

Solid Waste Industry Group

August 17, 2007

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Via Email: bgarcia@ciwmb.ca.gov

Subject: SWIG Comments on Task 2-4 White Papers prepared for AB 2296 Study

Dear Ms. Garcia:

Thank you for the opportunity to review and comment on various white papers that have been prepared by ICF with respect to various tasks pursuant to their review of post-closure care, corrective and financial assurance mechanisms for the CIWMB. Our Solid Waste Interest Group (SWIG) wishes to offer the following comments:

Task 2, Step 1: Agree on Criteria to Use for Evaluation.

- ***Cost.*** It is not clear from the language of the 4th bullet whether ICF will be evaluating all costs associated with a particular financial assurance demonstration or just “administrative costs”. We strongly requests that the full range of costs that might be associated with the provision of a particular mechanism be fully evaluated. The second range of options does not appear to have any cost consideration. We strongly object to any evaluation of mechanisms that does not include cost considerations.
- ***Full range of Criteria Used to Evaluate Mechanisms.*** We would support inclusion of a full range of non-overlapping criteria to evaluate the various mechanisms. Overall cost of the mechanism as well as administrative costs must be a part of such an evaluation.

Task 2, Step 2: Agree on List of Demonstrations to be Evaluated

- ***Full Range of Financial Assurance Mechanisms.*** We believe that the full range of mechanisms available to states pursuant to federal law (Subtitle D) must be included for evaluation – not just the mechanisms as they are currently worded in CIWMB regulations. While particular mechanisms used in California may be currently subject to restrictions in excess of federal regulations – the full range of potential options should be evaluated – including modification of those restrictions if warranted or if addition requirements could be added to allow existing restrictions to be eliminated or modified. We request that specific reference to existing CA regulatory sections be

eliminated. This would provide clear direction that the full range of FA options available pursuant to federal law are available for evaluation by ICF.

- ***Financial Means Test and Corporate Guarantee.*** We do not understand the meaning of “(Not CA)” that appears after the Financial Means Test and Corporate Guarantee on page 3. There also appears to be a missing footnote “1” to one of those terms. We believe that the unreferenced footnote as well as the parenthetical term should be removed. We believe that these mechanisms are and should continue to be made available as provided pursuant to federal law.

Task 2, Step 3: Perform Evaluation and Prepare Task 2 Report

- No Comment.

Task 3, Step 1: Analysis of Conceptual Fund Design.

- ***Support for Default Costs.*** We generally support the direction that has been given to ICF by the CIWMB. The truncated list of options focuses on the coverage of “defaulted costs” rather than the full range of Post-closure care and corrective action costs that may be required at all landfills in California. Identification of likely or anticipated potential “defaulted” costs that might occur given the future range of landfill unit closures (i.e., limited number of co-disposal sites, and increasing number of state of the art Subtitle D landfills, etc.) and projections of the magnitude of potential default costs.
- ***Recommended Option for Evaluation.*** Several (but not all) participants in SWIG previously endorsed an option that appears to closely correspond to Model No. 1 in Exhibit 3 -- which is included with this letter as Attachment 1: “Improvements to the State of California Solid Waste Landfill Post-Closure Care and Financial Assurance Mechanisms necessary to protect Human Health and the Environment” several SWIG members support evaluation of this options as part of the ICF study.

Task 3, Step 2: Review Pooled Funds Experience

- ***Support for Pooled Funds Approach.*** We support the review of pooled funds as described.
- ***Minnesota’s Closed Landfill Program as an example.*** In addition, we suggest you should consider evaluating Minnesota’s Closed Landfill Program (CLP). SWIG does not necessarily endorse the application of Minnesota’s CLP to California in any way. However, the Minnesota CLP demonstrates a pragmatic and cost-effective state-managed approach for over 100 closed landfills in Minnesota. As such, the Minnesota CLP seems to represent a useful example of a pooled fund approach to managing closed landfills where the primary goal of ensuring protection of human health and the environment is maintained in a very cost effective manner. Attachment 2 to this letter provides a more complete description of CLP. For even more information on the Minnesota CLP, go to:
<http://www.pca.state.mn.us/cleanup/closedlandfills.html>

Task 3, Step 4: Modeling Performance Defaults in Task 3 Fund Working Model

- ***Support for Broad-based funding.*** In general, SWIG support a broad-based default funding mechanism that would be applicable to all public and privately owned landfills.
- ***Public and Private Inclusion.*** SWIG supports the inclusion of both public and private sector landfills for performance defaults. Failure to include both public and private landfills would create and financial imbalance between the two ownership groups. If one sector is excluded from participation in a funding mechanism waste management the economic imbalance could cause waste to flow to the sector that is not contributing.
- ***Include Reasonable PCC and CA Costs.*** SWIG supports the inclusion of both reasonable Post-Closure Care (PCC) and reasonable Corrective Action (CA) obligations in the performance default assessment. We strongly suggest that the experience of other pooled fund examples, such as the Minnesota CLP cited above, be used to assess the extent and degree of total landfill PCM and CA obligations of which default modeling would only be a small part.
- ***Role of Financial Insurance.*** SWIG suggests that the concept of financial assurance for PCC and CA be supplemented with the concept of Long Term Stewardship (LTS) that would begin at the end of the Post-Closure Care Period when the landfill poses a minimal ongoing threat and there are entities mechanisms in place to provide for the long-term stewardship of the facility – and not require the continued maintenance of PCC or FA Financial Assurance.
- ***Default Rates.*** SWIG strongly suggests that historical experience be used to determine the likely level of default rates. We concur with ICF's assessment that “default rates should be expected to be low in absolute terms”. While there are some significant examples of default rates they generally have occurred at facilities that:
 1. were co-disposing of significant quantities of hazardous waste, liquid waste and municipal solid waste, and
 2. had limited or un-diversified assets (i.e., the landfill was the only significant asset of the owner/operator).

