

OSWER DIRECTIVE # 9477.00-6

EXCLUSIONS FOR PRE-EXISTING CONDITIONS IN RCRA TSDF INSURANCE
POLICIES, GUIDANCE ON

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

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MEMORANDUM

SUBJECT: Guidance for Reviewing Exclusions for Pre-Existing Conditions in
RCRA TSDF Insurance Policies

FROM: Marcia Williams, Director, Office of Solid Waste Original
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TO: Regional Waste Management Division Directors, Regions I-X

SUMMARY

Under 40 CFR Parts 264 and 265, Subpart H, owners and operators of RCRA treatment, storage and disposal facilities (TSDFs) may use insurance policies to meet RCRA requirements for financial assurance for third-party property and bodily injury damages. Insurance policy language generally begins with broad coverage for damages, which is modified through the use of inserted exclusions to limit the scope of the policy coverage. Because insurance is intended to cover only possible future events, policies typically have exclusions limiting the insurer's coverage of releases which occurred prior to the start of the policy. Such "pre-existing conditions" exclusions are acceptable provided that they do not so limit a policy that it no longer provides the coverage required by Subpart H. While the Agency recognizes that it is inappropriate to expect insurance to be provided to cover damage that is certain to occur or that has already occurred, it does expect policies to cover future conditions whose incidence is uncertain. This guidance describes acceptable pre-existing conditions exclusions based on the Agency's interpretation of the Subtitle C regulations.

BACKGROUND

Regulatory Provisions

On April 16, 1982 (47 FR 16554), EPA promulgated regulations to require owners and operators of TSDFs to provide financial assurance for third-party compensation for bodily injury and property damage caused by accidental

occurrences arising from facility operations. Such damage should be "neither expected or intended" by the owner or operator of the facility (40 CFR 264.141(g) and 265.141(g)).

While the regulation defines accidental occurrence and other key terms, it also provides that these definitions "are not intended to limit their meanings in a way that conflicts with general insurance industry usage," but

rather are intended to "be consistent with their common meanings within the insurance industry." Also, the definitions of bodily injury and property damage would "not include those liabilities which, consistent with standard industry practices, are excluded from coverage" (40 CFR 264.141 (g) and 265.141(g)).

Specific guidance on what constitutes industry practices was not deemed necessary in 1982. Of late, however, it has become difficult to define standard industry practice regarding exclusions. In response to court decisions that interpreted policy language in a manner that expanded the coverage intended by insurers, some insurers have tried to clarify the coverage by modifying the pre-existing conditions exclusions. A variety of such modified exclusions have been developed, some of which are inconsistent with the accidental occurrence definition in §264.141(g). This guidance is intended to assist in determining which exclusions are permissible under current regulations.

GUIDANCE

Acceptable Exclusions

The range of pre-existing conditions exclusions can be divided into broad and narrow exclusions. Broad exclusions are usually part of the basic policy language used by an insurer, while narrow exclusions are added to specific policies as endorsements to limit the scope of the basic policy for a particular insured. The Agency reviewed a variety of both types of exclusions and identified acceptable language for both. This guidance describes and provides examples of that language.

Broad Exclusions

Broad pre-existing conditions exclusions are "generic" exclusions applicable to all facilities covered by a particular type of policy. Such exclusions generally apply to a specific type of occurrence (e.g., a

pollution incident known or expected by the insured or a release occurring prior to the policy's effective date) or a particular type of damage (e.g., contamination of ground water).

Permissible broad exclusions may allow the insurer to limit its liability for current and certain damages present at the start of the policy. Policies that make clear that pre-existing conditions (releases likely to result in damages) must be known or reasonably foreseeable to the owner/operator would be acceptable.

The Agency has determined that the following provide examples of acceptable broad pre-existing conditions exclusions:

"Insurance does not apply where the insured knew or could have reasonably foreseen that claims would result."

"Insurance will pay on behalf of the insured ... provided always that the claim is made during the policy period and that the insured as of the 'First Coverage Date' did not know or might not have reasonably foreseen that such a claim would result."

"The policy will pay on behalf of the insured for damages caused by an occurrence ..," with occurrence defined as "a happening resulting in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

"The insurance does not apply to damages arising from any environmental impairment that was known or should have been known to the insured prior to the original policy inception date."

"This insurance does not apply to 'bodily injury,' 'property damage' or 'environmental damage' expected or intended from the standpoint of the insured."

"Insurance does not apply to damages from a release that the insured knew or could reasonably have known had occurred."

The language in these examples is specific enough to provide guidance to insurers and is consistent with the intent of the definition of accidental occurrence in its focus on whether damage, rather than a release, was expected or intended, or on whether the impairment was known or should have

been known. These exclusions are also consistent with industry practice since they are now used by some insurers.

The following sample language is representative of unacceptable broad exclusions:

"This insurance does not apply to release either expected or intended by the insured."

"This insurance does not apply to groundwater contamination."

