



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

MEMORANDUM

SUBJECT: Response to Office of Inspector General Final Report No. 18-P-0059
"Self-Insurance for Companies With Multiple Cleanup Liabilities Presents
Financial and Environmental Risks for EPA and the Public" dated
December 22, 2017

FROM: Barry Breen, Acting Assistant Administrator
Office of Land and Emergency Management

Susan Parker Bodine, Assistant Administrator
Office of Enforcement and Compliance Assurance

4/12/2018

Susan Parker Bodine
4/13/18

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendations in the subject audit report. The following is a summary of the Agency's overall position, along with its position on each of the previously unresolved report recommendations. EPA acknowledges that the report recommendations with which the Agency agreed previously, as well as the corresponding high-level intended corrective actions and estimated completion dates, have been incorporated into the final report. For those report recommendations with which the Agency did not previously agree, we have now reached agreement and included the new alternative recommendation language, as well as the corresponding high-level intended corrective actions and estimated completion dates. EPA has not included a Technical Comments Attachment, and instead addresses a limited number of factual edits in this response.

AGENCY'S OVERALL POSITION

EPA once again thanks the Office of Inspector General (OIG) for its attention to the financial assurance programs under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). EPA looks forward to implementing the corrective actions agreed upon and included in the final report. In particular, an assessment of self-insurance instruments and updates to existing guidance to encourage standard procedures for financial assurance instrument review and safeguarding will ensure program quality and efficiency. To this end, OLEM and OECA have previously accepted most of the OIG's recommendations in the OIG final report and recently



accepted the OIG's alternative recommendations for those recommendations that were previously unresolved.

In general, although EPA agrees that the financial assurance program's data can be improved, EPA continues to disagree with the OIG's characterization of the level of risk posed by self-insurance. Specifically, EPA notes the OIG's report does not refer to objective information, in the record, that supports a conclusion that billions of dollars are at risk from the use of the financial test and corporate guarantee. Furthermore, the report derives conclusions based on a dataset which is deficient, and which EPA has already taken action to improve. Thus, statements that billions of taxpayer dollars are at risk are not supported. However, consistent with the OIG's first recommendation, EPA looks forward to assessing the nature and extent of any problems that may be identified with self-insurance to better understand any potential issues that may exist. EPA appreciates the OIG's focus on this aspect of the RCRA and CERCLA financial assurance programs as it has served as a catalyst for undertaking this evaluation.

Furthermore, EPA has identified a few points from the OIG's final report that we wish to address to add clarity and correct where program features or level of risk were not properly described.

- Regarding the potential consequence of a financial assurance failure, the OIG's final report states that without sufficient financial assurance, contamination at sites can remain unaddressed for long periods and may result in prolonged exposure to harmful contaminants. In fact, in the event financial assurance is insufficient and depending upon the context, EPA can use program resources, or invoke its enforcement authorities to enforce the terms of a permit, order, or settlement, to protect human health and the environment.
- The level of financial risk presented in the OIG's final report is overstated. The report mentions progress made to improve financial assurance data quality under the RCRA program, but states the total amount of expired, missing, and insufficient financial assurance as almost \$3 billion. Although OLEM appreciates acknowledgment of its significant improvement in financial assurance data quality for the RCRA program, this total dollar amount appears to be based on an old dataset from February 2017, which predated OLEM's data cleanup and which OLEM had already forewarned contained a high level of data gaps. At the time of providing this data to the OIG, EPA cautioned that attempting to use the data to derive a total financial assurance gap would be inaccurate, due to reasons such as double counting, incomparability of categories, time allowances for review of instruments, and unreliable data quality. Improvement of data quality since February 2017 has been significant. For example, the percentage of facilities with errors dropped by over 50% between January 2017 and January 2108. Moreover, EPA strongly believes that the majority of instances identified in the February 2017 data are data quality gaps, not actual financial assurance deficiencies. For these reasons, EPA strongly submits that the \$3 billion figure is invalid and inflated.
- The final report states that the CERCLA guidance does not require full disclosure of all environmental liabilities. However, both the 2015 CERCLA financial assurance

guidance¹ and CERCLA financial assurance model documents for self-insurance instruments provide that all environmental liabilities assured through the use of self-insurance instruments be included in the submission of a self-insurance FA instrument.

