DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission

Hazardous Materials and Waste Management Division

6 CCR 1007-2

STATEMENT OF BASIS AND PURPOSE
AND SPECIFIC STATUTORY AUTHORITY FOR

Part 1 – Regulations Pertaining to Solid Waste Sites and Facilities (6 CCR 1007-2)
Amendment of Financial Assurance Regulations – Deletion of Section 1.8 of the regulations; Addition of Section 4 to the regulations

Basis and Purpose

I. Statutory Authority

These amendments to 6 CCR 1007-2, Part 1 are made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 30-20-104.5, C.R.S and § 30-20-109, C.R.S.

Statement of Basis & Purpose

The purpose of the current Part 1.8 and the future Part 4 of the solid waste regulations is to provide assurance that funds will be available to the Department when needed for adequate closure and post-closure of, and corrective action at, solid wastes disposal sites and facilities should the owner and operator become financially insolvent. These regulations require the owners and/or operators to estimate the costs of closure, post-closure and corrective action and assure financial responsibility for those costs through any of nine mechanisms: trust fund, letter of credit, surety bond, insurance, corporate financial test, local government financial test, corporate guarantee, local government guarantee, and certificate of deposit.

These changes to the financial assurance regulations are a result of, and response to, concerns of the Department after many years of program implementation. Vulnerabilities in the existing regulations that have been exposed by research done by EPA's Environmental Financial Advisory Board (EFAB), and effects of the 2008 economic recession. The proposed regulatory changes were developed with the help of a series of four stakeholder meetings at which comments were received from interested parties, discussed, and incorporated as appropriate. Work on the regulatory language may continue up to the rulemaking hearing date. It remains the Department's goal to resolve all stakeholder concerns by the hearing date.

43 **Discussion of the Regulatory Proposal**
44
45 This rulemaking proposes to make the solid waste financial assurance requirements a stand-alone
46 section of the regulations by moving the requirements from Section 1.8 to Section 4, which is
47 currently empty. This simplifies Section 1 of the regulations, gives appropriate emphasis to the
48 financial assurance requirements, and makes the solid waste regulations consistent with the
49 hazardous waste regulations where financial assurance requirements are in a separate section.
50
51 I. The significant changes proposed in this rulemaking fall into the five groups listed below, all
52 of which are discussed in the following sections:
53
54 1. Clarification of the role of the local governing authority,
55 2. Elimination of pay-in periods for new non-landfill facilities,
56 3. Adding requirements for financial assurance coverage of corrective action liabilities,
57 4. Eliminating requirements for stand-by trusts, and
58 5. Strengthening the requirements for insurance and captive insurance companies.
59
60 1. <u>Clarification of the role of the local governing authority</u>
61
62 The role of the local governing authority is prominent and vital in the solid waste statutes and
63 regulations. This is true in the existing Section 1.8, where the local governing authority is
64 involved with the Department in many review and consultation processes and decision
65 points. While our experience has been that the local governments have less expertise in
66 financial assurance than Department staff and almost always default to agreement with
67 Department positions, local government stakeholders opposed having their role significantly
68 diminished. On the other hand, the regulated community was concerned that, if the role of
69 the local governing authority remained unchanged from the previous regulations, regulated
70 entities could find themselves in a situation where the Department had approved their
71 financial assurance mechanism or updated cost estimates, but the local governing authority
72 never indicated a decision. This would leave the regulated entity at risk in terms of the
73 adequacy of their financial assurance. To solve this problem, the Department and the
74 stakeholders have developed draft regulations that define two levels of local government
75 involvement. The higher level of local government involvement is “consultation.”
76 Consistent with the Solid Waste Act, the draft regulations include a consultation role for the
77 local governing authority in a) all approvals of new financial assurance, including initial
78 financial assurance for new facilities and any subsequent financial assurance for corrective
79 action, b) all instances where financial assurance is being terminated for any facility (except
80 those instances where one financial assurance mechanism is being terminated in favor of a
81 new or different mechanism), and c) in approving situations where a single financial
82 assurance mechanism is being used to cover multiple solid waste sites and facilities which
83 may be owned by different owners or operators. An invitation for local government
84 consultation will come from the Division and will require an affirmative response from the
85 local government by a date set by the Division. The lower level of local government
86 involvement is “notification.” Notifications may come from the Division or the owner or
87 operator and will not require an affirmative response from the local government.

