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Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: 202.739.3000
Fax: 202.739.3001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Kevin P. McCulloch
202.739.5156
kmcculloch@morganlewis.com

SUBMITTED VIA E-MAIL

The Honorable Kathleen A. McGinty, Chairperson
Environmental Quality Board
Commonwealth of Pennsylvania
P.O. Box 8477
Harrisburg, PA 17105-8477

RCRA Corrective Action Project Electronic Submittal to RegComments@state.pa.us

Re: RCRA Corrective Action Project's Comments on the Environmental Quality Board's Proposed Revisions to Pennsylvania's Hazardous Waste Management Regulations

On behalf of the RCRA Corrective Action Project ("RCAP"), this letter provides substantive comments on the Environmental Quality Board's proposed revisions to Pennsylvania's Hazardous Waste Management Regulations. 37 Pa. Bull. 3249 (July 14, 2007).

In this proposed rulemaking, the Environmental Quality Board ("EQB") proposes, among other things, to delete the financial test and corporate guarantee provisions of the financial assurance requirements set forth in Subchapter H of Pennsylvania's Hazardous Waste Management Regulations, 25 Pa. Code § 264a.141 et seq. As set forth in greater detail below, the RCAP disagrees with the EQB's determination that there is a need to eliminate those options. As a full examination of the data reveals, since its adoption in 1982, the financial test[1] has successfully fulfilled both of the goals for which it was designed: (1) reducing unnecessary financial burdens on private industry, and (2) ensuring that closure and post-closure costs do not become public liabilities.

The EQB proposes to eliminate the financial test option on the basis of the EQB's purported "experience with companies suddenly losing the ability to meet the requirements of the financial

[1] Throughout these comments, the RCAP uses the term "financial test" to refer to both the financial test and corporate guarantee provisions of Pennsylvania's financial assurance regulations.

test with no means of replacing collateral available or entering bankruptcy." The EQB, however, offers no evidence to support this claim. Nor could it, as there simply is no evidence of companies that meet the rigorous requirements of the financial test suddenly failing. Eliminating such a beneficial and effective option without any data demonstrating problems with the current system— indeed, with barely any explanation of the basis for its decision —would be imprudent.

The RCAP urges the EQB to reconsider its proposal to delete the financial test provision. In developing the financial test option, EPA took great care to ensure that the financial test appropriately balances the public's need for ensuring that a company will be able to satisfy its closure and post-closure financial responsibilities, and industry's need to maintain flexible use of corporate assets. As 20-plus years of experience demonstrate, EPA has been highly successful in that endeavor. The financial test now is a critical tool for companies in good economic standing to satisfy their financial assurance requirements without committing capital to secure a bond or letter of credit. In this way, the financial test allows companies that are able to satisfy the rigorous financial threshold requirements to reinvest capital assets, thereby ensuring their continued financial strength and improving their ability to satisfy future environmental costs. All parties involved would be better served by maintaining the financial test and corporate guarantee provisions.

The RCAP hopes that these comments will encourage EQB to reevaluate its proposed elimination of the financial test.

I. Background on RCAP

The RCRA Corrective Action Project was formed nearly 20 years ago to provide constructive input to EPA and state agencies on critical policy issues affecting the cleanup of contaminated sites. The members of the RCAP are companies from diverse sectors of American business and industry that have extensive experience operating hazardous waste facilities and cleaning up contaminated sites. In particular, many of the RCAP's member companies operate facilities that generate or handle hazardous waste materials that are regulated under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). As a result, many of the RCAP's member companies have been obliged to provide financial assurance for these facilities in a number of states. In meeting those requirements, the RCAP's member companies have utilized a variety of the accepted mechanisms for financial assurance, including the financial test.

Since its inception, the RCAP has worked cooperatively with state environmental agencies to improve implementation of RCRA and related state programs. Toward that end, the RCAP is pleased to submit these comments regarding EQB's proposal, and hopes that these comments will assist EQB in developing a sound and coherent policy in this area.

