Commonwealth of the Northern Mariana Islands
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VIA EMAIL: kla.dpwtsd@gmail.com

October 23, 2023

OAGDPW: 2023-543
LSR No. 23-427

Ray N. Yumul
Secretary
Department of Public Works
Saipan, MP 96950

Re: Interpretation of 40 C.F.R. 258.70(a); Financial Assurance Exemption

Dear Secretary Yumul:

It is my interpretation that the Financial Assurance Exemption of 40 C.F.R. 258.70(a) would apply to the Marpi Landfill.

On September 5, 2023, you requested an interpretation by our office of 40 C.F.R. 258.70(a). On September 26, 2023, you provided further context of the issue (Attachment 1). In relevant part, you informed our office that BECQ had interpreted 40 CFR 258.74, such that the Marpi Landfill Permit required a financial assurance mechanism to be on file, and the Secretary of the Department of Finance ("DOF"), Tracy Norita, had found that the financial assurance's funding mechanism was ARPA funds and therefore could not be used as an assurance source. The Department of Public Works ("DPW") contended that it needed no such mechanism for compliance since it was exempted from the assurance requirement as a State-owned landfill, pursuant to 40 CFR 258.70(a).

40 C.F.R. 258.70(a) states:

> The requirements of this section apply to owners and operators of all MSWLF units, except owners or operators who are State or Federal government entities whose debts and liabilities are the debts and liabilities of a State or the United States.

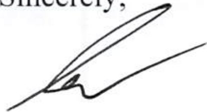
The U.S. Environmental Protection Agency ("EPA") interpreted this exemption to apply to State-owned and/or State-operated landfills. *See* Section 258.70(a) Applicability, 56 Fed. Reg. 51106 (October 9, 1991); (Attachment 2). Although the EPA states that the exemption only applies to government entities whose debts are "supported by the full faith and credit of the State under that State's laws[,]" its stated purpose for the exemption provides guidance as to the meaning of this language. *Id.* The EPA found that "Federal and State governments are permanent and stable institutions that exist to safeguard health and welfare, and they have the requisite financial strength and incentives to cover the costs of closure, post-closure care, and corrective

action for known releases. The availability of resources to Federal and State agencies differs from the availability of resources to local governments. Federal and State governments have flexibility in their annual budgets, which facilitates reallocation of funds for a specific purpose. Federal and State entities also can access sources of financing such as intergovernmental transfer relatively quickly." *Id.*

What is seemingly important to the EPA, regarding application of the exemption, is not the State's current allocation of resources, but rather the availability and flexibility of the State to allocate resources towards its owned/operated landfill's closures, post-closure care, and corrective action for known releases. The Solid Waste Management Revolving Fund "provide[s] an established potential funding source for any future financial assurance that may be required to close one or more cells at the Marpi Landfill[.]" PL 13-42, § 2. The CNMI has the required flexibility in its annual budget, to appropriate[1] funds to the Solid Waste Management Revolving Fund for the specific purpose of landfill's closures, post-closure care, and corrective action.[2] *See* 1 CMC § 7204; 2 CMC § 3551. Furthermore, the Governor may reprogram funds (an intergovernmental transfer) to DPW for landfill closures, post-closure care, and corrective action, pursuant to 1 CMC § 7402(b). The purpose of 40 C.F.R. 258.70(a) is to exempt State agencies, such as DPW, from the financial assurance requirement of the Resource Conservation and Recovery Act ("RCRA") for State-owned/operated municipal solid waste landfill units. Therefore, the State-owned Marpi landfill, operated by DPW, is exempt from financial assurance, pursuant to 40 C.F.R. 258.70(a).

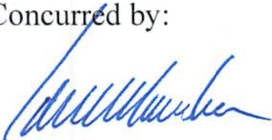
However, as the EPA is the ultimate authority on the RCRA, requesting further clarification from the EPA on this issue is recommended. Please let our office know if you have any additional questions.

