



# Enforcement Alert

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## Financial Assurance Requirements: A Fundamental Compliance Obligation

### *Failure to Comply with Financial Assurance Requirements Puts Human Health and the Environment at Risk*

The Casmalia Resources Hazardous Waste Management Facility was a 252-acre commercial hazardous waste treatment, storage and disposal facility located in Santa Barbara County, Cali-

fornia. Between 1973 and 1989, the facility accepted approximately 5.6 billion pounds of waste in its landfills, ponds, shallow wells, disposal trenches, and treatment units. The owners and operators of the Casmalia facility did not provide sufficient funds to close the facility and care for the site. In 1991, they abandoned their efforts to properly close the facility and clean up the site, which subsequently became known as the Casmalia Resources Superfund Site. The U.S. Environmental Protection Agency (EPA) estimates that it will cost at least \$272 million to remediate this site. Casmalia is an example of how hazardous waste facilities' failure to adequately fulfill their financial assurance obligations can result in Superfund sites.

Given the importance of preventing situations like Casmalia, EPA is stepping up its enforcement of the Resource Conservation and Recovery Act (RCRA) financial assurance requirements that ensure that persons handling hazardous wastes have adequate funds to close facilities, clean up any releases of those wastes, and compensate others that are harmed by the release of hazardous wastes.

This *Enforcement Alert* focuses on the financial assurance requirements for RCRA hazardous waste facilities and highlights:

- Financial mechanisms available for complying with financial assurance requirements;
- Common violations of financial assurance requirements;
- Situations that may trigger an owner's or operator's duty to substitute the financial assurance mechanism; and
- Significant court decisions addressing financial assurance requirements.

### Financial Assurance Requirements for Hazardous Waste Facilities

Financial assurance requirements address the cost of closing a hazardous waste facility in accordance with RCRA Subtitle C requirements; the annual cost required for post-closure monitoring and maintenance; liability coverage for sudden and non-sudden accidental occurrences; and corrective action required at solid and hazardous waste management units. Financial assurance requirements under Subtitle C cover permitted and interim status facilities. Financial assurance is required under RCRA Section 3004(a) and (t), and implementing requirements are found at 40 C.F.R. Part 264, Subpart H (for permitted facilities) and at 40 C.F.R.

- Financial assurance requirements;

#### About

#### Enforcement Alert

*Enforcement Alert* is published periodically by the EPA's Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance to inform and educate the public and regulated community of important environmental enforcement issues, recent trends and significant enforcement actions.

This information should help the regulated community anticipate and prevent violations of federal environmental law that could otherwise lead to enforcement action. Reproduction and wide dissemination of this publication are encouraged. *For information on how you can receive this newsletter electronically, send an email to the editor.*

Director, Office of Regulatory  
Enforcement: Walker B. Smith

Editor: Virginia Bueno  
bueno.virginia@epa.gov





Part 265, Subpart H (for interim status facilities). Where EPA has authorized a state to operate a hazardous waste program in lieu of the federal program, that state imposes financial assurance regulations that are at least as stringent as the federal regulations. Owners or operators of facilities located in an authorized state are required to comply with such state-issued financial assurance requirements, which are subject to enforcement by the state and EPA.

**Closure and Post-Closure Requirements:** Owners or operators of hazardous waste facilities must provide financial assurance for closure and post-closure care. They can accomplish this through a trust fund, surety bond, letter of credit, insurance policy, or financial test and corporate guarantee. Owners or operators must maintain financial assurance until the required closure and post-closure tasks are completed, a certification of completion has been submitted to the appropriate agency, and the owner or operator has received a notification from that agency indicating that financial assurance is no longer required.

**Liability Requirements for Accidents:** Owners or operators of hazardous waste facilities must be able to compensate third parties for bodily injury or property damage that might result from the accidental release of hazardous wastes. All hazardous waste facilities must demonstrate liability coverage for such sudden accidents. Hazardous waste facilities with land-based units such as landfills must also demonstrate liability coverage for non-sudden accidents, defined as events that take place over time and involve continuous or repeated exposure to hazardous waste.

