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Guidance For Regional Office Review Of State Underground Storage Tank Financial Assurance Funds

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Overview

This guidance provides U.S. Environmental Protection Agency (EPA) regions with recommended procedures and factors to consider for monitoring the soundness of state underground storage tank (UST) financial assurance funds (state funds). The goal of the guidance is to help ensure the adequacy of state funds.

Applicability

This guidance applies to all state funds operating as full or partial financial responsibility (FR) mechanisms for federally-regulated USTs in states with or without state program approval (SPA).

Annual Monitoring And Oversight

Regions should perform an annual tiered review of state funds. Regions should request data from states to complete these reviews.

The Tier 1 review should address these questions:

- **How quickly is the fund reducing its federally-regulated, fund-eligible (FRFE) cleanup backlog?**
- **Has the fund had enough resources to address its FRFE backlog?**
- **Will the fund have resources to further reduce its FRFE backlog?**
- **Are there any major or pending changes to the fund?**

The Tier 2 review, if needed, should evaluate in greater detail a fund's:

- Environmental performance
- Financial management
- Administrative management

Actions To Improve Fund Soundness

If concerns are identified, the region and state should pursue a collaborative process to address deficiencies and improve the performance of the fund.

Withdrawing State Fund Approval

Withdrawing EPA approval of a state fund should begin only after good faith collaboration between EPA and the state has failed or after the state has declined to address a fund's deficiencies. If a state's actions fail to restore its fund to an adequate level, then the region, in consultation with EPA's Office of Underground Storage Tanks (OUST), should withdraw the fund's approval as a mechanism for FR. As required in federal regulations, the state must notify UST owners and operators that they must find an alternative FR mechanism before approval is withdrawn.

Introduction

This guidance provides EPA regions with recommended procedures and factors to consider for monitoring the soundness of state funds.

Subtitle I of the Solid Waste Disposal Act (SWDA) requires the owner or operator of a federally-regulated UST to have an FR mechanism which covers the costs of any needed remedial action or third-party damages from a release. In issuing the FR requirements for owners and operators of federally-regulated USTs, EPA permitted a wide array of compliance mechanisms, including state assurance funds, insurance, risk retention group coverage, financial tests of self insurance, guarantees, letters of credit, surety bonds, fully-funded trust funds, and state-required mechanisms (40 CFR 280.94).

In order for EPA to recognize a state fund as an acceptable FR mechanism, the fund must meet the requirements in 40 CFR Part 280 and be approved by EPA in one of two ways:

- In states where EPA granted SPA the fund was effectively approved as part of the program approval.
- In states without SPA from EPA “Pending the determination by the Regional Administrator, the owner or operator of a covered class of USTs will be deemed to be in compliance with the requirements of § 280.93 for the amounts and types of costs covered by the state fund or other state assurance.”¹

State assurance funds have become the most widely used FR mechanism for tank owners and operators; they are now being used in 36 states to cover new releases. However, in 2007 the Government Accountability Office (GAO) found that “several of these [state] funds may not have sufficient resources to ensure timely cleanups.” GAO therefore recommended that EPA “Improve the agency’s oversight of the solvency of state assurance funds to ensure that they continue to provide reliable financial responsibility coverage for tank owners....”²

This guidance provides a process for evaluating state assurance funds and improving EPA’s oversight of funds. This guidance replaces the 1993 OSWER Directive 9650.14, *Monitoring the Financial Soundness of Approved State Assurance Funds*, which discusses the review of state funds for purposes of ongoing oversight. However, EPA retains the 1989 *Final Guidance for*

¹40 FR 280.101(c) “Pending the determination by the Regional Administrator, the owner or operator of a covered class of USTs will be deemed to be in compliance with the requirements of § 280.93 for the amounts and types of costs covered by the state fund or other state assurance.”

² GAO, *EPA Should Take Steps to Better Ensure the Effective Use of Public Funding for Cleanups*, GAO-07-152, February 2007.

Reviewing State Funds for Financial Responsibility, which discusses the review of state funds for purposes of initial approval.

