

Editor's Note: The model language issued in 2006 is incorporated with minor typographical corrections as section XV (Financial Assurance) in the 2016 revised model RCRA § 3008(h) administrative order on consent (AOC) . The current version of the model RCRA § 3008(h) AOC is available from the Cleanup Enforcement Model Language and Sample Document Database at https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=772.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

February 8, 2006

MEMORANDUM

SUBJECT: Model Provisions for Cost Estimates and Financial Responsibility for Use in RCRA § 3008(h) Administrative Order on Consent

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement

TO: Regional Counsels, Regions I-X
RCRA Program Managers, Regions I-X
RCRA Branch Chiefs, Regions I-X

The Office of Site Remediation Enforcement (OSRE) is pleased to issue model financial assurance provisions for RCRA § 3008(h) administrative orders on consent. This model language replaces Section XXIII (titled "Financial Responsibility") in the December 15, 1993 "Model RCRA § 3008(h) Consent Order." Section XXIII consisted of a note stating that EPA may require Respondent to establish some form of financial assurance. The new Section XXIII is renamed "Cost Estimates and Assurances for Financial Responsibility for Completing the Work." This model language requires facility owners or operators who enter into corrective action agreements under RCRA § 3008(h) to provide cost estimates for the work to be performed and assurances of financial responsibility to complete the work required by the order.

Ensuring compliance with financial assurance requirements is an Office of Enforcement and Compliance Assurance (OECA) national priority in FY 2006-2007. This model § 3008(h) order language is part of OECA's broader initiative to improve financial assurance to ensure the cleanup of hazardous waste sites. Information on OECA's financial assurance initiative will be available soon at <http://www.epa.gov/compliance/data/planning/priorities/index.html>.

Under this model provision a Respondent may use any of the following mechanisms to demonstrate financial responsibility for corrective action: trust fund, surety performance or payment bond, letter of credit, insurance policy, corporate guarantee, or self assurance using the financial test set forth in 40 C.F.R. § 264.143(f). If the Respondent chooses to use a surety bond, a letter of credit or a corporate guarantee, Respondent must also establish a standby trust fund to be available to receive funds from such mechanisms. The new Section XXIII specifies the

conditions under which EPA may demand payment or performance from the financial assurance provider. It also includes provisions for modification of the amount or form of financial assurance and release from financial assurance obligations. OSRE plans to develop sample financial assurance instruments and “tip sheets” which will be issued in the near future.

In September 2003, OSRE and the Office of Solid Waste jointly issued “Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action.” This guidance provides additional information concerning the statutory authority and regulatory requirements for financial assurance for corrective action, estimating the cost of corrective action, appropriate times to require financial assurance for corrective action, and dealing with claims of inability to pay for financial assurance for corrective action. The “Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action” is available at: <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/interim-fin-assur-cor-act.pdf>

Information on cost estimating tools is available at: <http://www.epa.gov/compliance/resources/publications/cleanup/rcra/avg-cost-investig-cmplt.pdf>

On November 1, 2005, OSRE issued the Model RCRA § 7003 Administrative Order on Consent which also includes financial assurance provisions. It is available at: <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/7003-aoc-mod.pdf>.

This new Section XXIII for the Model RCRA § 3008(h) Order on Consent will soon be available at: <http://www.epa.gov/compliance/resources/policies/cleanup/rcra/3008h-aocfa-mod.pdf>.

I would like to express my appreciation to the Regional offices, the Office of Solid Waste and the Office of General Counsel for their assistance in developing this document. This model order is intended solely as guidance for employees of the U.S. Environmental Protection Agency. If you have questions concerning this model financial assurance language for RCRA § 3008(h) consent orders, please contact Tracy Gipson, OSRE, at 202-564-4236.

