

9477.1988(01)

EXCLUSIONS FOR PRE-EXISTING CONDITIONS IN TSDF INSURANCE POLICIES

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

FEB 25 1988

MEMORANDUM

SUBJECT: OSWER Directive No. 9477.00-6 Guidance for Reviewing
Exclusions for Pre-Existing Conditions in RCRA TSDF
Insurance Policies

FROM: Jeffery D. Denit, Acting Director
Office of Solid Waste (WH-562)

TO: Robert L. Duprey, Director
Hazardous Waste Management Division, Region VIII

This memorandum is in response to your memorandum dated January 22, 1988 regarding OSWER Directive No. 9477.00-6 and Subpart H liability insurance coverage.

The guidance in this Directive, "Reviewing Exclusions for Pre-Existing Conditions in RCRA TSDF Insurance Policies," was developed because the Regions differed in their willingness to accept policies that contained pollution exclusions. The guidance is based on the Agency's interpretation of the existing Subpart H regulations. since the insurance certificate or endorsement is a statement that the policy fulfills the "insured's obligations to demonstrate financial responsibility under 264/265.147" such certificates or endorsements should provide evidence that the issued policies do not contain unacceptable exclusions.

As pointed out in the guidance, you may continue to rely upon the insurance certificate and the insurance endorsement required by Subpart H regulations to ensure that insurance mandated by RCRA is in place. As part of your oversight role, however, the guidance suggests that you routinely review the pollution exclusions endorsements to policies. Directive No. 9477.00-6 should provide adequate guidance in reviewing these contract endorsements. If problems or questions do arise,

please do not hesitate to contact either OSW or OWPE for assistance. OSW and OWPE are also currently ascertaining whether the Agency has funds to retain a contractor to assist in the review of insurance policies. If the project is undertaken, the task for the contractor would most likely entail an analysis of one "form" contract from each of the companies issuing liability insurance to RCRA TSDFs.

In reference to your last point concerning the expansion of liability insurance coverage for nonsudden events to all TSDFs, there are currently no plans to revise the regulations. In developing the distinction between sudden and nonsudden coverage, EPA relied on evidence contained in case histories concerning damages associated with waste facilities. As a result of this analysis the Agency determined that storage and treatment facilities were more likely to experience a sudden, rather than nonsudden accident. We believe that this distinction is still appropriate; however, the regulations are quite flexible. If a Regional Administrator or State determines there is a significant risk to human health and the environment from nonsudden accidents at a treatment or storage facility, such coverage may be required (264/265.147(d)).

Should your staff have further questions concerning these issues, they may contact Mark Pollins at FTS 382-4780.