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**McDonald, Jeffrey**

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**From:** Lucinda Low Swartz [LLS@LucindaLowSwartz.com]  
**Sent:** Tuesday, March 25, 2014 6:10 PM  
**To:** McDonald, Jeffrey; Gilmore, Tyler J; Penny Goodwyn; Patrick Maguire; Paul Champagne  
**Subject:** Re: Insurance Coverage for Emergency and Remedial Response Actions  
**Attachments:** Insurance Note[2].docx; Certificate of Insurance for emergency and remedial response\_EPA 032014[2].docx; ENDORSEMENT NO\_EPA[3].docx

And now for the attachments – sorry.

Lucinda Low Swartz, Esq.  
Chief Operating Officer  
FutureGen Industrial Alliance, Inc.  
Telephone: 301/933-4668  
Email: [lswartz@futuregenalliance.org](mailto:lswartz@futuregenalliance.org)

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**From:** Lucinda Low Swartz <[lswartz@futgen.org](mailto:lswartz@futgen.org)>  
**Date:** Tuesday, March 25, 2014 7:06 PM  
**To:** "McDonald, Jeffrey" <[mcdonald.jeffrey@epa.gov](mailto:mcdonald.jeffrey@epa.gov)>, "Gilmore, Tyler J" <[Tyler.Gilmore@pnnl.gov](mailto:Tyler.Gilmore@pnnl.gov)>, Penny Goodwyn <[pgoo@mcgriff.com](mailto:pgoo@mcgriff.com)>, Patrick Maguire <[PMaguire@McGriff.com](mailto:PMaguire@McGriff.com)>, Paul Champagne <[ptchampagne@verizon.net](mailto:ptchampagne@verizon.net)>  
**Subject:** Insurance Coverage for Emergency and Remedial Response Actions

Please forward this message to colleagues who need to participate.

Time: 10am Eastern/9am Central/ 7am Pacific

Attached are:

- (1) Summary notes prepared by Tyler Gilmore
- (2) Draft Certificate of Insurance prepared by EPA, based on draft certificate prepared by McGriff/AIG
- (3) Draft Endorsement prepared by EPA, with comments, based on draft endorsement prepared by AIG

Agenda

- (1) Confirm agreement EPA's proposed Financial Responsibility Attachment (see Tyler's note – from Jeff's email)
- (2) Terms of "draft insurance policy" referenced in proposed Financial Responsibility Attachment
  - (a) Cancellation/renewal terms
  - (b) Are there any other terms still in question?
- (3) Terms of draft endorsement needing resolution (e.g., no coverage for monitoring or site closure activities)
- (4) What does EPA need from the Alliance for its draft permit decision?
  - (a) If insurance issues cannot be resolved quickly, should the trust fund agreement be revised?
  - (b) If the trust fund agreement needs to be revised, does that need to happen before a draft permit decision is issued?
  - (c) If the trust fund agreement is revised to include \$6.1M for emergency and remedial response actions, by when would the funds need to be deposited in the trust fund (e.g., within 7 days of a final permit decision, prior to start of drilling, or prior to start of injection)?

Thanks,

Lucy

Meeting to resolve remaining issues related to Insurance that supports the UIC Financial Responsibility for the FutureGen permit application.

Please use the following call-in number:

**1-877-381-8833,  
passcode 193-2566**

### **Background**

Conference call March 14 discussed the following concern, policy renewal and language in certificate of insurance (please see attached files). The EPA also provided the following responses on the 18<sup>th</sup> and 21<sup>st</sup>

### **EPA comments on Certificate of Insurance**

*On the call, AIG's counsel raised one other issue related to the certificate of insurance. It may now be mitigated by our proposed revisions to the Certificate of Insurance, but we thought it was still worth clarifying:*

