

**CHAPTER 15 TECHNICAL NOTE #8:
CORRECTIVE ACTION COVERAGE
KNOWN OR REASONABLY FORESEEABLE,
WHICHEVER IS GREATER**

December 2, 1993

**NOT A MATTER
OF CHOICE**

Few portions of Chapter 15's newly-revised Article 5 regulations have generated so many questions as 2550.0(b), which requires the Discharger to "obtain and maintain assurances of financial responsibility for initiating and completing corrective action for all known or reasonably foreseeable releases from the waste management unit...." One misunderstanding that is popular within the Regulated Community is that the phrase "known or reasonably foreseeable" conveys the right of choice to the Discharger. This interpretation is incorrect, as it is inconsistent with the purpose served by a requirement for assurances of financial responsibility.

Therefore, a Discharger with a small, known release cannot satisfy the regulation with financial assurance coverage capable of addressing only that small release, in spite of the fact that flaws in the monitoring system make it reasonably foreseeable that a future release could grow to much greater size prior to its being reliably detected. The correct interpretation is that the financial assurance coverage must be adequate to address the largest release that a given waste management unit (**Unit**) could have prior to the release being reliably detected. The goal is to make it unlikely that the financial burden of cleanup would ever be borne by the people of the State. This goal is

clearly conveyed on pages 73-74 of the Article 5 Statement of Reasons, in response to comments 23G and 36J:

"If a discharger cannot afford to clean up a reasonably foreseeable release, then that discharger should not be permitted to operate because, in the event of a release from such a unit, the cost of the corrective action will be borne by the public. It is not reasonable to obligate the public for the convenience of a private, profit-making venture. The Water Code authorizes the regional board to set requirements for discharges and to require the discharger to establish capability for compliance with these requirements. In the case of a discharge of waste to land, a discharger remains responsible for compliance with the requirements of this article for as long as the discharged waste could affect the quality of the waters of the State. During this time, the regional board should ensure that the discharger has, and will have, the financial resources necessary to remedy any condition of pollution or nuisance that can be anticipated as a result of the discharge."

**THE COURT'S VIEW
ON ENVIRONMENTAL
STATUTES & REGS**

When environmental cases involving regulatory interpretation come before a court, courts typically interpret environmental statutes broadly to effectuate the intent of the Legislature. Similarly, a court would be inclined to interpret administrative requirements in a manner that promotes the broadest protection of environmental values that is consistent with an agency's statutory authority.

PORTER-COLOGNE

The Porter-Cologne Water Quality Control Act clearly charges the State Water Board with the responsibility for promulgating regulations designed to protect waters of the State from

degradation resulting from the discharge of waste to land. The ability to protect beneficial uses is closely tied to the ability to detect a release, response to a release is not possible until the release is detected. No containment system is 100 percent reliable; therefore, it is reasonable to require the discharger to be capable of addressing the largest release that could reasonably be expected to develop prior to being detected.

**THE WHY OF
THE WORDING**

The function of this requirement is to cause the Discharger to face a risk-based, present-day cost related to the reliability of the Unit's monitoring system, the earlier and more reliably the monitoring system can detect a release, the lower the level of coverage needed to assure the Regional Water Board that cleanup will be completed without burdening the State.

This is a market-based approach, in that it involves the balancing of two opposing present-day costs: (1) that of updating the monitoring system to increase its reliability, versus (2) that of the coverage needed to offset the uncertainty of an detecting a release early-on. The Discharger should naturally gravitate to a balance point where present-day costs are minimized. In most cases, this should involve a thorough review and augmentation of the monitoring system.

EXAMPLES

The wording of the requirement is designed to allow the Discharger to propose adjustments to assurances of financial assurance to reflect the current degree of reliability with which the monitoring system can provide early detection of a release, as illustrated in the following three examples.

Example A: Discharger A is currently

cleaning up a large release, but installs significant improvements in the Unit's monitoring system such that any new release will be detected quickly. Discharger A's coverage must show financial ability to address the larger cost of the known release until cleanup has been completed, but can thereafter be downsized to address the smaller size of release that the revised monitoring system is designed to reliably detect (i.e., the coverage is reduced to match a smaller foreseeable release).

Example B: Discharger B is currently cleaning up a small release, but the Unit's monitoring system is so poor that this detection was merely a fortuitous event; in the future, a much larger release could occur prior to detection. Because the detection of the small current release does not reflect the actual reliability of the monitoring system, the Discharger's coverage must be relatively high to reflect the actual risk involved.

Example C: Discharger C has never had a release. In working up an estimate of the coverage necessary, the Discharger finds that there are many scenarios in which a release could escape detection, thereby allowing a large plume to develop. In order to avoid a very large coverage, the Discharger could propose and install updates to the Unit's monitoring system to enhance the likelihood of early detection. Although the improvements to the monitoring system would have a cost, that cost could be more than offset by the greatly diminished level of coverage the Discharger would then need.

ACCESS TO THE FUNDS When a release occurs, the Discharger is

not automatically allowed to utilize the funds set aside for cleanup, because the occurrence of one release does not preclude future releases. The fund is there to be sure that funds are available in case the Discharger is financially unable to carry out the work. It is the Discharger's responsibility to be sure that an adequate coverage is maintained for as long as the waste in the Unit poses a potential threat to beneficial uses of waters of the State. This makes it doubly inadvisable for a Discharger to have an ineffective monitoring system, because: (1) the high risk of missing a release mandates a very high financial assurance coverage; and (2) once a release **is** detected, the Discharger must pay for the cleanup without recourse to the funds set aside for financial assurance.

SUMMARY

The financial assurance coverage required under 2550.0(b) must address the higher of either (1) the cost of any current cleanup, or (2) the likely cleanup cost of largest release that could occur in the future prior to being **reliably** detected by the monitoring system. The Discharger is free to propose a decrease in the coverage based upon the diminished size of release that a revised monitoring system is now capable of reliably detecting.