Owners or operators may provide financial assurance for liability cover-

age through a trust fund, surety bond, letter of credit, insurance policy, or financial test and corporate guarantee. Owners or operators must maintain financial assurance until closure is completed, a certification of completion has been submitted to the appropriate agency, and the owner or operator has received a notification from the appropriate agency indicating that financial assurance is no longer required. Liabil-

ity coverage is generally not required during the post-closure period.

### Situations Triggering Need to Replace Financial Mechanisms

EPA's regulations require owners or operators of hazardous waste facilities



## Financial Mechanisms

- A **trust fund** allows an owner or operator to set aside money in increments according to a phased-in schedule (known as the pay-in period). At the end of the pay-in period, the facility will have enough money set aside to cover its financial assurance costs, and will have funds specifically earmarked for closure, post-closure care, and liability requirements.
- A **surety bond** is a guarantee by a surety company that the owner's or operator's financial assurance obligations will be fulfilled. If the owner or operator fails to pay or perform as specified in a bond, the surety company will become liable.
- A **letter of credit** is a guarantee by a financial institution that covers the owner's or operator's closure or post-closure care obligations. The appropriate agency may draw on the letter of credit if the owner or operator fails to perform.
- An **insurance policy** guarantees that funds will be available for closure or post-closure care in the event that the owner or operator fails to perform. Once closure or post-closure care begins, the insurer will be responsible for paying out funds, up to the face value of the policy, as directed by the appropriate agency.
- An owner or operator with the financial assets to absorb the costs of closure, post-closure care, and liability obligations may comply with financial assurance requirements by using the **financial test**. EPA's regulations set out the criteria that an owner or operator must meet to pass the financial test.
- An owner or operator may arrange a **corporate guarantee** by demonstrating that its corporate parent, grandparent, or sibling, or other firm with which it has a substantial business relationship, meets the financial test requirements on the owner's or operator's behalf. The corporate guarantor is required to perform closure or post-closure care, or to establish a trust fund, where the owner or operator fails to perform.



to replace the facility's financial mechanisms in certain situations. The most common situations, which involve the incapacity of the institution issuing the financial mechanism, are discussed below:

- If the institution issuing a **letter of credit** declares bankruptcy or has its issuing authority suspended or revoked by the relevant state or federal agency, the owner or operator of the hazardous waste facility has 60 days to establish other financial assurance.

- The financial institution issuing a **surety bond** must be listed as an acceptable surety of federal bonds in Circular 570 of the U.S. Department of the Treasury. If the surety company en-

ters bankruptcy or has its authority to issue surety bonds suspended or revoked by Treasury, the owner or operator of the hazardous waste facility has 60 days to establish other financial assurance. Copies of Circular 570 and interim changes may be obtained directly from the Government Printing Office by calling (202) 512-1800. Interim changes are published in the Federal Register and at <http://www.fms.treas.gov/c570/c570.html> as they occur.

- An **insurance company** must be licensed to transact the business of insurance, or must be eligible to provide insurance as an excess or surplus lines insurer, in one or more states. If the insurance company becomes bankrupt or has its authority to issue insurance suspended or revoked, the owner or

operator of the hazardous waste facility has 60 days to establish other liability coverage.

- An owner or operator using the **financial test** must send updated information to the appropriate agency within 90 days after the close of each fiscal year to provide alternate financial assurance.

### Significant Court Decisions Address Financial Assurance Requirements

Owners and operators of RCRA hazardous waste facilities that fail to obtain or maintain acceptable financial assurance are in violation of the law. EPA and authorized states have taken enforcement actions against persons and entities not in compliance with financial assurance requirements.

