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Superfund and Bankruptcy/Summary of Impacts, Issues and Risks Associated with PRP Bankruptcy: September 2018 Association of State and Territorial Solid Waste Management Officials Paper

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The Association of State and Territorial Solid Waste Management Officials (“ASTSWMO”) states that its Remedial Action Focus Group prepared a paper to:

... assist states in identifying and addressing potential concerns that may arise when a potentially responsible party (PRP) at a National Priority List (NPL or Superfund) site files for bankruptcy protections during the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) remedial process.

ASTSWMO states that the paper was prepared under a Cooperative Agreement with the United States Environmental Protection Agency Office of Superfund Mediation and Technology Innovation and Office of Site Remediation Enforcement.

The paper notes that in the CERCLA process a potentially responsible party (“PRP”) bankruptcy (at any point in the CERCLA process) will significantly impact the progress of the site and require EPA and the state to coordinate on how to best meet the cleanup objectives identified in the Record of Decision.

The paper addresses two specific types of bankruptcy protections afforded to entities within the United States. It discusses:

- Chapter 7 (providing an entity the ability to turn their operations over to a Chapter 7 Trustee, and that Trustee will wind down the business and discontinue operations)
- Chapter 11 (providing businesses the opportunity to reorganize their business structure while still operating)

The paper discusses:

- Examples
- Chapter 7 – Crown Vantage (discussing a company that owned and operated three paper mills with associated wastewater treatment systems and their own landfills)
- Chapter 11 – General Motors (referencing this company as a PRP at several Superfund sites)

- Financial Assurance for Superfund Sites
- State Exposure
- Sites with single/limited number of PRPs
- Interagency communication on establishment or reduction of FA amounts
- Underestimation of FA
- PRP bankruptcy at Superfund sites – cautionary tale
- Dover, Ohio site
- St. Louis Park, Minnesota site
- Mitigating the impacts of future bankruptcies of Superfund sites
- State involvement in settlement negotiations
- State financial assurance coverage on PRP/lead sites
- Transition of O&M work/cost to states
- Coordination to mitigate the impact of future bankruptcies
- Post-bankruptcy considerations

A number of recommendations are provided, which include:

1. Early and ongoing coordination between U.S. EPA and States at PRP-lead Superfund sites- States should proactively engage with U.S. EPA and PRPs during development of the consent decree and selection of the FA mechanism to ensure the greatest possible protections for both U.S. EPA and States.
2. Robust FA mechanism- Letters of credit, corporate guarantees and other methods of FA may not be sufficient to provide for continued cleanup, O&M, or monitoring in the event of PRP bankruptcy.
3. State-specific FA- Where available, States should pursue their own separate FA with PRPs that may provide additional coverage if the State has to take over all or some of the work at a site.
4. Accurate estimates of FA- The actual costs for remedy implementation, O&M, and monitoring are likely to change following the feasibility study. FA amounts should be updated whenever possible following the remedial design or other project milestones, when long term costs can be more accurately developed.
5. Coordination between U.S. EPA and States leading up to and after bankruptcy- States should designate a point-of-contact for notifications when content is added to the U.S. EPA FA website and actively engage with U.S. EPA if a bankruptcy appears imminent.
6. Implement adaptive management concepts following bankruptcy- A PRP bankruptcy significantly alters the situation at a PRP-lead cleanup site and U.S. EPA and States should both be open to re-evaluating or optimizing the selected remedy or considering alternate remedies in light of potential re-use scenarios that were not present when the consent decree was signed.
7. Formalize FA requirements in CERCLA- Lessons learned at PRP-lead sites over the years should be incorporated into the FA requirements under CERCLA for the protection of U.S. EPA and the States.

A copy of the paper can be found [here](#).