Enclosure

cc: Matt Hale, OSW
Scott Sherman, OGC
Kathy Kelly, Lead RCRA Regional Coordinator, Region 10

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

**[Insert name of site or facility
and name(s) of Respondent &
EPA ID No., if applicable]**
RESPONDENT.

Proceeding under Section 3008(h) of
the Resource Conservation and
Recovery Act, 42 U.S.C. Section
6900, et seq., as amended.

EPA Docket NO. _____
RCRA 3008(h)-[insert docket number]

MODEL RCRA § 3008(h) ORDER ON CONSENT

(January 2006 revisions to December 1993 Model)

[FINANCIAL ASSURANCE SECTION ONLY]

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

XXIII. COST ESTIMATES AND ASSURANCES OF FINANCIAL RESPONSIBILITY
FOR COMPLETING THE WORK

A. Estimated Cost of the Work

1. Respondent shall submit to EPA detailed written estimates, in current dollars, of the cost of hiring a third party to perform the Work to be Performed under this Consent Order (hereafter “Estimated Cost of the Work”). The Estimated Cost of the Work shall account for the total costs of the work activities that they cover, as described in Section VIII and the SOW(s), including any necessary long term costs, such as operation and maintenance costs and monitoring costs. A third party is a party who (i) is neither a parent nor a subsidiary of Respondent and (ii) does not share a common parent or subsidiary with Respondent. The cost estimates shall not incorporate any salvage value that may be realized from the sale of wastes, facility structures or equipment, land or other assets associated with the facility.

[Choose between Alternative 1 & 2.]

[Alternative 1. Where some or all of the Work to be Performed under Section VIII is already well defined at the time that the consent order is negotiated.]

2. Respondent has submitted, and EPA has approved, an initial Estimated Cost of the Work to be Performed under Section VIII, which covers **[specify the Work covered by the initial cost estimate, by referencing the paragraph, e.g. “Interim Measures/Stabilization under Section VIII, Paragraph A.”; “RCRA Facility Investigation under Section VIII, Paragraph B.”; “Corrective Measures Study under Section VIII, Paragraph C.”; and/or “Corrective Measures Implementation under Section VIII, Paragraph D.”]** and described in **[identify the relevant SOWs], Attachment(s) [__]**,

[Alternative 2 . Where the Work to be Performed will not be defined until after some initial phase of the consent order, such as after EPA has selected the Interim Measures, approved the RCRA Facility Investigation or selected the Corrective Measures to be Implemented.]

2. Within thirty days after EPA has **[identify triggering event, e.g. “selected Interim Measures which Respondent shall perform under Section VIII, Paragraph A.” or “approved the RFI Workplan under Section VIII, Paragraph B.1.” or “selected the Corrective Measures under Section IX”]**, Respondent shall submit to EPA for review and approval an initial Estimated Cost of the Work to be Performed which covers **[specify the work covered by the initial cost estimate, e.g. “Interim Measures/Stabilization under Section VIII, Paragraph A.” and/or “RCRA Facility Investigation under Section VIII, Paragraph B.” and/or “Corrective Measures Study under Section VIII, Paragraph C.”, and/or**

Corrective Measures Implementation under Section VIII, Paragraph D”] described in [identify the relevant SOWs], Attachment(s) [___].

NOTE: Where the Consent Order covers several phases of work, and total extent of needed corrective action cannot be known until investigation phases are complete, EPA may require cost estimates to be done in phases. Where several different costs estimates will be required at different stages of the work, add additional paragraphs, e.g. 2.a and 2.b. EPA’s goal should be to require cost estimates and financial assurance as early as possible for each stage in the process.

3. Concurrent with the submission of additional Work Plan(s) required under Section VIII (Work To Be Performed), Respondent shall submit a revised Estimated Cost of the Work.

4. Respondent shall annually adjust the Estimated Cost of the Work for inflation within thirty days after the close of Respondent’s fiscal year until the Work required by this Consent Order is completed. In addition, Respondent shall adjust the Estimated Cost of the Work if EPA determines that any additional Work is required, pursuant to Section X. Subsection C. (Additional Work), or if any other condition increases the cost of the Work to be performed under this Consent Order.