Sincerely,



Gregory Cenac
Assistant Attorney General

Concurred by:



EDWARD MANIBUSAN
Attorney General

cc: Charles Reyes Jr., OAG

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[1] "Appropriation" is defined as "an act of the legislature that allows Commonwealth agencies to incur obligations and make payments from the Treasury for specified purposes." 1 CMC § 7103(c).

[2] A direct example of this is the Legislature's appropriation of funds towards the Cell #1 Marpi Landfill Closure Financial Assurance Mechanism. *See* PL 23-09 § 607, available at https://cnmilaw.org/pdf/public_laws/23/pl23-09.pdf

Gregory Cenac <gregory_cenac@cnmioag.org>

Re: LSR 23-427 - Further Context Needed

Ray Yumul <ryumul.sec@dpw.gov.mp> Tue, Sep 26, 2023 at 3:05 PM
To: Gregory Cenac <gregory_cenac@cnmioag.org>, "Kenn L. Aldan" <kla.dpwtsd@gmail.com>, Tina Aguon <taguon.sec@dpw.gov.mp>, camachot74@gmail.com, matthew.nieswender@opd.gov.mp
Cc: "Charles Reyes Jr." <charles_reyes@cnmioag.org>

`Good Afternoon,

I have included Matt Nieswender, Ken Aldan and Tony Camacho in this email thread. Collectively, we have been working on this issue for some time now.

Based on discussions with my team,

1. We do not think that technically we have a cell 1 closure project now. We do have a cost estimate from Henry Bautista that we are required to prepare annually. (see attachment)

2. The project is in compliance - with the conditions of the BECQ Marpi Landfill permit and BECQs interpretation that the Marpi permit requires a financial assurance mechanism to be on file as described in 40 CFR 258.74.
   a. The then Acting secretary of Finance Bertha Torres pledged full faith and credit (see attachment)
   b. David Atalig had set aside approx $6.8 million in a BOG account

3. However, Secretary of Finance Tracy Norita has found that the Financial Assurance's funding mechanism is ARPA funds and therefore CANNOT be used as an assurance source

4. Our contention is that we need no such mechanism for compliance since we are exempted from 40 CFR 258.71, .72, .73, .74, and .75 as a State owned landfill as described in 40 CFR 258.70(a).

