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Kenneth R. Meade

+1 202 663 6196 (t)
+1 202 663 6363 (f)
kenneth.meade@wilmerhale.com

By Hand

Catherine McCabe
Principle Deputy Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 2201A
Washington, DC 20460

Re: Corporate Environmental Enforcement Council
Financial Assurance Enforcement Priority

Dear Ms. McCabe:

We want to thank you again for meeting with the members of the Corporate Environmental Enforcement Council ("CEEC") regarding the U.S. Environmental Protection Agency's ("EPA" or the "Agency") enforcement program and priorities. The member company representatives were very interested in your comments and appreciative of the time you took to answer our questions and in your willingness to work with us to address some of the policy issues that we discussed. In that regard, we would like to share with you our views with respect to several issues relating to the CERCLA and RCRA "financial assurance" mechanisms and the enforcement priority that the Agency has placed on them.

As an initial matter, we believe that the financial assurance program is actually one of the better success stories that EPA can tell. For purposes of this letter and our ongoing dialogue, we refer to "financial assurance program" to include the regulations at 40 C.F.R. Part 264, Subpart H (applicable to permitted RCRA treatment, storage and disposal facilities), as well as the Agency's policy determination to apply those financial assurance requirements and mechanisms at RCRA corrective action and Superfund sites.

Subject to some of the specific issues that we discuss below, we believe that the program has worked reasonably well. While there may have been a small number of cases where the lack of a viable financial assurance mechanism has resulted in cleanup costs to the taxpayer, we question whether the result was due in any measure to a failure of the financial assurance program, and therefore whether this program truly deserves to be the subject of an enforcement priority, particularly given the overall success of the program. In addition, it is our understanding that some individual states with responsibility for the RCRA financial assurance programs pursuant to EPA authorization have reacted to the Agency's decision to make financial assurance an enforcement priority by making compliance with the requirements more difficult, not necessarily because of any specific problems but simply because financial assurance has been identified as an enforcement priority.

The purpose of this letter, however, is not to debate the merits or success of the financial assurance program, but rather to identify a couple of areas where we would like to discuss potential ways to improve the program. We identify and briefly discuss four issues below, and we would welcome the opportunity to arrange a time to discuss them with you and other appropriate Agency staff.

Continued Viability of Financial Test. CEEC believes that the financial test remains a financially sound mechanism for use as a financial assurance instrument, a conclusion supported by the January 11, 2006, memorandum from EPA's Environmental Financial Advisory Board ("EFAB"), where EFAB supported the continued use of the financial test. We are aware that there are critics of the financial test who believe that it is not adequate, claiming alternatively that current financial condition does not guarantee sufficient resources will be available in the future, that the reliability of audited financial statements has been adversely impacted by recently documented corporate accounting problems, and that environmental regulatory agencies do not have the requisite financial skills required to monitor, on an ongoing basis, a company's financial condition. CEEC believes that each of these criticisms is without merit and/or insufficient to warrant elimination, or significant modification, of the financial test. CEEC also supports and agrees with the comments submitted to EPA by the RCRA Corrective Action Project by letter dated October 14, 2005.

We are not aware of anything more than anecdotal references to instances where companies that have used the financial test have "failed," leading to cleanup costs ultimately borne by the government/taxpayers. In addition, there are reporting requirements for companies utilizing the financial tests pursuant to which they are required to submit updated information to the applicable regulatory authority annually. This mechanism ensures that the financial condition of the submitting company remains sufficiently strong to meet the regulatory requirements; if the company's condition falls below the regulatory threshold, the company will not be able to make the required submission and will be forced to secure additional and/or replacement assurance mechanisms.

This system has, in practice, worked very well. As EPA recognized in the "Evaluation Report" issued by the Office of Inspector General, even in those instances where companies that were using the financial test faced financial difficulties, the periodic reporting identified the problem and "the affected State regulatory agency successfully obtained alternative instruments from the companies."[1] This is exactly the way the system was designed to work; CEEC members also report that this system does in fact work as intended, with the result that a company that becomes ineligible to use the financial test is forced to put in place one of the other authorized instruments.