This guidance provides recommended procedures and factors for regions to conduct state fund reviews; work collaboratively with states to resolve any state fund deficiencies; and implement Section 9004(c)(6) of the SWDA, as amended by the Energy Policy Act of 2005. Those amendments authorize EPA to:

- Identify a financially deficient state fund;
- Engage a state in good faith collaborative efforts to remedy its fund's financial deficiency; and
- Withdraw approval of a state fund as an acceptable FR mechanism if the state does not act in good faith to remedy its fund's financial deficiency.

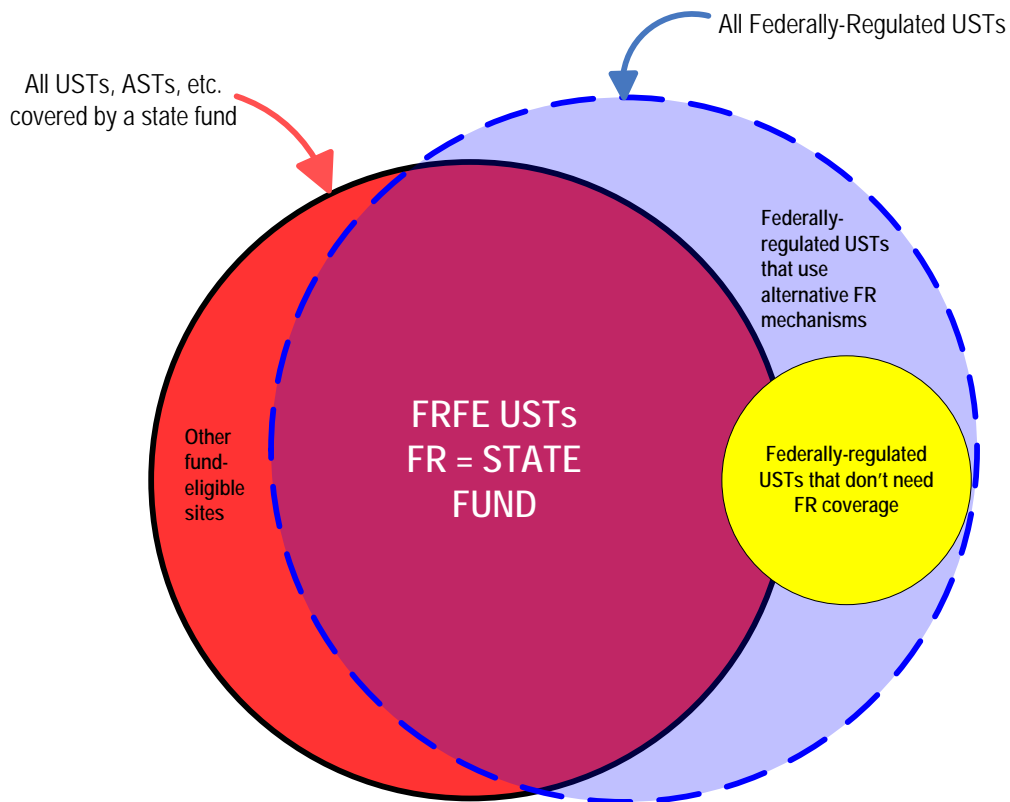
Of particular importance, in a state that has SPA, Section 9004(c)(6) grants EPA the authority to withdraw approval of a state fund as an acceptable FR mechanism without withdrawing approval of that state's overall UST program. For states without program approval, the authority to withdraw approval of the state fund as an EPA-approved FR mechanism exists within EPA's previously promulgated regulations (40 CFR 280.101). In either case, the intent of this guidance is to help regions and states work together to resolve state fund deficiencies.

Applicability

Which State Funds Does This Guidance Apply To?

This guidance applies to all state funds operating as full or partial FR mechanisms for federally-regulated USTs in both SPA and non-SPA states. For states that have transitioned away from the use of state funds to another mechanism allowed in the regulations (40 CFR 280.94), regions should review the current condition of any state funds that remain responsible for past and existing claims. The region should review the state funds' ability to meet any remaining obligations as part of the region's routine oversight of the overall state UST program.