NOTE: In the alternative, you may require Respondent to annually adjust the cost estimate within sixty days prior to the anniversary date of the establishment of the financial assurance instrument(s).

5. Respondent shall submit each Estimated Cost of the Work to EPA for review. EPA will review each cost estimate and notify Respondent in writing of EPA’s approval, disapproval, or modification of the cost estimate.

B. Assurances of Financial Responsibility for Completing the Work

1. In order to secure the full and final completion of the Work in accordance with this Consent Order, Respondent shall establish and maintain financial assurance for the benefit of the EPA in the amount of the most recent Estimated Cost of the Work. Respondent may use one or more of the financial assurance forms generally described in Paragraphs a - f below. Any and all financial assurance instruments provided pursuant to this Consent Order shall be satisfactory in form and substance as determined by EPA.

NOTE: EPA may limit the choices of the Respondent to one or more of the instruments on this list, based on the specific circumstances of the case, in order to “secure the completion of the corrective action.”

a. A trust fund established for the benefit of EPA, administered by a trustee who has the authority to act as a trustee under Federal or State law and whose trust operations are regulated

and examined by a Federal or State agency, and that is acceptable in all respects to the EPA. The trust agreement shall provide that the trustee shall make payments from the fund as the **[insert appropriate regional manager title]** shall direct in writing (1) to reimburse Respondent from the fund for expenditures made by Respondent for Work performed in accordance with this Consent Order, or (2) to pay any other person whom the **[insert appropriate regional manager title]** determines has performed or will perform the Work in accordance with this Consent Order. The trust agreement shall further provide that the trustee shall not refund to the grantor any amounts from the fund unless and until EPA has advised the trustee that the Work under this Consent Order has been successfully completed.

b. A surety bond unconditionally guaranteeing performance of the Work in accordance with this Consent Order, or guaranteeing payment at the direction of EPA into a standby trust fund that meets the requirements of the trust fund in Paragraph a above. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on Federal Bonds as set forth in Circular 570 of U.S. Department of the Treasury.

c. An irrevocable letter of credit, payable at the direction of **[insert appropriate regional manager title]**, into a standby trust fund that meets the requirements of the trust fund in Paragraph a above. The letter of credit shall be issued by a financial institution (i) that has the authority to issue letters of credit, and (ii) whose letter-of-credit operations are regulated and examined by a Federal or State agency.

d. A policy of insurance that (i) provides EPA with rights as a beneficiary which are acceptable to EPA; and (ii) is issued by an insurance carrier that (a) has the authority to issue insurance policies in the applicable jurisdiction(s), and (b) whose insurance operations are regulated and examined by a Federal or State agency. The insurance policy shall be issued for a face amount at least equal to the current Estimated Cost of the Work to be performed under this Consent Order, except where costs not covered by the insurance policy are covered by another financial assurance instrument, as permitted in Paragraph 5 of this Section. The policy shall provide that the insurer shall make payments as the **[insert appropriate regional manager title]** shall direct in writing (i) to reimburse Respondent for expenditures made by Respondent for Work performed in accordance with this Consent Order, or (ii) to pay any other person whom the **[insert appropriate regional manager title]** determines has performed or will perform the Work in accordance with this Consent Order, up to an amount equal to the face amount of the policy.

The policy shall also provide that it may not be canceled, terminated or non-renewed and the policy shall remain in full force and effect in the event that (i) the Respondent is named as a debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or (ii) EPA notifies the insurer of Respondent's failure to perform, under paragraph 11 of this section.

e. A corporate guarantee, executed in favor of the EPA by one or more of the following: (i) a direct or indirect parent company, or (ii) a company that has a "substantial business

relationship” with Respondent (as defined in 40 C.F.R. § 264.141(h)), to perform the Work in accordance with this Consent Order or to establish a trust fund as permitted by Paragraph a above; provided, however, that any company providing such a guarantee shall demonstrate to the satisfaction of the EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee; or

f. A demonstration by Respondent that Respondent meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied.

