

DER-41 / Financial Assurance Guidance for Sites in the State Superfund Program and Brownfield Cleanup Program

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Dereth Glance	Title: Deputy Commissioner Office of Remediation and Materials Management
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I. Summary

This program policy provides guidance on applicable financial assurance (FA) requirements for sites in the State Superfund Program (SSF) and Brownfield Cleanup Program (BCP) which is managed by the Division of Environmental Remediation (DER) in the New York State Department of Environmental Conservation (DEC). 6 NYCRR Part 375, *Environmental Remediation Programs*, is the regulation that applies to SSF and BCP, and it may require that the remedial party submit FA instruments to ensure the long-term implementation, maintenance, monitoring, and enforcement of any institutional or engineering controls as a condition of such controls being accepted by DEC.

II. Policy

During the final remedy selection for a site or the remedy selection of an Operable Unit (OU) of a site, the DEC will determine if FA will be required by the remedial party. The remedial party must submit the FA cost estimate prior to or simultaneously with the Site Management Plan or equivalent for the OU remedy or the final Site Management Plan (SMP) or equivalent for a final remedy that will require FA. The FA instrument(s) must be in effect, and original(s) submitted to DEC prior to the issuance of a certificate of completion (COC) or other liability release.

III. Purpose and Background

A. Purpose

The purpose of this program policy is to provide guidance to project managers and remedial parties to ensure that financial funding is available for the continued Operation, Maintenance, and Monitoring (OM&M), and enforcement of institutional or engineering controls required by a Decision Document and/or a Consent Order. These controls are necessary for the continued protection of public health and the environment. When a site is abandoned by the remedial party due to insolvency, and there is no financial assurance, the costs for continued operation and

maintenance are left to the State, creating a financial burden to the public. Requiring that the remedial party submit financial assurance instruments to ensure the long-term implementation, maintenance, monitoring, and enforcement of any institutional or engineering controls as a condition of such controls minimizes the financial risk to the public. Requiring FA should reduce the number of sites that are abandoned by a remedial party. FA obligations at Resource Conservation Recovery Act (RCRA) sites which are also SSF sites are not addressed in this policy. For RCRA FA obligations, the remedial party must refer to and comply with Part 373 regulations.

B. Background

Per 6 NYCRR 375-1.11(c), DEC may require, as a condition of accepting institutional or engineering controls, that the remedial party post FA to ensure the long-term implementation, maintenance, monitoring, and enforcement of any such controls. It is the goal of this guidance that the need for required FA be considered for each of the alternatives in the Proposed Remedial Action Plan (PRAP). The need for FA should be considered when selecting the remedy and issuing a Record of Decision. Over the last several decades, DEC has witnessed companies quickly lose their financial rating and fall into bankruptcy. The financial uncertainties affecting sectors of the economy including bankruptcy, dissolution, and reorganization of corporate entities present situations where the DEC should not continue to rely on the long-term existence and current viability of remedial parties committing to undertake long-term OM&M of sites. This policy will give DEC assurance that controls necessary for the protection of public health and the environment will have the available funding to operate without the financial responsibility falling to DEC, and therefore the public.

IV. Responsibility

Responsibility for maintaining this Program Policy lies with the Policy and Planning Section, Bureau of Program Management, DER. Primary responsibility for implementing this Program Policy is assigned to DER Remedial Bureau Directors and DER Regional Managers. The DER FA Coordinator holds all original FA Instruments. Release, adjustments, and substitutions of FA instruments must be coordinated with the DER FA Coordinator.

V. Procedure

DER project managers and the remedial parties need to ensure that accurate cost estimates for the operation, maintenance, and monitoring are included for each alternative contained in the PRAP. If the project manager has determined that an alternative would require FA, then the FA obligation must be included as a part of the alternative and cost estimate. The need to provide FA must be discussed in Basis for Selection – Criteria 7 – Cost Effectiveness. DER FA Coordinator must be notified of pending FA requirements during PRAP development.