- The final report suggests that the disclosure of all environmental liabilities is needed for all financial assurance instruments. For the CERCLA and RCRA programs, potentially responsible parties (PRPs) and owners and operators do not need to disclose all of their environmental liabilities if they choose to secure a financial assurance instrument from a third party (e.g., trust, letter of credit, insurance, surety bond). Such a requirement is unnecessary when these types of instruments are secured, because the amount is held by a third party if a trust is used, or is guaranteed by a third-party financial institution if a letter of credit, insurance or surety bond is used.
- The final report further suggests that only corporations may use self-insurance instruments. However, a PRP or owner or operator seeking to meet the self-insurance financial assurance requirements by obtaining a corporate guarantee or demonstrating passage of a financial test need not necessarily be a corporation.
- While our current data systems do not have the ability to view environmental liabilities across environmental programs, EPA has other means to identify issues across programs. For example, EPA has regular monthly calls with the states where we share and discuss information regarding potentially financially distressed companies and questionable self-insurance instrument submissions. Further, in addition to annual reviews of self-insurance instruments, in the CERCLA program, a headquarters process is in place for additional monitoring of companies with financial challenges. Collectively, these efforts help to ensure that PRPs who submit self-insurance instruments meet program requirements and, reduces risk to EPA and the public.

Following publication of the final report and consistent with EPA manual 2750², EPA provided alternative recommendations for consideration by the OIG for the unresolved recommendations 1-4 and 9. Subsequently, EPA and the OIG have reached agreement on alternative recommendations 1 - 4 and 9 as included in this response.

AGENCY'S RESPONSE TO REPORT RECOMMENDATIONS

EPA indicates agreement with the OIG's alternative recommendations from March 2018 in the following table titled "Agreements". EPA has also included planned corrective actions and milestone dates in that same table. Furthermore, EPA has included a second table titled "Milestone date modifications" in which EPA specifies new milestone dates for RCRA-related recommendations agreed upon in September 2017. EPA believes it necessary to amend the milestone dates for two reasons: (1) now that EPA has the full portfolio of corrective actions, the Agency is better able to sequence the actions in the most logical order; and (2) to account for the six-month lapse between when EPA first submitted the milestones and when agreement with the OIG was reached.

¹ U.S. Environmental Protection Agency Office of Site Remediation and Enforcement *Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders*. April 6, 2015. Available at <https://www.epa.gov/enforcement/guidance-financial-assurance-superfund-settlements-and-orders>

² U.S. Environmental Protection Agency Manual 2750 Audit Management Procedures, Maintained by Office of the Chief Financial Officer, March 28, 2017

