

Item #8

**Request For Rulemaking Direction On
Noticing Revisions To The Proposed
(Phase II) Regulations On Long-Term
Postclosure Maintenance, Corrective Action
And Financial Assurances For An Additional
Comment Period**

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
**INTEGRATED WASTE
MANAGEMENT BOARD**

- May 2009 direction
 - Amend the proposed Phase II rulemaking package based on comments (Attachment 2),
 - Conducted stakeholder workshop regarding implementation of amendments to:
 - Closed and closing landfills
 - Transfer of Ownership
- Now seeking direction regarding the workshop topics to Notice proposed Phase II rulemaking package for additional review and comment

Implementation of May 2009 Board Direction

- Options to Implement the May 2009 Board Direction for Phase II Regulations on Closed/Closing Facilities
 - Postclosure Maintenance Financial Assurances
 - Corrective Action Financial Assurances
- Continuity of Financial Assurances During Transfer of Ownership

Options to Address Postclosure Maintenance

Closing/Closed

1. 30X the PCM estimate
 - a) Same as Operating – including criteria allowing step-down
 - b) Allow build up period for cash mechanisms
2. Not require increase (to 30X) above current demonstration level, no less than 15X
3. Perform Evaluation to set multiplier level (options to determine multiplier?)
4. Some stakeholders requested that the closing and closed operators be allowed to draw-down on a year-for-year basis to 15X

Stakeholder Input

- Entitlement, fairness and equity is a major concern.
- Industry stakeholders believe closed landfills should be allowed to remain at current multiplier, while some agree the multiplier should not be allowed below 15X.
- Closed landfill operators believe it will be difficult to return to prior customers to secure the necessary funding to increase financial assurance for the closed landfill.
- Other stakeholders expressed concern that these landfills
 - represent older facilities.
 - were not designed to current standards - representing a higher risk than currently operating landfills and should be held at least to the same standard as operating landfills.

Closed and Closing Landfills

- 102 Closed and Closing Landfills
- 82 use non-cash type financial assurance mechanisms at 30X
- 20 use cash type financial assurance mechanisms
 - Six of the 20 cash type financial assurance mechanisms are less than 30X
 - Range between 15X – 29X multipliers

Staff-Recommended Option

- All closed sites provide financial assurance demonstrations valued at 30X,
 - Sites with cash-type mechanisms providing less than 30X be allowed up to 5 years to build up their cash-type demonstration to 30X.

Options to Address Corrective Action

Closed/Closing

1. Same as Active/Operating
 - a) Immediately
 - b) Allow Build Up Period
2. Original Phase II Proposal – Broaden Use of Water Board Financial Assurance
3. Delay Effective Date For Final Cover Replacement Estimate and Financial Demonstration
4. Site Specific Corrective Action Plan
5. Include Costs in Pooled Fund

Stakeholder Input

- Industry stakeholders believe that requiring operators to meet the financial requirements of either the Water Board or a final cover replacement requirement would place a severe, unplanned financial hardship on these operators.
- Environmental stakeholders identify that the Water Board requirement currently exists for all landfills and provisions for it should have been made by these operators.