The following enforcement language will be added to the PRAP Section 5: “DEC seeks to compel Potentially Remedial Parties to perform the remedial actions required in accordance with

the site's Record of Decision. To ensure the potentially remedial party can provide for the long-term management of the site, DEC may require the posting of financial assurance in accordance with 6 NYCRR 375.1-11(c)."

A. What constitutes operation, maintenance, and monitoring (OM&M)?

- Institutional Controls (ICs)
 - Periodic review
 - Compliance with Environmental Easement and/or Deed Restriction
- Engineering Controls (ECs): Any engineering control that requires OM&M after construction is complete. Examples of OM&M for ECs include, but are not limited to:
 - Fence – inspection and maintenance
 - Asphalt Cap – inspection and maintenance
 - Soil Cover – inspection, mowing, repairs
 - Groundwater Pump and Treat System – operation, maintenance, and monitoring
 - Soil Vapor Extraction System – operation, maintenance, and monitoring
 - Sub-slab Depressurization System – operation, maintenance, and monitoring
 - Barrier wall-maintenance and monitoring,
 - Recovery Wells – operation, maintenance, and disposal costs

B. Threshold amount and duration of time for control to be in place

FA will be required as part of the remedial alternative if:

- The present worth of the OM&M costs for any OU or final site remedy are greater than three million dollars (\$3,000,000.00); or
- It is anticipated that the selected remedy will require OM&M for greater than 10 years.

The costs and timeframes detailed above are minimums to require FA. DEC has the discretion to request FA outside of these minimums based on site specific circumstances.

C. Instruments

DEC must approve the amount of FA needed and the acceptable instrument(s), which include:

- Trust Agreement – fully funded account (trust fund)
- Surety Bond - guaranteeing payment must be accompanied by a Standby Trust Agreement (establishment of an unfunded trust account)

- Letter of Credit – must be accompanied by a Standby Trust Agreement (establishment of an unfunded trust account)
- Insurance – Policy which provides declarations and endorsements, must be accompanied with a Certificate of Insurance.
- A combination of the above instruments which face value total the required cost estimate. If multiple FA instruments are used, the remedial party shall specify at least one such instrument as “primary” coverage and shall specify the other instruments as “excess.”

Language for each instrument is provided via links on the same DEC webpage as this policy. The wording of an instrument must be identical to the wording specified on the linked DEC webpages.

Each instrument requires a cover letter to tie the FA instrument to the site and the obligations. The letter must include the site name, site number, address, obligation, FA amount, and any other applicable information.

D. Adjustments

- At a minimum, the cost estimate and the instrument(s) need to be adjusted for inflation every five (5) years (e.g., within 60 days of the fifth anniversary of the establishment of the FA).
- The remedial party may request a reduction in FA at any time with supporting documentation satisfactory to the DEC. Such documentation may include, but is not limited to, past years’ actual costs for OM&M, documented changes in site use, cessation of a remedial system (SVE, pump and treat system, etc.). FA adjustments are reviewed and approved by the site project manager who then notifies the FA Coordinator that the adjustment is approved. The FA Coordinator drafts a letter for the DER Division Director or Assistant Division Director to sign, approving the FA adjustment.
- DEC can draw on the instrument if DEC is unable to accept the Periodic Review Report, IC/EC are not maintained, or the remedy is no longer effective.
- Any transfers of a COC must include applicable FA by the new remedial party.

E. Release

- DEC will notify the remedial party in writing of any release or modification.
- DEC will modify the remedial party’s FA requirement to reflect the release or modification of the FA required.
- DEC will return to the remedial party (or issuing financial institution) such released FA instrument, if applicable, with the written notice.
- Release letters are drafted by the FA Coordinator and signed by either the DER Division Director or Assistant Division Director.

F. Substitution

- The remedial party must submit to DEC a proposal for alternate FA.
- Alternate FA must be as secure or more secure than the existing FA, as determined by DEC.
- Upon approval and receipt of alternate FA, DEC will release the prior FA instrument and notify the remedial party in writing.

VI. Related References

- 6 NYCRR Part 375, Environmental Remediation Programs, New York State Department of Environmental Conservation