

February 8, 2011

Ms. Ann M. Codrington  
Director, Drinking Water Protection Division  
Office of Ground Water and Drinking Water  
1200 Pennsylvania Avenue, N.W. (MC-4607M)  
Washington, D.C. 20460

Dear Director Codrington:

This filing provides the comments of the CCS Alliance on the U.S. Environmental Protection Agency's (EPA) draft Financial Responsibility Guidance for Class VI Underground Injection Control (UIC) program wells. We thank EPA for the extension of the comment filing period, which has enabled us and others to provide additional consideration to issues presented in the proposed guidance.

The CCS Alliance submitted comments on December 22, 2008 in docket EPA-HQ-OW-2008-0390 regarding the EPA's then proposed UIC rule for carbon dioxide geologic sequestration wells. Those comments included a special focus on risk management for geologic sequestration. We emphasized two fundamental financial assurance issues that are applicable in the context of this guidance: authorize use of a broad array of instruments, and ensure that risk management can be achieved in a manner that is economically efficient.

EPA's final Class VI rule and the draft financial responsibility guidance address the first issue well by authorizing a broad array of risk management instruments. As to the second issue, the guidance makes reference to EPA's intent that financial assurance be economically efficient. However, we believe the guidance recommends certain conditions, discussed below, that will frustrate that goal. It should be revised consistent with the suggestions below.

### **Importance of CCS**

If our country is to make significant reductions in greenhouse gas emissions, carbon capture and sequestration (CCS) is an essential technology. Fossil fuels, combustion of which accounts for the overwhelming majority of anthropogenic carbon dioxide emissions, and which will remain a key component of our energy supply, account for roughly 75 percent of U.S. electricity production and are the primary energy source for basic commodity manufacturing, such as steel and cement.

Even though geologic sequestration has yet to be used in the U.S. on a commercial scale, environmental regulatory objectives are assigning increasing importance to CCS. For example, EPA's GHG BACT guidance, issued last fall, states that "For the purposes of a BACT analysis

for GHGs, EPA classifies CCS as an add-on pollution control technology that is 'available' for large scale CO<sub>2</sub>-emitting facilities including fossil fuel-fired power plants . . . ."<sup>1</sup> This will result in CCS being evaluated as an option for facilities required to control GHG emissions. EPA has under consideration a significant number of proposed regulations that could result in modifications of existing fossil-fueled electric generating facilities that would subject those facilities to GHG controls.

The significance is that policy shifts are making CCS an increasingly relevant policy issue, and perhaps ultimately an indispensable technology. This regulatory confluence means a very significant set of public interests are at stake in devising an appropriate risk management regime.

### **Availability, Affordability, and the Notion of a “Guarantee”**

Financial responsibility obligations are an ingrained feature of environmental regulatory programs. It is appropriate for the government, as a feature of regulations to ensure that industrial activity neither impermissibly affects human health or the environment nor places taxpayers at risk, to require that financial resources be in place to guard against certain risks.

There is a tension between the government’s desire for the greatest possible certainty that taxpayers will not face risk and its interest in ensuring available, affordable risk management instruments. In the name of reducing financial risk to the public, tightened financial responsibility regulations have sometimes errantly deterred the activity that is the subject of the regulation. Given the range of essential human services that depend on fossil fuel combustion - such as electricity, heat, and transportation - trial and error with the rules for CO<sub>2</sub> sequestration could have dire consequences.

As an example of past problems, note that overly burdensome regulatory requirements played a significant part in the mining industry’s difficulty within the past decade in obtaining surety bonds for hardrock mining reclamation, a context with certain features (such as need for instruments of potentially long duration) similar to those of geologic sequestration:

[A]gencies increasingly have focused on the sufficiency of bond amounts in the context of extremely long-term risks, such as the potential for water treatment, with the regulators concerned that issues may arise decades or centuries after mine reclamation has been completed. . . . [T]he increased bond amounts are often implemented regardless of actual risk projections. The corresponding requirements can create financial guarantee obligations spanning a hundred years or more. Hundred-fold increases in bond amounts by state and federal agencies are not

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<sup>1</sup> “PSD and Title V Permitting Guidance for Greenhouse Gases,” p. 33-34, U.S. Environmental Protection Agency, Office of Air and Radiation, November 2010.

atypical. An increase of that magnitude may not be affordable and contributes to a company's inability to obtain surety.<sup>2</sup>

We appreciate EPA's recognition that cost is a significant issue, which is evident from the thoroughness with which EPA has discussed cost in the guidance.<sup>3</sup> Again, we emphasize cost can turn into an issue of instrument availability, not just price.