II. Development of the Financial Test

In this proposal, EQB proposes to revise Pennsylvania's Hazardous Waste Management

Regulations by, among other things, deleting the financial test provision of the financial assurance regulations. EQB's proposal fails to consider the careful and extensive analysis that EPA performed in developing the financial test option.

As courts often have noted, Congress enacted RCRA to establish a "'cradle to grave' regulatory structure for overseeing the safe treatment, storage and disposal of hazardous waste." *United Techs. Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). As part of this "cradle to grave" regime, EPA promulgated regulations to ensure that a company operating a hazardous waste treatment, storage, or disposal facility ("TSDF") has adequate financial resources available to meet closure and post-closure costs. *See* 40 C.F.R. § 264.140 et seq. RCRA's financial assurance requirements, including the financial test option, thus are designed to ensure that the owner or operator of a TSDF will have sufficient funds to provide liability coverage until the facility is finally closed, and to cover the cost of closure and post-closure care.

In developing the financial test option, EPA took great care to ensure that it designed a program that adequately protects the public from bearing closure and post-closure costs. When EPA first proposed financial assurance regulations in 1978, its initial proposal permitted an owner or operator to assure payment of closure and post-closure costs only by establishing a trust fund. *See* Hazardous Waste Guidelines and Regulations, 43 Fed. Reg. 58,995, 59,006-07 (proposed Dec. 18, 1978). EPA's initial proposal also required the closure trust fund to be fully paid-up when established, but did permit the post-closure fund to be built up over 20 years or the remaining operating life of the facility, whichever was shorter. *Id.* Given these stringent requirements, many commenters objected to EPA's proposal on the ground that it would be "so costly it could put them out of business." Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 46 Fed. Reg. 2802, 2821-22 (Jan. 12, 1981).

Taking these concerns into account, EPA amended its approach and proposed to allow a range of options for companies to provide financial assurance for closure and post-closure care. *See* Financial Requirements for Owners and Operators of Hazardous Waste Management Facilities, 45 Fed. Reg. 33,260, 33,278 (proposed May 19, 1980). Specifically, EPA proposed to allow owners and operators to satisfy their financial assurance obligations by establishing a trust fund or obtaining a surety bond, a letter of credit, or insurance. *Id.* EPA's proposal also included for the first time an option to permit owners and operators to satisfy financial assurance requirements by demonstrating the company's financial security. *Id.* At the time of proposal, however, EPA had yet to determine what specific financial thresholds would best balance public and private interests. EPA thus postponed adoption of the financial test option until it had time to conduct the extensive analysis necessary to develop appropriate financial thresholds.

In the two years between proposal and issuance of the Final Rule in April 1982, EPA "conducted an extensive analysis of the performance of numerous financial tests and made detailed calculations of the costs they would entail." Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 47 Fed. Reg. 15,032, 15,035 (Apr.

7, 1982). In developing the financial test, EPA was "particularly concerned" with three general goals:

> (1) Funds should be available for closure and post-closure care for protection of human health and the environment; (2) As a matter of equity, the parties responsible for closure and post-closure obligations, i.e., owners and operators, should pay those costs; (3) Costs to the regulated community of providing financial assurance should be as low as possible.

Id. at 15,034. In balancing these goals, however, EPA's "principal consideration in selecting the [financial assurance] mechanisms and determining their specifications was the effectiveness of the mechanism in assuring the availability of sufficient funds when needed for closure and post-closure care." 46 Fed. Reg. at 2822.

EPA went to great lengths to develop a financial test that would satisfy these goals. EPA considered over 300 candidate financial tests, and tested each of them against an empirical sample set of 178 viable firms and 66 bankrupt firms. 47 Fed. Red. at 15,035. For each test evaluated against the sample set, EPA computed two primary measures of effectiveness. First, EPA considered the percentage of viable firms that would be able to use the financial test as an option. As EPA explained, this factor measured each candidate test's potential for reducing private costs by allowing firms to use an alternative which costs less than a letter of credit or other financial mechanism. *Id.* Second, EPA considered the likely rate of bankruptcy for firms passing the test in order to evaluate the effectiveness of each test in eliminating firms that could potentially default and thus burden the public with their closure and post-closure costs. *Id.* EPA thus went to great lengths to evaluate each potential financial test and to determine the potential burden of the test on EPA resources if a company failed.