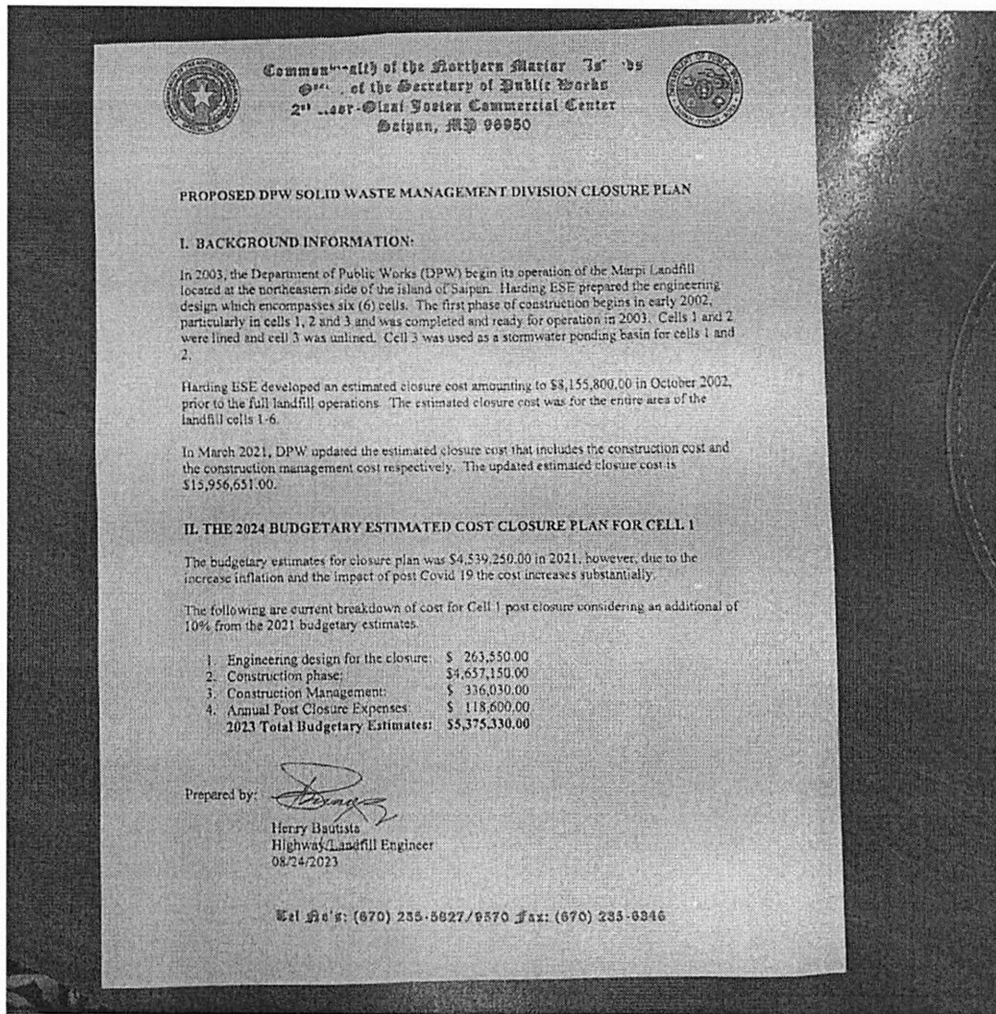
5. As an added layer to comply with BECQ's demand for proof of financial assurance, My team and I had been successful in lobbying the 23rd., CNMI Legislature to include within the FY 2024 Budget act section 607 Cell #1 Marpi Landfill Closure Financial Assurance mechanism as a "full faith and credit" guarantee of cell #1's closure when the time comes.

Please note that based on estimates by our landfill contractor MES, and DPW engineers, we have estimated that closure of cell #1 will not occur for another 1 1/2 to 2 years based on current daily tipping of waste. Currently we estimate cell #1 to be at 80% of capacity. This is in large part due to the severely reduced tourism market we are facing and the good work of our Solid Waste division team and contractors working at the transfer station and landfill.

We look favorably to your legal opinion.

Regards and happy tipping,

Ray N. Yumul
Secretary
Department of Public Works
Commonwealth of the Northern Mariana Islands
2nd Flr. Oleai Joeten Commercial Bldg.
Beach Road, Oleai
Saipan, MP 96950
Tel.: (670) 234-9828



Commonwealth of the Northern Mariana Islands
Office of the Secretary of Public Works
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Saipan, MP 96950

PROPOSED DPW SOLID WASTE MANAGEMENT DIVISION CLOSURE PLAN

I. BACKGROUND INFORMATION:

In 2003, the Department of Public Works (DPW) begin its operation of the Marpi Landfill located at the northeastern side of the island of Saipan. Harding ESE prepared the engineering design which encompasses six (6) cells. The first phase of construction begins in early 2002, particularly in cells 1, 2 and 3 and was completed and ready for operation in 2003. Cells 1 and 2 were lined and cell 3 was unlined. Cell 3 was used as a stormwater ponding basin for cells 1 and 2.

Harding ESE developed an estimated closure cost amounting to $8,155,800.00 in October 2002, prior to the full landfill operations. The estimated closure cost was for the entire area of the landfill cells 1-6.

In March 2021, DPW updated the estimated closure cost that includes the construction cost and the construction management cost respectively. The updated estimated closure cost is $15,956,651.00.

II. THE 2024 BUDGETARY ESTIMATED COST CLOSURE PLAN FOR CELL 1

The budgetary estimates for closure plan was $4,539,250.00 in 2021, however, due to the increase inflation and the impact of post Covid 19 the cost increases substantially.

The following are current breakdown of cost for Cell 1 post closure considering an additional of 10% from the 2021 budgetary estimates.

