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Draft Comments (9/5/07)  
Proposed Amendments to the Hazardous Waste Regulations

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September 12, 2007

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Environmental Quality Board  
P. O. Box 8477  
Harrisburg, PA 17105-8477

INDEPENDENT REGULATORY  
REVIEW COMMISSION

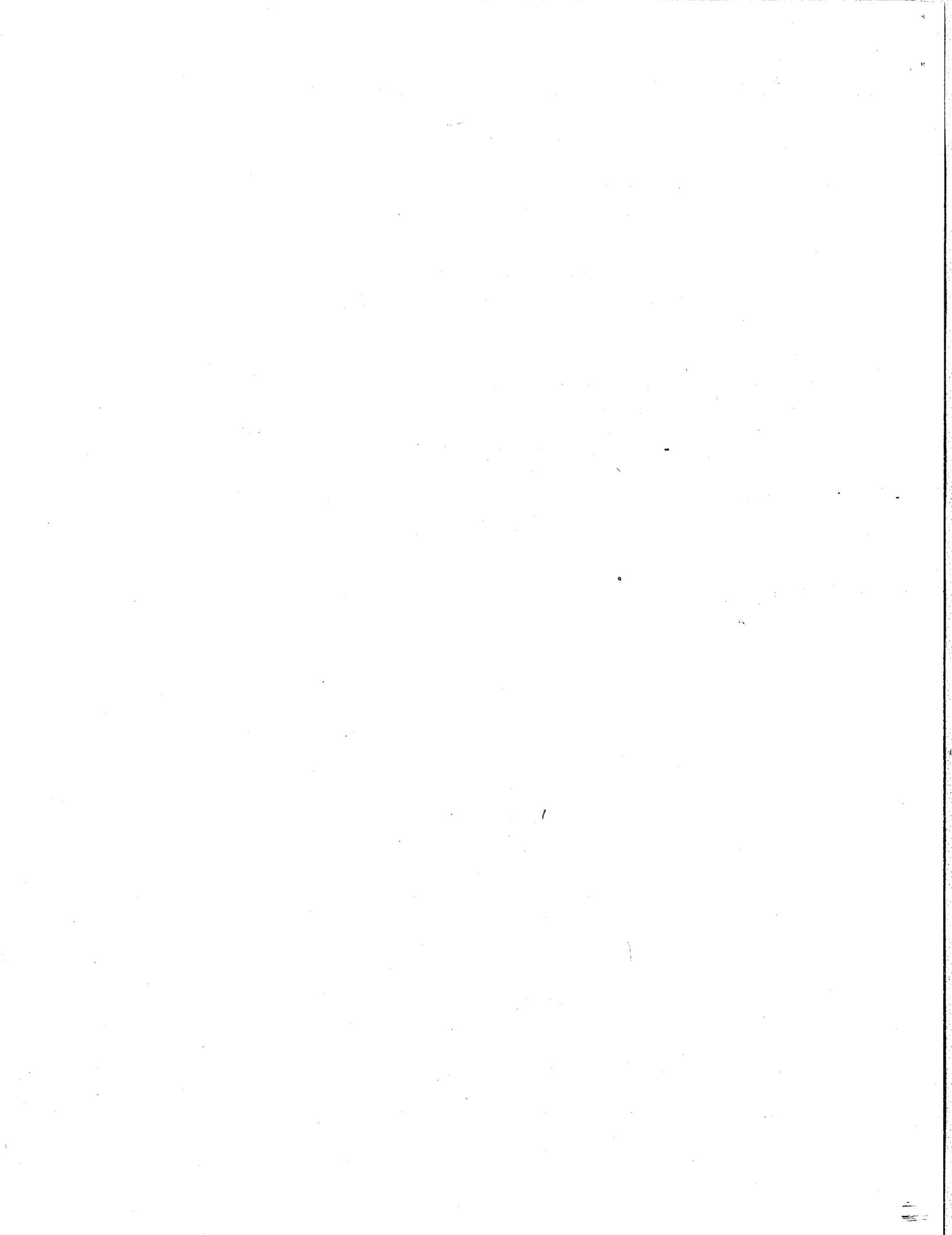
Reference: 37 PA.B 3249, Saturday, July 14, 2007  
(215 Pa Code Chapters 260a – 266a, 266b, 267a and 270a)

Dear Sir or Madam:

Please find attached a summary of our comments to the Board on the subject proposal. I understand this summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered. Also attached, please find our more detailed comments.

Sincerely,

Rolf W. Hanson  
Executive Director



**Summary of Comments**  
**By the Associated Petroleum Industries of Pennsylvania**  
**September 17, 2007**

**On the PROPOSED RULEMAKING – HAZARDOUS WASTE AMENDMENTS**  
**(215 Pa Code Chapters 260a – 266a, 266b, 267a and 270a)**  
**37 PA.B 3249, Saturday, July 14, 2007**

Associated Petroleum Industries of Pennsylvania (APIP), a trade association representing that represents all aspects of America's oil and natural gas industry. Our 400 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. APIP appreciates the opportunity to provide comment on the subject proposed rulemaking.

Regarding proposed changes to § 265a.143 Financial assurance for closure and to § 265a.145 Financial assurance for post closure care. APIP finds insufficient evidence to eliminate of the financial test and corporate guarantee provisions. APIP further notes that the United States Environmental Protection Agency (EPA) is engaged in a review of the financial assurance regulations, and therefore now is not the time to change the Hazardous Waste Regulations (25 Pa. Code Chapters 265a.143 and 265a.145).

**There is no comprehensive study completed that suggests elimination or the Financial Test or Corporate Guarantee is warranted.**

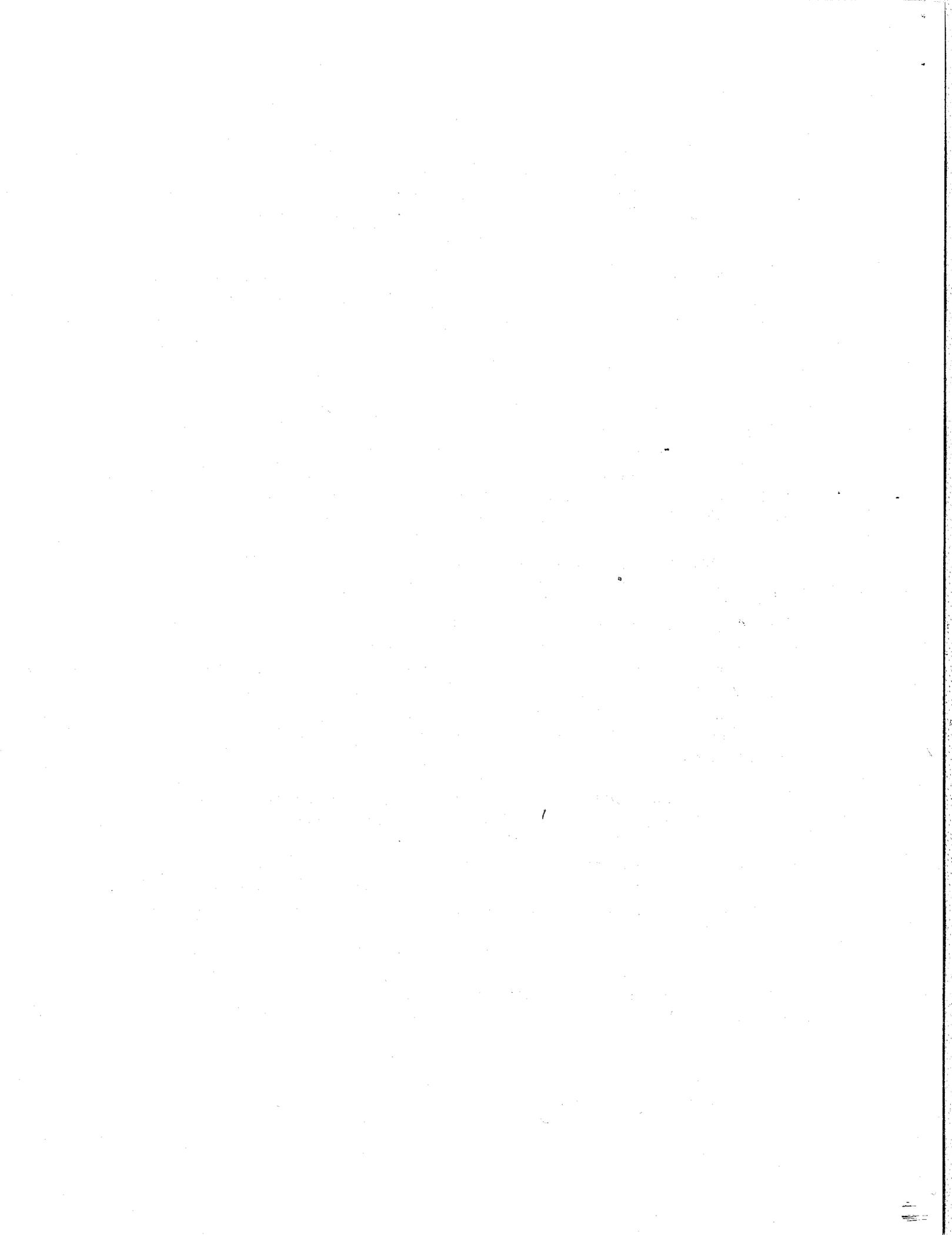
There have been anecdotal reports, such as that provided by Deputy Secretary Fidler at the May 16, 2007, EQB Meeting where he proposed eliminating the "self-assurance" process because of the experience the Department has had with it within the Commonwealth. However, the Deputy Secretary also stated that the Department has had problems with only a single large entity, with respect to the use of the corporate guarantee. This single problem within the Commonwealth seems insufficient to eliminate the Financial Test or Corporate Guarantee.

