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Via E-mail (Seaman.Martha@azdeq.gov)

Martha Seaman
Environmental Rules Specialist
Waste Programs Division
Arizona Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007

Re: Comments of ASARCO LLC on Draft Solid Waste Rules (7/7/08 Draft)

Dear Martha:

On behalf of my client, ASARCO LLC ("Asarco"), I want to thank the Department for the opportunity to participate in the ongoing stakeholder process to discuss the draft solid waste rules. Asarco owns mining and mineral processing facilities in Arizona, and these facilities operate non-municipal solid waste landfills ("non-MSWLFs") to handle certain non-hazardous wastes generated on site. Typical materials placed in these landfills include one or more of the following: construction debris, asbestos-containing materials (e.g., transite pipe, which may or may not be friable), solid waste PCS (as defined in A.A.C. R18-13-1601(13)), and some types of plant trash (i.e., material collected from wastebaskets on site). The landfills are located within the boundaries of larger facilities that restrict public access, and that have (or are in the process of obtaining) area-wide aquifer protection permits ("APPs") that provide comprehensive control over groundwater discharges and establish monitoring locations, points of compliance, alert levels and aquifer quality limits for the site as a whole.

Asarco offers the following comments on various portions of the draft rules. These comments are presented in the order in which the issues appear in the draft regulations. Asarco is most interested in the interface between the APP and plan approval processes at facilities with area-wide APPs.

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Article 1 - Definitions

“Contaminated soil” – Should the scope of this term be limited to contamination resulting from anthropogenic causes?

“Direct cost” – ADEQ should define or otherwise explain the terms “indirect costs,” “programmatic costs” and “non-billable administrative cost” (these are relevant in determining fees)

“Other reasonable direct cost” – What is meant by “contract services” in the context of solid waste facility plan review?

“Surface impoundment” – It may be prudent to clarify in some fashion that this term does not include secondary containment (e.g., bermed areas) around liquid product storage areas or process operation areas. These areas should not be considered solid waste facilities merely because they might occasionally and temporarily hold spilled material. (The material so contained probably should not be considered waste merely because it has been spilled).

“Wetlands” – Add “generally” in last sentence (wetlands “generally” include swamps, bogs, marshes, etc.), to be consistent with EPA definition referenced in the statute (A.R.S. § 49-772(H)(17)). Does ADEQ intend to follow federal guidance on determining wetlands (i.e., the wetlands delineation manual and supplements thereto?)

Article 6 (18-13-600 et seq.) – BMP facilities

18-13-602(B) – Asarco supports the notion that an APP financial assurance demonstration can be used to satisfy the solid waste financial assurance requirement. It should be clarified that if a facility has applied for an APP but it has not yet been issued on the date when a solid waste financial assurance demonstration would be due, no “interim” demonstration under the solid waste program should be required. ADEQ should in these circumstances defer to the pending APP permit or amendment.

18-13-603(F) – The draft rules impose BMPs that would apply to landfills accepting only wastes containing asbestos from manufactured products. These are in addition to the BMPs specified in A.R.S. § 49-762.02(6). However, the statute can be read to list the exclusive BMPs for such facilities (“The best management practices for these facilities that shall apply are as follows.”) This is in contrast to the other 6 categories of BMP facilities listed in the statute, where no BMPs whatsoever are identified and determination of BMPs is left to ADEQ rulemaking. Asarco questions whether ADEQ has authority to impose additional BMPs on landfills accepting only wastes containing asbestos from manufactured products.

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18-13-605(E)(7) –

(1) For the reasons noted in the previous comment, ADEQ’s legal authority for this closure provision (which would require asbestos landfills to meet closure and post-closure requirements applicable to MSWLFs) is uncertain.

(2) In addition, if the facility is subject to NESHAPs, closure requirements already exist (40 C.F.R. § 61.151; 40 C.F.R. § 61.154(g)). What “gaps” are being filled? Is this aimed at those facilities not subject to NESHAPs? If so, is it appropriate to subject such facilities to the same closure requirements as MSWLFs?

Article 7 (18-13-700 et seq.) – Self-certification facilities

18-13-700(A)(10) – These requirements encompass asbestos facilities not subject to BMPs (i.e., those that accept asbestos from a source other than manufactured products). In response to a question at the last stakeholder meeting regarding what this included, ADEQ staff made a somewhat ambiguous reference to mining. Just because a landfill accepting only wastes containing asbestos from manufactured products is located at a mining site (e.g., a landfill at a mine that accepts asbestos-containing transite pipe), that landfill should not automatically be considered a self-certification facility rather than a BMP facility. ADEQ should offer some clarification on the nature of asbestos landfills that it intends to regulate as self-certification facilities.

18-13-702(B) – As noted above with respect to proposed A.A.C. 18-13-602(B), it should be clarified that if a facility has applied for an APP but it has not yet been issued on the date when a solid waste financial assurance demonstration would be due, no “interim” demonstration under the solid waste program should be required. ADEQ should in these circumstances defer to the pending APP permit or amendment.

