

The Honorable Paul E. Gillmor
Chairman
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On November 3, 2000, the Environmental Protection Agency (EPA) received a letter from former Chairman Oxley. Enclosed is my response to the former Chairman's letter. The purpose of the Chairman's letter was to inquire about EPA's policy for reviewing and assessing "financial assurance" obligations under the Resource Conservation and Recovery Act (RCRA). For your convenience, I am also enclosing a copy of letter we received.

This past May, a major provider of environmental surety bonds lost its listing in the U. S. Treasury's Circular 570. EPA's regulations require an owner or operator who uses surety bonds to demonstrate financial assurance to use a surety that is listed in Circular 570. The letter expressed concern that the Agency is reacting to this event by heightening its scrutiny of all financial assurance products, and therefore, is subjecting sound companies to unreasonable delays or limitations. EPA shares the Chairman's interest in assuring that legitimate companies offering legitimate products have the necessary funds available for the effective closure of our nation's landfills. Following are answers to the five questions the former Chairman raised in his letter.

1. Has EPA issued a directive to its regional offices or to states calling for greater scrutiny of financial assurance agreements?

No, EPA has not issued any new directives to its regional offices or to states calling for greater scrutiny of financial assurance agreements. Our response number four provides more information on the process we and the states have been using for reviewing financial assurance agreements.

2. Has EPA regional offices or states been encouraged by National Headquarters to subject such agreements to increased scrutiny?

EPA believes that reliable financial mechanisms are important to the safe management of solid and hazardous waste. Our response number four provides an explanation of the process we and the states have been using to review financial assurance agreements and assess the financial ability of providers. Our headquarters office has not encouraged a change in the level of scrutiny that should be used in this review process.

3. Is greater scrutiny of all financial assurance agreements warranted on the basis of a single company's experience? Should each agreement be assessed separately, or should the overall soundness of the entity providing the product be considered?

As stated above, EPA has not asked states and regions to subject financial agreements to greater scrutiny than normal. At this point, we do not believe that such guidance is necessary. However, the difficulties you cited with a financial assurance provider, and recent difficulties of at least one other insurance provider, indicate that careful attention by the RCRA program to financial assurance requirements is important.

As explained in more detail in response number four, EPA believes that each financial assurance agreement should be reviewed separately for consistency with the national regulations in order to ensure that funds will be available if necessary. Without this process, the cost of care for waste facilities could fall to the general public. The overall soundness of the entity is considered in the national regulations, which rely on examinations by agencies that regulate or evaluate the providers of the mechanisms.

4. How do regulatory agencies go about reviewing financial assurance agreements and assessing the financial ability of providers? What type of financial expertise must they demonstrate?

EPA's hazardous waste regulations in 40 CFR 264.151 specify the actual language of the agreements. States who have adopted these regulations can assess whether the language of the agreement that they have received matches the language of the regulations. If an aspect of the agreement is not covered by the prescribed language in the regulations, then the states must ensure that the agreement as a whole complies with the regulations and is an enforceable document. Reviewers of an agreement must possess a knowledge of the regulations to ensure that the agreement will be enforceable.

In addition to ensuring that the agreements are enforceable, the agreements must be issued by financially viable providers. EPA's regulations do not require EPA or state environmental agencies to directly assess the financial viability of providers. Instead, the regulations rely upon examinations by other agencies to ensure the financial viability of providers. For example, a "trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State Agency." A surety must be listed as accepted on the U.S. Treasury's Circular 570. In the case of insurance, "the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States."

A reviewer of a financial assurance agreement must determine whether the provider meets the requirements of the regulation (for example, whether the surety is listed on Circular 570), but does not have to determine the financial ability of the provider. Instead, the provider's financial ability would be determined by another agency (such as the U.S. Treasury) which specializes in such determinations. Thus, the environmental agency does not have to demonstrate the financial expertise to make a determination of financial ability independently, and can defer to the judgement of the agency examining the provider.

5. How does EPA deal with review policies that may differ region by region? Is there a need to ensure some degree of uniformity?

As mentioned above, EPA's national regulations are very specific about what requirements are needed for financial assurance agreements. The need for consistency and uniformity is met through requirements outlined in national regulations and EPA headquarters guidance. Under RCRA, however, states can choose to be more stringent in their policies and how they implement their programs.

In order to provide an additional degree of uniformity, regions and states raise issues on a case-by-case basis, and EPA Headquarters serves to provide guidance to address these issues. We share our interpretations with states, regions, and the public through our RCRA Online database, which includes all of our regulatory interpretations on the hazardous waste program. This information is available on the web at <http://www.epa.gov/rcraonline>.

Thank you for your interest in this matter. If I can be of further assistance, please contact me at (202) 260-4610, or your staff may wish to contact Dale Ruhter of my staff at (703) 308-8192.

Sincerely yours,

Michael H. Shapiro
Acting Assistant Administrator

cc: The Honorable Michael G. Oxley

Enclosure

RO 14543