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**VIA E-MAIL**

Cynthia Mackey
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2271A
Washington, DC 20460

Re: Superfund Financial Assurance Reform

Dear Cyndy:

Thank you for this opportunity to expand on the issues discussed during our meeting on August 10, 2017 regarding Financial Assurance ("FA") at Superfund sites. We appreciate the Agency's new initiative to reform the Superfund program to find efficiencies, streamline process and reduce administrative costs.

As you are aware, the companies that are members of the Superfund Settlements Project ("SSP") are large entities with extensive experience remediating Superfund sites. In their experience, FA, as currently configured, imposes a significant administrative and financial burden on responsible entities that time and time again cooperate and step forward to undertake work. Yet it is often waived where it is most needed – where PRPs are bankrupt or otherwise lack the funds to both do the work and provide FA. This is particularly anomalous for publicly traded companies which must have reserves or Asset Retirement Obligations — reported to the SEC – to fulfill their obligations. We are not aware of any analyses demonstrating that EPA regularly encounters circumstances in which a PRP agrees to undertake a clean-up, repudiates its obligations and the presence of financial assurance made it unnecessary to expend public funds. We have heard only a few anecdotal claims that such incidents have occurred and, even then, without any indication of the total clean-up costs that were not paid by the PRP. In our experience, default clearly is not the rule; indeed, it is exceedingly rare. Thus, any potential changes to financial assurance requirements should be evaluated in the context of the substantial costs of securing against that minimal risk. It is not unusual for bond costs to be 1% of the estimated cost of the remedy and letters of credit to be in the range of 2%. Such costs represent annual outlays from operating companies to financial institutions of funds that could otherwise be spent on clean-ups or on more value-added activities.

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SSP therefore was pleased to see Task Force Recommendation 17 ("Adjust Financial Assurance (FA) Required Under Enforcement Documents to Reduce Cooperating PRP's Financial Burden While Ensuring Resources Are Available to Complete Cleanups"). Among the Specific Actions identified by the Task Force was "identifying other opportunities for achieving a responsible balance between the cost of financial assurances and the risk of financial default." This letter suggests several options to achieve this balance, as well as addresses the questions that you raised during our meeting and other related issues important to SSP member companies.

**Financial Test**

SSP strongly encourages EPA to retain and embrace the Financial Test as an effective FA mechanism, as agreed by EPA's Environmental Financial Advisory Board ("EFAB"). *See* United States Environmental Protection Agency, Environmental Financial Advisory Board, letter to Honorable Stephen L. Johnson, Administrator, USEPA, Re: EFAB initial findings concerning use of the financial test and corporate guarantees to meet financial assurance requirements under RCRA programs, January 11, 2006. Notwithstanding EFAB's endorsement of the Agency's policy of accepting the Financial Test, we find inconsistent acceptance among the Regions. Some unilaterally reject the Financial Test as an appropriate mechanism, apparently fueled, at least in part, by EPA guidance that appears to sanction that antipathy. Some specific examples of sites where the Financial Test was rejected are set forth below.

- At a site in Region 1, there are sixteen performing parties, all of whom are viable, operating entities. Use of the Financial Test was disallowed, and all parties were required to obtain letters of credit.
- At another site in Region 1, EPA refused to allow allocation of responsibility for the purpose of allowing companies to use the Financial Test and instead demanded 100% payment by a single party. This requirement to fund others' liabilities is wholly unrealistic, and eliminates the Financial Test as an option.
- Also in Region 1, EPA resisted "self-guarantee" mechanisms even when the responsible parties hired an expert consultant to provide an additional level of review of the financial viability of the members and the group as a whole.
- At a site in Region 8, a Trust rather than another instrument has been required despite decades of performance by the responsible parties.

To address this issue, SSP requests Headquarters to firmly and explicitly endorse the Financial Test and make clear that its acceptance is non-discretionary when the PRP meets the applicable criteria.

SSP also recommends that EPA expand the Financial Test to reflect current economic realities, where intellectual property can represent significant value to a company. SSP therefore suggests that EPA change the standard from one that turns on a responsible party's "tangible net worth" to "net worth." For example, last year an SSP member company sold a substantial portion of one of its businesses. Most of what was sold consisted of tangible investment assets, such as properties and buildings. Cash from the transaction was used to buy back stock as well as acquire assets that have become a digital business. The digital assets are primarily intellectual property – valuable, but not tangible. Clearly management believed that these changes would improve the

financial situation of the company – but it did reduce the company's tangible net worth. Making it more difficult for such a company to rely on the Financial Test is an odd outcome that does not further any meaningful clean-up objectives. Finally, we note that relying on net worth is an approach that has already been tested as the NRC allows the use of intangible assets in calculating total net worth.