Notes: (1) In situations where some or all of the Work to be performed has already been well defined by EPA or the Respondent prior to the negotiation of the Consent Order, EPA should negotiate and finalize the form and substance, including value, of Respondent’s financial assurance well in advance of the effective date of the Consent Order, so that the final financial assurance mechanism can actually take effect within ten days after the effective date of the Consent Order.

(2) Case Teams should also ensure that entities providing a corporate guarantee or demonstration of satisfaction of the financial test pursuant to Paragraphs e or f above have submitted all documentation required under 40 C.F.R. § 246.143 (f) well in advance of the effective date of the Consent Order in order that EPA can determine that such financial assurance is sufficient and that corporations providing a corporate guarantee or demonstration of satisfaction of the financial test have fully and accurately reflected in their financial statements all of their environmental obligations to the United States, i.e., that all RCRA, UIC, TSCA and CERCLA, obligations guaranteed by such entity as "financial assurance" and/or as a Performance Guarantee have been properly accounted for in determining whether such entity passes the financial test referenced in 40 C.F.R. § 264.143(f).

(3) Respondent must submit original executed/or otherwise finalized financial assurance instruments or documents. Facsimiles or photocopies are not acceptable.]

[Alternative 1, for situations where some or all of the Work to be performed has already been well defined and the initial financial assurance has been negotiated prior to executing the Consent Order]

2.1[For initial financial assurance under Paragraphs 1.a, 1.b, 1.c, 1.d, or 1.e:] Respondent has selected, and EPA has approved, as initial financial assurance **[insert type(s)]** pursuant to Paragraph 1[], in the form attached hereto as Exhibit []. Within ten days after the effective date of this Consent Order, Respondent shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the documents attached hereto as Exhibit [], and such financial assurance shall be fully effective. Respondent shall submit all executed and/or otherwise finalized instruments or other documents to EPA within thirty days after the effective date of this Consent Order.

2.2 [For initial financial assurance under Paragraph 1.f:] Respondent has provided initial financial assurance by demonstrating to EPA’s satisfaction that Respondent satisfies the financial test requirements of 40 C.F.R. § 264.143(f).

[Alternative 2, for situations where the Work to be performed will not be defined until after some initial phase of the consent order, such as after EPA has selected Interim Measures to be performed, approved the RCRA Facility Investigation, or selected Corrective Measures to be implemented.]

2.1 **[For initial financial assurance under Paragraphs 1.a, 1.b, 1.c, 1.d, or 1.e:]** Within thirty days after EPA has **[identify triggering event, such as “selected Interim Measures which Respondent shall perform under Section VIII, Paragraph A,” and/or “approved the RFI Workplan under Section VIII, Paragraph B,” and/or “selected the Corrective Measures to be Implemented under Section IX”]**, Respondent shall submit draft financial assurance instruments and related documents to EPA, concurrently with Respondent’s submission of the initial Estimated Cost of the Work, for EPA’s review and approval. Within ten days after EPA’s approval of both the initial Estimated Cost of the Work, and the draft financial assurance instruments, whichever date is later, Respondent shall execute or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the financial assurance documents reviewed and approved by EPA. Respondent shall submit all executed and/or otherwise finalized instruments or other documents to EPA within thirty days after EPA’s approval of the initial Estimated Cost of the Work and the draft financial assurance instruments, whichever date is later.

2.2 **[For initial financial assurance under Paragraph 1.f:]** Within thirty days after EPA has **[identify triggering event, such as selection of Interim Measures or Corrective Measures]**, Respondent shall submit to EPA all documentation necessary to demonstrate that Respondent satisfies the financial test criteria pursuant to Paragraph 1.f., concurrently with Respondent’s submission of the initial Estimated Cost of the Work. Respondent’s financial assurance shall be effective immediately upon EPA’s approval of the initial Estimated Cost of the Work and Respondent’s demonstration that Respondent satisfies the financial test criteria pursuant to Paragraph 1.f., whichever date is later.

