



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON D C 20460

APR 12 1985

MEMORANDUM

SUBJECT: Enforcement Guidance for a Constrained Insurance Market  
FROM: *Jack W. McGraw*  
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Office of Solid Waste and Emergency Response  
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Office of Enforcement and Compliance Monitoring  
TO: Enforcement Division Directors, Regions I-X  
Regional Counsels, Regions I-X

INTRODUCTION

This guidance describes appropriate enforcement responses to RCRA facilities facing a constrained insurance market. It provides for enforcement of RCRA's financial responsibility requirements, while recognizing the practical problems that the regulated community may have in securing appropriate liability coverage. It requires that a facility make a good faith effort to obtain insurance and thoroughly document those efforts. Unsubstantiated good faith claims will result in appropriate enforcement actions; penalties will be assessed when the facility fails to make a good faith effort in accordance with specified criteria. The enforcement approach described is meant only as an interim measure until the insurance problem is mitigated, and does not constitute a long term solution to this problem. The Agency will be working with both the Congress and the insurance industry to identify problem areas and work toward a long term solution. In the meantime, the following guidance should be used in dealing with the regulated community. This guidance will remain in effect until November 8, 1985.

BACKGROUND

In accordance with Part 265, Subpart H requirements, approximately 4800 treatment, storage and disposal facilities are subject to sudden liability requirements, and approximately 1000 surface

impoundments, land treatment and landfill facilities are subject to nonsudden liability insurance requirements. There are approximately 325 facilities subject to nonsudden liability requirements, and approximately 14 surface impoundments, land disposal and landfills subject to nonsudden requirements under Part 264, Subpart H. The requirements for nonsudden liability insurance have been phased in over time on the basis of owner and operator size, the smallest owners and operators (those with sales or revenues of five million dollars or less) needing to obtain nonsudden liability insurance by January 15, 1985 (40 CFR 265.147(b), 264.147(b)).

Due to a depressed market (decrease in the availability of reinsurance and insurance) for environmental impairment liability (EIL) insurance, owners and operators may experience difficulty in meeting regulatory requirements for obtaining nonsudden coverage. Moreover, because of some court decisions broadening sudden coverage under comprehensive general liability (CGL) policies, some insurance companies are eliminating sudden coverage from such policies. Therefore, some owners and operators may also have difficulty meeting the requirement for sudden liability coverage (40 CFR 265.147(a)). Major monetary losses suffered by insurance companies on EIL and CGL policies from non-RCRA events have also resulted in the reduction of the reinsurance market.

The situation for land disposal facilities is further complicated by the recent statutory amendment (§3005(e)) requiring facilities to certify compliance with ground-water monitoring and financial responsibility requirements, and submit a Part B application by November 8, 1985, or lose interim status. Without having liability coverage, or being on a compliance schedule to continue efforts to obtain such coverage, these firms will be unable to certify compliance with all financial responsibility requirements. We are now in the process of deciding how to address the loss of interim status issue and will advise the Regions of our decision soon.

#### GUIDANCE

This memorandum provides an Agency enforcement response guidance for: (1) dealing with the immediate problem of firms (owners and operators) who have five million dollars or less in sales and revenues and are subject to the January 15, 1985 compliance deadline for nonsudden liability insurance; and (2) those other firms facing the shrinking insurance market who have had either a nonsudden policy cancelled or have had sudden coverage removed from their CGL policy.

The underlying principle of this guidance is that enforcement action against violators of the insurance requirements must be taken within the context of current RCRA inspection and enforcement priorities, including Reauthorization requirements. As Agency enforcement guidance directs, a comprehensive enforcement approach should be undertaken at a facility specific level, considering whether or not the facility owner/operator intends to seek a permit

and whether or not the facility is in serious noncompliance with applicable Part 265 standards and/or poses a significant risk to the environment.\*

The following question must be asked to determine what action to take when dealing with the liability insurance issue:

Did the firm make a "good faith" effort to obtain/renew insurance?

Among the factors that should be reviewed in defining a good faith effort are:

- Did the firm submit a complete application to insurance company(ies) in a timely fashion, allowing for the insurance firm to process and issue the policy?
- Did the firm submit its application to "known" supplier(s) of EIL insurance?
- Can the firm provide the Agency official with documentation of attempts to gain insurance with known insurers? Has the firm documented (1) the contacts it made? and (2) the reasons given by the insurance companies for denying or delaying the applications?

The owner/operator needs to demonstrate its good faith effort through careful and thorough documentation of each step it has taken to seek insurance. The burden of proof is on the owner/operator; unsubstantiated good faith claims will merit enforcement action as described on the following page.

With regard to timeliness, existing information indicates that in a healthy insurance market, insurance firms need at least three months to process and issue straightforward applications, and at least nine months to review more complex applications, e.g., for applications covering multiple facilities. Thus, when reviewing good faith claims of an owner/operator subject to the January 15, 1985 deadline, the enforcement official should check to see whether the application was filed no later than three months prior to that date or October 15, 1984.

The Agency official should evaluate carefully a firm's claim that it was unable to locate an insurer. For example, the firm should have approached/applied to a "known" supplier(s) of EIL insurance.\*\* Failure to apply to a "known" insurer will act as an

\*The RCRA Implementation Plan and Enforcement Response Policy discuss program goals and priorities.

