



MINNESOTA POLLUTION CONTROL AGENCY PROGRAM MANAGEMENT DECISION MEMO

ISSUE: Clarifying the role of financial assurance when evaluating the case-by-case need for environmentally protective measures at industrial landfills

EFFECTIVE DATE: December 5, 2003

DECISION

1.) The commissioner has the authority to set specific conditions for permits, and one of those is financial assurance requirements. One of the specific cases that deserve some form of financial assurance is an industrial landfill that contains waste chemically or biologically active enough that it is necessary to have a liner and leachate collection system for the protection of environmental and human health. When a proposed industrial landfill will be lined and will have leachate collection, as a general matter, the operator of that landfill should have sufficient financial assurance to cover closure, post closure, and contingency action costs.

2.) Where a lined coal-ash monofill is operated by a publicly regulated utility, and where the Public Utilities Commission regulates that utility in such a way as to allow the operator to pass along a rise in its landfill costs, such monofills shall continue, at the minimum, to be required to obtain uncollateralized instruments for their financial assurance.

BACKGROUND

MPCA's authority to require financial assurance at industrial landfills has been questioned by a regulated party. Management asked staff to review our authority and recommend a course of action.

RELEVANT STATUTES AND RULES

- Minn. Stat. 116.07, subdivision 4(h), on MPCA authority to adopt financial assurance rules.
- Minn. Rule 7001.0150, subpart 2: MPCA authority to add permit conditions where necessary to protect human health and environment.
- Minn. Rule 7035.1590 to 7035. 2500: Industrial landfill construction and operation.
- Minn. Rule 7035.2665 to 7035.2805: Financial assurance requirements for mixed-municipal and combustor-ash landfills.

RATIONALE

Financial assurance for industrial landfills can and should be negotiated on a case-by-case basis, citing Minnesota rule 7001.0150, subpart 2. Minn. Rule 7001.0150 gives the agency authority to add to a permit “any conditions that the agency determines to be necessary to protect human health and the environment”. It is clear that on a case by case basis the agency has authority to require financial assurance as a condition that is protective of human health and the environment. The level of protection may vary based on circumstances. Circumstances vary so much among industrial landfills that the MPCA has not pursued broad rules about financial assurance at these facilities, under the statutory authority of Minn. Stat. 116.07, subdivision 4(h).

Generally speaking, financial assurance mechanisms fall into three general types: uncollateralized (“self insurance”), secured (surety bonds, standby letter of credit), and cash instruments (trust funds).

As to coal-ash landfills that are owned by publicly regulated power utilities, financial assurance at these facilities need not be collateralized so long as Minnesota retains its traditional approach to utility regulation. The significance of this is that regulated utilities typically are able to charge their ratepayers for the immediate costs of power generation, including the maintenance of ash landfills. Given that the electric industry is regulated, when such a landfill operator sees a sudden rise in its response costs, the Minnesota Public Utilities Commission (PUC) will allow the operator to pass along those costs to ratepayers. In such cases classic financial assurance mechanisms such as surety bonds, trust funds, or letters of credit are not obligatory.

There are three situations where the MPCA permitting staff should closely examine circumstances as to the possible need for permit conditions that move an industrial landfill to more protective measures than uncollateralized financial assurance mechanisms:

- 1) Where a lined landfill is not operated as part of a regulated utility’s generation system (e.g., where the operator produces process steam for an industrial plant or for that plant’s own power supply);
- 2) Where the lined landfill is run by a regulated utility but the individual circumstances make it questionable whether the Minnesota Public Utilities Commission would allow decades of landfill care to be charged to ratepayers; or
- 3) Where a landfill has been run by a regulated utility but a change in permittee is requested.

While at this time staff does not advise changing current MPCA rules for financial assurance, because the effort does not appear to pose a significant gain for the amount of agency resources that would be required, still will monitor Minnesota and national reports for any evidence of financial failures at industrial landfills nationwide, with particular attention to purchased insurance policies. Minnesota does not currently allow

insurance policies to serve as a mechanism for financial assurance and at this time Minnesota's rules appear to be adequately protective.

IMPLEMENTATION

Management and staff will notify industrial landfill operators.

APPROVAL

I have reviewed this management decision and I concur.

Signed:

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