1.	Engineering design for the closure:	$ 263,550.00
2.	Construction phase:	$4,657,150.00
3.	Construction Management:	$ 336,030.00
4.	Annual Post Closure Expenses:	$ 118,600.00
	2023 Total Budgetary Estimates:	**$5,375,330.00**

Prepared by:

Henry Bautista
Highway/Landfill Engineer
08/24/2023

Tel No's: (670) 235-5827/9570 Fax: (670) 235-6346

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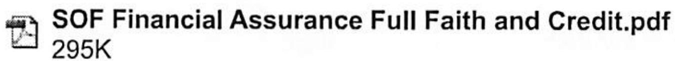
3 attachments

Bureau of Enviromental Coastal Quality.pdf
788K



SOF Financial Assurance Full Faith and Credit.pdf
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SOF Doc.pdf
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3. Section 258.70(a) Applicability

The proposal would require all owners and operators of MSWLFs, except State and Federal government agencies, to demonstrate financial responsibility for closure, post-closure care and corrective action for known releases. The proposal also requested comment concerning whether Indian tribes should be subject to the requirements.

a. Applicability to State and Federal Government Entities

The proposal would exempt from the required financial assurance demonstrations MSWLFs that are owned or operated by government entities whose debts and liabilities are the debts and liabilities of a State or the United States. The Agency recognizes that Federal and State governments have the requisite strength and stability to fulfill their financial assurance obligations for MSWLFs.

No commenters disputed the Agency's position that Federal and State governments have the financial strength and incentives to cover the costs of closure, post-closure care, and corrective action for known releases. Nevertheless, several commenters argued that State and Federal government entities should be required to demonstrate financial assurance. These commenters argued that as a matter of fairness all levels of government should be treated the same; either all government entities should be required to demonstrate financial assurance or all should be excluded from the requirements. Other commenters asserted that exempting any MSWLFs will disrupt competitive forces within the industry.

Two commenters had specific questions about how the requirement should be interpreted. One commenter urged EPA to exempt public authorities whose debts and liabilities are the debts and liabilities of a State. This commenter argued that a single-purpose authority is as fiscally sound as a State because if a State decides to dissolve the authority, the State must take over any bonded debt issued by the authority. The other commenter suggested that the Agency should clarify whether the requirements apply to landfills owned by a State or Federal government, but operated and/or leased by a local government.

After considering these comments, the Agency is promulgating the final rule as proposed. MSWLFs owned or operated by those government entities whose debts and liabilities are the debts and liabilities of a State or the United States will continue to be exempted from financial assurance requirements. In some cases, this will include single-purpose public authorities. In other cases, however, the debt of single-purpose authorities may not be supported by the full faith and credit of the State under that State's laws. In those cases, it is not appropriate to exempt the authority from financial assurance requirements.

The Agency believes that differences between Federal and State governments and other governmental entities provide sufficient rationale for treating these entities differently with regard to the financial assurance requirements. Federal and State governments are permanent and stable institutions that exist to safeguard health and welfare, and they have the requisite financial strength and incentives to cover the costs of closure, post-closure care, and corrective action for known releases. The availability of resources to Federal and State agencies differs from the availability of resources to local governments. Federal and State governments have flexibility in their annual budgets, which facilitates reallocation of funds for a specific purpose. Federal and State entities also can access sources of financing such as intergovernmental transfers relatively quickly. Further, since few MSWLFs (four percent) are owned or operated by Federal or State agencies, exempting these facilities will not significantly disrupt competition in the solid waste disposal industry.

As indicated in the preamble to the proposed rule, the financial assurance exemption extends to cases in which a MSWLF is owned by a State or Federal government entity and operated by a private party or local government (or operated by a State or Federal government entity while owned privately or by a local government). A State or Federal owner may, of course, require the private or local government operator to provide financial assurance by contractual agreement. The exemption may also extend to a single-purpose authority if the authority's debts and liabilities are the debts and liabilities of the State.

b. Applicability to Local Governments

The proposal would exempt only Federal or State governments. All other owners and operators, including local governments, would be required to provide financial assurance for closure, post-closure care and corrective action at MSWLFs that they own or operate. Local governments include both general purpose local governments (e.g., municipalities, counties, cities, townships, towns, and villages) and special purpose local governments. Special purpose local governments, generally designated as either public authorities or special districts, may perform a single function or a limited range of functions. Both general purpose local governments and special purpose entities were required to provide financial assurance under the proposed rule.