**A comprehensive EPA study is underway to review Financial Assurance; it seems prudent to wait for the results before making a regulatory change.**

There have been several reports raising concerns about financial liability of hazardous waste facilities and Superfund sites. Many of these questions have been raised by states and within the EPA itself, while others have come from beyond environmental regulators.

In response the EPA initiated in October 2006 a Financial Assurance Plan. On March 30, 2007, OSWER decided to initiate the Agency's Action Development Process (ADP) to determine whether regulatory changes need to be made to the current RCRA Subtitle C financial test regulations. By starting this process, EPA will be closely evaluating the current financial test.

The bulk of the efforts ongoing within the EPA argue to wait on any change in the use of the financial test or the corporate guarantee.



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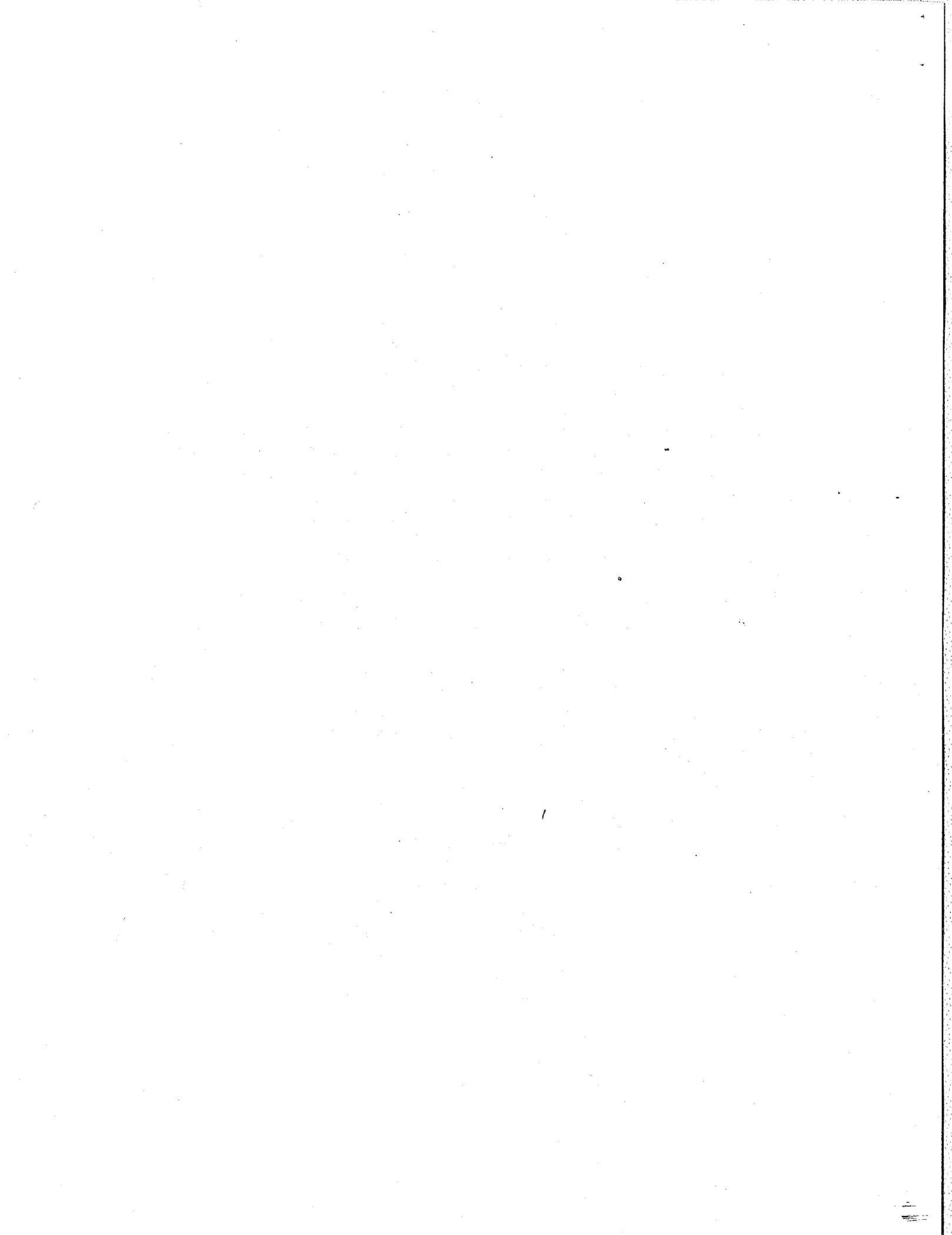
**The USEPA Continues to Support the Corporate Financial Test under RCRA**

In the latest major RCRA rulemaking on treatment, storage and disposal facilities handling hazardous wastes, the corporate financial test was authorized as an option: The USEPA issued final rules for standards for owners and operators of hazardous waste facilities operating under a standardized permit on September 8, 2005 (70 *Fed. Reg.* 53453). In 40 CFR §267.143 (f) the Corporate financial test was included as an option. Ironically, the reaffirmation supporting by EPA of the financial test is part of 40 CFR 267 which the Board proposes incorporate by reference in its new Chapter 267a, *Standards for Owners and Operators of Hazardous Waste Facilities Operating Under a Standardized Permit*.

**There is no comprehensive study completed that suggests elimination or the Financial Test or Corporate Guarantee is warranted.**

There have been anecdotal reports, such as that provided by Deputy Secretary Fidler at the May 16, 2007, EQB Meeting where he proposed eliminating the “self-assurance” process because of the experience the Department has had with it within the Commonwealth. However, the Deputy Secretary also stated that the Department has had problems with only a single large entity, with respect to the use of the corporate guarantee. This single problem within the Commonwealth seems insufficient to eliminate the Financial Test or Corporate Guarantee.

**A comprehensive EPA study is underway to review Financial Assurance; it seems prudent to wait for the results before making a regulatory change.**



Draft Comments (9/5/07)

Proposed Amendments to the Hazardous Waste Regulations

There have been several reports raising concerns about financial liability of hazardous waste facilities and Superfund sites. Many of these questions have been raised by states and within the EPA itself, while others have come from beyond environmental regulators.

