

Angus Macbeth, Esq.
Sidley and Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Re: Financial Assurance for Corrective Action Beyond the Facility Boundary

Dear Mr. Macbeth:

This is in response to your January 5, 1989 letter concerning current regulations requiring financial assurance for corrective action beyond facility boundaries. Sections 3004(a)(6) and 3004(v) of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), codified at 40 C.F.R. 264.100(e) and 264.101(c), require that corrective action be instituted beyond the facility boundary where necessary and that assurances of financial responsibility for such corrective actions be provided.

As discussed in the December 1, 1987 second HSWA codification rule (52 F.R. 45788), Congress intended that owners and operators of hazardous waste management facilities provide financial assurances for corrective action beyond the facility property boundary. The Agency does not believe that this requirement duplicates other financial assurance requirements such as the third-party liability coverage requirements. (40 CFR 264/265.147). Under 40 CFR 264/265.147 an owner or operator must maintain specific types and levels of coverage for bodily injury and property damage to third-parties. Sections 264.141(g) and 265.141(g) provide that the terms "property damage" or "bodily injury" have the meaning given such terms under applicable state law. Additionally, these terms do not include those liabilities which, consistent with standard industry practices, are excluded from coverage in liability policies for bodily injury and property damage. (40 CFR 264/265.141(g)).

In general we believe that it is both appropriate and likely that onsite or off-site corrective action activities will exceed the common definition and construction of "bodily injury" or "property damage" as found in an insurance policy issued to satisfy RCRA third-party liability coverage requirements. The Agency is also concerned that to allow the use of established liability coverage financial instruments to satisfy known corrective action costs could deplete those instruments, thereby rendering funds unavailable to satisfy the claims of injured third-parties.

However, insurance policies can be used to satisfy financial responsibility for off-site corrective action under the current regulations in certain circumstances.

Specifically, if an insurance carrier determines that off-site corrective action costs are covered under the terms of its policy, and the carrier provides unequivocal documentation of a specified payment to cover all or a part of off-site corrective action activities, then that policy would satisfy all or part of the required financial assurance for corrective action.

The above discussion concerning the use of insurance to satisfy off-site corrective action financial assurance requirements can be extended, under limited circumstances, to the use of other financial assurance instruments for liability coverage provided by a third-party, *i.e.*, letter of credit, surety bond, guarantee and trust fund. Those circumstances could arise only when the off-site corrective action costs are part of a third-party claim against the owner, operator, or holder of the financial instrument and that claim has triggered payment of the instrument pursuant to 40 CFR 264.151(h), (k), (l), and (m). The owner or operator of a facility subject to the financial assurance requirements cannot itself be considered a third-party within the meaning of applicable regulations and instruments.

Similarly, when an owner or operator uses the financial test or corporate guarantee to comply with third-party liability financial responsibility regulations, and a certified settlement or court judgement resulting from a third-party claim for property damage is coincident with all or part of the cost estimate prepared for off-site corrective action, a second mechanism would not have to be used to cover that portion of the corrective action cost. If, in the situation described above, the owner/operator wishes to use the financial test or guarantee to demonstrate compliance with both third-party liability requirements and off-site corrective action financial assurance, the cost estimate to be used in the alternative formula provided in 40 CFR 264.151(g) would be equal to the sum of the third-party liability requirements and any off-site corrective action costs not coincident with the valid third-party claim. The Agency intends to carefully re-examine the procedures and financial instruments requirements for corrective action (51 F.R. 37854), to ensure that owners and operators of facilities are afforded ample flexibility to meet the requirements and that sufficient funds are available to cover all necessary liabilities.

Finally, your letter requests that the issue of duplicative coverage also be examined in the context of the Subtitle D rule. The Agency is considering these issues in the context of the Subtitle D proposal (August 30, 1988 53 F.R. 33314) and will formally respond to any comments concerning this issue as part of the final rule.

Should you have any questions concerning the above matter you may contact Margaret Schneider (382-4696) in the Office of Solid Waste or Anne Ryan (382-7703) in the Office of General Counsel.

Sincerely,

J. Winston Porter
Assistant Administrator