\*\*A list of currently known suppliers of liability insurance is attached. Also, the guidance manual, Liability Coverage: Requirements for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, lists major national trade associations that can supply general information about the insurance industry.

indicator that the owner/operator did not make a good faith attempt to find insurance.

The determination of whether the application is of sufficient quality to be considered "good faith" is a difficult question. One means by which an owner/operator could demonstrate good faith is to show the inspector documentation that she or he had a risk assessment prepared, and submitted that assessment to the insurance company along with the application. However, it should be noted that not preparing such a risk assessment need not indicate "bad faith", as the preparation of such an assessment is not an application requirement for all insurance companies.

The penalization of facilities adjudged to be making a good faith effort (including permitted facilities) to obtain insurance is generally not advised. However, there may be cases, e.g., where the owner or operator applied to only one insurer, or where the insurance application was incomplete, where a penalty may be warranted.

Failure to demonstrate that a good faith effort was made to obtain insurance is a serious offense, which will result in a compliance order and penalty being issued (See RCRA Penalty Policy). If the facility is also in serious violation of other applicable Part 265 standards, the Region may need to consider closure for this facility.

This guidance is an interim measure until November 8, 1985. Should you have any questions regarding this guidance please call Jackie Tenusak (382-2034) of the RCRA Enforcement Division or Pam Sbar (475-8173) of OECM. Any new information regarding the liability insurance market or solutions proposed by the Agency, the Congress, or insurance firms will be conveyed to you promptly.

ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE  
(known to USEPA)

Name & Address

Contact

American Home/National Union  
Insurance Companies  
American International Group  
70 Pine Street  
New York, New York 10270

Mark Vuono  
Manager  
(212) 770-7186

or

3699 Wilshire Blvd.  
Los Angeles, California 90010

Paul Kinni  
Manager  
(213) 480-3400

Swett & Crawford Management  
Co., Ltd.  
88 Pine Street  
16th Floor  
New York, New York 10005

Dominick Anzalone  
(212) 809-4277  
[send submissions to local  
field office]

Pollution Liability  
Insurance Association  
One East Wacker Drive, Suite 3720  
Chicago, Illinois 60601

(312) 467-0003

[Offering coverage on the Insurance Services Office (ISO) form  
are 42 member companies\*; contact individual PLIA members--see  
attached list]

The Hartford Insurance Group\*  
Hartford Plaza  
Hartford, Connecticut 06115

David Sterling  
Secretary, Commercial Casualty  
Underwriting Group  
(203) 547-4166  
[send submission to local  
field office]

The Travelers Insurance Co.\*  
One Tower Square  
Hartford, Connecticut 06115

Thomas Jackson  
Secretary  
(203) 277-2867

\* must have other insurance coverage with company

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Name & AddressContact

Shand, Morahan & Co., Inc. †  
 Shand Morahan Plaza  
 Evanston, Illinois 60291

Paul Springman or  
 Charles North  
 Special Risks Underwriting  
 Department  
 (312) 866-2800

Stewart Smith Mid America, Inc. †  
 125 South Wacker Drive  
 Chicago, Illinois 60606

John J. Metelski  
 Vice President  
 (312) 236-7333

The Home Insurance Co. †  
 59 Maiden Lane  
 New York, New York 10038

Donald Weekes  
 Manager, EIL Underwriting  
 (212) 530-6678  
 [send submissions to local  
 field office]

† appears to no longer write EIL coverage

POLLUTION LIABILITY INSURANCE ASSOCIATION--MEMBER COMPANIES

AID Insurance Company (Mutual)  
American Mutual Liability Insurance Company  
American Mutual Reinsurance Company  
Amerisure Insurance Company  
Austin Mutual Insurance Company  
Auto-Owners Insurance Company  
Bituminous Insurance Companies  
Central Mutual Insurance Company  
Chubb  
Employers Casualty Company  
Employers Mutual Casualty Company  
Federal Insurance Company  
Federated Rural Electric Insurance Corporation  
Hanseco Insurance Company  
Harleysville Mutual Insurance Company  
Hawkeye-Security Insurance Company  
Iowa National Mutual Insurance Company  
Liberty Mutual Insurance Company  
Lincoln National Reinsurance Company  
Lumber Mutual Insurance Company  
Lumbermens Mutual Casualty Company  
Millers National - Illinois Group  
MSI Insurance Company  
Nationwide Mutual Insurance Company  
Northbrook Property and Casualty Insurance Company  
Paxton National Insurance Company  
Pennsylvania Manufacturers' Association Insurance Company  
Pennsylvania National Mutual Casualty Insurance Company  
Prudential Reinsurance Company  
Ranger Insurance Company  
The Reinsurance Corporation of New York  
Republic Western Insurance Company  
Selected Risks Insurance Company  
Sentry Insurance A Mutual Company  
Shelby Mutual Insurance Company  
South Carolina Insurance Company  
United Fire & Casualty Company  
United States Fire Insurance Company  
Utica National Insurance Group  
West Bend Mutual Insurance Company  
The Western Insurance Companies  
Zurich-American Insurance Companies

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