EPA's guidance should better encourage regulators to balance the interest of "minimizing the potential risk of instrument failure and the potential costs to the public" with the potential costs to the public of not having CCS reasonably available as an option in the future.<sup>4</sup> The guidance describes the success of a financial responsibility program as follows:

A successful financial responsibility demonstration will likely establish instruments that are aimed to protect USDWs and that guarantee the owner or operator will pay if coverage is needed for financial responsibility activities and ensure that no costs for GS projects will be passed on to the public.<sup>5</sup>

A program with no geologic sequestration projects will pose no risk of groundwater cleanup costs to the public. However, this would be manifestly contrary to the objectives of the Administration. EPA should insert a statement recognizing that success from a public policy perspective also depends upon implementation that encourages parties to deploy a technology that the Obama Administration, its predecessor, key leaders in the House and Senate, and many others have been laboring to promote.

### **Director Approval**

EPA's final Class VI UIC rule requires that corrective action and post-injection site care not only comply with certain provisions of the rule, but also that it be "acceptable to the Director."<sup>6</sup> This language is unclear and suggests the possibility that the regulator could impose obligations beyond the regulations of unknown scope and nature and for which there may not be prior warning. This is an area in which the regulation should be amended, but at a minimum, this is important area on which the guidance should provide direction.

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<sup>2</sup> "Mining and the Vanishing Surety Bond Market," Lisa Kirschner and Edward B. Grandy, *Natural Resources & Environment*, Winter 2003, Volume 17, Number 3.

<sup>3</sup> EPA devotes nearly a full page to discussion of costs on p. 23 of the draft guidance.

<sup>4</sup> Proposed guidance, p. 51.

<sup>5</sup> *Id.*

<sup>6</sup> *See* 40 CFR 146.84(b) and 40 CFR 146.93(a).

Read in the most favorable light, we could presume that EPA intends that these “Director approval” provisions reflect either the obvious point that routine disagreements may arise over compliance and that the Director decides as the implementing entity when the requirements are met, or that State agencies that have been approved for primacy may have regulations more stringent than the federal UIC regulations, or both. However, both of these points are implicit in the regulatory structure and need no explicit provision to fulfill them. The Director approval provisions therefore serve only to confuse matters and suggest some additional power is intended.

The exercise of some additional undefined power through Director approval not only could pose an unfair circumstance both for entities that decide to self-insure, as well as those who manage their risks through third-party instruments, but at worse could discourage parties from pursuing CCS or could make third-party instruments less available or considerably more difficult to obtain. No party wants to undertake obligations that are largely at the whim of a regulator to define after the fact. It undermines the ability to make the calculations on which risk management instruments are based.

Although the Director approval language was present in the proposed rule, it is considerably more troubling in light of the significant changes between financial responsibility requirements in the proposed and final rules. This issue is most acute in the case of insurance, which we will discuss below.

The CCS Alliance offers the following comments on EPA’s recommendations for specific financial responsibility instruments.

### **Financial Responsibility Instruments**

As a general matter, we concur with EPA’s commentary that each risk management instrument has features that make it more or less attractive under certain circumstances. EPA’s draft guidance performs an appropriate role in pointing out these features without (as a general matter) proscribing the use of certain instruments in situations where another instrument might offer advantages to the facility operator. Flexibility allows instruments to compete and the market to evolve.

With respect to several of the instruments below, we note that EPA recommends conditions that in the name of more fully protecting the government from potential expense will make financial assurance instruments more expensive. A result of this may be that smaller and less well-capitalized entities may be disadvantaged in undertaking CCS projects. EPA may have reason to prefer that outcome, but we note that it may prove disadvantageous to rural electric cooperatives and other small entities who have a responsibility to serve customers.

**Trust Funds** - As the guidance notes, 40 CFR 146.85(f) requires that the Director approve the use and length of pay-in periods for trust funds. The guidance recommends, but does not require, a three-year pay-in period for trust funds. We suggest that a less restrictive construct might make trust funds better available for use.