We believe that there are few facilities currently that meet the above criteria. We generally believe that experience shows a very low level of default across the public and private sectors. Further, this risk is reducing and large financial secure public and private institutions are operating more and more landfills.

- ***Financial Strength.*** SWIG strongly objects to the statement by ICF on page indicating that they plan to ignore the financial strength or size of a corporation or government entity when considering failure rates. As ICF shows in Exhibit 1, failure rate is directly related to the net worth of the corporation or entity (in essence, the size

of the entity). We ask that this correlation not be ignored and that it be included in the model.

- **Cost Shocks.** As indicated on Page 6 of the White Paper, ICF does not propose to compare the "cost shocks" of CA to the likelihood of default. Instead ICF indicates that it will correlate the likelihood of default with some kind of statistical failure rate. The magnitude and/or frequency of Correction Action (CA) can have a direct significantly impact on the financials of a company or government entity and cause a default. Totally ignoring the enormous impact that CA has on financial stability could be viewed as a significant gap in the modeling analyses. That being said, inclusion of "cost-shocks" must be reasonable considering past experience and the pool of existing landfill owners and operators that would be subject to the default analysis.

Task 4: Insurance Product.

- **Permanent Default.** On page 2 of the White Paper, it appears that the CIWMB may be ignoring ICF's advice and is insisting that ICF to look at "permanent default" as a reasonable likelihood. ICF indicates that a defaulted site would be sold by the insurance company to another ("replacement responsible") party and therefore not be in permanent default. We ask that permanent default not be considered in the model given that it is not a real world scenario. If it is included, it must be clearly recognized that such a total permanent default is a much more unlikely event than partial or temporary default. Permanent default has a very limited likelihood of occurrence given the current pool of landfills and owner/operators that would be subject to default conditions.
- **Insurance unworkable as default funding backstop.** SWIG believes the white paper makes it reasonably clear that an insurance product will be unworkable as a "default safety-net" because of all the stipulations an insurer would have to agree to. The stipulations would most likely be cost prohibitive and "non-friendly" to their type of business. (e.g., see what happened after Katrina).
- **Stipulation of No Continuing Liability.** Page 2 first full paragraph states that the insurer would have the opportunity to find a new responsible party to take over the landfill. This may mean landfill operation, but there would also have to be a stipulation that the insurers could not bring an action against any prior owners/operators or customers under CERCLA (or state equivalent) in the event that the landfill was closed. Use of a front loaded insurance program to fund PCC or CA should release all parties to the site and produce financial finality for them.
- **Insurer Failure to Perform.** Another difficulty with the use of an insurance product would likely need to be a stipulation to release of all owners/operators/customers from future actions in the event that the insurers fail to perform or challenge the default action. Without this, owners will pay twice and then still be burdened with recovery actions.

- **Definition of Default Page 2, (2)** – Option (b) must include the cause of default. If not, the CIWMB could claim default for any reason. Further, there ought to be reasonable opportunity for an owner or operator to appeal a declaration of default by the CIWMB: First to the Board itself, and ultimate to Superior Court.
- **Potential Limits Page 2, (3)** – Option (a) is not reasonable. An insurance policy must have specified dollar limits. An underwriter would not consent to issuing an instrument without an amount; the amount caps their exposure.
- **Potential Exclusions Page 3, (4)** – The ICF recommends that no exclusions from coverage be acceptable. This requirement would definitely preclude insurance as an acceptable instrument, insurers would not be agreeable to write policies with this condition.
- **Cancellation, Termination, Non-renewal, and Voiding/Rescission Page 3, (5)** – Is the intent of the last sentence “...premium payments can be front-loaded so that after a 1 – 3 year period, all premiums will have been paid” to require the premiums for the 30-years PCM period be paid during the first 1 – 3 years? If so, this would cause numerous concerns such as; 1) if the limits decreased at anytime, the insured would have to pursue a credit from the insurer, 2) if the policy was replaced by another instrument, once again the insured would be faced with trying to obtain a credit from the insurer, 3) the insured is paying full amount up front.

Please contact me if you have any questions regarding these comments submitted on behalf of the Solid Waste Industry Group (SWIG).

Sincerely

Original Signed By

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- Attachments:
1. Improvements to the State of California Solid Waste Landfill Post-Closure Care and Financial Assurance Mechanisms
 2. Minnesota Closed Landfill Program (CLP)