Stakeholder Input

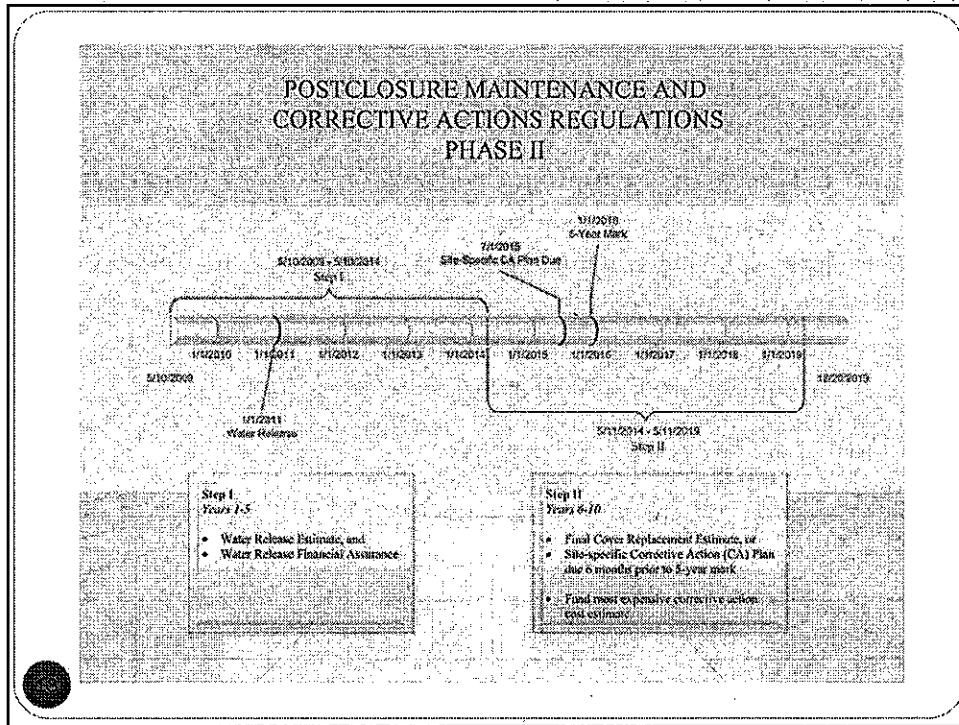
- Some believe operators may default due to lack of means to raise the necessary capital.
- Industry stakeholders suggest that capital used as financial assurance for corrective action is a resource directed away from other more beneficial uses at operating landfills.
- Others expressed their concern that estimated costs are not great enough to cover activities at closed landfills. These participants are also concerned that previously closed landfills are at least as likely as currently operating landfills to encounter major corrective action needs in the future.

Staff-Recommended Option

- Operators initially provide a financial assurance demonstration to match the Water Board corrective action cost estimate value. (This process will occur during the first 5 years after adoption of the proposed regulations.)
- Operators that do not currently have a financial assurance demonstration for the current Water Board requirement must produce an estimate and submit it to both Water Board and Waste Board staff along with a matching financial assurance demonstration.

Staff-Recommended Option

- Five years later, all operators submit either; a final cover replacement cost estimate, or a site-specific non-water release corrective action plan and cost estimate for review and approval.
 - The site-specific non-water release assessment adds a level of refinement that improves the regulatory options, however
 - The site-specific non-water corrective action plan must demonstrate that the complete replacement of the final cover is not a reasonably foreseeable event,
 - The greatest cost estimate must be financially assured:
 - Water Board requirement, or
 - Cover replacement or site-specific non-water release.



Options to Address Transfer of Ownership Concerns

- Stay at current landfill financial assurance requirement
- Automatically step-up to 30X
- Alternative "X" level
 - 5X increments
 - Based on what criteria?

Stakeholder Input

- Return the new owner to a multiplier of 30X but include a provision to allow the purchaser to maintain the previous level of financial assurance if it can demonstrate it possesses the operating experience, technical expertise, and management capability to effectively maintain the landfill at its current level of financial assurance.
- Some stakeholders supported this approach,
- Others expressed concern with it and suggested all new owners be returned to 30X where, over time, they can earn step downs.

Stakeholder Input

- Other options for providing additional assurances for transfers of ownership included:
 - Stay at current level of seller,
 - Develop criteria to establish an alternative "X" level,
 - Return all new landfill purchasers to 30X, allowing them to step down over time based on their performance in complying with the step down criteria.

Staff-Recommended Option

- Upon transfer of ownership, require all financial demonstrations below 30X to return to 30X.
 - Include a waiver process under which the new operator can petition Board to allow less than 30X,
 - For those new operators that obtain a waiver to less than 30X,
 - Allow the same option to drop down in 5 year increments to the minimum 15X financial assurance demonstration based on performance.

Additional Amendments

- **§ 22220. CIWMB - Scope and Applicability. (new)**
- (a) This article requires operators of disposal facilities to demonstrate the availability of financial resources to conduct corrective action activities for known and reasonably foreseeable corrective action for:
 - (1) Releases from the solid waste landfill to water all as required by SWRCB under Article 1, Subchapter 3, Chapter 3 (§section 20380(h) et seq.) and §22100; and

(change "and" to "or")

Additional Amendments

- **§ 22221. CIWMB - Amount of Required Coverage.**
~~(F14:Section 17258.73)~~
- (a) ... most recently approved or submitted corrective action cost estimate, whichever is greater, prepared pursuant to §22101(a), reviewed and approved by ~~submitted to the~~ appropriate RWQCB.