As indicative of the ongoing effort by the EPA, the Office of Inspector General (OIG) issued an evaluation report on August 1, 2007 following up on recommendations in its April 2004 report on the Superfund program, *Superfund: Building on the Past, Looking to the Future*. Recommendation 11 of that report: If the evaluation confirms a high correlation with RCRA regulated facilities, OSWER and OECA should examine different approaches to financial assurance under the RCRA program to reduce the likelihood of RCRA-regulated facilities becoming part of the future Superfund program.

Recommendation 11 is closely related to OIG recommendation 4.1 from their September 2005 report (include footnote) on RCRA financial assurance.

In response the EPA initiated in October 2006 a Financial Assurance Plan. The OIG evaluation report found the Plan is addressing the recommendations. For example, on March 30, 2007, OSWER decided to initiate the Agency's Action Development Process (ADP) to determine whether regulatory changes need to be made to the current RCRA Subtitle C financial test regulations. By starting this process, EPA will be closely evaluating the current financial test.

Even more recently, in a June 26, 2007 letter to the American Petroleum Institute, Susan Parker Bodine, Assistant Administrator of the Office of Solid Waste and Emergency Response and Granta Y, Nakayama, Assistant Administrator of the Office of Enforcement and Compliance Assurance stated "... we intend to explore a range of options for addressing concerns brought to our attention regarding the current financial test ... if we determine a rule could be an effective approach we intend to seek perspective of all members of the public in this effort...".

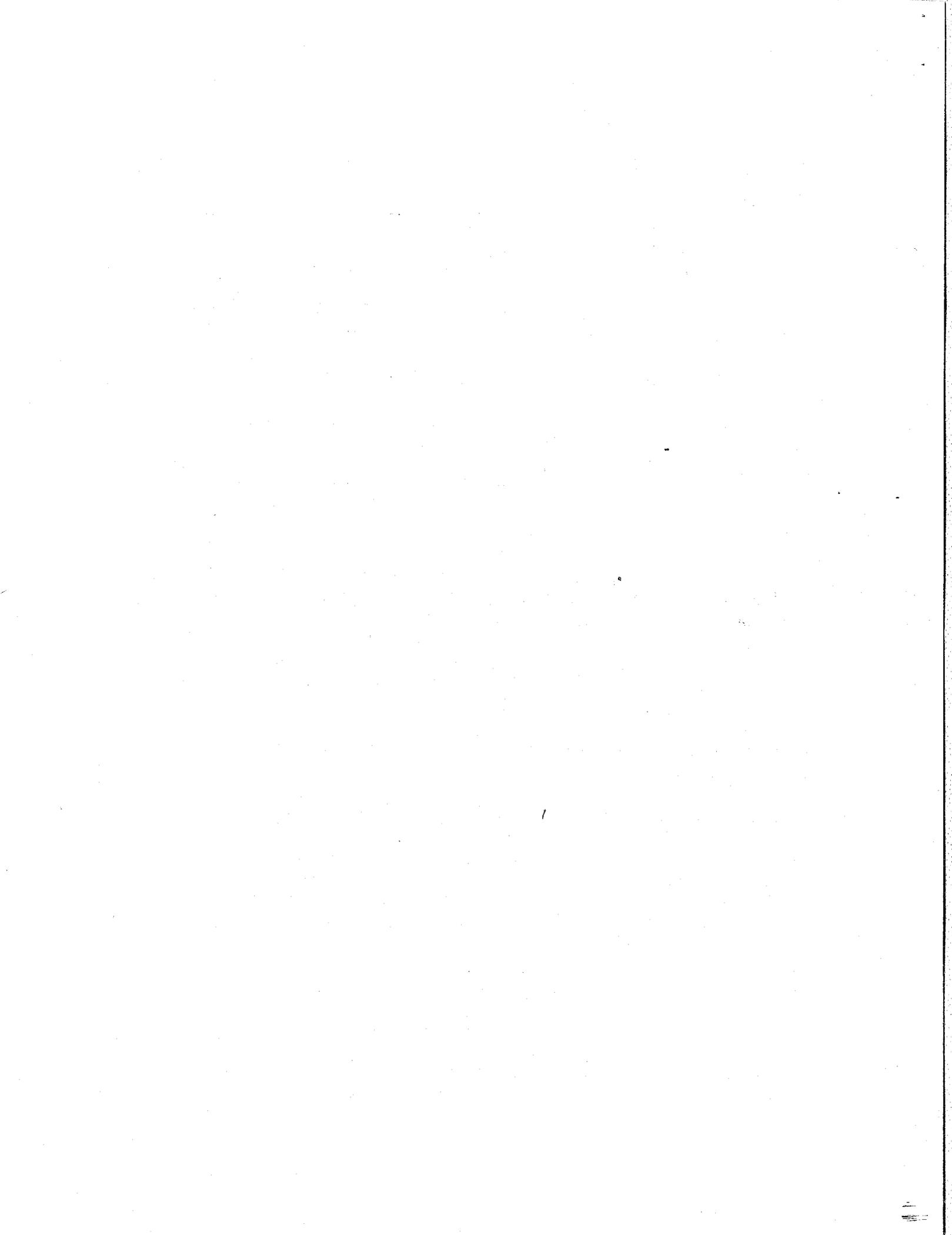
The bulk of the efforts ongoing within the EPA argue to wait on any change in the use of the financial test or the corporate guarantee.

**Changing the financial assurance mechanisms in the Commonwealth is ant-business**

The majority of the jurisdictions in the country allow for the financial mechanisms being considered for elimination in the Commonwealth. Self insurance and corporate guarantee are often the most economical option to demonstrated financial assurance. If these instruments are not allowed in the Commonwealth it will act as a disincentive for business to relocate or remain in Pennsylvania.

**All potential liabilities of the Commonwealth should be evaluated on equal footing.**

One overarching concern with any increase in the cost to business that is aimed at reducing liability to the Commonwealth is that these decisions should not be made in a vacuum. Regarding the proposal to change the financial assurance mechanisms, there is no cost to business calculated, or reduction in liability to the Commonwealth quantified.



Draft Comments (9/5/07)

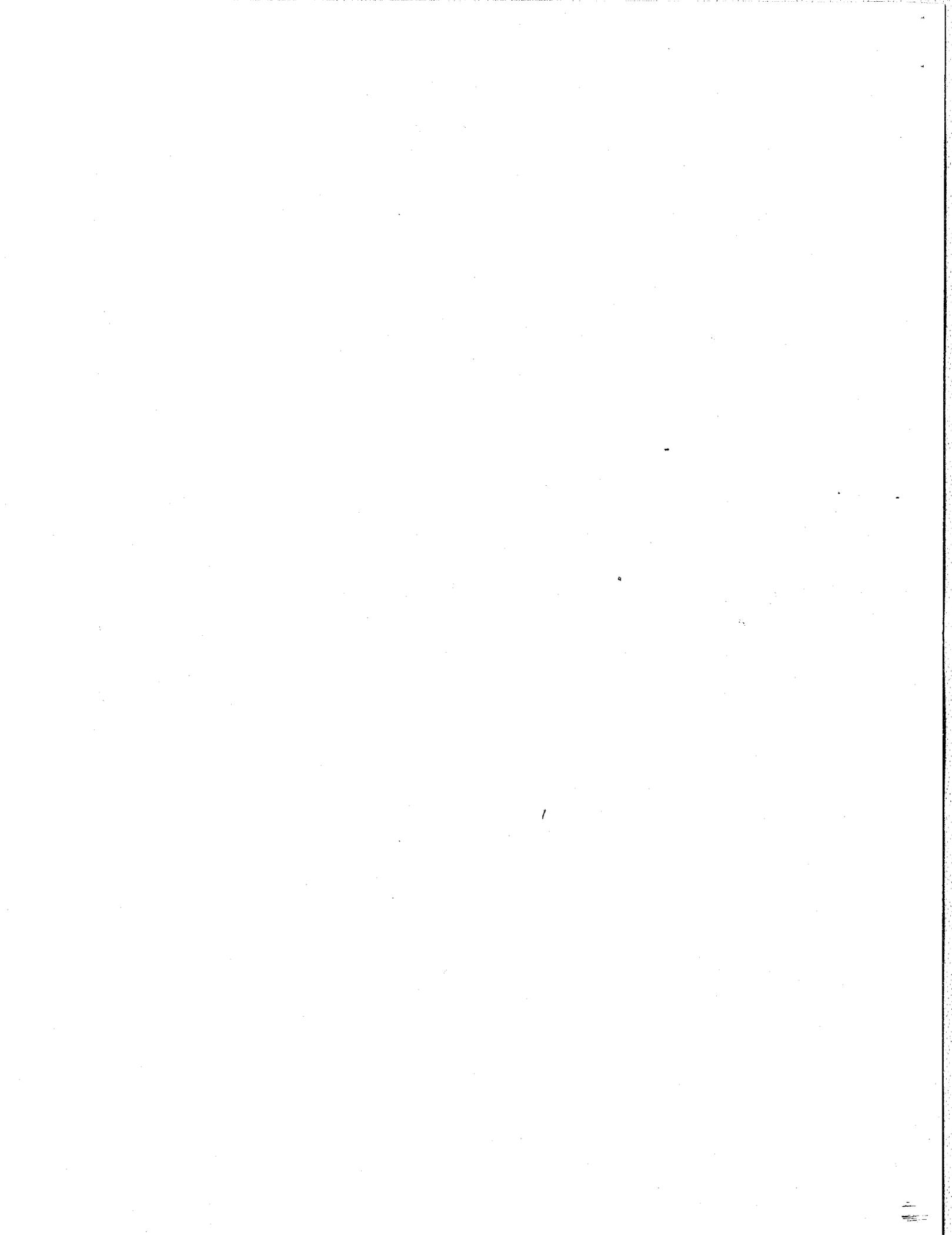
Proposed Amendments to the Hazardous Waste Regulations