As an additional option, SSP recommends that EPA add a new, simple alternative to satisfy the Financial Test – demonstrating an A-level rating from a rating agency. Several arguments support this. First, it is an uncomplicated test. Either a company enjoys this high investment grade rating or it does not. Second, reputable rating agencies are in a strong position to assess a company's creditworthiness. Third, this option addresses a current anomaly that to satisfy FA requirements a company may purchase a bond from a financial institution with a lower credit rating than the PRP itself enjoys.

Last, SSP suggests that EPA consider alternatives to reduce the administrative burden on companies using the Financial Test. The Superfund program could consider the RCRA FA program as a model. For RCRA, only one financial assurance letter per region is required no matter how many operating sites a company may have in the region. Consolidating in this way would help address and limit the burdens that arise from the fact that each Financial Assurance Letter has its own train of requirements, including:

- Financial Assurance Letter is prepared with all the accompanying financial statements and calculations;
- Each letter must be reviewed and certified by an independent public accounting firm (essentially recreating the work that was already done above); and
- Each package is then assembled and each letter is signed individually by the CFO.

If only one letter was required for each EPA Region (rather than for each individual site), this would substantially reduce the amount of paperwork, the cost for independent review by the accounting firm, the time spent by the CFO reviewing the packages and signing the letters and the time spent by EPA reviewing the paperwork.

**Captive Insurance**

As with the Financial Test, the Regions sometimes unilaterally reject captive insurance as a financial assurance mechanism. Consistent with EFAB's extensive review, however, captive insurance is an effective form of assurance. *See* United States Environmental Protection Agency, Environmental Financial Advisory Board, letter to Honorable Stephen L. Johnson, Administrator, USEPA, Re: EFAB Report on the Use of Captive Insurance as Financial Assurance Tool in Office of Solid Waste and Emergency Response Programs, March 20 2007. To address this issue, SSP requests Headquarters to firmly and explicitly endorse captive insurance and require the Regions to accept its use.

With captive insurance, company assets are set aside in the captive insurance company before the captive writes a policy for a facility. A financial downturn or bankruptcy of the parent will not alter a captive's capitalization and surplus. A captive holds a defined group of assets—the

capital and surplus to cover the risks it insures—and under bankruptcy laws, the captive's assets must be used first to pay claims that are made on the policies it has written. Captives are separate legal entities that are strictly regulated by the department of insurance in their domiciliary state, and are required to maintain capital and surplus sufficient to support their insurance programs. Among other things, captives are required to undergo annual financial audits, file loss reserve certifications, submit detailed annual reports to their regulators and undergo periodic regulatory examinations. In sum, the financial stability of a captive is separate and distinct from its parent and is assessed and is rated on a separate basis.

Because of these traits, captive insurance can be superior to letters of credit, surety bonds, commercial insurance and trust funds. Unlike arrangements with unrelated third party insurers, banks or sureties, the captive's parent has a strong incentive to invest in risk management and loss control to avoid or minimize any claims against its own captive. In the event of a claim, captive insurance is also less complicated from an administrative perspective. There are not multiple parties with whom to negotiate, and a captive is much less likely to deny or delay claims payments based on questionable interpretations of policy exclusions or alleged noncompliance with policy terms and conditions. By allowing the use of captive insurance, EPA can expedite CERCLA clean-ups in these situations.

Finally, when comparing captive insurance to other options, it is important to recognize that banks, sureties, and third-party insurance companies also might go bankrupt or decide to leave the environmental financial assurance market. For example, in the midst of the 2008 financial crisis, AIG, one of the largest providers of environmental insurance, collapsed and nearly failed, requiring a federal government bailout of $180 billion. Last year, AIG decided to leave the pollution legal liability market, and is no longer offering to write new insurance policies to meet RCRA liability requirements. More recently, JP Morgan Chase Bank resigned as trustee on hundreds of standby trusts, many of which were used as financial assurance mechanisms for CERCLA and RCRA sites. The AIG and JPMorgan resignations have compelled covered entities to search for alternate financial assurance mechanisms, often quickly, with less favorable terms and potentially greater costs. In contrast, companies that use captive insurance do not need to wonder whether the provider of an instrument (their affiliate or subsidiary) will exit the market on short notice, ensuring greater continuity of financial assurance coverage and availability of funds.