The Agency received numerous comments on its proposal to require local governments to demonstrate financial assurance. Commenters supporting the Agency's proposal argued that local governments may be unable to raise the necessary funds through their taxing powers and that local governments may not be able to make long-term advance commitments of future funds necessary to provide adequate assurance. Commenters argued further that because of these limitations on the availability of funds, all owners and operators, including local governments, need to factor the cost of closure and post-closure care into the management of an MSWLF in order to ensure that the site is not abandoned. Several commenters suggested that many MSWLFs operated by local governments could become future Superfund sites if financial assurance is not required of local governments.

Many other commenters, however, urged the Agency to exempt some or all local governments (including cities, counties, and towns) from financial assurance requirements for a variety of reasons. Some commenters asserted that local governments operating MSWLFs have a direct stake in providing for the health, welfare and protection of their communities, and should not be burdened with rules that interfere with the efficient execution of their duties. Several commenters argued that local governments should not be required to demonstrate financial responsibility because they rarely go bankrupt and in those cases when they have gone bankrupt, they have paid all of their obligations eventually. Several commenters contended that many local governments have sources of funds that would be available in an emergency to cover the costs of closure, post-closure care, and corrective action, such as unused taxing authority, user fees, bonds, and short-term notes, thus making financial responsibility requirements unnecessary.

Some commenters argued that local governments should be exempted from financial assurance requirements because of the burden such requirements would impose. Several

commenters stated that the cost of demonstrating financial assurance would cause many local governments to abandon their solid waste disposal programs. They argued that new part 258 criteria will increase the costs of operation, and that financial assurance requirements would only compound the economic burden on MSWLF owners by requiring up-front money or guarantees. Other commenters indicated that financial assurance requirements may cause solid waste management to shift from the public sector to the private sector if local governments choose to contract with private commercial MSWLF facilities rather than provide the amount of assurance required for their own landfills.

Finally, commenters suggested that States should be given flexibility in deciding whether to exempt their own local governments from the financial assurance requirements.

The Agency has carefully considered all of the comments on this issue, and, for the reasons discussed below, continues to believe it appropriate to distinguish between local governments and Federal and State governments when applying the financial assurance requirements. Under today's final rule, therefore, local governments remain subject to financial responsibility requirements.

The Agency agrees with commenters who asserted that local governments may be unable to raise sufficient funds through taxation and that local governments may not be able to make long-term commitments of future funds. While several commenters contended that local governments would have the ability to raise funds in a timely manner sufficient to cover the costs of closure, post-closure care and corrective action, these commenters did not supply the Agency with evidence that this was generally true for all local governments. While the Agency recognizes that many local governments, like Federal and State governments, are permanent entities that act to secure the well-being of their citizens, there is substantial variation among local governments in terms of size, financial capacity, and functions performed. It is therefore likely that there is substantial variation among these governments in terms of their ability to meet their closure, post-closure care and corrective action obligations in a timely manner. Exempting all local governments from the requirements would provide insufficient protection of human health and the environment.

Furthermore, although local governments are unlikely to abandon their MSWLFs even in the event of bankruptcy, studies of the probability of bankruptcy among local governments indicates that (relative to Federal and State governments) they are generally (1) more limited in terms of financial resources and less flexible in their annual budgets, thereby making reallocation of a substantial amount of funds for a specific purpose in a given year more difficult; (2) less able to obtain their traditional sources of financing (e.g., bond issues, taxes, and intergovernmental transfers) quickly enough to ensure funding in a timely manner; and (3) more prone to fiscal emergencies than Federal and State governments. Also, while localities in bankruptcy may be able to meet their obligations over the long term, obligations such as closure and corrective action may require immediate financing to ensure adequate protection of human health and the environment. In light of the need to ensure that all owners and operators meet their environmental obligations in a timely manner, combined with the variability among municipalities, the Agency believes that a uniform set of applicable requirements is necessary. Therefore, the Agency has decided against allowing States to decide whether to exempt their own local governments.

