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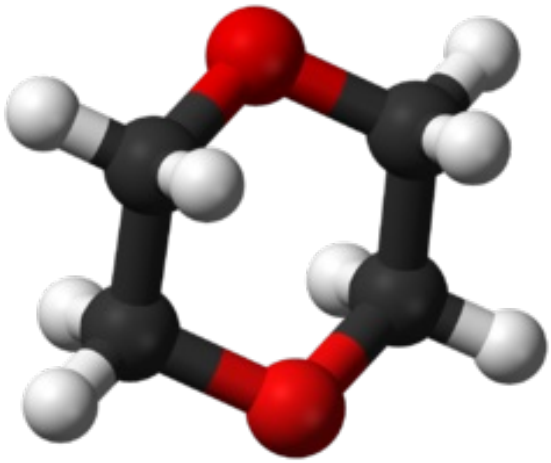
EPA Updates Its Audit Policy Guidance

While the new administration's approach to environmental enforcement begins to take shape, EPA has given a pretty clear indication of its continued commitment to the use of its Audit Policy as a tool for compliance assurance. EPA recently updated its guidance for this policy by issuing a new set of Frequently Asked Questions. A link to the new FAQ can be found here. Under the Audit Policy, facilities can achieve up to a 100 percent reduction in the gravity component of penalties associated with noncompliance



Interstate Technology & Regulatory Council Issues New Guidance on 1,4-Dioxane

The Interstate Technology & Regulatory Council's (ITRC's) guidance on 1,4-dioxane is now available. A copy of the guidance can be found here. 1,4-Dioxane is considered as a likely human carcinogen by EPA, and as possibly carcinogenic to humans by the International Agency for Research on Cancer (IARC). 1,4-Dioxane has not received as much attention in recent

if it provides notification to EPA of such noncompliance in accordance with the procedures set forth in the policy and the new guidance, and if it meets all the criteria set forth in the policy.

The new FAQ supersedes previous guidance issued by EPA in 1997, 2000, and 2008. (A separate FAQ on the use of EPA's eDisclosure Central Data Exchange, or CDX, remains in place.) There are not very many substantive changes in the new FAQ. However, the organization of this guidance is somewhat more user friendly than previous iterations. In addition, the new FAQ provides important information on the use of EPA's eDisclosure system for submitting notices pursuant to this policy.

years as other emerging contaminants such as PFAS. Nonetheless, 1,4-dioxane contamination is a significant concern due in part to its significant use in the past as a stabilizer for 1,1,1-trichloroethane (1,1,1-TCA), and its high solubility and mobility in groundwater. The presence of 1,4-dioxane contamination has also been associated with the presence of other chlorinated solvents such as trichloroethylene (TCE), 1,1-dichloroethane (1,1-DCA) and 1,1-dichloroethylene (1,1-DCE).

I hope to have more on 1,4-dioxane in a future edition of The Cubical.

Providing Assurances: What Is Financial Assurance? And Why Should I Care About It?

Owners of permitted hazardous waste management facilities (HWMFs) often spend the first several months of a new fiscal new fiscal year busily updating or making changes to the financial instruments and documents used to demonstrate the financial wherewithal to close any hazardous waste management units (HWMUs), monitor and care for closed HWMUs, and pay claims associated with releases from HWMUs. Under the financial assurance provisions of the hazardous waste management regulations, an owner of a permitted HWMF must either rely on the financial strength of the corporate parent or secure a financial instrument such as a letter of credit or insurance policy in order to demonstrate the ability to perform or pay for these activities or claims.

Financial assurance is one of the most confounding aspects of hazardous waste management. This is so for a variety of reasons, chief among them being the minutiae and detail in the wording of the financial instruments. Nonetheless, with planning and foresight, an owner of a permitted HWMF can successfully navigate these requirements. And, in so doing, it can minimize its compliance risks; minimize the compliance costs associated with financial assurance, and help the organization optimize its liquidity position.

To read more, click here...