Public liabilities exist in numerous instances, and reducing those liabilities by increasing costs to businesses should be judged on how much liability is removed for the burden. One Agency, such as the Department, is not in a position to make that evaluation independently. Consultation with the larger Executive should occur before any business liability is imposed to ensure the benefit to the Commonwealth is sufficient.

*Attachments*

*Report From OIG*

*Letter to API*





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 26 2007

Mr. Ted Steichen  
Senior Regulatory Analyst  
American Petroleum Institute  
1220 L Street, NW  
Washington, DC 20005-4070

Dear Mr. Steichen:

Thank you for meeting with our staff on March 27, 2007. We would like to take this opportunity to respond to your comments about the Model RCRA 3008(h) Order on Consent, the RCRA financial test and financial assurance requirements for generators and facilities managing hazardous substances.

Background

In accordance with our October 2006 Financial Assurance Plan, we have convened a workgroup with representation from the Regions and States to address issues related to financial assurance for corrective action. This workgroup provides a means for us to work through the issues and identify areas where we need to develop new guidance (or enhance our existing guidance). Furthermore, if information arises during this process which indicates that the current regulations may need to be updated we will assess what regulatory amendments are needed. As discussed at the March meeting, we are still considering the possibility of initiating the rulemaking process for financial assurance for corrective action. If we determine a rule could be an effective approach, we intend to seek perspectives of all members of the public in this effort, including those from the regulated community. To this end, we will keep you and other members of the regulated community informed as we determine how best to involve stakeholders in the workgroup's efforts.

In the permitting and program implementation context, the underlying principle behind the Agency's approach to financial assurance for corrective action can be found in the May 1, 1996, Subpart S Advanced Notice of Proposed Rulemaking. There, we made it clear that program implementers should apply financial assurance requirements flexibly, and their main goal should be to ensure that remedies proceed expeditiously (see 61 FR 19432 - 19455). We continue to operate under that principle.

Based on that principle, EPA has repeatedly taken the position that the mechanisms available for closure and post-closure care are generally available for corrective action. On October 24, 1986, the Agency proposed a series of mechanisms for



financial assurance for corrective action, which were based on the mechanisms in Parts 264 and 265 Subpart H (see 51 FR 37854). Later, in the 1990 Subpart S proposed rule, the Agency stated its intent to rely on the 1986 proposed rule as a guide for financial assurance mechanisms for corrective action, in the absence of regulations (see 55 FR 30798 - 30856). Most recently, on September 30, 2003, the Agency issued an "Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action," which stated that the Agency may allow the financial mechanisms that are available under the regulations for closure, post-closure, and third-party liability to establish financial assurance for corrective action.

The Agency expects that, in most cases, owners and operators will use the instruments available under Parts 264 and 265 Subpart H to demonstrate financial assurance for corrective action in the permitting process. However, because those instruments are not codified permit requirements for corrective action, more flexibility is available under corrective action than is available for closure and post-closure care. In the 1990 Subpart S proposed rule, EPA stated that owners and operators have the flexibility to use other instruments to demonstrate financial assurance for corrective action, as long as they provide an acceptable level of financial assurance. In the September 30, 2003 Interim Guidance, the Agency said, "Regions and authorized States have discretion in determining how to address the corrective action financial assurance requirements at each RCRA TSDF to meet the regulatory requirements and statutory requirements in the light of the specific circumstances at that facility."

#### Model RCRA §3008(h) Administrative Order on Consent

You had also asked about the Model RCRA §3008(h) Administrative Order on Consent (AOC), and we want to take this opportunity to provide some additional information. In the enforcement context, the flexibility described above continues to be available for demonstrating financial assurance for corrective action. EPA has incorporated a flexible approach in its Model Provisions for Cost Estimates and Financial Responsibility for use in its RCRA Section §3008(h) AOCs. The model financial assurance AOC language is guidance for EPA enforcement staff in the negotiation of consent agreements, and it does not impose binding requirements on them or any other person. Regional case teams modify model order language to suit the particular circumstances of a case, without the concurrence of Headquarters.

The Headquarters enforcement program managers meet frequently with Regional enforcement staff to foster reasonable and consistent interpretation of Agency guidance. Regions will use their judgment when they review financial assurance documents to determine whether they provide adequate financial assurance, or in determining whether new or additional information is needed to conclude that a financial assurance provider is still qualified to provide adequate financial assurance.

As such, we do not plan to withdraw this model document, as you request. Nonetheless, we would be interested in learning more about your assertion that this is guidance "being used as a substitute for" regulations and that the experience of your

member companies supports this concern. Please feel free to forward any information you have regarding this matter.

#### RCRA Financial Test

In response to your comments about EPA's plans for the financial test, we intend to explore a range of options for addressing concerns brought to our attention regarding the current financial test. As in the case of corrective action discussed above, if we determine a rule could be an effective approach, we intend to seek perspectives of all members of the public in this effort, including those from the regulated community.

#### Financial Assurance Requirements for Generators and Facilities Managing Hazardous Substances

With respect to your comments regarding financial assurance for facilities not regulated under Subtitle C of RCRA that have the potential to be listed on Superfund's National Priorities List, the Agency has not decided whether regulation under 108(b) of CERCLA is necessary. EPA is investigating the degree and duration of risk associated with modern production, transportation, treatment, storage or disposal of hazardous substances. If EPA determines that there are classes of facilities where modern production, transportation, treatment, storage or disposal of hazardous substances is creating a risk that may need to be addressed under the Superfund program, EPA would then determine the appropriate level of financial responsibility needed to protect against the identified level of risk.

Thank you for your comments and interest in the area of RCRA financial assurance. If you have any further questions, please call Tom Rinehart of the Office of Solid Waste at (703) 308-0157 or Bruce Kulpan of the Office of Site Remediation Enforcement at (202) 564-4252.