3. If Respondent seeks to establish financial assurance by using a surety bond, a letter of credit, or a corporate guarantee, Respondent shall at the same time establish, and thereafter maintain, a standby trust fund, which meets the requirements of Paragraph 1.a. above, into which funds from the other financial assurance instrument can be deposited, if the financial assurance provider is directed to do so by EPA, pursuant to Paragraph 11.b.

4. Respondent shall submit all financial assurance instruments and related required documents by certified mail to the EPA Regional Financial Management Officer, with copies to **[the Regional financial assurance specialist, if one exists in the relevant Region and]** at the address **[es]** listed below. Copies shall also be sent to the EPA Project Officer **[and the State]**.

[Name], EPA Regional Financial Management Officer
[Address]

[Name], EPA Regional Financial Assurance Specialist
[Address]

5. If at any time during the effective period of this Consent Order the Respondent provides financial assurance for completion of the Work by means of a corporate guarantee or financial test pursuant to Paragraphs 1.e or 1.f above, Respondent shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods, unless otherwise provided in this Consent Order, including but not limited to, (i) initial submission of required financial reports and statements from the guarantors' chief financial officer and independent certified public accountant; (ii) annual re-submission of such reports and statements within ninety days after the close of each of the guarantors' fiscal years; and (iii) notification of EPA within ninety days after the close of any of the guarantors' fiscal years in which any such guarantor no longer satisfies the financial test requirements set forth at 40 C.F.R. Part 264.143(f)(1). Respondent further agrees that if Respondent provides financial assurance by means of a corporate guarantee or financial test, EPA may request additional information (including financial statements and accountant's reports) from the Respondent or corporate guarantor at any time.

[NOTE: EPA must be sure that the language of the corporate guarantee includes a provision whereby the guarantor agrees to provide such additional financial information to EPA at any time upon request]

6. For purposes of the corporate guarantee or the financial test described in Paragraphs 1.e and 1.f above, references in 40 CFR 264.143(f) to "the sum of current closure and post-closure costs and the current plugging and abandonment cost estimates" shall mean "the sum of all environmental remediation obligations" (including obligations under CERCLA, RCRA, UIC, TSCA and any other state or tribal environmental obligation) guaranteed by such company or for which such company is otherwise financially obligated in addition to the cost of the Work to be performed in accordance with this Consent Order.

7. Respondent may combine more than one mechanism to demonstrate financial assurance for the Work to be performed in accordance with this Consent Order, except that mechanisms guaranteeing performance rather than payment may not be combined with other instruments.

[NOTE: There may be circumstance where EPA would consider accepting a combination of a performance guarantee mechanism with a payment mechanism. If such a combination is accepted by EPA, EPA must be sure that special care is taken in drafting and/or reviewing the financial assurance instruments to be sure that EPA, the Respondent, and each financial assurance provider are clear about which instrument covers which work and/or costs.]

8. If at any time EPA determines that a financial assurance instrument provided pursuant to this Section is inadequate, or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, EPA shall so notify Respondent in writing. If at any time Respondent

becomes aware of information indicating that any financial assurance instrument provided pursuant to this Section is inadequate or no longer satisfies the requirements set forth or incorporated by reference in the Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, then Respondent shall notify EPA in writing of such information within ten days. Within thirty days of receipt of notice of EPA's determination, or within thirty days of Respondent's becoming aware of such information, as the case may be, Respondent shall obtain and present to EPA for approval a proposal for a revised or alternative form of financial assurance listed in Paragraph 1 above that satisfies all requirements set forth or incorporated by reference in this Section. In seeking approval for a revised or alternative form of financial assurance, Respondent shall follow the procedures set forth in Paragraph 12.b. below.

