

TITLE 329 SOLID WASTE MANAGEMENT DIVISION

LSA Document #14-287

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 12, 2020, through March 13, 2020, on IDEM's draft rule language. IDEM received comments from the following party:

Jean A. Martin, BP America Inc. (JM)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: BP supports IDEM's hazardous waste financial assurance rulemaking, as it provides regulatory certainty for facilities currently in corrective action and facilities that may have future corrective action obligations. (JM)

Response: IDEM appreciates the general support of the rulemaking expressed in the comment.

Comment: We are concerned that IDEM's proposed amendment would inappropriately exclude the use of payment bonds as an approved method of financial assurance.

A payment bond is appropriate for corrective action and should be an allowed mechanism under 329 IAC 3.1-14 and 329 IAC 3.1-15. The United States Environmental Protection Agency (U.S. EPA) supports states' use of payment bonds to provide financial assurance for corrective action in current U.S. EPA guidance. Just like other U.S. EPA and IDEM-allowed mechanisms, a payment bond provides funds to IDEM for corrective action by placing funds into a standby trust fund. This ensures that IDEM has the funds available to pay for corrective action, in the event the owner or operator does not perform corrective action as required. (JM)

Comment: U.S. EPA, in its "Interim Guidance: Financial Responsibility for Facilities Subject to RCRA Corrective Action (Sept. 30, 2003)," specifies that U.S. EPA and states may allow any of the financial assurance mechanisms authorized in RCRA closure and post-closure financial assurance regulations¹—including payment bonds—as well as other mechanisms, to be used as financial assurance for corrective action.² This Interim Guidance is intended to "assist the states that are authorized for corrective action in the implementation of financial assurance requirements."³ Following U.S. EPA's current guidance, IDEM should allow payment bonds for corrective action in its financial assurance regulations.

1 See 40 CFR Part 264, Subpart H.

2 U.S. EPA, "Interim Guidance: Financial Responsibility for Facilities Subject to RCRA Corrective Action," Sept. 30, 2003, pages 5, 9.

3 U.S. EPA, "Memorandum: Transmittal of Interim Guidance on Financial Responsibility for Facilities Subject to FROM: RCRA Corrective Action," Sept. 30, 2003.

A payment bond satisfies financial assurance requirements for corrective action, and owners and operators should be allowed to select any financial assurance mechanism that meets regulatory requirements. By allowing payment bonds for corrective action, U.S. EPA has recognized that there is no reason to compel an owner or operator to choose an option that U.S. EPA expects to have the lowest cost. (JM)

Comment: A payment bond for corrective action—just like performance bonds and letters-of-credit—ensure that IDEM has all the funds needed for corrective action in a standby trust fund, should an owner or operator default on its corrective action obligation. There is no justifiable reason to exclude payment bonds from the list of available mechanisms for corrective action financial assurance. BP therefore respectfully requests that IDEM include payment bonds as an allowed mechanism for corrective action financial assurance in 329 IAC 3.1-14 and 329 IAC 3.1-15. (JM)

Response: IDEM’s original decision to exclude the surety bond guaranteeing payment for corrective action was based upon information in the 1986 U.S. EPA proposed rule for corrective action financial assurance at hazardous waste facilities (51 Fed. Reg. 37854) and IDEM’s exclusion of the surety bond guaranteeing payment for corrective action financial assurance at municipal solid waste landfills in 329 IAC 10-39-10. Upon review of the comments and recent information concerning financial assurance at hazardous waste facilities, IDEM will allow a surety bond guaranteeing payment as an option for corrective action financial assurance at hazardous waste facilities. IDEM does not foresee any reason to restrict the usage of a surety bond guaranteeing payment if a regulated entity meets the applicable requirements for the mechanism. The surety bond guaranteeing payment for corrective action financial assurance will have similar requirements to the same mechanism for closure or post-closure. IDEM has made amendments in 329 IAC 3.1-14-4, 329 IAC 3.1-14-6, 329 IAC 3.1-14-27, and 329 IAC 3.1-15-4 to include a surety bond guaranteeing payment as an option for corrective action financial assurance.

Comment: IDEM currently allows payment bonds for closure and post-closure care and should allow payment bonds for corrective action. Under 329 IAC 3.1-14 and 329 IAC 3.1-15, an owner or operator can secure a payment bond, which is a guarantee from a surety company that all closure and/or post-closure care requirements will be fulfilled. With a payment bond, an owner or operator also must establish a standby trust fund. That trust fund remains unfunded, i.e. “standby,” until an owner or operator fails to fulfill its closure and/or post-closure care obligations. At that time, the surety company is liable to IDEM for the cost of the unfulfilled closure and/or post-closure care obligations and pays the penal sum of the bond (the estimated cost of closure and/or post-closure care) into the standby trust fund. The now funded trust gives IDEM the money needed to pay for the performance of closure and/or post-closure care. This exact same structure can, and should, be used for corrective action. (JM)

Comment: This payment guarantee bond and standby trust structure is comparable to the surety bond guaranteeing performance (“performance bond”) and letter-of-credit mechanisms

allowed for corrective action in IDEM's proposed rule. Like with a payment bond, a standby trust fund is required with a performance bond and with a letter-of-credit. Under a performance bond, if the owner or operator is unable to perform corrective action, the surety that issued the performance bond can choose whether to perform corrective action or deposit the sum of the bond (the estimated cost of corrective action) into the standby trust fund. If the surety opts to fund the standby trust, IDEM is in the same position as if a surety funded a standby trust from a payment bond. Similarly, if IDEM draws on a letter-of-credit for corrective action, the issuing bank deposits the amount of the letter-of-credit (the estimated cost of corrective action) into the standby trust fund, just like a surety would fund a standby trust fund. (JM)

Response: The current requirements in 329 IAC 3.1-14 and 329 IAC 3.1-15 for the surety bond guaranteeing payment for closure or post-closure care require the owner or operator to fully fund the standby trust fund before the beginning of final closure or within 15 days after an administrative order or an order from a court of competent jurisdiction. In accordance with these requirements, the standby trust fund is not intended to remain unfunded until the owner or operator fails to fulfill their closure or post-closure care obligations. IDEM has amended the wording at 329 IAC 3.1-14-6(d), 329 IAC 3.1-14-16(d), 329 IAC 3.1-15-4(c)(4), and 329 IAC 3.1-15-6(c)(4) to clarify these requirements.

This structure is different than the rule requirements for a performance bond and letter-of-credit, which do not require the standby trust to be funded unless the owner or operator fails to fulfill closure or post-closure care obligations and the financial assurance mechanism is exercised. The requirements for a surety bond guaranteeing payment are designed to be at least as stringent as the analogous federal requirements at 40 CFR 264, Subpart H, and 40 CFR 265, Subpart H. In order to maintain consistency and stringency with the current state and federal requirements, IDEM is proposing similar requirements for a surety bond guaranteeing payment for corrective action.