Agreements

Original OIG Recommendation, 12/22/17	3/29/18 Alternative Recommendations	Planned Corrective Action	Milestone Date
<p>1. Conduct a study to determine the costs associated with modifying the existing regulations to include (a) a requirement for full disclosure of all self-insured environmental liabilities; and (b) eliminating the use of corporate self-insurance instruments, including the financial test and corporate guarantee, for Resource Conservation and Recovery Act and Superfund financial assurance.</p>	<p>1. Conduct a study to qualitatively and quantitatively analyze and evaluate the program effectiveness and resource requirements to EPA of the corporate self-insurance instruments, including the financial test and corporate guarantee, in the Resource Conservation and Recovery Act regulations and the Superfund Program for current settlements and orders. Assess adequacy of self-insurance instruments for companies with multiple environmental liabilities and the nature and extent of any problems identified.</p>	<p>1.a. OLEM, with support from OECA, will conduct a study to qualitatively and quantitatively analyze and evaluate the program effectiveness and resource requirements to EPA of the corporate self-insurance instruments, including the financial test and corporate guarantee, in the Resource Conservation and Recovery Act Subtitle C regulations. Assess adequacy of self-insurance for companies with multiple environmental liabilities and the nature and extent of any problems identified.</p>	<p>1.a. 2nd quarter FY 2019</p>
		<p>1.b. OECA, with support from OLEM, will conduct an analysis of the Superfund Program's use of corporate self-insurance instruments for current settlements and orders at sites where the Superfund program follows the general framework of the Resource Conservation and Recovery Act regulations for financial assurance.</p>	<p>1.b. 2nd Quarter FY 2019</p>
<p>2. Once the study in Recommendation 1 is complete, implement the</p>	<p>2. Once the study in Recommendation 1 is complete, use the information to develop</p>	<p>2. Once Recommendation 1 is complete, OLEM, with support from OECA, will use the information to</p>	<p>4th Quarter FY 2020</p>

selected measure (1a or 1b).	appropriate risk management actions to mitigate any identified problems in line with Agency practices for enterprise risk management under Office of Management and Budget Circular A-123, and determine whether additional controls, such as the requirement for full disclosure of all self-insured environmental liabilities over corporate self-insurance, should be implemented and if corporate self-insurance should continue as an option.	develop appropriate risk management actions to mitigate any identified problems in line with Agency practices for enterprise risk management under OMB Circular A-123, and determine whether additional controls, such as a requirement for full disclosure of all self-insured environmental liabilities in corporate self-insurance demonstrations and/or disallowance of corporate self-insurance, should be pursued at that time.	
3. Update standard operating procedures and data systems to accommodate the changes implemented for Recommendation 2.	3. Update standard operating procedures and data systems to accommodate the implemented risk management actions.	3. OLEM, with support from OECA, will update standard operating procedures and data systems to accommodate the implemented risk management actions.	3. 4th Quarter FY 2021
4. Train staff on the changes implemented for Recommendation 2.	4. Train staff on the implemented risk management actions.	4. OLEM, with support from OECA, will train staff on the implemented risk management actions.	4. 1st Quarter FY 2022
9. Develop and distribute to EPA regions and states annual reports that include the total dollar amount of Resource Conservation and Recovery Act and Superfund financial assurance required and provided.	9.a. Develop and distribute to EPA regions and states annual reports that include the total dollar amount of Superfund financial assurance required and provided.	9.a. Original corrective action, as provided in the prior response, to be retained for Superfund.	9.a. Original milestone date, as provided in the prior response, to be retained for Superfund.
	9.b. Work with EPA regions and states to identify and implement appropriate metrics, including metrics to help identify, track, and correct, on a facility level, where there are monetary gaps in the amount of Resource Conservation and Recovery Act financial assurance required and provided. Develop and	9.b. ORCR, with support from OECA, will work with EPA regions and states to identify and implement appropriate metrics, including metrics to help identify, track, and correct, on a facility level, where there are monetary gaps in the amount of Resource Conservation and Recovery Act financial assurance	

	distribute to EPA regions and states annual reports on these metrics.	required and provided. Develop and distribute to EPA regions and states annual reports on these metrics.	
--	---	--	--

Milestone date modifications:

No.	Recommendation	High-Level Intended Corrective Action(s)	Original Estimated Completion by Quarter and FY	Revised Estimated Completion by Quarter and FY
5	Develop standard operating procedures that outline the Office of Land and Emergency Management and Office of Enforcement and Compliance Assurance roles and responsibilities for overseeing the validity of Resource Conservation and Recovery Act and Superfund financial assurance instruments.	EPA will, for the RCRA program, inventory and assess existing guidance and/or SOPs, outline OLEM and OECA roles and responsibilities for overseeing the validity of RCRA financial assurance instruments, communicate existing guidance and/or SOPs to financial assurance community, and develop or update SOPs and provide to financial assurance community.	2nd Quarter FY 2019	3rd Quarter FY 2020
6	Develop and include procedures for checking with other regions for facilities/sites with multiple self-insured liabilities in the standard operating procedures created for Recommendation 5.	In the RCRA program, EPA will inventory and assess existing guidance and/or SOPs, outline OLEM and OECA roles and responsibilities for overseeing the validity of RCRA financial assurance instruments, communicate existing guidance and/or SOPs to financial assurance community, and develop or update SOPs and provide to financial assurance community. The RCRA program will develop and include procedures for checking with	2nd Quarter FY 2019	3rd Quarter FY 2020