Providing Assurances: Letters of Credit

A common circumstance that arises in the realm of financial assurance compliance

is where the owner of a permitted HWMF must switch from the financial test to a letter of credit. This typically arises from a triggering event such as the assumption of new debt or weak financial performance in a given fiscal year. The threshold question that must be answered when such a circumstance arises is: When must the permittee establish an alternative means of demonstrating financial assurance? To answer this question, it must first be understood that compliance with the financial test is based on the parent corporation's most recent *audited annual financial report*. So, for example, if the corporate parent assumes debt for an acquisition in the middle of a fiscal year, and it is possible that this event might cause the parent corporation to fail the financial test, no immediate action is necessary. With this in mind, the first important deadline comes 90 days following the end of the fiscal year. By this date, the owner of the permitted HWMF must submit a notice to the regulatory authority of its intention to switch from the financial test to a letter of credit.

Okay, so compliance with the notice requirement doesn't sound so bad. However, what must the owner of the permitted HWMF do to secure a letter of credit? And, what must the owner submit to the regulatory authority? To read more, click here...

Providing Assurances: Tying Up Loose Ends

The newly-acquired ability of an organization to comply with the financial test can be a quite a significant event. The organization will be able to avoid the costs associated with a letter of credit. More importantly, the organization's access to liquidity will likely be enhanced once by the amount of any letter of credit that can be released.

What can sometimes be overlooked when switching from the letter of credit to the financial test are the loose ends that must be tied up. Even after the financial test package is submitted, the regulatory authority's approval to release the letter of credit must still be obtained. Until the regulatory authority approves such a release, the letter of credit will remain in place. Fees associated with maintaining such collateral will continue to accumulate. More importantly, the parent corporation's ability to access liquidity under its existing credit facilities will continue to be limited by the amount of the unreleased letter of credit.

A detail that is probably overlooked more often is terminating the standby trust. The continued existence of an unnecessary standby trust will not impact an organization's borrowing ability in the same way that an unreleased letter of credit will. However, financial institutions charge periodic fees to maintain such a trust in place. These fees will continue to accrue until the trust is terminated.

A trust termination agreement is necessary to terminate the standby trust. No regulatory template exists for such an agreement and it need not be lengthy or complex. However, unlike the standby trust, the regulatory authority is party to, and therefore must execute, the trust termination agreement. Thus, the process of obtaining a fully-executed trust termination agreement can be quite a paper chase in its own right.

Tying up the loose ends after switching from a letter of credit to the financial test requires persistence, patience, and focus. Until these loose ends are tied up, the organization cannot realize the main benefits of the financial test, which is a cost-free means of demonstrating financial assurance and removing impediments to the

organization's access to liquidity.

Providing Assurances: Transactional Considerations

Maintaining collateral in the form of a letter of credit in order to demonstrate compliance with financial assurance can be a significant financial obligation. As such, the transfer of such an obligation can be an important consideration in asset sales and similar transactions. The transferor of a financial assurance obligation secured by a letter of credit must continue to maintain the letter of credit until the transferee has demonstrated compliance with financial assurance to the satisfaction of the regulatory authority. The transferee has up to six months following the close of such a transaction to assume responsibility for complying with financial assurance.

Managing the activities associated with the transfer of a financial assurance obligation requires the persistence and patience of both transferor and transferee. The EHS, finance, and treasury functions of the transferee will likely be pre-occupied with other transition and integration activities in the days, weeks, and months following the closing of the transaction. And, even after the transferee has put its own financial assurance mechanism in place, the regulatory authority must still release the transferor from its obligation. In the interim, the existence of backstop letter of credits or similar mechanisms should ensure that the transferor is not saddled with the cost of or risk associated with financial assurance obligations for operations that it no longer owns. Nonetheless, any significant delay by the regulatory agency in approving the transferee's demonstration of compliance with financial assurance and releasing the transferor from its obligations may negatively impact the transferor's access to liquidity.

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