*EPA does not read the regulations to require that the insurer would have to tender the face value of the policy in the event FG were to go bankrupt or otherwise end operations. Unlike other financial responsibility instruments outlined in the regulations that are fully funded and provide residual/available funds to satisfy financial responsibility, insurance is a premium-based financial instrument, which basically covers specified events for the duration of the covered activity, if the events were to occur. This is why it is important for the insurance company to factor in the probability of a risk that an event will occur in its issuance of the instrument.*

*Consistent with 146.85(a)(4)(i)(A) "...any funds from the instrument being cancelled must be released within 60 days of notification by the Director.", IAG will not be required to release the face amount of the policy, **unless** a covered incident occurred while the instrument was still in full force **and** there was ongoing remediation activity costing up to that amount after the instrument was cancelled. In that case the insurance company will be responsible to directly paying the expenses related to the financial responsibility activities or reimburse the insured party for those expenses, as requested by the UIC Program Director.*

*If a new owner/operator takes over the operation of the site and continues to pay the premium, that would suffice. If the owner or operator files for bankruptcy, the subsequent coverage will follow bankruptcy proceeding and related court decisions related to keeping the policy in effect.*

### **EPA's proposed Financial Responsibility Attachment to the Permit**

*The Permittee will provide financial responsibility for the cost of implementing the Emergency and Remedial Response Plan through an insurance policy in substantially the same form as the attached draft. Because insurers generally only offer final policy terms once a facility is permitted to operate, and because a policy offer typically extends for only 30 days, Permittee will obtain an insurance policy in substantially the same form as this draft within 60 days of the Effective Date of the Permit and will not commence any construction activity until such a policy is fully executed and effective. The Permittee shall provide a copy of the final insurance*

*policy, which will substituted for this portion of Attachment F as a minor modification to the Permit.*

*If the Permittee is unable to obtain an insurance policy in substantially the same form as the attached draft within 60 days of the Effective Date of the Permit, the Permittee shall have 60 days to provide a substitute demonstration of financial responsibility that is acceptable to the Director. Such a substituted demonstration of financial responsibility shall require a permit modification, and the Permittee may not commence any construction activity until that modification is effective.*

*The attached draft insurance policy addresses the cost estimate for activities that may be covered or required under the Emergency and Remedial Response Plan prior to commencement of injection. No later than 120 days prior to beginning injection under this Permit, the Permittee must submit a revised cost estimate for the cost of implementing the activities that may be covered or required under the Emergency and Remedial Response Plan after injection begins. No later than 60 days prior to beginning injection under this Permit, the Permittee must either revise its existing insurance policy, obtain a new insurance policy, or provide a substitute demonstration of financial responsibility. The Permittee may not begin injection until the Director has approved the cost estimate and demonstration of financial responsibility, and any necessary permit modifications are completed and become effective.*

Certificate of Insurance

Purpose: To satisfy the financial responsibility demonstration for emergency and remedial response under the Class VI Underground Injection Control (UIC) regulations (40 CFR §§ 146.81 – 146.95) for the FutureGen 2.0 Project.

Name and Address of Insured (herein called the “insured”): FutureGen Industrial Alliance, Inc., 73 Central Park Plaza East, Jacksonville, IL 62650

Name and Address of Insurer (herein called the “insurer”):

Injection Wells covered: FutureGen 2.0 Project: Morgan County CO<sub>2</sub> Storage Site Class VI UIC Wells 1-4.

Permit Name: FutureGen Industrial Alliance, Inc.

Permit Numbers: IL-137-6A-0001; IL-137-6A-0002; IL-137-6A-0003; and IL-137-6A-0004

Physical Address: Section 26–Township 16N–Range 9W; latitude 39.800266°N and longitude 90.07469°W

Mailing Address: 73 Central Park Plaza East, Jacksonville, IL 62650

Cost estimate for emergency and remedial response: \$10 million

Face Amount: \$10,000,000.00 total coverage for emergency and remedial response (prior to injection)

Policy Number:

Effective Date:

The insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance for emergency and remedial response for the FutureGen 2.0 Project injection wells identified above. The Insurer further warrants that such policy conforms in all respects with the requirements for the fulfillment of emergency and remedial response obligations described at 40 CFR 146.94, as applicable and as such regulations were constituted on the date shown immediately below.