9. Respondent's inability or failure to establish or maintain financial assurance for completion of the Work shall in no way excuse performance of any other requirements of this Consent Order, including, without limitation, the obligation of Respondent to complete the Work in strict accordance with the terms of this Consent Order.

10. Any and all financial assurance instruments provided pursuant to Paragraphs 1.b., 1.c., 1.d. or 1.e. shall be automatically renewed at the time of their expiration unless the financial assurance provider has notified both the Respondent and the **[title of appropriate regional staff person]** at least one hundred and twenty days prior to expiration, cancellation or termination of the instrument of a decision to cancel, terminate or not renew a financial assurance instrument. Under the terms of the financial assurance instrument, the one hundred and twenty days will begin to run with the date of receipt of the notice by both the **[title of appropriate regional staff person]** and the Respondent. Furthermore, if Respondent has failed to provide alternate financial assurance and obtain written approval for such alternate financial assurance within ninety days following receipt of such notice by both Respondent and the **[title of appropriate regional staff person]**, then the **[[title of appropriate regional staff person]** will so notify the financial assurance provider in writing prior to the expiration of the instrument, and the financial assurance provider shall immediately deposit into the standby trust fund, or a newly created trust fund approved by EPA, the remaining funds obligated under the financial assurance instrument for the performance of the Work in accordance with this Consent Order.

NOTE: Because the Consent Order does not bind the financial assurance provider, EPA must carefully review each instrument to be sure that it obligates the financial assurance provider to perform the obligations of the provider which are prescribed in the Consent Order and to do so in a timely manner. There are special considerations regarding cancellation, termination or failure to renew insurance policies that need to be addressed when reviewing insurance policies.

11. Performance Failure

a. In the event that EPA determines that Respondent (i) has ceased implementation of any portion of the Work, (ii) is significantly or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice ("Performance Failure Notice") to both the Respondent and the financial assurance provider of Respondent's failure to perform. The

notice issued by EPA will specify the grounds upon which such a notice was issued and will provide the Respondent with a period of ten days within which to remedy the circumstances giving rise to the issuance of such notice.

b. Failure by the Respondent to remedy the relevant Performance Failure to EPA's satisfaction before the expiration of the ten-day notice period specified in Paragraph 11.a. shall trigger EPA's right to have immediate access to and benefit of the financial assurance provided pursuant to Paragraphs 1.a, 1.b, 1.c, 1.d, or 1.e. EPA may at any time thereafter direct the financial assurance provider to immediately (i) deposit into the standby trust fund, or a newly created trust fund approved by EPA, the remaining funds obligated under the financial assurance instrument (ii) or arrange for performance of the Work in accordance with this Consent Order.

NOTE: Because this Consent Order does not directly bind the financial assurance provider, be sure that the financial assurance instrument obligates the provider to perform the Work or deposit funds into the standby trust fund as directed by EPA.]

c. If EPA has determined that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 11.a. have occurred, and if EPA is nevertheless unable after reasonable efforts to secure the payment of funds or performance of the Work in accordance with this Consent Order from the financial assurance provider pursuant to this Consent Order, then, upon receiving written notice from EPA, Respondent shall within ten days thereafter deposit into the standby trust fund, or a newly created trust fund approved by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount equal to the estimated cost of the remaining Work to be performed in accordance with this Consent Order as of such date, as determined by EPA.

d. Respondent may invoke the procedures set forth in Section XVII (Dispute Resolution), to dispute EPA's determination that any of the circumstances described in clauses (i), (ii), or (iii) of Paragraph 11.a. have occurred. Invoking the dispute resolution provisions shall not excuse, toll or suspend the obligation of the financial assurance provider, under Paragraph 11.b. of this section, to fund the trust fund or perform the Work. Furthermore, notwithstanding Respondent's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion direct the trustee of such trust fund to make payments from the trust fund to any person that has performed the Work in accordance with this Consent Order until the earlier of (i) the date that Respondent remedies, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Performance Failure Notice or (ii) the date that a final decision is rendered in accordance with Section XVII (Dispute Resolution), that Respondent has not failed to perform the Work in accordance with this Consent Order.