Figure 1. Financial Responsibility Coverage for Federally-Regulated USTs



What If A State Fund Covers More Than Federally-Regulated USTs?

Some state funds that cover federally-regulated USTs also cover other tanks not included in the federal UST FR regulations (e.g., aboveground storage tanks [ASTs] or tanks containing hazardous substances). Figure 1 illustrates the relations between FRFE USTs and other categories of tanks. All federally-

regulated USTs are within the dashed circle in Figure 1. A region's review should assess the state fund's fulfillment of the FR requirement for FRFE USTs and not the fund's fulfillment of other responsibilities it may also have. However, the region should also be alert for other liabilities (e.g., spills from aboveground storage tanks) that could also affect the soundness of the fund.

In some cases, a state fund does not provide all the federally-required elements (e.g., no third-party bodily injury) or required amounts of coverage. In other cases, a state fund does not provide FR for all federally-regulated USTs in the state. In fact, fund eligibility rules may specifically exclude certain USTs from the fund, and those owners and operators would need alternative mechanisms of FR. Ineligibility for the state fund or partial coverage by the fund does not relieve the owner or operator of a federally-regulated UST from compliance with the federal FR requirement. Each UST should have complete FR coverage. Elements not covered by the state fund or an EPA-approved alternative FR mechanism should be addressed by the program's enforcement efforts rather than by review of the state fund. The state's enforcement of FR for fund-ineligible or partially-covered USTs should be considered in the region's regular review of the state program for compliance assurance.

Who Will Conduct The Review?

Both OUST and EPA regions are responsible for implementing this guidance, with EPA regions having primary responsibility for overseeing all state funds in their region.

To ensure proper oversight, this guidance includes recommended procedures and factors for a region to use when reviewing each state fund. As part of these reviews, a region will ask states to provide the information necessary to make a soundness determination.

To ensure consistency of regional evaluations, OUST intends to provide technical assistance and to consult, as appropriate, with each region on its fund soundness evaluations and recommended restorative actions. The region should keep OUST fully informed of any concerns during the reviews.