The insured is responsible to ensure that the insurance does not cancel, terminate, or fail to renew except for failure to pay the policy premiums. The insurer may cancel the policy only for limited conditions outlined specifically in the policy, by sending notice of cancellation by certified mail to the owner or operator and to the UIC Program Director for WPA Region 5. EPA requires that cancellation not become final for 120 days beginning on the date of receipt of the notice of cancellation by the UIC Program Director, as evidenced by the return receipts. A shorter cancellation period is provided for non-payment of the premium because full payment of the entire premium is required before the policy becomes fully binding and effective. In addition the Insured is responsible for renewing the policy if it is set to expire, for the entire term of the emergency and remedial

response phase of the project. The Insurer may include automatic renewal clauses in the policy as long as the Insured has the option of renewal at the face amount of the expiring instrument. Whenever requested by the UIC Program Director, the Insurer agrees to furnish to the UIC Program Director a duplicate original of the policy listed above, including all endorsements thereon.

Authorized signature of insurer \_\_\_\_\_  
Name of the person signing \_\_\_\_\_  
Title of the person signing: \_\_\_\_\_  
Signature of witness or notary \_\_\_\_\_

Date \_\_\_\_\_

ENDORSEMENT NO.

This endorsement, effective 12:01AM,

Forms a part of Policy No:

Issued to:

By:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CARBON STORAGE COVERED OPERATIONS ENDORSEMENT

Solely with respect to Loss arising from the Underground Injection Control (UIC) wells presented in the Underground Injection Control Permit Applications for the FutureGen 2.0 Morgan County Class VI UIC Wells 1, 2, 3, and 4, Supporting Documentation, March 2013 (Revised May 2013 in accordance with the U.S. Environmental Protection Agency's Completeness Review) by FutureGen Alliance, is hereby agreed that:

1. Section I. **INSURING AGREEMENTS, 1 COVERAGES** is deleted in its entirety and replaced with the following:

**COVERAGE B - ON-SITE CLEAN-UP OF NEW CONDITIONS**

1. To pay on behalf of the **Insured, Clean-Up Costs** resulting from a **Pollution Condition** arising from **Covered Operations** on or under the **Insured Property** that first commenced on or after the **Continuity Date**, provided:
  - (a) A **Responsible Insured** first becomes aware of such **Pollution Condition** during the **Policy Period** and such **Pollution Condition** is reported to the Company in writing as soon as possible after such discovery and in any event during the **Policy Period** in accordance with Section III. of the Policy.
  - (b) Where required, such **Pollution Condition** has been reported to the appropriate governmental agency in substantial compliance with applicable **Environmental Laws** in effect as of the date of discovery.
2. To pay on behalf of the **Insured, Loss** that the **Insured** is legally obligated to pay as a result of a **Claim** for **Clean-Up Costs** resulting from a **Pollution Condition** arising from **Covered Operations** on or under the **Insured Property**, which **Pollution Condition** first commenced on or after the **Continuity Date**, provided such **Claim** is first made against the **Insured** and reported to the Company in writing during the **Policy Period** in accordance with Section III. of the Policy, or during the **Extended Reporting Period** if applicable.