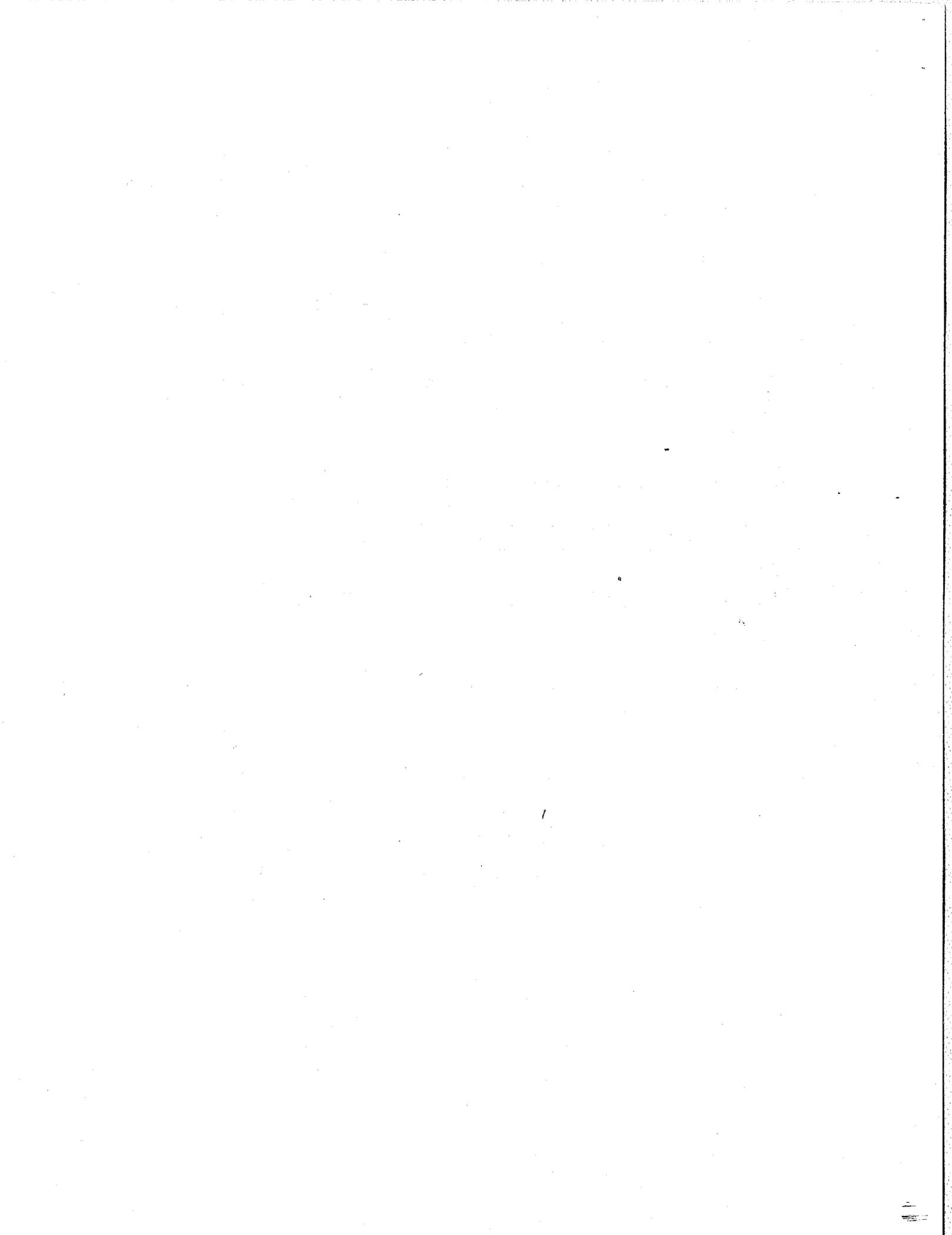
Sincerely,



Susan Parker Bodine  
Assistant Administrator  
Office of Solid Waste and Emergency Response



Granta Y. Nakayama  
Assistant Administrator  
Office of Enforcement and Compliance Assurance





OFFICE OF INSPECTOR GENERAL

*Catalyst for Improving the Environment*

## Evaluation Report

# Superfund's Board of Directors Needs to Evaluate Actions to Improve the Superfund Program

Report No. 2007-P-00029

August 1, 2007

**Report Contributors:**

Carolyn Copper  
Tina Lovingood  
Chad Kincheloe  
Steve Hanna  
Anne Emory  
Jayne Lilienfeld-Jones  
Mike Wagg

**Abbreviations**

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
FY	Fiscal Year
NPL	National Priorities List
OECA	Office of Enforcement and Compliance Assurance
OIG	Office of Inspector General
OSWER	Office of Solid Waste and Emergency Response
RCRA	Resource Conservation and Recovery Act
TSD	Treatment Storage and Disposal Facility



U.S. Environmental Protection Agency  
Office of Inspector General

2007-P-00029  
August 1, 2007

# At a Glance

*Catalyst for Improving the Environment*

## Why We Did This Review

We evaluated the U.S. Environmental Protection Agency's (EPA's) progress in responding to three recommendations from its 2004 study of the Superfund program (see below). The study recommended that EPA determine if Resource Conservation and Recovery Act (RCRA) facilities were causing a burden on the Superfund program. We also evaluated EPA's progress in responding to an Office of Inspector General recommendation on RCRA financial assurance.

## Background

In April 2004, EPA released a study entitled *Superfund: Building on the Past, Looking to the Future* (the *Study*). It was requested by then Acting Deputy EPA Administrator Stephen Johnson. The final report made 102 recommendations for improving the Superfund program. In response, the Acting Deputy EPA Administrator created a Superfund Board of Directors (the Board). Its role was to prepare, coordinate, and execute action plans to address the report's recommendations.

For further information, contact our Office of Congressional and Public Liaison at (202) 566-2391.

To view the full report, click on the following link:

[www.epa.gov/oig/reports/2007/20070801-2007-P-00029.pdf](http://www.epa.gov/oig/reports/2007/20070801-2007-P-00029.pdf)

## **Superfund's Board of Directors Needs to Evaluate Actions to Improve the Superfund Program**

### What We Found

We found that EPA completed its work to determine the financial impact of RCRA-regulated facilities on the Superfund program. The Agency is still assessing the financial impacts of non-RCRA facilities on the Superfund program. EPA also responded to Office of Inspector General recommendations on RCRA financial assurance. However, we found that some of EPA's planned actions to address its *Study* recommendations were different than the actions recommended.

### What We Recommend

We recommend that the Board review a sample of the implemented *Study* recommendations to confirm that the actions taken were complete and responsive to the original *Study* recommendation(s).



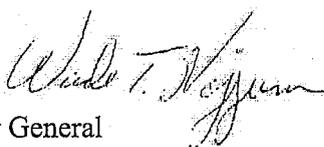
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
INSPECTOR GENERAL

August 1, 2007

**MEMORANDUM**

**SUBJECT:** Superfund's Board of Directors Needs to Evaluate Actions to Improve the Superfund Program  
Report No. 2007-P-00029

**FROM:** Wade T. Najjum   
Assistant Inspector General  
Office of Program Evaluation

**TO:** Susan Parker Bodine  
Assistant Administrator  
Office of Solid Waste and Emergency Response  
  
Granta Nakayama  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. The OIG responded to the Agency's draft report comments by making changes to the report and providing responses to EPA, as appropriate. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established resolution procedures.

The estimated cost of this report – calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time – is \$246,015.

**Action Required**

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 90 calendar days. The Office of Solid Waste and Emergency Response should coordinate EPA comments on this report and provide a consolidated response. Your response

should include a corrective action plan including milestone dates. Please email an electronic version of your response that complies with Section 508 of the Rehabilitation Act to Tina Lovingood at [lovingood.tina@epa.gov](mailto:lovingood.tina@epa.gov). We have no objections to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Carolyn Copper, Director for Program Evaluation, Hazardous Waste Issues, at 202-566-0829 or [copper.carolyn@epa.gov](mailto:copper.carolyn@epa.gov); or Tina Lovingood, Project Manager, at 202-566-2906 or [lovingood.tina@epa.gov](mailto:lovingood.tina@epa.gov).