(Specifying cross-reference)

Distillation of Policy Options

- Staff recommend Option #6 including specifically Options #2, #4, and #5 as shown in proposed regulations, Attachment #3.
- Notice the proposed Phase II regulations as directed by the Board in May 2009 for a 45-day public comment period with;
 - Consideration for currently closed and closing landfills in complying with new Board postclosure maintenance financial assurance demonstration requirements,
 - New Board corrective action financial assurance demonstration requirements applicable to all landfill operators,
 - Transfer of ownership requirement amendments, and
- Return to the Board for consideration of the comments received and potential adoption of the rulemaking.

Phase II Rulemaking Timeline

Aug 2009 – Additional Board Direction on
Closed/Closing Landfills

Aug-Oct 2009 – 45-day comment period

Nov-Dec 2009 – 15-day comment period, if needed

Dec 2009 – Board adoption

Jan 2010 – Prepare Formal Response to Comments and
Final Statement of Reasons

Feb 2010 – Legal Review

Feb 27, 2010 – Deadline to submit to OAL

Sanitation Districts of Los Angeles County
San Bernardino County Department of Public Works Solid Waste Division
Recology
Ventura Regional Sanitation District
OC Waste & Recycling
Rural Counties' Environmental Services Joint Powers Authority
Lassen Regional Solid Waste Management Authority
Republic Services
Riverside County Waste Management Department
Kern County Waste Management Department
Salinas Valley Solid Waste Authority
League of California Cities
California State Association of Counties
Solid Waste Association of North America, California Chapters

July 2, 2009

Chair Margo Reid Brown
California Integrated Waste Management Board
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Dear Chair Brown:

Financial Assurance for Closed Landfills

The signatories to this letter, which collectively represent most of the solid waste infrastructure in California, request that closed landfills be exempted from the proposed financial assurance (FA) regulations, which also contain the non-water quality corrective action funding requirements, since they will result in a substantial and unnecessary burden at a time when there are no existing sources of income to meet this new financial requirement. We instead request that the current federal regulations be applied to closed sites since they promote the same goals that underlie the proposed regulations and provide the landfill owners time to plan for and establish additional financial assurances when the current FA instruments are exhausted.

CIWMB Executive Director Already Has Authority to Extend Financial Assurance

The proposed regulations are unnecessary for closed landfills. Current federal regulation (Title 40 CFR §258.61) allows the Executive Director to lengthen the postclosure care period on a case-by-case basis if it is necessary to protect human health and the environment. In lengthening the postclosure period, the operator would then be obligated to provide FA for that extended time period pursuant to Title 40 CFR §258.72 of the Subtitle D regulations. Therefore, if necessary, the Executive Director could extend the postclosure period beyond 30 years when the current FA demonstrations are exhausted and require the operator to establish a new FA instrument. In applying these standards, the state is protected since additional financial assurances would be established and operators would be given the opportunity to plan and budget for any new FA instrument. This approach would ensure site-specific conditions are considered in determining the extended level of FA that may be needed at some sites but unwarranted at others.

Retroactively Applying Proposed Regulations to Closed Sites May Cause Defaults

In the case of cash FA demonstrations, monies were collected and set aside by the operator for the purpose of performing postclosure care. The proposed regulations will impair or take away the operator's vested right to that money since substantial amounts of the fund would be frozen and prevented from being used for its intended purpose. The operator would be forced to exhaust the accrued interest in the trust fund account prematurely. Consequently, any excess money above the FA funding requirement would soon disappear, leaving the operator without any significant financial resources to care for the site. Since the proposed regulations were unforeseen during the fund buildup period and the site is now closed, there is no real ability or time to replenish the fund. Given the state of the current financial markets, money to finance capital projects is already limited. Since closed sites have no revenue stream, there is no real ability to borrow or secure financing to cover operating costs.

The proposed regulations will also have a secondary retroactive effect in that the existing fund, which was approved under an earlier regulatory regime, will be impacted into the foreseeable future because additional monies will need to be added to the fund in order to always maintain the minimum of 15 years worth of FA. This is unsustainable for landfills already closed. The proposed regulations will, therefore, create a new financial obligation or duty on a past fund that at closure CIWMB deemed as fully funded and compliant with the regulations at that time.

Local governments are already severely constrained by the current recession and may not be able to pledge or reallocate funds to satisfy these new financial demands since funds are already scarce. The proposed regulations may result in a new financial mandate that cannot be met and, therefore, lead to operators defaulting. Furthermore, waste diversion programs will also be compromised if funds need to be transferred in order to meet the new financial requirements.

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Your consideration of our request to grandfather closed sites as described above would be greatly appreciated.

Yours truly,

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