In *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F. 3d 846 (4th Cir. 2001), the court held that financial assurance requirements are exempt from the automatic stay provisions under the Bankruptcy Act. The court held that South Carolina, a state authorized to run the program under RCRA, can issue and enforce orders to force companies to comply with financial assurance requirements during bankruptcy. The court concluded that the RCRA financial assurance requirements fall within the government's "regulatory exception" from the bankruptcy automatic stay provision because the financial assurance regulations serve the primary purpose of deterring environmental misconduct. "Stated more positively, the [financial assurance] regulations serve to promote environmental safety in the design and operation of hazardous waste facilities. The incentive for safety is obvious: the availability and cost of a bond will be tied directly to the structural integrity of a facility and the sound-

### Common Violations of the Financial Assurance Requirements

- Failure to obtain financial assurance.
- Failure to substitute financial assurance based on the issuing financial institution's incapacity, through, for example, bankruptcy, rehabilitation, or removal from the U.S. Department of Treasury's Circular 570.
- Failure to maintain current cost estimates for closure and post-closure care.
- Failure to adjust closure or post-closure care costs for inflation. An owner or operator is required to adjust the estimated closure or post-closure care costs for inflation 60 days prior to the anniversary date of the establishment of the financial mechanism.
- Failure to adjust financial assurance coverage within 60 days after an increase in the adjustment to closure or post-closure care cost estimates.
- Failure to notify the appropriate agency, within 10 days, of the commencement of a bankruptcy proceeding naming the owner or operator as debtor.
- Failure of an owner or operator relying on the financial test to: (1) update the facility's financial information annually; (2) notify the appropriate agency of the owner's or operator's intent to obtain alternate financial assurance; or (3) obtain alternate financial assurance within 90 days after the end of the fiscal year in which the owner or operator no longer meets the financial test requirements.





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ness of its day-to-day operations.” *Id.*  
 at 866.

In *U.S. v. Power Engineering Co.*,  
 191 F.3d 1224 (10th Cir. 1999), the  
 Tenth Circuit Court of Appeals upheld

## Useful Compliance Assistance Resources

**Office of Enforcement and Compliance Assurance:**  
<http://www.epa.gov/compliance>

**RCRA Enforcement Division:**  
<http://www.epa.gov/compliance/civil/programs/rcra/index.html>

**RCRA Financial Assurance Website:**  
<http://www.epa.gov/osw/hazwaste.htm#finance>

**RCRA Online:**  
<http://www.epa.gov/rcraonline>

**National Compliance Assistance Clearinghouse:**  
<http://www.epa.gov/clearinghouse>

**Compliance Assistance Centers:**  
<http://www.assistancecenters.net>

**Small Business Gateway:**  
<http://www.epa.gov/smallbusiness>

**EPA's Audit Policy:**  
<http://oeaftp.sdc-moses.com/compliance/incentives/auditing/>

a district court decision granting EPA's request for an injunction requiring the Power Engineering Company to immediately comply with financial assurance requirements to ensure funds would be available to close its hazardous waste management units and to abate releases of hazardous waste from its facility. Power Engineering had illegally disposed of and managed hazardous waste for many years, and the hazardous waste, in some instances, had migrated into the groundwater and released into a nearby river. The 10th Circuit, in affirming the district court decision, required the company to immediately provide \$3.5 million in financial assurance.

## Self-Disclosure of Financial Assurance Violations

The use of effective financial assurance mechanisms is necessary to ensure the protection of human health and the environment.

EPA encourages owners or operators who believe they may be in violation of these requirements to take advantage of the Agency's Audit Policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 F.R. 66,706 (Dec. 22, 1995). The Audit Policy eliminates gravity-based penalties for owners or operators that voluntarily discover, promptly disclose, and expedi-

tiously correct violations of federal environmental law.

**Further information about the Policy may be found at <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>.** Owners or operators interested in conducting an audit or disclosing violations should contact the appropriate EPA Regional office. Owners or operators with facilities located in more than one Region should contact Phil Milton, EPA's Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, (202) 564-5029, or email: [milton.philip@epa.gov](mailto:milton.philip@epa.gov).

**For more information on RCRA financial assurance requirements,** contact Lynn Holloway, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, (202) 564-4241 or email: [holloway.lynn@epa.gov](mailto:holloway.lynn@epa.gov).

**For compliance assistance information,** contact Sharie Centilla, (202) 564-0697, Email: [centilla.sharie@epa.gov](mailto:centilla.sharie@epa.gov).