From this list of 300 potential tests, EPA identified the 16 "best test" options. EPA then eliminated any test alternatives that did not include a minimum net worth requirement of at least $10 million because empirical data revealed that this threshold requirement was sufficient to ensure that funds will be available for closure and post-closure care.[2] EPA also eliminated any test that did not include a domestic asset requirement.[3] EPA concluded that these requirements

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[2] In settling on this minimum net worth requirement, EPA analyzed public and private costs associated with different thresholds. EPA found that firms that have assets over $10 million are significantly less likely to become insolvent. *See* Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities and Hazardous Waste Treatment, Storage, and Disposal Facilities; Proposed Rules, 59 Fed. Reg. 51,523, 51,527 (Oct. 12, 1994). Moreover, EPA's analysis also demonstrated that although a higher threshold may provide even more security, the benefits "would not offset the additional costs to the regulated community of obtaining alternative financial assurance mechanisms." *Id.*

[3] The domestic asset provision requires that the owner or operator have assets in the United States amounting to at least 90 percent of total assets or at least six times the sum of the closure and post-closure cost estimates. EPA later proposed to amend this provision to require that all firms using the financial test have assets in the United States at least equal to the costs they seek to assure through a financial test. 59 Fed. Reg. at 51,527. EPA's domestic asset test for Subtitle D does require that all firms using the financial test have assets in the United

would help "ensure accessibility to funds in the event of bankruptcy or other default." 47 Fed. Reg. at 15,036. Of the remaining alternatives, EPA selected the financial test "which resulted in the lowest sum of direct public and private costs . . . ." *Id.* EPA's analysis thus included a careful review of various competing considerations and an extensive review of relevant evidence. The financial test that EPA ultimately identified as the best possible test requires that an owner or operator have $10 million in tangible net worth, have tangible net worth and net working capital each at least six times the sum of closure and post-closure costs, satisfy a domestic asset requirement, and either satisfy a bond rating requirement, or pass one of two financial ratios. *See* 40 C.F.R. § 264.141.

After this extensive analysis, EPA concluded that "[f]irms passing the test were not likely to fail suddenly." 47 Fed. Reg. at 15,034. Indeed, EPA's rigorous analysis indicated that "only a very small percentage of the firms that pass this test could be expected to go bankrupt without providing alternative financial assurance (.01 percent)." *Id.* at 15,036. EPA also concluded that the features of the financial test ensured that "an owner or operator who passed it had the financial capability to establish one of the alternative forms of financial assurance should he later fail the test." *Id.* at 15,034.

EPA thus expanded the financial assurance provision to include a financial test option only after it was fully satisfied that a properly defined financial test would provide adequate assurance of financial responsibility and that the test would "ensure the equitable result that the persons who benefit directly from hazardous waste treatment, storage, and disposal activities will pay the costs of proper closure and post-closure care." *Id.* at 15,044.

III. EPA's Continued Review of the Financial Test

Every time EPA has reviewed the financial test requirement, it has confirmed that there is "a small probability" that a qualifying company would go bankrupt, calling such a failure "unlikely." *See, e.g.*, 63 Fed. Reg. at 17,723

For instance, in 1988, EPA proposed revisions to the regulations concerning municipal solid waste landfills ("MSWLFs"), including adding financial assurance provisions patterned after the requirements for hazardous waste facilities under Subtitle C. *See* 53 Fed. Reg. 33,314 (August 30, 1988). Comments on the MSWLF proposal supported the development of financial tests for both local governments and corporations. EPA agreed with commenters, but, at the time the final MSWLF criteria were promulgated in 1991, EPA was in the process of re-evaluating Subtitle C's financial test. *See* Solid Waste Disposal Facility Criteria; Final Rule, 56 Fed. Reg. 50,978 (October 9, 1991) ("EPA is currently re-evaluating, and will consequently propose revisions to, the subtitle C corporate financial test as part of a separate rulemaking. The Agency would anticipate proposing at the same time conforming changes to the . . . financial

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States at least equal to the costs they seek to assure through a financial test. See "Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities; Final Rule," 63 Fed. Reg. 17,706, 17,709 (April 10, 1998).

responsibility performance standard to allow this revised corporate test to be used as a compliance option for demonstrating financial responsibility for MSWLFs.").