2. Elimination of pay-in periods for new non-landfill facilities

It is clear from the federal financial assurance regulations for solid waste that allowance of a pay-in period for trust funds was intended only for use by landfills. The problem is that the current Colorado regulations do not limit pay-in period to landfills, but allow the use of pay-in periods for all solid waste facilities. This has created current situations where a facility reaches a point where it can present its maximum closure risk, but is still many years from full-funding of their trust fund.

The Department believes that pay-in periods for financial assurance trust funds are appropriate for facilities that accumulate closure and post-closure liabilities slowly. Most disposal facilities (landfills and monofills) would fit in this category because as new cells are constructed and filled, which can take many years, closure and post-closure liabilities expand slowly. Conversely, risk does not accumulate slowly at other types of solid waste facilities such as impoundments, waste treatment facilities, and compost facilities. These facilities typically reach capacity quickly, long before any pay-in period has accumulated the needed financial assurance protection. If these facilities were to become financially insolvent, the Department would be at risk of having to cover the vast majority of closure, post-closure and corrective action costs.

This regulatory proposal allows all current facilities that have pay-in periods to continue to operate under those pay-in schedules, unless the facility does not comply with the pay-in schedule. This proposal will also continue to allow new landfills to use pay-in periods. However, the proposal eliminates pay-in periods for other solid waste facilities such as new impoundments, waste treatment facilities, and compost facilities.

3. Adding requirements for corrective action coverage with financial assurance

When a solid waste facility has a confirmed release of contaminants to the environment that requires monitoring or remediation, corrective action is required. Depending on the severity of the release, corrective action could be limited to monitoring the contamination to ensure that it naturally attenuates over time, or the corrective action may involve complicated and costly remediation projects. The Department must be able to pay these costs if the owner and/or operator become financially insolvent. Therefore, the Department must be able to call upon adequate financial assurance to be able to complete the corrective action liabilities.

4. Eliminating requirements for stand-by trusts

In the years since the regulations were promulgated, Colorado has developed alternatives to, and no longer needs, stand-by trust accounts for receipt of financial assurance funds. This should be good news to regulated facilities as the account set-up and administration fees paid for these accounts are expensive.

5. Strengthening the requirements for insurance and captive insurance companies

A. Requirements for Insurers.

These proposed regulations strengthen the requirements for insurance companies to include qualifications for the insurer. The insurer must, at a minimum, be licensed to transact the business of insurance in the State of Colorado, attain a rating of A- or better from A.M. Best, be eligible to provide insurance as an excess or surplus lines insurer of more than $100 million in one or more States, and submit a copy of the proposed insurance policy to the Department for review before it is in full force and effect.

The Department has chosen to utilize an A.M. Best rating to assure that the insurer has the financial strength to secure their liabilities. A.M. Best is a third party rating agency that evaluates all insurers and is the top rated third-party agency to provide their type of analysis and research. A rating of A- means that the insurer has a very good financial prognosis and is not at risk of becoming financially insolvent. An insurer will also have to demonstrate that they have at least $100 million or greater in capital and surplus beyond the liability of their outstanding policies. This will assure that the liability covered by the policy will be guaranteed even if other outstanding policies are paid in full. The Department is also requiring an owner and/or operator to submit the insurance policy to the Department before it is approved for financial assurance. This will ensure that the policy coverage adequately meets the required needs of the closure, post-closure and/or corrective action at the facility before the policy is bound.

B. Requirements for Captive Insurance Companies.

These regulations also strengthen the requirements for captive insurance providers. Captive insurance is insurance issued by a wholly-owned subsidiary of the company being insured. The financial health of the captive insurance company is closely tied with the parent company, so if the company encounters financial difficulties there is no guarantee that the captive insurance company would retain the necessary resources to fund any closure and post-closure liabilities they may have.