## Purpose

The purpose of this evaluation was to follow up on the U.S. Environmental Protection Agency's (EPA's) progress in responding to recommendations in its April 2004 report on the Superfund program, *Superfund: Building on the Past, Looking to the Future*, known generally as the *120-Day Study*. Our evaluation followed up on three of the report's recommendations:

- ❑ **Recommendation 10:** "OSWER [Office of Solid Waste and Emergency Response] should evaluate the history of NPL [National Priorities List] listings and removal actions to determine what percent[age] were RCRA [Resource Conservation and Recovery Act] treatment, storage, and disposal facilities [TSDs] or hazardous waste generators and to what extent these facilities present a continuing burden to the Superfund program."
- ❑ **Recommendation 11:** "If the evaluation confirms a high correlation with RCRA-regulated facilities, OSWER and OECA [Office of Enforcement and Compliance Assurance] should examine different approaches to financial assurance under the RCRA program to reduce the likelihood of RCRA-regulated facilities becoming part of the future Superfund universe."
- ❑ **Recommendation 12:** "For facilities not covered under RCRA, OSWER should study whether promulgating new regulations under CERCLA's [Comprehensive Environmental Response, Compensation, and Liability Act's] broad financial assurance authorities could reduce the future needs of the Superfund program."

We also followed up on Agency progress in responding to OIG Recommendation 4.1 from our September 2005 report on RCRA financial assurance.<sup>1</sup> The recommendation is closely related to Recommendation 11 in the *120-Day Study*. We recommended that OSWER develop and communicate the EPA plan to address concerns with RCRA financial assurance regulations.

## Background

The *120-Day Study* (the *Study*) was an EPA-conducted review of the Superfund program. The overall objective of the *Study* was to identify ways to make the Superfund program more efficient so that the Agency could fund more cleanups with current resources. The *Study* was requested by then Acting Deputy EPA Administrator Stephen/Johnson. The final report made 102 recommendations for improving the Superfund program. In response to the *Study*, the Acting Deputy EPA Administrator created the Superfund Board of Directors (the Board). The Board's role is to prepare, coordinate, and execute action plans to address the report's recommendations. The Assistant Administrators for OSWER and OECA co-chair the Board.

## Scope and Methodology

We addressed the following questions. The questions address work that the Agency was to complete in responding to *Study* Recommendations 10, 11, and 12.

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<sup>1</sup> *Continued EPA Leadership Will Support State Needs for Information and Guidance on RCRA Financial Assurance*, Report Number 2005-P-00026, September 26, 2005.

1. What progress and findings has the Agency made in compiling and analyzing information on RCRA referrals to the Superfund program, to include those that have become NPL sites? (Recommendation 10)
2. Where it has occurred, what are the causes for RCRA referrals to the Superfund program? Do causes include inadequacies in RCRA financial assurance regulations, and what is the status of EPA actions to correct these inadequacies? (Recommendation 11 from the *Study* and Recommendation 4.1 from the September 2005 OIG RCRA financial assurance report)
3. What is the origin (e.g., non-RCRA Brownfield sites, previously unregulated private party abandoned sites) of the sites on the NPL and what proportion is represented by RCRA referrals? (Recommendation 12)

We performed preliminary research from June 2006 to November 2006. We applied *Government Auditing Standards*, issued by the Comptroller General of the United States, to areas within the scope of this review. We evaluated EPA's management controls over completing recommendations 10, 11, and 12. We also evaluated EPA's reporting of selected other recommendations. To address our objectives, we reviewed and analyzed financial assurance regulations, documents, reports, and data. We conducted our work at EPA Headquarters.

### **Prior Evaluation Coverage**

The OIG issued a report entitled *Continued EPA Leadership Will Support State Needs for Information and Guidance on RCRA Financial Assurance*, Report Number 2005-P-00026, on September 26, 2005. This report stated that:

- EPA does not have adequate data on financial assurance at hazardous waste TSDs regulated under RCRA.
- State and EPA financial assurance officials need to improve communication mechanisms to share financial assurance information.
- EPA needs to update guidance and needs to uniformly oversee State programs.
- States and EPA staff expressed concerns with aspects of the financial test and other financial assurance mechanisms.

The OIG recommended (among other actions) that OSWER develop and communicate EPA's plan for addressing concerns with financial assurance. EPA generally agreed with the OIG recommendations. In October 2006, EPA provided us its plan.

### **Noteworthy Achievements**

EPA has begun implementing its financial assurance plan. And, according to EPA, it has accomplished 89 percent of the *Study* recommendations.<sup>2</sup>

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<sup>2</sup> According to the Agency it has completed 89 percent of 108 *Study* recommendations as of 1/31/07. Its action plan contains 102 recommendations from the *Study*, including the 102 recommendations, and 6 additional "optional" recommendations.

## **Agency Progress in Addressing Recommendation 10**

The Agency has completed its work on Recommendation 10. EPA evaluated the history of NPL listings and removal actions to identify RCRA facilities and the extent to which these facilities pose a continuing burden to the Superfund program. To determine this burden, OSWER staff analyzed Superfund expenditure data from Fiscal Year (FY) 1981 through FY 2005.

The staff estimated that RCRA facilities account for 27 percent, or about \$2.8 billion, of the NPL site cleanup costs between FY 1981 and FY 2005. OSWER staff stated that these expenditures are "not insignificant." The staff also studied the history of 40 TSDs proposed for listing to the NPL after 1990.<sup>3</sup> The staff wanted to determine the reasons for proposal and whether similar types of facilities would be proposed to the NPL in the future. The staff concluded that the environmental damage at most of these sites generally occurred before EPA began to regulate TSDs. The sites' proposed listing to the NPL was not due to the failure of the RCRA regulatory program. Rather, the proposed sites were marginal RCRA TSD facilities that were forced to cease operations due to their inability to comply with RCRA requirements.

During fieldwork, we found that EPA had not completed the portion of Recommendation 10 that directed EPA to analyze the history of Superfund removal actions to determine what percentage were RCRA TSDs and to what extent these sites present a continuing burden to the Superfund program. That EPA had not performed this analysis may have been due in part to the fact that the last three action plans submitted by the Board (March and June 2006, and January 2007) did not contain the actual language from Recommendation 10 to conduct this work. Subsequent to issuing our draft report, the Agency provided documentation showing it had modified Recommendation 10 in its tracking system to contain the language. The Agency also told us that it did not interpret Recommendation 10 to require a separate analysis of removal action costs. Despite that, and in response to OIG requests, EPA provided documentation to show that it had conducted analysis of the potential costs of Superfund removal actions at TSDs. The Agency concluded that removal action costs were small in comparison to NPL costs, and that its work was complete on Recommendation 10.

## **Agency Progress in Addressing Recommendation 11**

EPA's work on Recommendation 11 is complete. Recommendation 11 stated that if EPA found a high correlation with RCRA-regulated facilities, EPA should examine approaches to RCRA financial assurance to reduce the likelihood of the facilities becoming future Superfund sites. To satisfy Recommendation 11, and OIG recommendation 4.1 in the 2005 OIG report on RCRA financial assurance, OSWER provided the OIG with a detailed financial assurance action plan. OSWER's plan comprehensively addresses the OIG recommendation and will be used by EPA to perform followup activities to address RCRA financial assurance for Recommendation 11.

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<sup>3</sup> EPA selected the 40 sites because it believed these facilities would be good predictors of the types of RCRA facilities that could be listed on the NPL in the future. By 1990, most of the significant 1984 Hazardous and Solid Waste Amendments regulations were in place. The Superfund deferrals policy, which governs the types of RCRA facilities proposed for the NPL, has not changed significantly since 1990.

## Agency Progress in Addressing Recommendation 12

The Agency is working to complete Recommendation 12. This recommendation stated that, for non-RCRA facilities, EPA should study whether new regulations under CERCLA's financial assurance authorities could reduce future Superfund resource needs. OSWER staff concluded that obtaining accurate information for NPL sites would be resource-intensive. OSWER's estimate to complete this recommendation is December 2007.

A necessary first step to address this recommendation would be to examine the origin and history of Superfund sites. We attempted to do so by reviewing internal databases. However, without further review of EPA files, the search failed to provide the information needed to answer our objective. Therefore, we were unable to independently determine site origins.