In 1994, EPA finally proposed to amend the financial assurance regulations for MSWLFs to include the financial test option. *See* 59 Fed. Reg. at 51,527. In developing the financial test under Subtitle D, EPA once again undertook an extensive analysis of the effectiveness of the financial test, including performing similar evaluations of test options and reviewing extensive empirical data that had been collected since the adoption of the financial test for Subtitle C. *Id.* at 51,527-29. EPA also conducted a sensitivity analysis to determine whether the costs of the RCRA Corrective Action Program would affect the performance of the candidate financial tests. *Id.* at 51,530. EPA's review of the financial test option confirmed its earlier determination that it was appropriate to "allow owners and operators to use a combination of financial assurance mechanisms, including this financial test, to assure the costs associated with their facilities." *Id.* at 51,524. EPA finalized the financial test for MSWLFs in 1998. *See* 63 Fed. Reg. at 17,723.

EPA's Office of Inspector General also conducted an intensive audit of the financial assurance program that culminated in a March 2001 report. EPA Office of Inspector General, "RCRA Financial Assurance for Closure and Post-Closure," March 30, 2001 ("OIG Report"). The OIG's Report concluded that "[a]lthough States and [EPA] regions expressed concern about financial assurance, we noted *few examples in which failure occurred.*" *Id.* at i (emphasis added). After an exhaustive review, the Inspector General's audit failed to find any deficiencies in the administration of EPA's financial test, nor did it call for EPA to initiate rulemaking to revise—let alone eliminate—the financial test option. In fact, the Report specifically noted that the current framework is appropriate for larger companies. *Id.* at 16-17.

Most recently, EPA's Environmental Financial Advisory Board ("EFAB") undertook a comprehensive review of the financial test and corporate guarantee provisions culminating in a January 2006 report. United States Environmental Protection Agency, Memo re: "EFAB initial findings concerning the use of the financial test and corporate guarantees to meet financial assurance requirements under RCRA programs," Jan. 11, 2006. The EFAB workgroup was tasked with evaluating "the strength and pitfalls of the financial test and corporate guarantee" and determining "[w]hat, if any, new or different financial tests or protections might be appropriate." *Id.* at 3. After completing an initial review, EFAB uncovered no data revealing "specific failures" of the financial test. *Id.* at 4. EFAB also noted that empirical data revealed "very little information concerning utilization of the financial test by small entities, and particularly those without a bond rating"—a particularly significant fact given that EFAB also determined that "the methodologies used by the credit rating agencies are a reliable assessment of credit quality." *Id.* at 5.

EFAB's report noted that regulated companies objected to modifying the financial test provision "without sound evidence showing that the test has not achieved its intended purpose and that changes are necessary to assure that the risks presented by its use are not appreciably larger—or less acceptable—than when the test was adopted." *Id.* at 4. Finding no such "sound evidence"

of a need to eliminate the financial test, EFAB concluded that the test provides an important financial assurance alternative, and that only minimal changes were warranted. Based on its initial review, EFAB recommended that the independent credit analysis requirement of alternative II be required under alternative I as well. *Id.* at 6. EFAB made this recommendation on the basis of data that revealed that credit ratings requirements provide "a cost-effective mechanism for demonstrating financial assurance and should continue to be an alternative for those companies that have investment-grade ratings in their debt." *Id.* at 5.

As this history demonstrates, EPA repeatedly has conducted extensive and detailed analysis of the financial test option, and those reviews consistently have demonstrated that the financial test appropriately balances public and private interests and that the risk of qualifying companies failing is minimal. The EQB's proposal ignores the careful balance that EPA devised when it developed the financial test over 25 years ago.

