist that adequate FA mechanisms are established and be accessible by the State that may have to perform O&M if the PRP should go bankrupt. That way, there will be sufficient funds to cover unexpected State costs including

capital and O&M. The FA provided by the PRP should be independent of any future bankruptcy; sufficient to do the work; and available to the lead agency for the future work.

5.2 State Financial Assurance Coverage on PRP- Lead Sites

Some States may have the regulatory authority to require FA at cleanup sites separate from CERCLA. If the State has not established or does not exercise this authority, the State may be left with no FA coverage and be reliant on U.S. EPA to address FA coverage for both RA capital costs and long-term O&M/monitoring costs. U.S. EPA guidance⁸ asserts that debtors must comply with injunctive obligations including FA pursuant to settlements or unilateral administrative orders, however it does not appear that all FA mechanisms, such as corporate financial tests and guarantees would be considered “bankruptcy proof”. States typically have little to no voice regarding the FA mechanism or amount that U.S. EPA approves for use by PRPs at Superfund sites; therefore, States should be aware of any additional FA mechanism potentially available to them outside of the enforcement instrument with U.S. EPA.

Prior to the PRP beginning remedial action, the U.S. EPA and PRP enter into settlement negotiations. Representatives from the State in which the site is located typically do not participate in the settlement negotiations because the State is not a party to the settlement. However, during negotiations, FA is discussed between the PRP and U.S. EPA and is incorporated into a consent decree. If the PRP cannot fully provide the financial resources to fulfill its settlement agreement due to bankruptcy, the U.S. EPA may look upon the States to provide financial support to complete the remedial process, especially if the process is in the O&M phase, which EPA is statutorily unable to fund. Of the universe of final and deleted NPL sites, approximately 30% of them have ongoing PRP O&M or PRP Long-Term Response Actions. If a site is in RD or the early phases of RA (e.g., system installation) at the time of a PRP bankruptcy, U.S. EPA could opt to use most/all of the liquidated FA funds to complete the RA work, prior to transferring the site O&M obligations to the State.

Ultimately a State can end up in a vulnerable and inequitable position in many instances; reliant on the decisions of U.S. EPA as to the type and amount of FA coverage established and the future use (and sharing) of the funds should liquidation be necessary. Yet, as long-term O&M is necessary in most instances, the States have as much or more of a vested interest in all aspects of FA coverage.

5.3 Transition of O&M Work/Costs to States

If the remaining work required at the site can be performed under the Removal program, the PRP FA resources provided to U.S. EPA could potentially be used to fund the removal activities with no significant financial obligation incurred by the State. Alternately the State could take over the financial obligations or evaluate the possibility to amend the ROD or optimize the remedy as part of an adaptive management approach. This reevaluation should consider the remedial action objectives (RAOs) selected for the remedy, the RAOs already achieved, and potential site redevelopment opportunities. After the updated evaluation is made, suitable cost effective remedial action options (and their associated O&M) may be selected in an updated decision

⁸ <https://www.epa.gov/sites/production/files/2015-04/documents/fa-guide-2015.pdf>

document and then implemented. Once the U.S. EPA transitions the site from PRP-Lead to Fund-lead, the transition of O&M work/costs from U.S. EPA to the State will be handled like any site that was initiated as a Fund-lead site.

5.4 Coordination to Mitigate the Impact of Future Bankruptcy

While States that enter into multi-party orders with U.S. EPA and PRPs should have an opportunity for better communication and input, this is not always the case. For sites where a PRP is under an order with only U.S. EPA, communication is often sporadic regarding the establishment and modification of FA. When establishing and/or reducing the amount of FA coverage at a site, it may not be required that U.S. EPA inform the State or provide the State an opportunity for input. Of importance is the difference in financial protection the various FA mechanisms provide, particularly regarding bankruptcy. While U.S. EPA closely scrutinizes FA mechanisms proposed by PRPs, corporate financial tests and guarantees are not “bankruptcy-proof” and would likely afford no protection in the event of a PRP bankruptcy. States should have input on the types of FA mechanisms approved by U.S. EPA for PRP use at Superfund sites. Given that the State is likely to be “on the hook” for significant long-term O&M work and costs in the event of a bankruptcy at a single or limited-number PRP site, communication with and input from the States is of vital importance.

U.S. EPA remedial project managers (RPMs) work with the U.S. EPA personnel that administer the FA aspects of these sites, however RPMs often have less information on the FA mechanism types and amounts in existence. Further, the lack of specific information on annual PRP O&M costs and modeling of the number of years of remaining system operation is exacerbated by limited communication between the personnel at U.S. EPA who administer the FA mechanisms and the RPMs. A solid connection between RPMs and FA administrative personnel is important as both groups have specific but different information that must be pulled together to ensure adequate FA coverage.