## Superfund Board of Directors Oversight of Action on 120-Day Study Recommendations

We found that the Superfund Board of Directors had management controls to implement and complete most *Study* recommendations. Some of the controls include a system that tracks the progress on the recommendations and weekly management review of the progress. The Office of Site Remediation and Technology Innovation (OSRTI) and OECA also include *Study* projects and the completion milestones in performance standards for senior managers, where appropriate.

However, during fieldwork, we found that the Board lacked management controls<sup>4</sup> to ensure implementing and completing the *Study* recommendations. Management controls will ensure that milestones are met or updated on a regular basis and completed work addresses the recommendations.

The Board issued action plans for responding to the *Study* recommendations in September 2005, and March and June 2006. The plans included completion dates, lead offices, and status of actions for each recommendation. During our fieldwork, the completion dates for Recommendations 11 and 12 in the June 2006 action plan had passed. We brought this point to the attention of a Board representative and asked how the Board monitors planned completion dates, follows up on missed completion dates, and when the action plan would be updated next. We also asked for updated completion dates for Recommendations 11 and 12. The response stated that the Board uses action plan updates to track the progress in completing the recommendations and that, at that time, 82 percent of the recommendations had been completed. We were told that changes in planned completion dates should be expected over time. We were also told that the next update of the action plan would coincide with the next Board meeting. The Board believed Recommendation 11 was complete and that Recommendation 12 would not be completed until March 2007 (and as of this report date, December 2007). OSWER and

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<sup>4</sup> Examples of management controls include actions such as (1) verifying that the action plans correctly state the *Study* recommendations, (2) regular progress updates on completing the action plans, (3) updating action plan milestones when needed, (4) briefings to the Board on the specific actions or analysis taken to complete the recommendations, and (5) confirmation of the completeness and responsiveness of the actions to the original *Study* recommendation(s).

OECA also told us EPA would update the action plan to correctly state Recommendation 10. In January 2007, OSWER staff provided us an updated action plan. However, the recommendation language had not been corrected.

After we issued our draft report, the Agency provided documentation showing it had modified Recommendation 10 language in its tracking system. It also provided details on its “internal checks and balances”, or controls for completing *Study* recommendations.

### ***Some Inconsistencies Between Agency Action Plans and Study Recommendations***

Because we initially found a difference between the way the Agency characterized Recommendation 10 in its action plans, and the way it appeared in the *Study*, we compared how the Agency characterized other *Study* recommendations. We found several instances in the Agency’s action plans where the recommendations were rephrased and key actions the Agency was supposed to take were omitted. Examples include recommendations 35, 48, 51, 52, 92, and 93. Rephrasing the *Study* recommendations can modify the intent of the recommendation, the Agency’s action, and the results obtained.

## **Recommendations**

We recommend the Superfund Board of Directors:

1. In coordination with appropriate lead offices, modify the *Study* Action Plan to correctly state Recommendation 10 as it appears in the final *Study*.
2. In fiscal year 2008, review a sample of completed actions on the *Study* recommendations to confirm that actions are complete and responsive to the original *Study* recommendation(s). The sample should include recommendations 35, 48, 51, 52, 92, and 93.

## **Agency Comments and OIG Evaluation**

The OIG made changes to the report based on the Agency’s comments where appropriate. Appendix A provides the full text of the Agency comments and OIG response.

The agency agreed with recommendation 1 and completed corrective action. We consider recommendation 1 closed in the Inspector General Operations and Reporting System. The agency provided comments to recommendation 2 but did not agree or disagree. We revised recommendation 2 to reflect the agency comments. In response to our final report, the Agency will need to comment on the revised recommendation 2. We consider recommendation 2 open and unresolved.

## Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Claimed Amount	Agreed To Amount
1	5	In coordination with appropriate lead offices, modify the <i>Study</i> Action Plan to correctly state Recommendation 10 as it appears in the final <i>Study</i> .	C	Superfund Board of Directors	07/09/07		
2	5	In fiscal year 2008, review a sample of completed actions on the <i>Study</i> recommendations to confirm that the actions are complete and responsive to the original <i>Study</i> recommendation(s). The sample should include recommendations 35, 48, 51, 52, 92, and 93.	O	Superfund Board of Directors			

<sup>1</sup> O = recommendation is open with agreed-to corrective actions pending  
 C = recommendation is closed with all agreed-to actions completed  
 U = recommendation is undecided with resolution efforts in progress

## **Agency Comments on Draft Report and OIG Evaluation**

May 21, 2006

### **MEMORANDUM**

**SUBJECT:** Response to OIG Evaluation Report "Superfund's Board of Directors Needs to Better Oversee Completing Superfund Improvements" (April 20, 2007)  
Assignment Number 2006-1413

**FROM:** Susan Parker Bodine/s/  
Assistant Administrator  
Office of Solid Waste and Emergency Response

Granta Nakayama/s/  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

**TO:** Bill Roderick  
Acting Assistant Inspector General  
Office of the Inspector General

We appreciate the opportunity to respond to recommendations on your draft report "Superfund's Board of Directors Needs to Better Oversee Completing Superfund Improvements." This draft report was submitted to us on April 20, 2007. Comments were provided on an earlier draft of that report on January 19, 2007.

Several areas of concern with the report's results and recommendations remain. First, we have concluded that the analyses called for in the 120-Day Study Recommendations 10 and 11 are complete. We have included removal actions in our evaluation; however, we believe that there is nothing to be gained from separating out costs associated with removal actions from other activities. In addition, the Superfund Board of Directors has been overseeing the completion of Superfund improvements. Specifically, the Board has been given progress updates on the 120-Day Study in briefings and board members use their existing management systems to oversee progress on implementing the 120 Day Study recommendations. Our specific responses to the OIG recommendations are included in the attachment.

Attachment

**Response to OIG Evaluation Report “Superfund’s Board of Directors Needs to Better  
Oversee Completing Superfund Improvements” (April 20, 2007)  
(Inserted into the table below by the OIG)**

<b>Table 1: EPA comments on OIG recommendations and OIG response</b>		
<b>OIG Recommendation</b>	<b>OSRE or OSRTI Response and/or Alternative</b>	<b>OIG Evaluation of Agency Comments</b>
<p>The Superfund Board of Directors in coordination with appropriate lead offices:</p> <p>1. Modify the <i>Study</i> Action Plan to correctly state Recommendation 10 as it appears in the final <i>Study</i>.</p>	<p>The 120 Day Study, SUPERFUND: Building on the Past, Looking to the Future (April 2004) and the OSWER 120-Day Study Action Plan (February 2005) have the same language regarding Recommendation 10. However, OSWER’s periodic 120-Day Study Action Plan Status Reports do not. We are planning to develop another status report for a Superfund Board of Director’s meeting in June and we will ensure the language in the next 120 Day Study status report contains the same language that was used in the original 120 Day Study regarding Recommendation 10.</p>	<p>EPA agreed and completed this action. We are closing this recommendation upon final report issuance in the Inspector General Operations and Reporting System.</p>
<p>The Superfund Board of Directors in coordination with appropriate lead offices:</p> <p>2. Develop new milestones to complete work on Recommendation 10 and 11; specifically, the Board should complete the evaluation of the history of Superfund removal actions that have occurred at RCRA facilities.</p>	<p>The analysis conducted in response to Recommendations 10 and 11 of the 120-Day Study is complete. Therefore, we see no reason to update the analysis, schedules, or milestones.</p> <p>Specifically, Recommendation 10 of the 120-Day Study asked OSWER to “evaluate the history of National Priorities List (NPL) listings and removal actions to determine what percent were RCRA treatment, storage, and disposal facilities (TSDs) or hazardous waste generators and to what extent these facilities present a continuing burden to the Superfund program.” OSWER evaluated sites in two categories: Non-NPL and NPL. The historical record of Superfund removal actions have been assessed as part of both of these categories. OSWER concluded that 2.3% of the</p>	<p>The Agency disagreed with our recommendation. It had interpreted the <i>Study</i> differently than the OIG. The Agency could have verified the intent of the <i>Study</i> recommendation with the <i>Study</i> leader. However, to address our concerns, the Agency provided some documentation to show that it had conducted an analysis of removal action obligations, as expenditure data were not available. Although the obligations data has limited applicability, the Agency said it is the best data they could provide. We are withdrawing this recommendation from the final report.</p>