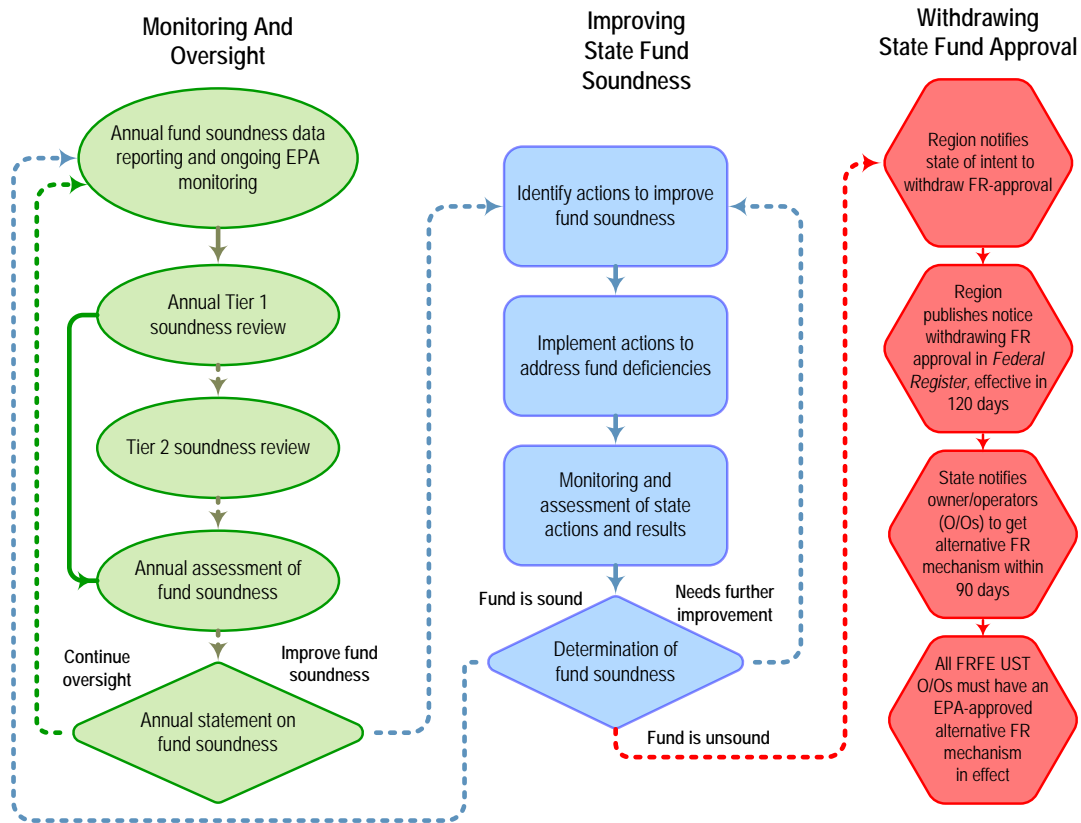
The Review Process

This guidance establishes a three-part process (see Figure 2) for regions to use when reviewing the financial soundness of state funds:

- Part 1: Monitoring And Oversight
- Part 2: Improving State Fund Soundness
- Part 3: Withdrawing State Fund Approval

The guidance also establishes two tiers of review: Tier 1 review focuses on a set of questions about the state fund’s ability to meet its performance objectives. If it is necessary to further evaluate fund soundness, the region will conduct a Tier 2 review, which focuses on a more detailed evaluation of finances, management, and/or environmental performance of the fund. This tiered review process will provide regions with the information needed to evaluate the soundness of state funds.

Figure 2. State Fund Review Process




Part 1: Monitoring And Oversight

During this part of the process, a region should work with each state to evaluate the soundness of the state fund. This part of the process concludes with a written assessment of the fund and a determination of whether the region and state need to take action to improve the fund's soundness.

Annual Reporting And Monitoring

The first step of Part 1 is annual reporting and ongoing monitoring. Regional oversight of state funds should be an ongoing activity that includes at least an annual review. To ensure effective oversight, a region should establish and maintain a baseline of management, financial, and environmental performance information that describe a state's fund and its activity over time. The annual review should, at a minimum, look at trends over at least several fiscal years to produce a snapshot of the fund and an estimate of the fund's ability to sustain sufficient environmental performance.



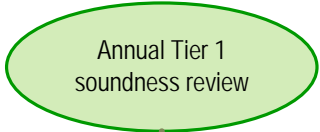
Annual fund soundness data reporting and ongoing EPA monitoring

An annual review is sufficient for funds that appear to be healthy. For funds that do not appear healthy, a region may request information more frequently. A region can also ask a state for additional data and review available and more detailed analyses. The region is encouraged to pursue clarification about a fund's soundness or environmental performance and, as necessary, act on concerns between annual reviews.

Tier 1 And Tier 2 Reviews

To balance the need for oversight with the resources required to conduct a state fund review, a region should conduct an annual review in tiers, beginning with Tier 1. Depending on the results of the Tier 1 review, a Tier 2 review may be necessary.

Regions will ask state fund officials for limited data. This should present a minimal burden for states and should significantly overlap with information states already collect. The region should work closely with the state during the Tier 1 and Tier 2 reviews to ensure that the review and the findings are accurate.



Annual Tier 1 soundness review



Tier 2 soundness review

Tier 1: Soundness Review

Tier 1 is the initial assessment of a fund in the region's annual review. During the Tier 1 review, the region should examine a limited set of questions to assess a fund's soundness as an FR mechanism. The Tier 1 review provides both a current snapshot of the fund and any trends that may warrant further attention. At a minimum, the region should work with each state to evaluate trends in the following:

- **How quickly is the fund reducing its FRFE cleanup backlog?** Given its past and current resources, has the fund been able to address new FRFE releases and close ongoing FRFE cleanups without undue delay?
- **Has the fund had enough resources to address its FRFE backlog?** How many FRFE UST sites are awaiting financing? Is that number large relative to historic trends? Has the fund's revenue been enough to support sustained progress of FRFE UST cleanups?
- **Will the fund have resources to further reduce its FRFE backlog?** If the fund's current level of resources, workload, and costs continue, will the fund be able to sustain adequate environmental performance in coming years?
- **Are there any major or pending changes to the fund?** What policy or funding changes were made or are pending that could affect the fund's fulfillment of the FR requirement?