5.5 Post Bankruptcy Considerations

Site access that is granted in an enforcement instrument is primarily for inspections by government agencies, but does not typically contemplate those agencies having to implement the remedy or conduct O&M. States should be thinking about this from the start and if they lack the legal authority to access the site to implement the remedy, then the State should coordinate with U.S. EPA to determine how best to provide for site access in the event of bankruptcy.

Similarly, property ownership may be in question for a period of time following bankruptcy; therefore, both U.S. EPA and States should be closely tracking any potential property transfers to ensure potential owners are aware of the ongoing cleanup requirements.

6.0 Conclusions and Recommendations

At any point in the remedial process at a PRP-lead Superfund site, the PRP could declare bankruptcy. Prior to remedial work beginning, U.S. EPA and the PRP sign a settlement agreement which identifies which type of FA mechanism will be incorporated. Typically, the State is not a party to the agreement. If an FA mechanism is selected that cannot fund the long-term O&M in bankruptcy and/or the PRP cannot provide the financial resources to fulfill its obligations under

the settlement agreement due to bankruptcy, U.S. EPA may look to the State to provide financial support to complete the remedial process. States should anticipate this bankruptcy scenario and seek out opportunities early on in the CERCLA process and become an active participant in the FA discussion. States should also be aware that O&M may be necessary for many years, possibly exceeding the 30-year default system run times typically assumed in RODs. Optimistic time and cost estimates for remedy construction, O&M, and monitoring could present the State with a major financial burden.

Based on input received from States and discussions with U.S. EPA, the ASTSWMO RAFG would like to offer the following recommendations:

1. Early and ongoing coordination between U.S. EPA and States at PRP-lead Superfund sites- States should proactively engage with U.S. EPA and PRPs during development of the consent decree and selection of the FA mechanism to ensure the greatest possible protections for both U.S. EPA and States.
2. Robust FA mechanism- Letters of credit, corporate guarantees and other methods of FA may not be sufficient to provide for continued cleanup, O&M, or monitoring in the event of PRP bankruptcy. U.S. EPA should strive for the most robust FA mechanism feasible and coordinate with the State on the distribution of FA monies ahead of time to avoid any potential surprises. U.S. EPA shares general FA information with States via SharePoint™ at: https://usepa.sharepoint.com/sites/OECA_Community/FA/SitePages/Home.aspx and also discusses FA matters and questions during the monthly EPA-States FA Call.
3. State-specific FA- Where available, States should pursue their own separate FA with PRPs that may provide additional coverage if the State has to take over all or some of the work at a site.
4. Accurate estimates of FA- The actual costs for remedy implementation, O&M, and monitoring are likely to change following the feasibility study. FA amounts should be updated whenever possible following the remedial design or other project milestones, when long term costs can be more accurately developed.
5. Coordination between U.S. EPA and States leading up to and after bankruptcy- States should designate a point-of-contact for notifications when content is added to the U.S. EPA FA website and actively engage with U.S. EPA if a bankruptcy appears imminent.
6. Implement adaptive management concepts following bankruptcy- A PRP bankruptcy significantly alters the situation at a PRP-lead cleanup site and U.S. EPA and States should both be open to re-evaluating or optimizing the selected remedy or considering alternate remedies in light of potential re-use scenarios that were not present when the consent decree was signed.
7. Formalize FA requirements in CERCLA- Lessons learned at PRP-lead sites over the years should be incorporated into the FA requirements under CERCLA for the protection of U.S. EPA and the States.

7.0 REFERENCES

ASTSWMO 2016, Superfund State Contracts – A Reference for States & Territories: How to Get the Most Out of Your Superfund State Contract. Remedial Action Focus Group. April 2016.

U.S. EPA 2000, A guide to Developing and Documenting Cost Estimates During the Feasibility Study

U.S. EPA 2015, [“Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders](#)

U.S. EPA 2017, Superfund Task Force Recommendations

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PRP Bankruptcy

State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
Alabama	No	N/A	N/A	N/A	N/A	N/A
Alaska	No	N/A	N/A	N/A	N/A	N/A
Arkansas	Received clarification on the Mid-South site from EPA. The PRP did not file for bankruptcy; however, in an April 5, 2009 letter to EPA, the widow of the PRP stated that funds to keep the facility operating were not available. Two trusts were set up at the start, the first was terminated on September 30, 2003. The second has also been terminated since then (date not provided). Results are the same, but no official bankruptcy filing.	N/A	N/A	N/A	N/A	N/A
California	No	N/A	N/A	N/A	N/A	N/A
Colorado	No	N/A	N/A	N/A	N/A	N/A