**Table 1: EPA comments on OIG recommendations and OIG response**

OIG Recommendation	OSRE or OSRTI Response and/or Alternative	OIG Evaluation of Agency Comments
	<p>total universe of Non-NPL sites (which includes non-NPL removal sites) were potential TSDs. The costs associated with these potential TSDs were \$111 million, or 5.6% of the total Superfund site-specific expenditures at Non-NPL sites. In addition, EPA found that 5.1% of Non-NPL sites were identified as hazardous waste generators; these generators represent 9.5% of the total Superfund site-specific expenditures at Non-NPL sites. We note that dollar figures in the Non-NPL category include all site-specific expenditures at all Non-NPL sites where removal actions have occurred. Furthermore, as noted below, removal costs at sites proposed to, listed on, or deleted from the NPL were included as part of the analysis of the NPL category. Thus, OSWER has fully captured site information and all site-specific costs associated with Superfund sites where removal actions took place.</p> <p>The analysis of site-specific expenditures for NPL sites also included both remedial and removal actions. Specifically, our analysis determined that 143 potential TSDs were NPL sites, or 9% of the universe of 1,562 final and deleted NPL sites. Superfund site-specific expenditures at these sites totaled \$1.03 billion, or 9.8% of the \$10.6 billion spent on NPL sites (FY05 expenditure figures). The analysis did not break out removal actions/costs within the NPL site summaries. This was not an omission. Our reading of Recommendation 10 was to identify the number of sites and costs associated with site-specific Superfund work. Site work is often</p>	

**Table 1: EPA comments on OIG recommendations and OIG response**

OIG Recommendation	OSRE or OSRTI Response and/or Alternative	OIG Evaluation of Agency Comments
	<p>conducted using a combination of both remedial and removal actions. Because remedial and removal actions are both used to support actions at NPL sites, distinguishing between them for NPL sites neither inform decisions on nor change conclusions drawn on the need for financial assurance. Moreover, combining remedial and removal actions for NPL sites provides for a more straightforward presentation of results.</p> <p>EPA did conduct a more detailed analysis of 40 RCRA TSDs that were listed or proposed for the NPL, but it did not conduct a comparable analysis of TSDs subject to removal actions (except where those facilities were within the NPL category). This more detailed analysis did not address non-NPL TSDs or hazardous waste generators that underwent Removal Actions, or hazardous waste generators proposed to, listed on, or deleted from the NPL. We noted this order of magnitude difference in expenditures:</p> <ul style="list-style-type: none"> <li>• The Superfund site-specific expenditures associated with potential RCRA TSDs and hazardous waste generators that became Non-NPL sites totaled <u>\$298 million</u> (combined);</li> <li>• The Superfund expenditures associated with potential former TSDs and hazardous waste generators that were proposed to, listed on, or deleted from the NPL totaled <u>\$2.84 billion</u> (combined).</li> </ul> <p>Given the much larger amount spent at</p>	

**Table 1: EPA comments on OIG recommendations and OIG response**

OIG Recommendation	OSRE or OSRTI Response and/or Alternative	OIG Evaluation of Agency Comments
	<p>NPL sites, we chose to focus on those sites in order to evaluate the most contaminated, costly group of TSD sites (i.e., the NPL TSD sites). We do not believe that analyzing an additional set of lower cost facilities would change our conclusion that the majority of these Superfund expenditures were used to address contamination that was historical (pre-RCRA) in nature.</p> <p>We believe that it makes more sense at this time to put our resources into implementing our financial assurance plan. For example, on March 30, 2007, the Office of Solid Waste and Emergency Response (OSWER) decided to initiate the Agency's Action Development Process (ADP) to determine whether regulatory changes need to be made to the current RCRA Subtitle C financial test regulations. By starting this process, we will be closely evaluating the current financial test. During the initial exploratory phase, we will develop and analyze a full range of options, including addressing the concerns that have been raised through implementation assistance.</p>	
<p>The Superfund Board of Directors in coordination with appropriate lead offices:</p> <p>3. Develop and implement management controls such as: a quarterly schedule to receive progress updates on the completion of the <i>Study</i> Action Plan,</p>	<p>As stated in previous correspondence, OSWER and the Office of Enforcement and Compliance Assurance (OECA), the Co-Chairs of the Superfund Board of Directors, disagree with the OIG's statement that the "Superfund Board of Directors lacks management controls to ensure implementation and completion of the 120-Day Study recommendations." Implementation of the 120-Day Study recommendations is built upon the</p>	<p>EPA disagrees with this recommendation, because the Agency believes it has internal checks and balances to assure accountability for <i>Study</i> recommendations. At the exit conference to discuss the draft report, the Director for the Assessment and Remediation Division, OSRTI, and the Deputy Director for the Office of Site Remediation and Enforcement and their staffs provided details on the "Internal checks and balances". Some</p>

**Table 1: EPA comments on OIG recommendations and OIG response**

OIG Recommendation	OSRE or OSRTI Response and/or Alternative	OIG Evaluation of Agency Comments
<p>and requirements to update action plan milestones when needed. Progress updates should include briefings to the Board on the specific actions or analysis taken to complete the recommendations as stated in the <i>Study</i>.</p>	<p>Agency's performance management and accountability systems. Responsibility for each recommendation rests with one or more Agency office with a single office designated as the lead. The Board and its Working Group (consisting of senior managers of the organizations represented by Board members) comprise the major Superfund resource stakeholders across the Agency. Internal checks and balances to assure accountability for Study recommendations are provided through the respective management chains of the Working Group and Board of Directors. The Board meets periodically and is briefed on progress against planned completion dates. As you have stated in the draft report, 82 percent of the 102 recommendations were completed by June 2006. A January 2007 Update (attached), that was reviewed by the Superfund Board of Directors during a briefing on 5 February, indicates that 89 percent of the recommendations were complete.</p>	<p>of the controls include a system that tracks the progress on the recommendations and weekly management review of the progress. OSRTI and OECA also include <i>Study</i> projects and the completion milestones in performance standards, where appropriate. Staff briefs management on progress so management can give appropriate direction. We are withdrawing this recommendation from the final report.</p>
<p>The Superfund Board of Directors in coordination with appropriate lead offices:</p> <p>4. Select a sample of completed actions on the <i>Study</i> recommendations to confirm that the actions are complete and responsive to the original <i>Study</i> recommendation(s). The sample should include the examples cited in the report.</p>	<p>We will present this recommendation to the Superfund Board of Directors at their next meeting in June 2007 and discuss how the Agency should approach this recommendation.</p>	<p>The Agency did not agree or disagree with the recommendation, but indicated that it will present the recommendation to the Superfund Board of Directors and discuss how the Agency should approach this recommendation. In our exit conference with the Agency, the Deputy Assistant Administrator for OECA told us that the Board had decided not to act on the OIG's recommendation, due to resource issues, until all the recommendations from the <i>Study</i> are completed. The Agency's January 31, 2007 action plan indicates that all but one recommendation will be completed at</p>

**Table 1: EPA comments on OIG recommendations and OIG response**

<b>OIG Recommendation</b>	<b>OSRE or OSRTI Response and/or Alternative</b>	<b>OIG Evaluation of Agency Comments</b>
		the end of 2007. Therefore, we have modified the recommendation to address the Agency's resource concern. In the Agency response to the final report, the Agency will need to consider the revised recommendation, and develop an action plan, with completion milestones, for this recommendation.

## *Distribution*

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Assistant Administrator, Office of Enforcement and Compliance Assurance  
Principal Deputy Assistant Administrator, Office of Solid Waste and Emergency Response  
Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance  
Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance  
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Deputy Director, Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance  
Deputy Assistant Administrator, Office of Air and Radiation  
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