The region should review the state's data and confer with the state to resolve issues or answer questions. The interpretation of these data should reflect any unique circumstances reported by the state.

On completing the Tier 1 review, the region should determine the soundness of the fund:

- If the fund appears sound, then the region should continue to monitor the fund and the program throughout the year.
- If there are concerns or sufficient uncertainty about the fund's soundness, the region should conduct a Tier 2 review.
- If the state diverted funds from the state fund, the region should understand the implications of such a diversion (e.g., whether FRFE UST cleanups are impeded) and take action accordingly.

Tier 2: A More Detailed Review

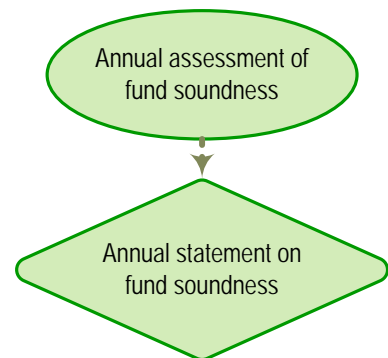
The region should pursue a more detailed review of a state fund if the Tier 1 review raised questions regarding the soundness of the fund. These questions do not necessarily imply a problem with the fund, only that more information is needed for the region to understand the fund's condition.

In conducting a Tier 2 review, the region should work closely with the state to more completely evaluate any or all facets of the fund, including:

- **Environmental Performance:** Factors that further detail the progress that the state fund is making in cleaning up FRFE USTs and improving the environment.
- **Finances:** Factors that describe the actual or potential flow of dollars into and out of the fund.
- **Management:** Factors that describe actions or policies the state uses to govern or manage the state's fund.

Annual Assessment Of Fund Soundness

After receiving the state's Tier 1 data and, if needed, Tier 2 data, the region should write an assessment of the fund. The region should consider factors and other information that create a profile of a state fund over time to determine whether it is operating as an effective mechanism of FR. This assessment of a fund's soundness should not be based only on any one indicator, nor should the region establish a strict quantitative soundness threshold.



The region should discuss its preliminary interpretations of these data with the state. The region should finalize the annual written assessment after consideration of state comments. The written assessment should establish a factual basis for the region's statement on fund soundness and, if necessary, a starting point for developing improvement strategies for the fund.

The annual written assessment should contain a concluding statement regarding the soundness of the fund. If the region determines that the performance of a state fund is satisfactory, the region should continue ongoing oversight of the state fund.

Part 2: Improving State Fund Soundness

If the region, in consultation with OUST, determines that the fund's condition constrains its environmental performance and there is no reasonable expectation of near-term resolution of this condition, then the region and the state should begin a process for improving the state fund's soundness. In this situation, the region should formally communicate its decision in writing to the relevant senior state officials. This communication should accompany and explain the region's written assessment and ask the state to identify state actions that would restore the fund's soundness.

Identify Actions To Improve Fund Soundness

The state, in consultation with the region, should identify and develop actions that will improve the fund's soundness. These actions should increase the financial resources of the state fund or reduce its costs sufficiently to close the gap between the fund's resources and its commitments. A state should not pursue actions that would modify the fund to a point that it would no longer meet EPA's requirements to be an approved fund as required in 40 CFR 280.94. These actions could lead to withdrawal of EPA approval of the fund as an FR mechanism.

Identify actions to improve fund soundness

The state should submit to the region a written soundness improvement plan that shows how actions to correct fund deficiencies will proceed. The plan should also describe what remedies will be applied and when the state expects them to show measurable results. The plan should include interim goals over an agreed-upon period with periodic review and dialogue until the region determines that fund soundness is restored.