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State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
Delaware	Yes, one Site (Halby Chemical) when it was in O&M	The Site had two PRPs. When the one went Bankrupt (Chemtura) the other PRP took over full responsibility.	Yes, the State was involved in the original settlement agreement between the PRP and EPA.	The State concurred with the ROD	The PRP was not required to have financial assurance; however, EPA received limited funds during the bankruptcy procedure to go toward the remedial action.	Since the other viable PRP took over financial responsibility the State did not need to provide funds.
Florida	No	N/A	N/A	N/A	N/A	N/A
Idaho	No	N/A	N/A	N/A	N/A	N/A
Indiana	No	N/A	N/A	N/A	N/A	N/A
Iowa	Yes - one site, General Motors in Sioux Rapids, but the Chapter 11 was signed more than 5 years ago – December 2010	N/A	N/A	N/A	N/A	N/A
Kansas	No	N/A	N/A	N/A	N/A	N/A

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State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
Louisiana	Yes. Petro Processors PRP Chemtura filed for bankruptcy in 2012	Yes. All remaining PRP's are viable	Yes. State of Louisiana was a party in the Consent Decree	Yes	The Petro Processors clean-up is funded by the PRP's	The State was not required to provide funds.
Massachusetts	No	N/A	N/A	N/A	N/A	N/A
Michigan	Yes, but minimal impacts due to either other PRPs in existence or good, high dollar bankruptcy settlements.	Yes	Yes	All pre-ROD	N/A (pre-ROD)	No cost share to date; sites still Enforcement (PRP)-Lead
Minnesota	Yes (Vertellus (Reilly))	Yes, but only other "PRP" is a public entity, unlikely to assist.	?	?	?	Site has had five FYRs and was in O&M at time of Vertellus (Reilly) bankruptcy filing in spring 2017
Montana	No	N/A	N/A	N/A	N/A	N/A
Nebraska	No	N/A	N/A	N/A	N/A	N/A
New Mexico	No	N/A	N/A	N/A	N/A	N/A

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State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
New Jersey	Yes, Maxus Energy Corp, Diamond Alkali Site (Passaic River)	Yes, there are multiple PRPs	State NRD case, and State is involved in Consent Agreement	State concurred with the ROD	Yes	No
New York	No	N/A	N/A	N/A	N/A	N/A
North Carolina	No	N/A	N/A	N/A	N/A	N/A
North Dakota	No CERCLA Sites	N/A	N/A	N/A	N/A	N/A
Ohio	Yes (Vertellus (Reilly) - Reilly Tar and Chemical site in Dover Ohio; and others (GM, Chrysler)	Reilly Tar site only had Reilly Industries as PRP; other sites had GM or Chrysler as one of several or many PRPs so nominal impact on continuation of site work.	Ohio EPA was not a signatory to CD between US EPA and Reilly Industries.	Ohio EPA concurred with Reilly Tar site ROD.	Original FA amount was \$2.8M, with \$1.6M for capital costs and \$1.2M for O&M/Monitoring. FA amount was reduced to \$1.2M at Reilly request to US EPA, but without Ohio EPA input/knowledge.	O&M ongoing for 15+ years by Reilly at \$150K per year; recently found out that Reilly walked away from O&M and left system in disrepair; Ohio EPA will have to pick up O&M in July 2017, after Remedial Optimization and ROD re-evaluation. Ohio EPA and US EPA

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PRP Bankruptcy

State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
						agreed to split the \$1.2M letter of credit and any future bankruptcy settlement proceeds.
Oklahoma	No	N/A	N/A	N/A	N/A	N/A
Oregon	Yes	Yes	Yes	Yes	N/A	N/A
Pennsylvania	No	N/A	N/A	N/A	N/A	N/A
Rhode Island	No	N/A	N/A	N/A	N/A	N/A
South Carolina	No	N/A	N/A	N/A	N/A	N/A
South Dakota	No	N/A	N/A	N/A	N/A	N/A
Texas	There have been bankruptcies, but they were all longer ago than 5 years.	N/A	N/A	N/A	N/A	N/A
Utah	No	N/A	N/A	N/A	N/A	N/A
Vermont	One Site had the PRP go bankrupt just before the RI started (5 years ago)	N/A	N/A	N/A	N/A	N/A
Virginia	No	N/A	N/A	N/A	N/A	N/A

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PRP Bankruptcy

State	State experience with PRP Bankruptcy during CERCLA Process	Multiple PRP's for the Facility	State Participation in original settlement	State concurrence with ROD	Financial Assurance	State Cost Share
Washington	No	N/A	N/A	N/A	N/A	N/A
Wyoming	No	N/A	N/A	N/A	N/A	N/A