The first example, by excluding a release "expected" by the insured, could severely limit coverage because any releases from hazardous waste facilities could be deemed "expected" by the very nature of the material involved. The second example specifically excludes, in blanket fashion, a particular type of damage and therefore would be inconsistent with Subtitle C regulations.

Narrow Exclusions

Narrow exclusions are coverage exclusions for damages related to a specific problem at a specific facility. Such exclusions may be written for a particular area of contamination (e.g., contamination from waste unit X) or for a particular type of damage at a specific facility (e.g., groundwater contamination at facility A). Narrow exclusions are generally added, in an

accompanying endorsement, to the basic policy's broad exclusions and are intended to tailor the policy to a specific facility.

Narrow exclusions should be specific enough to prevent excessive limitations of policy coverage. A narrow exclusion should be described so that there appears to be a basis for the exclusion (i.e., damage must be expected from a known, actual release). To ensure that such a basis exists, narrow exclusions should refer to a facility assessment¹ that identifies the threatening contamination. An acceptable exclusion should include a description of the media, type of contamination, and specific location involved. Thus, such exclusions should specifically indicate a current and reasonable belief that damage has occurred or is likely to occur.

Given this need for specificity, the Agency has identified the following sample language as representative of acceptable narrow exclusions:

"All claims and costs resulting from ...

- a) groundwater contamination as identified in the facility assessment dated XX/XX/87 ...

[or]

- b) groundwater contamination by light and gross hydrocarbons as identified in the facility assessment dated XX/XX/87 ...

[or]

- c) contamination arising from a release at unit A and identified in the facility assessment dated XX/XX/87 ...

at facility XYZ in Smalltown, Any State, are not covered by this policy."

These types of exclusions specifically and clearly identify particular known existing problems constituting current and certain -- i.e., known or expected -- damages that an insurer should not be required to cover.

Less specific language, or language excluding certain damages from coverage due to facility conditions causing insurers to suspect, rather than know, there has been or will be a release, are unacceptable. There should be clear evidence that a pre-existing condition in fact exists that has a reasonable likelihood of resulting in damage. The Agency reviewed, and found

1 A facility assessment is similar to a CERCLA preliminary assessment or the preliminary review portion of the RCRA facility assessment. It is generally based on a search of the files of the facility and regulating agencies, and a windshield site review. The format for assessments will vary, and we are not suggesting that any specific format is required. It is also not necessary to review those assessments unacceptable, the following language:

"All claims and costs resulting from ...

- a) groundwater contaminations ...

[or]

- b) groundwater contamination by light and gross hydrocarbons ...

at facility XYZ in Smalltown, Any State, are not covered

by this policy."

These exclusions are insufficiently narrow to justify an exclusion of a pre-existing condition. They could be interpreted to exclude all groundwater damage, even that initially occurring during the policy period. The coverage provided would thus be too limited to meet the §§264.141(g) and 265.141(g) definition of accidental occurrence.

Implementation

Current regulations (40 CFR 264.147 and 265.147) require the owner or operator of a RCRA TSDf to submit a signed duplicate of the Hazardous Waste Liability Endorsement or Certificate of Liability Insurance to the appropriate EPA Regional Administrator(s). These certificates and endorsements state only that coverage is provided in a particular amount and do not reveal specific policy terms or endorsements. Therefore, to implement this guidance, EPA or the authorized State should review the pre-existing conditions exclusions of the policies being used to demonstrate financial assurance. Such a review should routinely include the following steps:

- 1) Endorsements relating to pollution coverage should be routinely requested. Any endorsement adding narrow exclusions for pre-existing conditions should be reviewed to determine if the exclusions are acceptable based on the criteria described above.
- 2) If the narrow exclusions are determined to be unacceptable, the owner/operator should be notified, so that it can seek an acceptable policy (enforcement action may also be determined to be appropriate).
- 3) If reason for broader concern arises, the Regional Administrator or State may request signed copies of liability policies from owner/operators (this authority is granted under §§264.147(a)(1)(i) and (b)(1)(i) and 265.147(a)(1)(i) and (b)(1)(i)).
- 4) Periodically, a review of selected basic policy language should be undertaken to determine if its broad pre-existing conditions exclusion is acceptable based on the criteria described above.

Apart from the acceptability of any narrow exclusions, their presence in

a policy may signal a need for corrective action at the facility. In some cases, the need for corrective action will already have been determined by EPA because exclusions are often written based on records from the RCRA permitting and interim status program. However, if a review of narrow exclusions indicates a potential need for corrective action, the following is applicable:

- 5) Appropriate EPA Regional or State staff should be notified if a narrow pre-existing conditions exclusions points to a potential need for corrective action.²

For further assistance in implementing this guidance, please contact Margaret Schneider, Chief, Closure and Financial Responsibility Section, Office of Solid Waste (202 or FTS 382-4640).

cc: Regional Counsels

² The presence of a narrow exclusion is merely one factor to consider in determining the need for corrective action decisions. Consistent with established priorities, these releases should be addressed using any and all corrective action authorities.