The region and state should characterize impediments to the fund's environmental performance and estimate resources needed to restore the state fund's soundness. The state should act as quickly as feasible to develop realistic but ambitious steps to address its fund deficiencies. Some remedies for addressing a fund's deficiencies may require legislative changes that take time and resources to implement. Therefore, the region should take into account the timely implementation of state actions to be evidence of a good faith effort by the state to address the identified concerns.

Depending on the circumstances, possible fund soundness remedies might include:

Actions to enhance environmental performance

- *Pursue more aggressive enforcement.* Improved enforcement may increase the responsiveness of parties responsible for cleanups.

- *Improve communication among fund, prevention, and remediation programs.* If these programs are located in independent organizations, better communication may streamline cleanups.
- *Improve claim processing.* Quicker processing of claims may result in remedial action starting sooner.

Actions to limit liabilities

- *Minimize releases.* For example, collaborate with a state’s release prevention program to prevent releases and encourage early release detection and reporting.
- *Reduce cleanup costs.* For example, strengthen competitive bidding for cleanup contracts and revise treatment technology when a site’s cleanup progress stalls.
- *Limit fund eligibility.* For example, focus the fund on federally-regulated USTs.

Actions to increase resources

- *Raise revenues.* For example, consider raising tank fees.
- *Explore financing options.* For example, consider claims financing, revolving loan funds, and issuing bonds.

These are some ways state funds have increased their resources or reduced costs to assure their soundness. States should consider the specific remedies that best match the state-specific circumstances.

Implement Actions To Address Fund Deficiencies

Together, the region and state should develop mutually agreeable steps to remedy the fund’s weaknesses and improve its performance.

Implement actions to address fund deficiencies

The region should provide prompt feedback and work with the state in selecting the most appropriate methods of addressing the fund’s deficiencies and developing a reasonable process to implement restoration. OUST is also available to provide policy and technical support, as needed.

The region may:

- Require the state to develop a set of actions up front to address all deficiencies.

- Accept state initiation of some actions, provided the state agrees to additional actions that can fully remedy the fund’s overall deficiencies.
- Consider and support individual actions as they are proposed by the state even if they do not address all deficiencies, provided the state agrees to additional actions that would restore fund soundness within a period agreed-upon with the region.

Monitor State Actions And Results

To ensure progress, the region should monitor the state’s actions to address fund deficiencies and their effectiveness. While some remedies may not be known or implemented immediately, the region should consider timely state action to be a demonstration that the state is acting in good faith to remedy fund deficiencies.

Monitoring and assessment of state actions and results

As part of a region’s monitoring, it may need more frequent or more specialized information to evaluate the restorative actions. At least annually, the region should monitor and report on state progress to both senior regional and OUST officials.

Determination Of Fund Soundness

If the fund’s deficiencies are corrected within the agreed-upon restoration period and the region expects they are unlikely to recur, then the region should revise its written assessment of fund soundness and resume its normal oversight of the fund. The region should inform the state in writing of the region’s conclusion that the fund’s soundness is restored. The region and state can also revise fund oversight practices at this point to reflect the changed condition of the fund.

Determination of fund soundness

The region also may allow the state additional time if, after the agreed-upon restoration period, the state has made sufficient progress in correcting its fund deficiencies, but further time is needed to fully correct deficiencies and prevent a recurrence. The region’s decision to provide additional time should be based on the state’s level of effort, the progress made, and the fund’s improved soundness.

If the state undertakes restoration plans that in practice become unreasonable or have unacceptable impacts, the state may cease its implementation of those steps and modify its plan. If there are any additional remedies or modifications that the state wants to implement to remedy or prevent future financial deficiency, the state should discuss these with the region and include them in ongoing oversight of the fund.