The Department has had concerns about captive insurance for some time. These concerns include the following:

1. A lack of independence, and thus the transfer of risk, between the captive subsidiary and the insured parent company.
2. A lack of consistent requirements for captives with regard to minimum capitalization thresholds, reserves, and encumbrances on reserves.
3. A general lack of Department expertise in monitoring and reviewing the financial state of captive insurance providers and their parent companies.
4. The financial viability of companies (and their captive insurance providers) can change very rapidly.

178 To address these concerns, and to address comments received from stakeholders, the
179 Department sought additional outside expertise on captive insurance from the
180 Colorado Division of Insurance (part of the Department of Regulatory Agencies); the
181 Vermont Department of Financial Regulation, and the U.S. Environmental Protection
182 Agency. We very much appreciate the input we received.
183
184 We believe our concerns have been adequately addressed by adding the same
185 requirements that were added for all insurers, as explained above. In addition,
186 requirements have been added that the captive insurer be domiciled in a jurisdiction
187 accredited by the National Association of Insurance Commissioners (NAIC) and be in
188 good standing with the domiciliary regulator. Further, the captive insurer must give
189 the Department at least 180 days of notice before cancelling a captive insurance
190 policy.
191
192 The Department had originally proposed that all captive insurance companies be
193 domiciled in Vermont because Vermont regulates more captive insurance entities
194 than any other state and has developed regulations that keep pace with, and
195 effectively control, the industry. For many years, Vermont has been widely viewed
196 as the "gold standard" in captive insurance regulation. However, after feedback from
197 stakeholders, as well as from the Division of Insurance, the Department decided to
198 allow captive insurance companies to be domiciled in an NAIC accredited
199 jurisdiction and be in good standing in the State of Colorado. The Department is
200 comfortable with this approach because of the more rigorous national standards that
201 have developed over the past few years, including in Colorado's insurance
202 regulations.
203
204 The Department has also required that if the captive insurance company fails to
205 provide a Certificate of Good Standing, or its equivalent, issued by the domiciliary
206 regulator, the owner and operator shall submit notification to the Department, at
207 which point a different approved mechanism would need to be secured. The 180-day
208 notice allows the Department to work with the company to put another approvable
209 financial assurance mechanism in place before the captive insurance policy lapses.
210
211 II. In addition to these significant changes, the following issues were discussed with
212 stakeholders:
213
214 1. Section 4.2.1(D): Stakeholders asked why owners and operators would not be allowed to
215 incorporate a zero cost into their financial assurance cost estimates for solid wastes that
216 might have an economic value. That is to say, if the Department has to call on the
217 financial assurance to enable cleanup and closure of a facility, and there are solid wastes
218 on-site that might have re-sale or re-use value to another entity, should the cost estimate
219 for financial assurance be able to take that value into consideration at least to the extent
220 that disposition of that material would have a zero-cost impact to the closure of the
221 facility? The Department believes that this should not be allowed for several reasons:

a. Market values of these waste materials are usually dynamic, unpredictable, and hard for the Department to verify;
b. The market value of these waste materials are often over-estimated by the owner and/or operator;
c. Many times even processed materials viewed by the owner/operator as a product do not have market value and are instead a closure liability; and
d. Neither the Department nor the third party performing closure will have the time or expertise to disposition materials from a site that might have positive or non-negative value.

2. Section 4.6.2(B): Stakeholders asked why investments with trust fund monies need to have “no” risk of losing principle value versus having a “low” risk. The Department believes that trust fund money can be invested in a manner that achieves rates of return that cover inflation, but have essentially no risk of losing the underlying principle of the fund. This can be done by investing in high grade corporate bonds, treasury bonds, and even Certificates of Deposit. Such investments can be structured to remain fully insured by the FDIC. Any loss of the underlying principle represents inadequate financial assurance and places the owner/operator in a non-compliant status.

The remainder of the changes in the proposed rulemaking are clarifications and readability improvements.