**Surety Bonds**

EPA in some cases has been resistant to the use of surety bonds, putting caps on the amount used and requiring that the balance at the site be assured with trusts or letters of credit. Surety bonds cost a fraction of the amount required for either trusts or letters of credit, yet they afford full protection for the required sum. Particularly for "Reliable PRPs" (see below), PRPs should be able to use surety bonds to the full extent of their obligation to secure a site.

**"Reliable PRP"**

During the meeting, we discussed the high cost of financial assurance, and why the costs are not warranted when a PRP has a track record of timely and high-quality work at Superfund sites. We noted in this respect that there is a distinction between a PRP being financially unviable and a PRP disagreeing with EPA at a particular site regarding cleanup goals, methods, etc. that do not bear on the PRP's financial viability to take on the clean-up. What is relevant in the FA context is whether work that has been taken on by the PRP has been completed without having to

access FA mechanisms. Accordingly, SSP proposes the following definition of a Reliable PRP for FA purposes:

> "Reliable PRP" shall mean an entity that (1) has been a PRP at more than ten (10) NPL sites, OR (2) implemented remedial activities at sites where remedial costs were greater than $500 million pursuant to CERCLA Consent Orders or Consent Decrees, and (3) where, at a minimum, the RI has been completed and the lead agency has not been required to access the Financial Assurance instrument for that work.

This definition will identify those PRPs that have a good track record with the Agency. Consistent with Task Force Recommendation 17, these Reliable PRPs should be offered reduced FA requirements. Specifically, SSP suggests s reducing the FA required of Reliable PRPs in the following ways:

- <u>Post only a percentage of estimated cost</u>

  Reduce the required FA amount to a percentage of the estimated cost based on the nature of the site (*see, e.g., infra* Site Characteristics/Nature of Remedial Action). This would ease negotiations, lessen the financial burden on Reliable PRPs, keep working assets in the hands of viable companies to invest in productive activities, and still provide assurance that the remedial action will be implemented.

- <u>Allow automatic FA reductions or reductions by right</u>

  The current process by which a PRP can secure reductions is unwieldy and long. It is administratively burdensome to PRPs and a low priority for Agency staff. Consequently, with no required timeframe for review and response, these requests for adjustment may languish for years. Some alternatives to current practice include:

  - Setting a timeframe for EPA review and decision;
  - Allowing automatic adjustment based on documented expenditures;
  - Allowing automatic adjustment based on cost estimates included in progress reports; and
  - Providing for increased by-right opportunities to request reduction.

- <u>Waive FA for small share Reliable PRPs</u>

  Where other PRPs provide greater than 85% of the FA amount, waive FA requirements for Reliable PRPs.

**Phased Financial Assurance**

The second Specific Action identified by the Task Force is "defining situations where it may be appropriate for parties to incrementally provide FA for the various phases of cleanup work as they occur." SSP believes that financial assurance should always be phased or rolling based on the remedial component being conducted (RI, FS, RD, active remediation, O&M). With regard to O&M, FA should be required for incremental time periods, perhaps tied to five-year reviews. Additional phased or rolling FA considerations should be available in the following circumstances:

- For Reliable PRPs;
- When the cost estimate for the work has an uncertainty factor greater than 30%;
- When the selected remedy has a cost estimate greater than $50 million, or
- When the projected schedule for the remedial design and construction is greater than 5 years or when more than 7 years have elapsed from the time of final NPL listing.

**Discount Rate**

The third Specific Action considers adjusting the discount rate used in the calculation of the cost of future work. SSP endorses using discounted costs, particularly when the timeframe for work exceeds a set period of time.

You also asked us to weigh in on three other topics:

**Use of Liquid Assets**

You asked what type of incentives would be required to induce PRPs to want to use liquid assets more frequently. As we discussed, setting aside significant sums or incurring significant annual costs for a FA instrument is a "dead" asset for operating entities. Accordingly, aggressive reductions, on the order of 75%, in the amount of FA would likely be the only inducement that would make tying up assets attractive, and even a 75% reduction may not provide sufficient incentive depending on the site and/or the PRP.