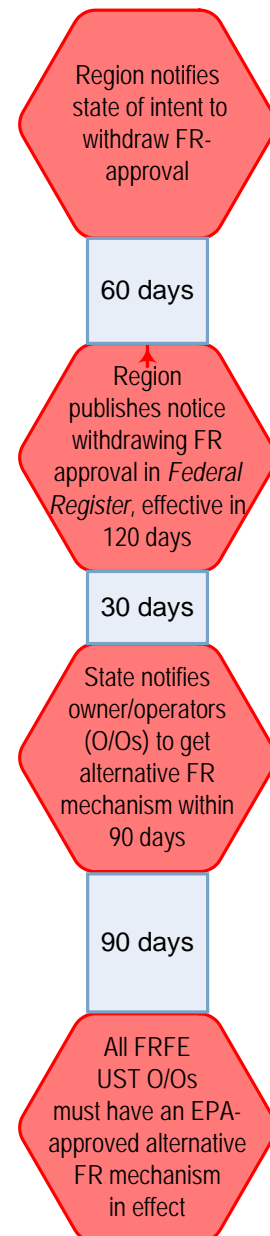
Part 3: Withdrawing State Fund Approval

The region, in consultation with OUST, should decide when a state has exhausted its options for addressing fund deficiencies and whether to initiate the process of withdrawing the fund's approval as an FR mechanism. For example, withdrawal of approval could occur if:

- A state fails to propose or implement any actions to address its fund deficiencies;
- A state unilaterally ceases to implement agreed-upon actions;
- A state fails to modify a plan that is not working; or
- Collaborative, good-faith efforts of the region and state fail to restore the fund's soundness.

The steps and timing following the region's decision to withdraw its approval of a state fund are summarized in Figure 3. The entire process takes a minimum total of 180 days. The state fund remains financially responsible to clean up all FRFE releases reported before the effective date of the region withdrawing approval.

Figure 3. Withdrawing State Fund Approval



Notify State Of Intent To Withdraw Approval

The region should notify the state in writing of the region's intent to withdraw approval of the state fund as an FR mechanism and the effective date of the withdrawal. Prior to publishing a public notice, the region should provide the state with a final opportunity to discuss the region's intent to withdraw approval of the fund. Within 60 days of receiving the region's letter of intent to withdraw fund approval, the state may propose specific steps and milestones for resolving state fund deficiencies. If the region agrees with the proposal and concludes that the likelihood of success is high, then the region should cease the process of withdrawing approval. The region should notify the state in writing that it will continue to monitor the state's actions, and not withdraw the state fund's approval, provided that the state implements the proposal on schedule.

Publish Public Notice Withdrawing EPA FR Approval

If the region concludes withdrawal is still needed after 60 days, the region should publish a notice withdrawing approval of the state fund and the date effective. This notice should be published in the *Federal Register* and state media. The region should also alert news outlets serving UST owners and operators and UST cleanup contractors via trade publications, websites, and associations.

Notify FRFE UST O/Os To Get Alternative FR Coverage

Within 30 calendar days after publication of the notice withdrawing EPA approval in the *Federal Register*, the state should notify its FRFE UST owners and operators that they must obtain another FR mechanism before the effective date of fund withdrawal. This notification allows UST owners and operators time to obtain alternative FR coverage. The effective date of withdrawal will be no sooner than 120 calendar days after publication in the *Federal Register*.

All FRFE UST O/Os Must Have Alternative FR Coverage

Once EPA withdraws approval of the fund, the region should work with the state to ensure that FRFE UST owners and operators have obtained an alternative FR mechanism and are meeting the FR requirements in 40 CFR Part 280 or approved state regulations in SPA states.

Resuming Use Of A State Fund To Fulfill The Federal FR Requirement

If after EPA has formally withdrawn approval of a fund, the state decides it wants to resume use of its fund to fulfill the federal FR requirement, the state should submit a new application for fund approval for the region's review. This new application should follow OUST's *Final Guidance for Reviewing State Funds for Financial Responsibility*, November 17, 1989.

Summary

This guidance provides EPA regions with recommended procedures and factors to consider for monitoring the soundness of state UST financial assurance funds. OUST recommends regions use this guidance to conduct state fund reviews, work collaboratively with states to resolve any state fund deficiencies, and, if necessary, withdraw approval of a state fund as a mechanism of FR.