The Agency decided not to exempt any special category of local governments from today's final rule (with the exception of small landfills qualifying for an exemption in approved States as discussed above). While the Agency recognizes that local governments may vary in their ability to meet the costs of closure, post-closure care, and corrective action, the Agency is unable to support a variance for any type of local government (e.g., cities, counties). The same concerns that prompted the Agency to include local governments generally apply to these special categories as well. Requiring all local governments to demonstrate financial assurance should encourage appropriate advanced planning for the costs of closure, post-closure care, and corrective action for known releases by these entities.

The Agency does not believe that the requirements will generally be burdensome to local governments. As discussed above, the cost of the financial assurance requirements are a relatively small part of the total cost of compliance with today's rule. Because the requirements will be applied to all MSWLF owners and operators, regardless of whether they are local governments or private companies, the Agency does not believe that the requirements will cause a shift from public to private ownership of solid waste management facilities.

The Agency does recognize the potential burden that financial assurance requirements may impose on some local governments. To minimize this burden, the Agency is finalizing several alternate mechanisms that may be used to demonstrate financial assurance and encourages States to develop innovative financial responsibility mechanisms. To further reduce the potential burden of these provisions on local governments, the Agency is developing a financial test designed specifically for local governments that is expected to be proposed soon after today's rule is promulgated (see section 7.b below). The Agency currently anticipates that the effective date of the financial test for local governments will coincide with the effective date of the financial responsibility provisions of this rule (30 months following publication of today's rule). Financially strong local governments that demonstrate that they possess the necessary financial capacity and have adequately planned to meet their MSWLF obligations in a timely manner will be able to use a financial test and will not be required to acquire additional financial assurance mechanisms. The specific criteria of this financial test for local governments and projected estimates of the test's availability to local government owners and operators for use to meet today's requirements will be discussed more fully in a separate notice of proposed rulemaking.

c. Applicability to Indian Tribes

The preamble to the proposed rule requested comments on whether to exempt Indian Tribes from financial responsibility requirements, and on whether Indian Tribes have the requisite financial strength and incentives to cover the costs of closure, post-closure care, and corrective action for known releases.

In response to this request, many commenters urged the Agency to exempt Indian Tribes from the financial responsibility requirements. Commenters argued that Indian Tribes are sovereign in their own right and, like State governments, are permanent and stable institutions that exist to safeguard health and welfare. Commenters noted that Tribal governments have the same financing options (e.g., bonding and taxation) available to them as do States and the Federal government. In addition, commenters asserted that due to the small populations of reservations, solid

waste disposal problems on reservations are likely to be of a small magnitude and to require less funding than those of other MSWLFs. Other commenters argued that with such small populations and a high unemployment rate, most Tribes would be unable to meet the financial assurance requirements.

Some commenters, however, opposed exemption of Indian Tribes from financial assurance requirements. These commenters argued that Tribal land is often leased to government and industry for use as disposal facilities. As a result, financial assurance for MSWLFs on Tribal lands is as necessary as for any other MSWLF. Another commenter noted that Indian landfills in Arizona are causing adverse impacts on the environmental quality of the State and that there is currently no mechanism to address those problems.

The Agency has carefully considered the commenters' concerns and has decided not to exempt Indian Tribes from the financial responsibility requirements of today's rule. Section 1004 of RCRA defines "municipality" to include Indian Tribes. The Agency is concerned that Indian Tribes, for reasons similar to those discussed for municipalities above, do not have the requisite financial strength to ensure funding of their closure, post-closure care and corrective action obligations. While a number of commenters suggested that Indian Tribes have the financial strength to meet these obligations, none provided data to support an exemption from the financial assurance requirements. The Agency believes, therefore, that it is in the interests of protecting human health and the environment to require Indian Tribes to comply with the financial assurance requirements of today's rule. Financially strong Indian Tribes, like financially strong municipalities, will be able to comply with the requirements using the local government financial test to be proposed in the near future.