12. Modification of Amount and/or Form of Performance Guarantee.

a. Reduction of Amount of Financial Assurance. If Respondent believes that the estimated cost to complete the remaining Work has diminished below the amount covered by the existing financial assurance provided under this Consent Order, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph A.4. of this Section, or at

any other time agreed to by EPA, submit a written proposal to EPA to reduce the amount of the financial assurance provided under this Section so that the amount of the financial assurance is equal to the estimated cost of the remaining Work to be performed. The written proposal shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval of a revised financial assurance amount, Respondent shall follow the procedures set forth in Paragraph 12.b.(ii) of this Section. If EPA decides to accept such a proposal, EPA shall notify Respondent of its decision in writing. After receiving EPA's written decision, Respondent may reduce the amount of the financial assurance only in accordance with and to the extent permitted by such written decision. In the event of a dispute, Respondent may reduce the amount of the financial assurance required hereunder only in accordance with the final EPA Dispute Decision resolving such dispute. No change to the form or terms of any financial assurance provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraph 12.b.below.

b. Change of Form of Financial Assurance.

(i) If Respondent desires to change the form or terms of financial assurance, Respondent may, at the same time that Respondent submits the annual cost adjustment, pursuant to Paragraph A.4. of this Section, or at any other time agreed to by EPA, submit a written proposal to EPA to change the form of financial assurance. The submission of such proposed revised or alternative form of financial assurance shall be as provided in Paragraph (ii) below. The decision whether to approve a proposal submitted under this Paragraph 12. shall be made in EPA's sole and unreviewable discretion and such decision shall not be subject to challenge by Respondent pursuant to the dispute resolution provisions of this Consent Order or in any other forum.

(ii) A written proposal for a revised or alternative form of financial assurance shall specify, at a minimum, the cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of financial assurance, including all proposed instruments or other documents required in order to make the proposed financial assurance legally binding. The proposed revised or alternative form of financial assurance shall satisfy all requirements set forth or incorporated by reference in this Section. EPA shall notify Respondent in writing of its decision to accept or reject a revised or alternative form of financial assurance submitted pursuant to this paragraph. Within ten days after receiving a written decision approving the proposed revised or alternative financial assurance, Respondent shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected financial assurance legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such financial assurance shall be fully effective. Respondent shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected financial assurance legally binding to the EPA Regional Financial Management Officer within thirty days of receiving a written decision approving the proposed revised or alternative financial assurance, with a copy to **[the Regional financial assurance specialist and]** the EPA Project Officer [and the State]. EPA shall release, cancel or terminate the prior existing financial assurance instruments only after Respondent has submitted all executed and/or otherwise finalized new financial assurance instruments or other required documents to EPA.

[NOTE: Respondent must submit original executed/or otherwise finalized instruments or documents. Facsimiles or photocopies are not acceptable.]

c. Release of Financial Assurance. Respondent may submit a written request to the **[insert appropriate regional manager title]** that EPA release Respondent from the requirement to maintain financial assurance under this Section at such time as EPA and Respondent have both executed an “Acknowledgment of Termination and Agreement to Record Preservation and Reservation of Right” pursuant to Section XXVII (Termination and Satisfaction) of the Consent Order. The **[insert appropriate regional manager title]** shall notify both the Respondent and the provider(s) of the financial assurance that Respondent is released from all financial assurance obligations under this Consent Order. Respondent shall not release, cancel or terminate any financial assurance provided pursuant to this section except as provided in this paragraph or Paragraph 12.b.(ii) In the event of a dispute, Respondent may release, cancel, or terminate the financial assurance required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.