There appears to be no reason why a trust fund could not be authorized to meet whatever portion of a financial assurance obligation the trust fund is capitalized to meet. As the amount in the trust fund grows, the credit the trust fund is accorded in meeting the financial responsibility obligation can grow along with it. Since trust fund holdings are likely to be in constant flux, we suggest that an operator could provide evidence annually of the minimum amount expected to be in the fund in the coming year. Under such a regime, a minimum pay-in period is not necessary.

**Letters of Credit** - The guidance recommends that letters of credit may be cancelled only if the Director has consented in writing. Though this is a typical practice under other financial assurance regimes, it makes letters of credit more costly.

The guidance recommends that:

if the owner or operator does not establish alternate financial assurance as specified in this section, and obtain written approval of such alternate assurance from the Director within 60 days after receipt by both the owner or operator and the Director of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Director should draw on the letter of credit.<sup>7</sup>

The suggestion that the Director draw upon the letter appears to be unrelated to whether any expenses have been incurred which the letter was intended to cover. If the issuer of a letter of credit is restricted from revoking the letter, and required to pay if revocation is attempted, even if no damages have occurred, letters of credit are likely to be a very expensive option for financial assurance.

In conjunction with the provision of 40 CFR 146.85(b) that “[t]he requirement to maintain financial responsibility and resources is directly enforceable regardless of whether the requirement is a condition of the permit,” the recommendation that the Director draw on the letter means an operator could have its ability to operate damaged by a reduction in credit and payment under the letter at the same time it is seeking a new financial responsibility instrument to replace the revoked letter.

We also recommend that EPA’s guidance be clear to distinguish the expiration of the effective period and the coverage period of the letter of credit. An extension of the effective period of the letter of credit would provide more time to present requests drawing on the letter, but would not change the period for occurrences covered by the letter. If the coverage period is not extended, there could be a lapse in coverage.

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<sup>7</sup> Proposed guidance, p. 34.

**Surety Bonds Guaranteeing Performance** - Through the model surety bond terms set forth in the guidance, EPA recommends that a surety bond “is to remain in full force and effect” in the event that an owner/operator is unable to arrange alternate financial assurance upon receiving a notice of cancellation of the bond.<sup>8</sup> As with letters of credit, we raise the concern that this structure will make surety bonds more expensive than they otherwise would be. Sureties may require large assurances, often in cash, under such conditions. Again, we recognize that this would not be a novel requirement, but the point applies nevertheless.

**Insurance** - The combination of several provisions in the guidance and regulations presents not only the issue of cost discussed above with respect to surety bonds and letters of credit, but possibly whether policies would be available at all under the conditions recommended.

As with letters of credit and surety bonds, EPA recommends, through a draft model certificate of insurance, that the instrument be cancellable “only for failure to pay the premium.”<sup>9</sup> However, the model certificate also states that the insurer “warrants that such policy conforms in all respects with the requirements” of the Class VI regulations for corrective action, plugging, post injection site care and closure, or emergency and remedial response (as the case may be). It further states “It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.”<sup>10</sup>

We understand that some States, starting with California, have adopted similar requirements. Such requirements may limit the flexibility of the parties to cover some fortuities through insurance and other matters through other instruments.

In conjunction with the “Director approval” provisions in the regulations, discussed above, the non-cancellation, conformity and consistency provisions of the model insurance certificate raise an even more troubling problem. These recommendations, if implemented together with the Class VI requirements, imply that the only insurance agreement that should be approved is a non-cancellable one under which the insurer is liable for whatever the Director determines it should be liable for, regardless of what the agreement itself specifies. This likely will limit the availability of insurance and increase its cost.

We do not believe these restrictive provisions are necessary or appropriate for inclusion in the guidance. EPA obviously disagrees. We recommend that the agency seek additional advice after conclusion of the comment period from offerors of third-party insurance instruments and alert regulators to the problems of implementing the guidance EPA suggests.

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<sup>8</sup> Proposed guidance, p. 74.

<sup>9</sup> Id, p. 78.

<sup>10</sup> Id.

## **Conclusion**

In conclusion, we appreciate the opportunity to offer these comments and offer our availability to discuss them with the agency at its convenience.

Sincerely,

Fred Eames  
for the CCS Alliance