With respect to the issue of the capacity of state regulatory agencies to appropriately monitor companies' compliance with the financial assurance requirements, specifically a company's use of the financial test, we believe that this is an issue that is appropriately the subject of the EPA-state training that is currently being undertaken, and it should not be used as a tool in the effort to

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1 . *"Continued EPA Leadership Will Support State needs for Information and Guidance on RCRA Financial Assurance,"* U.S. Environmental Protection Agency, Office of Inspector General, Report No. 2005-P-00026 (September 26, 2005), pp. 6-7.

substantially modify or eliminate the ability to use the financial test as a method of complying with financial assurance requirements. In that regard, we support EPA's commitment to continuing to provide financial assurance training to State regulatory agencies.

Financial Assurance in Multi-Party Proceedings. Several CEEC member companies are or have been involved in multi-party CERCLA or RCRA proceedings where the Agency, usually the appropriate Regional office, requires, at one stage or another of the process, that individual potentially responsible parties ("PRPs") secure financial assurance for the entire cost of the matter. This is true even where the PRPs have agreed and proposed to make individual commitments to secure financial assurance for an allocated share of the total costs, such that the total costs are covered.

While EPA may not believe that this poses a hardship for PRPs, the Agency should understand that companies that are not able to meet the self-insuring financial test for one reason or another incur real costs in securing the trust fund, surety bond, letter of credit, or insurance to meet those obligations.

A hypothetical illustrates the illogical result: 5 PRPs have agreed to each be responsible for 20% of the costs of a cleanup where the total costs are $20 million (i.e., $4 million each), and to secure financial assurance covering that amount. EPA requires, however, that each PRP secure $20 million in financial assurance, and one of the PRPs that could meet the financial test for a $4 million commitment cannot meet the test for a $20 million commitment. The result: $100 million in financial assurance for a $20 million cleanup, with one PRP incurring costs above and beyond what is necessary to ensure that adequate funds will be available when needed to undertake the cleanup.

CEEC understands and appreciates the need to ensure that there are financial assurance mechanisms in place in each case where such requirements apply that are sufficient to cover 100% of the required financial assurance amount. EPA does have the ability, through carefully crafted provisions in Consent Orders or other documents, to ensure that instruments are in place (and remain in place) to cover 100% of the required amount without imposing the draconian requirement that each party assure for the entire amount.

Indeed, CEEC member companies are involved in a number of matters where the Agency has approved a scheme where the PRPs allocate responsibility among themselves for covering the required amount for financial assurance, rather than requiring that each party cover the entire amount. Our concern, however, is that this scenario seems to be the exception rather than the rule, and it seems to us that the Agency should be promoting this type of arrangement and discouraging regions or states from requiring that each PRP have a mechanism in place assuring the entire amount.[2]

We are not aware that the Agency has, through guidance or otherwise, recently communicated with its regional offices and/or individual states regarding the preferred practice for financial assurance at

[2] We also note that accounting practices may restrict or prohibit publicly traded companies from providing financial assurance coverage for liabilities that have been allocated to other, unrelated entities.

multi-party sites. We respectfully suggest that the Agency should consider issuing guidance to the regions and to states regarding this issue, emphasizing that the goal of ensuring coverage of 100% of the determined amount can and should be achieved in a manner that is fair and equitable to the parties involved. In addition, we also suggest that this issue be incorporated into the ongoing regional and state training programs. We would be happy to meet with you and other Agency staff to further discuss this issue.

Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards. We understand that the Agency takes the position that companies seeking to use the self-insuring financial test must use financial statements meeting Generally Accepted Accounting Principles ("GAAP") in demonstrating that certain of the regulatory provisions have been satisfied. One of the requirements associated with the use of the financial test includes the obligation to submit " a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year." 40 CFR 264.143(f) (3)(ii). The regulations further provide that "independently audited refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards." 40 CFR 264.141(f). Generally accepted auditing standards include a statement regarding whether the financial statements that are the subject of the audit were prepared in accordance with GAAP. The regulations also provide that "the definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices." 40 CFR 264.141(f).