For financially strong companies, EPA provided low-cost mechanisms, such as the financial test, which rely on the inherent strength of qualifying companies to assure performance of their obligations. For less-strong companies, EPA provided more secure but costlier mechanisms, such as letters of credit and surety bonds, to minimize the possibility that the liabilities of these companies would be shifted to taxpayers. In other words, EPA recognized that different financial assurance mechanisms are appropriate for different companies based on the relative level of risk of each company failing to fulfill its obligations. The EQB's proposal ignores that critical recognition and imposes a uniform approach to financial assurance that mistakenly presumes that all companies should be treated as if they were bordering on financial distress.

IV. The Value and Effectiveness of the Financial Test

A. Any alleged uncertainties regarding the financial test are baseless.

In contrast to the extensive studies carried out by EPA in developing the financial test option, the EQB proposes to delete the financial test based simply on its "experience with companies suddenly losing the ability to meet the requirements of the financial test with no mean of replacing collateral available or entering bankruptcy." Yet EQB offers absolutely no support for this conclusion, either anecdotal or otherwise. Nor could it, as there simply is no data to support this claim. Indeed, to the best of our knowledge, even well-publicized bankruptcies such as Bethlehem Steel and Enron resulted in no hazardous waste closure costs being transferred to the federal or state governments.[4] EQB fails to offer a detailed analysis of the significant implications of eliminating the financial test option. To eliminate an effective and beneficial financial assurance alternative and thereby significantly increasing companies' costs, without any demonstrable justification is unsupportable.

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[4] Ironically, if this proposal is adopted, it may actually force companies that currently are able to meet the financial test to purchase other financial assurance mechanisms from sources that may actually be less creditworthy than the company owning the TSDF.

EQB's failure to conduct such an analysis and subject that inquiry to public scrutiny also is inconsistent with an agency's fundamental duty to support any proposed rulemaking. *See Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (Agencies are obliged "to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."). Indeed, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). A proposed rule thus is "arbitrary and capricious" if the agency has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." *Id.* Under Pennsylvania's Administrative Law and Procedure statute, the rule is no different, as courts will vacate actions taken by agencies of the Commonwealth where "any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." 2 Pa.C.S. § 704 (2006).

Such is the case here. As explained above, EPA has repeatedly examined whether the financial test requirements provide an adequate guarantee that qualifying companies are financially stable, and each time EPA has concluded that sudden failures are highly unlikely. *See, e.g.*, 63 Fed. Reg. at 17,715. And the numerous reports that have examined the issue have never identified sudden failure as a risk under the financial test, confirming EPA's conclusion.

Simply put, the track record of actual experience under the current requirements is quite favorable and provides little support for the notion that fundamental changes are needed. There simply is no evidence of the sudden failure of companies utilizing the financial test. And for good reason, as EPA clearly took great care to design the financial test to ensure that companies that satisfy the annual certification provision are economically healthy companies that pose very little risk of suddenly becoming insolvent.

B. The Financial Test includes important redundancies.

The lack of sudden failures by qualifying companies is a direct result of the way in which EPA developed the financial test. It is important to remember that EPA designed the financial test to include the minimum net worth requirement because it concluded that this requirement demonstrated that it was extremely unlikely that a qualifying company would go bankrupt *in the next 3 years*. 47 Fed. Reg. at 15,032. In other words, the financial test is designed to screen out companies that have a significant risk of declaring bankruptcy at any time in the 3 years after qualifying for self-assurance, and thus includes an important 3-year "look ahead" feature. The financial test also requires that new letters and new reports for each subsequent fiscal year must be submitted within 90 days after the end of the qualifying entity's fiscal year. Because a company relying on the financial test must re-qualify each year, there always is at least a 2-year period during which default is highly unlikely.

The program also includes other redundancies that are designed to ensure that, even if a company does fail, its closure and post-closure costs will not become public liabilities. For instance, the conservatism built into the test ensures that, even if a company fails the test before its next certification, it is highly likely that the company still will have the financial ability to procure alternative financial assurance. And, in the extremely unlikely event that a company should fail entirely within one year, the domestic asset requirement makes it much easier for EPA or a state agency to recover costs in any future proceedings, whether they are bankruptcy proceedings or an action under the joint and several liability provisions of CERCLA.