**COVERAGE D – THIRD - PARTY CLAIMS FOR OFF-SITE CLEAN-UP RESULTING FROM NEW CONDITIONS**

To pay on behalf of the **Insured, Loss** that the **Insured** becomes legally obligated to pay as a result of a **Claim** for **Clean-Up Costs** resulting from a **Pollution Condition** arising from **Covered Operations**, beyond the boundaries of the **Insured Property**, that first commenced on or after the **Continuity Date** shown below, and migrated from or through the **Insured Property**, provided such **Claims** are first made against the **Insured** and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

**COVERAGE E – THIRD - PARTY CLAIMS FOR BODILY INJURY AND PROPERTY DAMAGE**

To pay on behalf of the **Insured**, **Loss** that the **Insured** becomes legally obligated to pay as a result of a **Claim for Bodily Injury or Property Damage** resulting from a **Pollution Condition** arising from **Covered Operations**, beyond the boundaries of the **Insured Property** that first commenced on or after the **Continuity Date** shown below, and migrated from the **Insured Property**, provided such **Claims** are first made against the Insured and reported to the Company in writing during the **Policy Period**, or during the **Extended Reporting Period** if applicable.

#### **COVERAGE F – EMERGENCY RESPONSE COSTS**

1. The Company will pay **Emergency Response Costs** resulting from a **Pollution Condition** arising from **Covered Operations** on, under or migrating from the **Insured Property**. **Emergency Response Costs** must be first incurred by the **Insured** and reported to the Company during the **Policy Period**.

For this Coverage to apply, all of the following conditions must be satisfied:

- (a) The **Insured** must report the **Emergency Response Costs** to the Company in accordance with Section III. of the Policy.
  - (b) **COVERAGE B – ON-SITE CLEAN UP OF NEW CONDITIONS** is purchased.
2. The Company will pay **Emergency Response Costs** resulting from a **Pollution Condition** caused by **Transportation**. **Emergency Response Costs** must be first incurred by the **Insured** and reported to the Company during the **Policy Period**.

For this Coverage to apply, all of the following conditions must be satisfied:

- (a) The **Insured** must report the **Emergency Response Costs** to the Company in accordance with Section III. of the Policy.
- (b) With respect to Transportation, **COVERAGE I – THIRD-PARTY CLAIMS RESULTING FROM THE TRANSPORTATION OF CARGO** is purchased.

#### **Continuity Date: (Inception Date)**

2. Section **VIII. DEFINITIONS**, Paragraph **F. Clean-Up Costs** and **H. Covered Operations** is **deleted** in its entirety and replaced with the following:

**F. Clean-Up Costs** means reasonable and necessary expenses, including legal expenses incurred with the Company's written consent which consent shall not be unreasonably withheld or delayed, for the investigation, removal, treatment including in-situ treatment, remediation including associated monitoring, or disposal of soil, surfacewater, groundwater, or other contamination beyond the boundaries of the **Injection Zone**:

1. To the extent required by **Environmental Laws**; or
2. That have been actually incurred by the government or any political subdivision of the United States of America or any state thereof or Canada or any province thereof, or by third parties.

**Clean-Up Costs** also include **Restoration Costs**.

**H. Covered Operations** means:

- i. the injection and storage of Carbon Dioxide and all other materials or components captured into the Injection Zone through the permitted underground injection

control (UIC) wells, including all ancillary and associated operations, at the **Insured Property**;

- ii. the transfer, temporary storage, capture, scrubbing, compression, and dehydration of Carbon Dioxide in preparation for such injection including equipment utilized to support such activities; and
- iii. the construction, drilling and installation of the permitted underground injection control (UIC) wells and associated equipment and infrastructure.

3. Solely with respect to any **Pollution Condition** below ground surface, **Section VIII. DEFINITIONS**, Paragraph CC. **Pollution Condition** is deleted in its entirety and replaced with the following:

**CC. Pollution Condition** means the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, low-level radioactive material, electromagnetic fields, medical waste including infectious and pathological waste and waste materials, beyond the boundaries of the **Injection Zone**, including carbon dioxide and other materials captured pursuant to the **Permit for Injection**, provided such conditions 1) are not naturally present in the environment in the amounts or concentrations discovered, or 2) otherwise result from man-made activities.