Despite these somewhat indirect references to GAAP, there is no express requirement in the financial assurance regulations at 40 CFR 264.143(f) to use GAAP. By reading a GAAP requirement into these regulations, EPA effectively precludes many foreign companies operating in the United States who use financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") developed by the International Accounting Standards Board (IASB"), rather than GAAP financial statements, in the normal course of their business from using the financial test. We do not believe that this differentiation is warranted, as financial statements prepared in accordance with IFRS are no less dependable than those statements prepared in accordance with GAAP. Indeed, as noted below, the U.S. Securities and Exchange Commission has acknowledged that IFRS and GAAP are "...both sets of high-quality accounting standards that are similar to one another in many respects."[3]

As a result of the Agency's position, these companies are forced to incur additional expenses to either create a new set of financial statements, reconciled to GAAP, or secure one of the other

[3] *Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP*, Securities Act Release No. 33-8879, Exchange Act Release No. 34-57026 (Dec. 21, 2007), at 20 (*available at* http://www.sec.gov/rules/final/2007/33-8879.pdf).

acceptable instruments. This result does not seem equitable, nor does it reflect the modern reality regarding financial instruments in the global context.

We note that last November the U.S. Securities and Exchange Commission promulgated a final rule allowing, for the first time, the use of financial statements from foreign private issuers without reconciliation to GAAP principles where those statements are prepared using IFRS.[4] In promulgating this rule the SEC noted: "Specifically, the Commission has adopted rules to encourage the use of IFRS, which has become increasingly widespread throughout the world. Approximately 100 countries now require or allow the use of IFRS, and many other countries are replacing their national standards with IFRS."[5]

In light of the foregoing, CEEC believes that there is no logical reason for the Agency to require that companies that in the normal course prepare IFRS-compliant financial statements be precluded from using those statements to satisfy the financial test mechanism for use in complying with financial assurance requirements. We would like to discuss with the Agency the best way to provide relief for these companies by following the SEC's lead and allowing the use of documents prepared in accordance with IFRS.

EPA and State Investigation of Companies' Historical Compliance with Financial Assurance Requirements. We would like to bring to your attention one final issue with respect to the enforcement priority placed on the financial assurance requirements. We have become aware of several instances where state agencies and EPA regional offices have begun to investigate companies' past compliance with financial assurance requirements, including burdensome information requests seeking documentation of compliance with financial assurance requirements dating back several years.

CEEC believes that the focus of the Agency's inquiry into financial assurance is better aimed at ensuring that (a) there are financial assurance mechanisms **currently** in place for each matter for which financial assurance is required, covering the amount that has been determined to be appropriate, and (b) the financial assurance mechanisms that are **currently** in place meet applicable regulatory requirements. EPA and the states have historically indicated that they do not have sufficient resources to monitor compliance with financial assurance requirements; in light of these resource issues, CEEC respectfully submits that those resources should be devoted to ensuring that current financial assurance obligations are met and that the appropriate instruments are in place, and not on whether companies have retained documents showing that financial assurance mechanisms were in place three, four or even five years ago. Further, such inquiry into past financial assurance often does nothing more than create an administrative burden for the regulated community – requiring retroactive amendments of assurance statements (typically to comport to administrative "form" rather than any concern over the substantive adequacy of the assurance) provides no actual benefit with respect to current or future activities, obligations or financial assurance.

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4 *Id.*

5 *Id.*, at 2.

As we indicated when you met with us in December, we look forward to continuing to work with the Agency on enforcement issues such as this, and we would appreciate the opportunity to meet with you and your staff to discuss these issues in greater detail.

Very truly yours,

Kenneth R. Meade