Article 11 (18-13-1101 et seq.) Plan approval facilities

18-13-1101 – Asarco strongly supports ADEQ’s intent (stated at the last stakeholder meetings) to exempt from plan approval requirements those facilities that have, or are in the process of obtaining, an APP. This is a logical approach, for the reasons noted in the Arizona Mining Association’s previous (February 15) comments. Exemption language should be added to A.A.C. R18-11-1101. We suggest a new subsection B to read as follows:

B. The requirements of this Article do not apply to any solid waste facility, or any subsequent modification of such a facility, where the facility, on the date when a solid waste facility plan approval application is required under Title 49,

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Chapter 4, Article 4 and these rules, meets either of the following criteria: (1) the facility has been issued an aquifer protection permit under Title 49, Chapter 2, Article 3 and the rules promulgated thereunder or is located within the boundaries of an area-wide aquifer protection permit issued pursuant to A.R.S. § 49-243(P); or (2) the facility is included within an application for an aquifer protection permit under Title 49, Chapter 2, Article 3 and the rules promulgated thereunder that (i) has been determined to be administratively complete or (ii) was submitted prior to the effective date of Department regulations on licensing time frames contained in A.A.C. Title 18, Chapter 1, Article 5.

18-13-1102(A)(1) – For clarity, the deadline for submitting a plan approval request for an existing facility should be specified in this section (that deadline appears to be within 180 days of the effective date of the rules, see A.R.S. § 49-762.03(A)(2)).

18-13-1102(A)(1) – How does the requirement to obtain plan approval prior to construction of a new facility (which is consistent with A.R.S. § 49-762.03(A)(1)) relate to the language in A.R.S. § 49-770(C), which states that a demonstration of financial assurance is not required prior to completion of construction but is required before an approval to operate is granted? The simplest way to reconcile these two provisions would be to conclude that the financial assurance mechanism (which needs to cover only closure, post-closure and any required corrective action) can be negotiated or provided subsequent to initial approval of the facility plan that is sufficient to allow construction. This appears to be ADEQ's interpretation, as reflected in proposed 18-13-1802(A) (which states that operation – not construction – cannot commence until the requisite financial assurance is provided). But if financial assurance information must be included with the initial request for plan approval (proposed A.A.C. 18-11-1102(A)(2)(h)), will this as a practical matter hold up construction until financial assurance for closure is demonstrated? Such a result would be inconsistent with A.R.S. § 49-770(C).

18-13-1102(A)(2)(k) & 1102(B) – Asarco strongly supports the proposal (reflected in proposed 18-13-1102(B)) to require construction quality assurance and construction quality control plans only for new facilities or expansions. Existing facilities likely would be unable to provide CQA and CQC plans meeting the requirements of the proposed rule. The scope of this requirement should be reiterated in proposed 18-13-1102(A)(2)(k) (i.e., only applications for new facilities or expansions need include CQA and CQC plans).

18-13-1102(A)(2)(j) – How does ADEQ anticipate the presence of a “learning site” within 2 miles of a solid waste facility will affect ADEQ's approval process? Will it matter if the solid waste facility is an existing facility, or if it was present before the learning site was constructed? If ADEQ intends to impose different or additional requirements based on the presence of a learning site, what is the statutory basis for this approach? Some explanation of ADEQ's thinking on this issue is necessary.

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18-13-1102(A)(2)(l) – The requirement to submit “any other relevant information required by” ADEQ to determine whether to approve the plan is very open-ended. Can ADEQ clarify what sort of information is being contemplated?

18-13-1102(A)(4) – The requirement to provide water balance modeling when permitting a solid waste landfill goes beyond the APP application requirements and is therefore inconsistent with A.R.S. § 49-761(C), which provides that aquifer protection standards under the solid waste rules are to be no more stringent than APP standards.

18-13-1102(A)(5) – The requirement that all “technical data” be sealed by a registered professional engineer is also more stringent than APP requirements and is therefore inconsistent with A.R.S. § 49-761(C).

18-13-1102(B) –

(1) The requirement for all new or expanded land disposal facilities to provide construction quality assurance and construction quality control plans is more stringent than APP requirements and is therefore inconsistent with A.R.S. § 49-761(C).

(2) In addition, these requirements are on their face excessive for a non-MSWLF receiving only waste generated on-site, such as a landfill at a mining site (in the event the landfill is not covered by an APP for any reason and thus not exempt from plan approval requirements).

18-11-1104(D) (made applicable to non-MSWLFs by proposed 18-11-1121) – This section reiterates A.R.S. § 49-772(D)(4), and lays out several of the basic requirements for obtaining a Section 404 permit in the event a landfill is located in wetlands (no practicable alternative site, attempt to achieve “no net loss” of wetlands, etc.). What does this mean in practice - will ADEQ second-guess Corps permitting decisions or mitigation requirements? Asarco also notes that ADEQ is not bound to adopt this provision in the rules – see A.R.S. § 49-772(G) (stating that A.R.S. § 49-772(D), and several other provisions, apply “until” ADEQ adopts solid waste rules). Asarco questions whether ADEQ should be evaluating the same criteria that a federal agency will be examining (especially because ADEQ already has the right to condition any Section 404 permit through Section 401 certification if water quality is threatened).