4. Section VII. **EXTENDED REPORTING PERIOD FOR CLAIMS - COVERAGES A THROUGH I**, Paragraph B. **Optional Extended Reporting Period** is deleted in its entirety.
5. Section III. **NOTICE REQUIREMENTS AND CLAIM PROVISIONS**, Paragraph B. **NOTICE OF POSSIBLE CLAIM** is deleted in its entirety.
6. The following is added to Section II. **EXCLUSIONS**:

#### **4. COVERAGE B and D EXCLUSIONS**

The following Exclusions apply to Coverage B and D.

This Policy does not apply to **Clean-Up Costs** or **Claims for Clean-Up Costs**:

#### **MONITORING COSTS:**

Due to monitoring costs associated with the **Covered Operations** as specified and otherwise required pursuant to the **Permit for Injection**.

#### **CLOSURE/POST CLOSURE ACTIVITIES**

Due to costs for Closure or Post Closure Activities

7. Section VI. **CONDITIONS** is amended by the addition of the following:

**Compliance with Permit** - By acceptance of this Policy, the **Responsible Insured** agrees to comply with and enforce the **Permit for Injection** and acknowledges that this Policy is issued in reliance upon such agreement.

8. Section VIII. **DEFINITIONS** is amended by the addition of the following:

**Injection Zone** means the Mount Simon Sandstone and the Elmhurst Sandstone member of the Eau Claire formation as described in the Underground Injection Control Permit Applications for the FutureGen 2.0 Morgan County Class VI UIC Wells 1, 2, 3, and 4, Supporting Documentation, March 2013 (Revised May 2013 in accordance with the U.S. Environmental Protection Agency's Completeness Review) by FutureGen Alliance

**Permit for Injection** means the Underground Injection Control Permit Applications for the FutureGen 2.0 Morgan County Class VI UIC Wells 1, 2, 3, and 4, Supporting Documentation, March 2013 (Revised May 2013 in accordance with the U.S. Environmental Protection Agency's Completeness Review) by FutureGen Alliance (this citation will be modified when the final UIC permit is issued by EPA)

Section **VI. CONDITIONS** is amended by the addition of the following:

**Renewal** - The Company agrees to renew this Policy upon its expiration date, provided that the Company continues to offer insurance substantially similar to the insurance provided by this Policy, and the **Insured** has complied, at the time of the expiration of this Policy, with all of the following conditions:

1. In the sole judgment of the Company, all terms and conditions of the Policy have been completely satisfied, including payment of premium;
2. The **Named Insured** provides the Company with a properly completed and signed renewal application not more than 30 days and not less than 10 days prior to the expiration date of this Policy;
3. Use of the **Insured Property(s)**, in the sole judgment of the Company, has not materially changed from the use described in the application which forms a part of this Policy. However, any such **Insured Property(s)** which has a material change in use shall not prejudice the **Named Insured's** rights to renewal as described herein provided the Company may exclude such **Insured Property(s)** at the renewal of this Policy; and
4. At the time of policy expiration, Incurred Loss shall not exceed 50% of the policy premium stated in the Declarations. Incurred Loss means paid losses by the Company and outstanding loss reserves set by the Company for **Clean-Up Costs** and **Loss** covered under this Policy. For purposes of the Incurred Loss calculation, Incurred Loss shall not include the Self-insured Retention layer which is borne by the Insured.

The Company reserves the right to modify the terms and conditions of any subsequently issued policy as follows: (i) the renewal rate may increase but shall not be more than 20% higher than the rate offered for this Policy and (ii) the self-insured retention may increase but shall not be more than \$2,000,000 Each Incident. The **Insured** agrees that the Company in taking such action shall not be considered in violation of the agreement to renew this Policy pursuant to the conditions set forth above.

However, if the Company does not offer renewal terms for any reason, including the exceedance of loss ratios as set forth herein, the Company shall extend this policy by 90 days for additional premium.

All other terms, conditions, and exclusions shall remain the same.