		other regions or states when facilities/sites with multiple self-insured liabilities exist.		
7	Develop and include instructions on the steps to take when an invalid financial assurance instrument (expired, insufficient in dollar amount, or not provided) is identified in the standard operating procedures created for Recommendation 5 and collect information on the causes of invalid financial assurance.	<p>In the RCRA program, EPA will inventory and assess existing guidance and/or SOPs, outline OLEM and OECA roles and responsibilities for overseeing the validity of RCRA financial assurance instruments, communicate existing guidance and/or SOPs to financial assurance community, and develop or update SOPs and provide to financial assurance community.</p> <p>The RCRA program will develop and include in the guidance and/or SOPs: (1) instructions on the steps to take when an invalid financial assurance instrument (expired, insufficient in dollar amount, or not provided) is identified and (2) where and when to collect and document causes of invalid financial assurance.</p>	2nd Quarter FY 2019	3rd Quarter FY 2020
8	Train staff on the procedures and instructions developed for Recommendations 5 through 7.	In the RCRA program, EPA will hold webinar for EPA regions and states, add SOPs to existing training materials, and evaluate financial assurance training needs and develop training plan for recommendations 5 through 7.	4th Quarter FY 2019	4th Quarter FY 2020

10	Develop and distribute to EPA regions and states annual reports that include progress on the reduction of financial assurance that is expired, insufficient and/or not provided.	For RCRA, annually track progress to improve financial assurance data in RCRAInfo to reduce the number of facilities that, based on available data, have financial assurance that is expired, insufficient in amount and/or not provided; and distribute to EPA regions and states, as applicable.	1st Quarter FY 2020	Unchanged
13	In coordination with EPA Regional Administrators, evaluate each region's compliance with documented EPA and federal procedures to physically safeguard hard-copy Superfund and/or Resource Conservation and Recovery Act financial assurance instruments.	The RCRA program, in coordination with the EPA Division Directors, will evaluate each region's compliance with documented EPA and federal procedures to physically safeguard hard-copy RCRA financial assurance instruments, as applicable. The RCRA program will communicate best practices for financial assurance instrument safeguarding, and develop a memo to regions memorializing those best practices and directing regions to assess their compliance with best practices. Regions will provide the memo to authorized states.	4th Quarter FY 2018	1st Quarter FY 2019
14	As needed, update procedures evaluated in Recommendation 13 to include details on how hard-copy financial assurance instruments submitted to the EPA should be received, maintained and monitored.	RCRA Prior to issuing memo to regions, EPA will evaluate best practices and revise if necessary for inclusion in memo.	4th Quarter FY 2018	Unchanged
		CERCLA As needed, for Superfund, update procedures evaluated in Recommendation 13 to include details on how hard-copy financial assurance instruments submitted to the EPA should be received, maintained and monitored.	3rd Quarter FY 2018	4th Quarter FY 2018

CONTACT INFORMATION

If you have any questions regarding this response, please contact Kecia Thornton (OLEM) at 202-566-1913 and Gwendolyn Spriggs (OECA) at 202-564-2439.

cc: Kevin Christensen
Richard Eyermann
Christine El-Zoghbi
Christina Lovingood
Barnes Johnson
James Woolford
Cyndy Mackey
Rosemarie Kelley
Kecia Thornton
Gwendolyn Spriggs