18-13-1121(A) – This section prohibits any new non-MSWLF or expansion of an existing non-MSWLF from resulting in the take of an endangered plant or animal or the destruction or adverse modification of critical habitat. This language has several problems; if ADEQ intends to include the concepts in the rules at all (as noted above, doing so is not required, pursuant to A.R.S. § 49-

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772(G)), then it should more closely track the controlling language in the statute (A.R.S. § 49-772(D)(2)):

- (1) The language goes beyond A.R.S. § 49-772(D)(2), which prohibits “jeopardizing” species or habitat. “Take” is a different and lower standard than jeopardy, so the proposed ban on “take” makes the rules significantly more stringent than the statute. Moreover, the prohibition on take is independently enforceable under the ESA even in the absence of federal action, so there is no need to include it in the State’s solid waste rules;
- (2) The take prohibition in the ESA (16 U.S.C. § 1538) does not apply to plants, so in this respect also the rule language goes well beyond the statute;
- (3) The language for MSWLFs (proposed 18-11-1104(D)(2)) more closely tracks A.R.S. § 49-772(D)(2), resulting in the anomalous situation where the requirements for non-MSWLFs are actually more restrictive than for MSWLFs;
- (4) As a practical matter, how will ADEQ make evaluations regarding jeopardy? These are normally made by the U.S. Fish and Wildlife Service (“FWS”), but unless there is a federal permit or approval required for the facility, FWS will not generally be involved in reviewing the project.

18-13-1121(B) – The design requirements for non-MSWLFs that are incorporated by reference (liners, control of 25-year flood runoff) are likely to be overly stringent for many types of non-MSWLFs (e.g., construction debris landfills, on-site landfills at industrial sites that do not receive putrescible waste). There should at a minimum be some ability for ADEQ to waive requirements on a case-by-case basis where MSWLF requirements are not appropriate for a particular non-MSWLF.

18-13-1121(H) – Same comment (and for the same reasons) with respect to the closure and post-closure requirements for MSWLFs that are also applied to non-MSWLFs (e.g., presumption of 30 years of post-closure monitoring, leachate collection system, methane monitoring). Again, there should at a minimum be some ability for ADEQ to waive requirements on a case-by-case basis where MSWLF requirements are not appropriate for a non-MSWLF.

Article 18 (18-13-1801 et seq.) – Financial assurance

18-13-1802(F) – Does the Department plan to publish or otherwise make available inflation adjustment factors? If not, how will solid waste facilities calculate the appropriate inflation factor to use on a yearly (in the case of landfills) or triennial (in the case of other solid waste facilities) basis?

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18-13-1802(H) – This section requires that financial assurance mechanisms for a solid waste facility covered by an APP on the effective date of the rules be updated within 180 days of effective date of the new solid waste rules. Presumably, such facilities must then annually update the plan (in the case of a landfill, even a non-MSWLF), pursuant to proposed A.A.C. R18-13-1802(E). Asarco has several concerns with this provision:

(1) A.R.S. § 49-770(C) exempts APP facilities that have demonstrated financial assurance from all the requirements of solid waste facility plan approval (i.e., from all of Article 18). We therefore question the legal basis for the requirement contained in proposed A.A.C. R18-13-1802(H);

(2) Even if ADEQ has the legal authority to do so, we question whether it makes sense to require facilities otherwise exempt from the plan approval process to make a more rigorous and frequent demonstration of financial assurance than is required under the APP program. This is especially true for non-MSWLFs such as those located at Asarco's operations.

(3) Current APP regulations already provide ADEQ the authority to request a permittee to make a renewed financial assurance demonstration and provide for automatic review of all facilities covered by an individual permit whenever a significant permit amendment is sought. A.A.C. R18-9-A203(D) & (F). This provides an adequate level of ongoing agency review and oversight of financial assurance demonstrations.

(4) There may be other mechanisms (beyond APP) that would assist in meeting closure and post-closure costs (e.g., financial assurance under the mined land reclamation program, A.R.S. § 27-991 *et seq.*, for a mine site). If these alternate approved mechanisms provide some or all assurance for closure, post-closure or corrective action requirements associated with a solid waste facility, the facility owner should be allowed to reduce solid waste financial assurance by a commensurate amount.

Article 21 (18-13-2101 *et seq.*) – Fees

Schedule B - a potential maximum plan review fee of \$100,000 for landfills is quite high for many types of landfills. Asarco suggests that ADEQ consider tiered maximum fees based on factors such as type of landfill (MSWLF or non-MSWLF), size (annual disposal volumes), type of waste being disposed, etc.

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Please call if you have any questions on these comments. Again, thank you for the opportunity to participate in this stakeholder process.

Sincerely yours,



Scott H. Thomas