Given all of these redundancies, it would be a rare case indeed that the closure or post-closure costs become the responsibility of the State.

C. The financial test is an important financial assurance mechanism.

The RCAP recognizes that financial assurance is an essential element of the legal framework for cleanup of contaminated sites. Financial assurance regulations ensure that adequate funding will be available for closure and post-closure activities, and thus prevents such costs from becoming a public liability. The RCAP fully supports sound and reasonable requirements to provide such assurance. The RCAP, however, is concerned that eliminating the financial test mechanism will create unnecessary and counterproductive financial burdens.

The EQB's proposal to eliminate the financial test option fails to consider the significant burdens that such a change would impose on companies that currently utilize the test to satisfy their financial assurance obligations. Although there always is some risk of failure for any financial assurance mechanism, EPA designed the various options to minimize the risk of failure as much as possible, evaluating literally hundreds of potential tests and selecting the one which best met its two goals. And although EPA also sought to avoid imposing unnecessary financial burdens on private industry, EPA's primary consideration always was that the financial obligations for closure and post-closure care were shouldered by the responsible company and did not become a public liability. Indeed, because the flexibility of the financial test permits companies to reinvest capital, these two goals are complimentary. The financial test thus strikes the proper balance, allowing financially strong entities to reinvest capital in an effort to continue growth, thereby helping assure their financial stability and capacity to cover future environmental liabilities.

As a result, the financial test has become an important financial assurance tool. According to the Inspector General's 2001 Report, over one-third of TSDFs rely on the financial test to meet their financial assurance obligations, and more than 30 percent of the MSWLFs used the local government financial test. OIG Report at 24-25. Moreover, those facilities using the financial test also had the highest closure and post-closure cost estimates. *Id.* Eliminating the financial test mechanism thus will impose significant financial burdens on a large number of owners and operators.

To impose such costs on private industry without any demonstrable evidence of any problems under the current system is irresponsible. Every dollar spent on duplicative and unnecessary

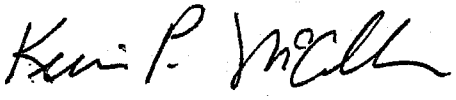
financial assurance instruments is a dollar that is no longer available for capital improvements, including proactive investment in pollution control equipment.

In previous rulemakings, EPA has "encourage[d] States to make *reasoned* judgments in implementing the performance criteria in the existing rules, including providing flexibility for firms in circumstances that States determine to reasonably *balance the public and private cost of financial assurance.*" 63 Fed. Reg. at 17,716 (emphasis added). To eliminate an important financial assurance option with virtually no explanation of the basis for that decision, let alone a reasoned justification, runs afoul of this guidance. Little or no data exists to suggest a problem, and no evaluation was made to determine the existence or extent of a problem with the current program. It simply is bad policy to make changes to programs that work.

IV. Conclusion

For the reasons set out above, the RCAP urges EQB to fully examine the history of the financial assurance regime. That history demonstrates that the financial test has proven very capable of serving its dual purpose: ensuring that financial resources will be available for closure and post-closure costs while also ensuring that those costs are shouldered by the responsible company. Given the importance of the financial test mechanism, and the substantial costs that would attend eliminating that option, EQB's proposed deletion of the financial test is not a change to be undertaken unless there is a strong reason to believe that a significant problem needs to be corrected. Such is not the case here. Indeed, numerous reviews, audits, and reports all have failed to find any evidence of sudden failures by companies that meet the financial test when revising Pennsylvania's financial assurance regulations. The RCAP thus strongly encourages the EQB to reconsider its proposed deletion of the financial test.

Sincerely,



Kevin P. McCulloch

Counsel to the RCRA Corrective Action Project

September 12, 2007

Morgan Lewis
COUNSELORS AT LAW

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Kevin P. McCulloch
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