



THE ADMINISTRATIVE WATCH

ADMINISTRATIVE WATCH ADDRESSES ENVIRONMENTAL, HEALTH & SAFETY ISSUES

BCCZ

BABST | CALLAND | CLEMENTS | ZOMNIR

A PROFESSIONAL CORPORATION

Volume 9

Issue 4

May 2006

IS YOUR FINANCIAL (assurance) HOUSE IN ORDER?

*EPA's RCRA Corrective Action Financial Assurance Guidance
is sure to shake up your house!*

If one of your sites is subject to corrective action under the federal Resource Conservation and Recovery Act (RCRA) and/or a delegated state corrective action program, you may be required to financially assure for corrective action. As you may know, the Hazardous and Solid Waste Amendments of 1984 (HSWA) to RCRA provided the U.S. Environmental Protection Agency (EPA) with authority to require financial assurance for covering the anticipated costs of conducting corrective action for releases of hazardous waste or hazardous constituents from any solid waste management unit at permitted and/or interim status hazardous waste treatment, storage and/or disposal facilities (TSD facilities). Specifically, RCRA § 3004(u) requires that RCRA permits issued after November 8, 1984 contain corrective action requirements, including, but not limited to, the requirement to provide financial assurance for completion of corrective action. Further, the implementing regulations at 40 C.F.R. § 264.101(b) require RCRA TSD facility permits to contain language requiring financial assurance for completing selected corrective action remedies. However, the regulations do not mandate: (1) the use of specific types of mechanisms for meeting the financial assurance obligations; or (2) specific time frames by which financial assurance instruments must be in place. Similarly, RCRA § 3008(h) provides EPA with the authority to issue corrective action orders to RCRA interim status TSD facilities. However, RCRA § 3008(h) is silent regarding any corrective action financial assurance requirements.

It has been our experience that EPA, as well as authorized state environmental regulatory agencies that have been delegated authority for administering the RCRA corrective action program, does not typically require the posting of financial assurance for corrective action under either the TSD facility permitting or interim status corrective action order scenarios because, by the time a final corrective action remedy is selected, implementation of the remedy typically occurs over an accelerated time frame (*e.g.*, from a few months to a few years) making financial assurance largely unnecessary.

In contrast, it has been our experience that EPA, as well as authorized state environmental regulatory agencies, may be more likely to require the posting of financial assurance for corrective action remedies that are well defined and will be implemented well into the future. In such cases, upon agency approval of a corrective measure, the agency could force the TSD facility to immediately obtain financial assurance in an amount specified by the agency to cover the approved corrective action activities.

Two gateway center

Pittsburgh, PA 15222

412.394.5400

WWW.BCCZ.COM

The recent issuance of EPA guidance on cost estimates and financial responsibility for use in finalizing RCRA § 3008(h) interim status corrective action orders is likely to prompt EPA and authorized state environmental regulatory agencies to take a much more aggressive role in requiring financial assurance mechanisms for corrective action activities in the future.

Specifically, on February 8, 2006, EPA's Director of the Office of Site Remediation Enforcement issued a memorandum entitled "Model Provisions for Cost Estimates and Financial Responsibility for Use in RCRA § 3008(h) Administrative Order on Consent." This memorandum provides the EPA Regional Offices with model language to replace the general language in the December 15, 1993 "Model RCRA § 3008(h) Consent Order." The 1993 language generally stated that EPA may require TSD facilities to establish some form of financial assurance but was silent on the types of financial assurance mechanisms available and on any trigger dates for securing financial assurance instruments. In contrast, in line with EPA's Fiscal Year 2006-2007 focus on compliance with financial assurance requirements as a national priority, the use of the model language will likely require more interim status TSD facilities to obtain a financial assurance mechanism(s) to cover their corrective action obligations. In addition, we expect that such language will likely be incorporated into RCRA TSD facility permits and other remediation agreements (*e.g.*, Superfund, Brownfields) in the future.

A copy of the above-referenced memorandum and/or a succinct summary of the model language are available by contacting Colleen Grace Donofrio in BCCZ's New Jersey office at (856) 686-4608 or cdonofrio@bccz.com.