**Site Characteristics/Nature of Remedial Action**

Sometimes the site characteristics or nature of the remedial action would justify a reduction in the FA amounts:

- If the site is part of an operating facility, a reduction in FA would be warranted because the owner would be a going concern and have a vested interest in completing the remedial action.
- At sites where there are more than five non-*de minimis/de micromis* PRPs with investment grade credit, a reduction in FA would be warranted because, as with insurance, the risk of default is reduced. More PRPs are available to complete the work.

- At sites where there are more than three non-*de minimis/de micromis* PRPs with investment grade credit, and the total remedy cost is under $40 million.

- Waive FA for any sites where there is a single PRP, the cost estimate is less than $1 million, and the PRP has obtained/provided financial assurance for other sites totaling more than $50 million. Companies that are capable of obtaining/providing more than $50 million should be presumed to be solvent enough to cover $1 million or less.

- Simple, inexpensive components of the remedy could forego FA; e.g., institutional or engineering controls or monitored natural attenuation.

- FA could be subject to phased or rolling FA, or FA could be required for only a certain period of years, particularly for O&M.

- For mega-sites, the sheer size of the remedy might make it difficult, or even impossible, to assure the entire estimated cost of the remedy, and/or the annual cost of financial assurance may become so prohibitive that it may make cooperative resolution of a site nearly impossible. In addition, the remedial action might have a very long duration. In these circumstances, it is inequitable to require tying up such large amounts for such a long duration so reductions or phased FA should be considered.

**108(b) Financial Test**

You asked about our specific views of the 108(b) proposed Financial Test as a model for Superfund sites. As an initial matter, SSP does not support the need for any 108(b) financial assurance requirement for the sectors under consideration by EPA. Further, as discussed during our meeting, SSP considers the 108(b) proposed Financial Test to be seriously flawed. First, the 108(b) proposed rule indicates a preference to eliminate the Financial Test. As set forth above, SSP, in contrast, believes the Financial Test should be expanded. Second, the test that has been proposed as part of the Rule is so strict as to render it worthless.

EPA's Regulatory Impact Analysis for the proposed 108(b) rule demonstrates that eliminating corporate guarantees imposes compliance costs that vastly exceed the benefit at *all* of the credit rating levels it considered. For example, "Under the Investment Grade Ratings Test, EPA's analysis estimates the annualized cost savings to industry at approximately $112.5 million. As a result of allowing the test, the public would in turn experience potential costs in annualized dollars of approximately $19.6 million due to the possibility of a company defaulting in spite of having passed the test." 82 Fed. Reg. 3442. Further, in its 108(b) rulemaking, EPA provided no examples of defaults by entities that qualify under existing financial tests, such as the RCRA test, which EPA has used successfully for many years. That is because those tests work, and, if anything, should be made more available rather than less. EPA's argument that the financial test should be made more restrictive to provide an "early warning" of potential bankruptcies is not supported by any facts; companies that qualify for existing tests seldom enter bankruptcy, and those that do still discharge their environmental obligations, substantially mitigating the risk to the government. EPA itself said "in general, such an issue has not been a widespread problem in other EPA financial responsibility programs." 82 Fed. Reg. 3432.

EPA evaluated various financial test options should one be included in a final rule. The proposed financial test entirely eliminates the non-investment grade test currently allowed by RCRA. Moreover, it uses the credit rating aspect of the test in a new way to constrain both the operators who would qualify and the portion of the overall obligation that can be covered. An owner or operator would be required to have: (1) a tangible net worth of at least six times the amount of its environmental obligations and (2) U.S. assets equal to or greater than 90% of its total assets, or six times the amount of its environmental obligations. However, an operator could only use this form of financial assurance if it holds a long-term corporate credit rating equal to or higher than A- as issued by Standard & Poors or its equivalent. For operators without this rating, the proposed rule would limit use of the financial test to one-half of its obligation, and require annual verification that it holds at least one long-term corporate credit rating of BBB+ or BBB. Even though a BBB- rating in fact qualifies as investment grade, EPA would not accept it as part of this test. Even the largest and most diversified companies would have trouble satisfying such a test.

We appreciate this opportunity to brainstorm and present ideas for reform of CERCLA FA. We are eager to continue these discussions. Please let me know how SSP can be of assistance.

Sincerely,

Ronald J. Tenpas

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