4. Sections 258.71(b), 258.72(b), and 258.73(b) Scope of Coverage

a. Financial Assurance for Corrective Action for Other Than Known Releases

The proposal would require financial assurance for the costs of known corrective actions to be demonstrated only at the time that the costs of these activities are estimated (i.e., at the time of remedy selection). The proposal would not include coverage requirements for the potential costs of corrective action for unknown releases and requested comments on this decision. The Agency also requested information concerning appropriate methods for estimating the costs of corrective action for other than known releases.

EPA received several comments supporting its decision to require financial assurance for corrective action for known releases only and for deferring financial responsibility requirements for potential future releases. Commenters agreed that it would be difficult to set an appropriate level of coverage for corrective action for future releases because it would be difficult to predict the probability and costs associated with a release, which are highly dependent on location-specific and operation-specific factors. One commenter stated that financial assurance requirements for other than known releases are unnecessary because financial assurance will be required once the release is discovered. Another commenter suggested that additional financial responsibility requirements for corrective action would be more appropriately established by States because they have greater familiarity with the site-specific conditions within their jurisdictions.

A few commenters believed that the scope of the financial assurance requirements should be expanded to include additional assurances, declaring that EPA should prevent the possibility that unanticipated corrective action costs could be left unfunded by requiring financial assurance for these costs.

These commenters did not, however, suggest methods for establishing levels of coverage.

The Agency agrees with the majority of commenters that current data are not adequate to accurately establish national uniform levels of coverage for future corrective actions. Moreover, it believes that an approach to establishing such coverage levels which relies upon a facility risk analysis could require considerable time and expense to complete, and could thereby delay the implementation of the basic financial assurance regulations. Therefore, the Agency is not at this time promulgating financial assurance requirements for other than known releases. While the Agency recognizes that the possibility exists that unanticipated corrective action costs may go unfunded, it believes that the requirements for financial assurance for known corrective action being promulgated today will go far towards minimizing any potential unfunded obligations. The requirements promulgated today will ensure that the costs of remediation of releases are borne by the appropriate facility owner or operator.

While the promulgation of uniform national requirements for corrective action for unknown releases applicable in all States will require a substantial amount of additional analysis, States may wish to consider whether data are already available in their jurisdictions to support state-specific rulemakings. Today's rule does not preclude States from promulgating their own requirements for corrective action for other than known releases if they deem such requirements necessary and appropriate supplementals to today's requirements.

b. Financial Assurance for Third-Party Liability

In the preamble to the proposed rule, the Agency indicated that it considered, but chose to defer, adoption of financial responsibility requirements for third-party liability claims arising from off-site personal injury or property damage. The reasoning for this deferral was two-fold. First, as discussed in the preamble, the Agency had insufficient data to set appropriate levels of third-party liability coverage for MSWLFs. Second, the Agency was concerned that owners and operators of MSWLFs would encounter difficulties in obtaining financial assurance mechanisms to fulfill this requirement. The Agency requested data and other information regarding appropriate levels of third-party liability coverage.

While a few commenters recommended that the financial assurance requirements include requirements for third-party liability coverage, most of the comments supported EPA's decision to defer third-party liability financial assurance requirements. Commenters noted that both the likelihood and the size of third-party awards are variable and difficult to predict. Due to the uncertainty of the costs of liability claims, some commenters said that additional time and data would be necessary for both the insurance industry and MSWLF owners and operators to respond to the need for liability coverage. Other commenters pointed out that some MSWLFs may never face third-party liability claims, and suggested that the Agency limit itself to requiring financial assurance only for expenses that are certain to be incurred. Another commenter stated that it is more appropriate for States to establish third-party liability requirements, since third-party liability claims are defined under applicable State law.