

ELECTRONIC COMMENT - F-2002-CC2A-FFFFF

To: Elizabeth Cotsworth
United States Environmental Protection Agency ("Agency")

From: Albert "A. J." Birkbeck
on behalf of:
American Brownfields Assurance Company, and
The Fulcrum Law Group

Dated: April 29, 2002

Re: Comment Submitted regarding Announcement of Availability and Request for
Comment on "Completion of Corrective Action Activities at RCRA Facilities" Guidance
(Federal Register, Vol. 67, No. 39, Weds, February 27, 2002)

Docket: F-2002-CC2A-FFFFF

Issue: Identify mechanisms, other than permits and orders, that might be used to implement institutional controls following a "Corrective Action Complete with Controls" decision, and under what circumstances those mechanisms would provide enough certainty with respect to continued compliance with required controls to justify elimination of the permit or order.

Use of an Independent Private Trust to Assure the Long-Term Viability of Institutional Control & Financial Assurance Mechanisms

Primary Purpose of the Sentinel Trust(TM)

This proposal involves the implementation of an independent, not-for-profit private trust, known as the Sentinel Trust, to: (1) provide a mechanism to assure maintenance of institutional and other control mechanisms, as well as financial assurance mechanisms, at corrective action facilities; and (2) allow the regulated community a means by which property may be returned to productive use without the stigma of outstanding orders and permits. For purposes of this comment, the term "control mechanisms" includes governmental controls, proprietary controls, enforcement tools, and informational devices. Participation, by responsible parties seeking a "Corrective Action Complete with Controls" determination from the Agency, is proposed to be voluntary.

Given the differences in remedial programs and regulatory approaches on a state-by-state basis, a separate Sentinel Trust is proposed for each state. Regulatory oversight is ensured, given that at least one Sentinel Trust Trustee would be directly appointed by regulatory authorities. The primary responsibility of an Agency Trustee would be to ensure both the accountability and accuracy of any report or certification remitted by the Sentinel Trust to regulatory authorities.

The Sentinel Trust could also be utilized to verify or provide responsible parties with any financial assurance mechanisms which may be required by regulatory authorities not only at RCRA corrective action facilities, but also at a variety of voluntary cleanup sites, brownfield sites, state or federal "Superfund" sites.

Trust Funding

Through the use of innovative financial and tax constructs, the costs of Sentinel Trust verification and certification services to responsible parties would be extremely competitive, while affording responsible parties with the significant benefits of a "Corrective Action Complete with Controls" determination. Any need for public funding would be limited.

Benefits to Regulatory Authorities

Both regulatory authorities and the regulated community would benefit significantly from the implementation of the Sentinel Trust concept at facilities given a "Corrective Action Complete with Controls" determination. More specifically, regulatory authorities would recognize the following benefits:

- Monitoring and Periodic Certification of Land Use Controls, Restrictive Covenants, Deed Notices and other Control Mechanisms by non-Agency resources, thus allowing regulators to modify their workload universes to focus Agency resources on other facilities;
- Monitoring and Periodic Certification of any Engineered Controls required as part of the Corrective Action;
- Provisions for the Establishment and Maintenance of reliable Financial Assurance Mechanisms;
- Creation and Maintenance of a Cost-Effective "Institutional Controls" Database, which would allow the nature and status of all control mechanisms associated with a particular facility to be quickly and accurately identified and verified; and
- Significant Savings of Agency Funds and Human Resources.

Benefits to the Regulated Community

Sentinel Trust activities would also benefit the regulated community. Benefits to the regulated community include:

- Conduct of Verification Work at the Lowest Possible Overall Cost - through the Sentinel Trust's economies of scale and the use of cost saving tax structures;

- Work with Regulated Community & Local Government Units to assure proper Implementation and Maintenance of Institutional Controls;
- Procurement and Maintenance of Financial Assurance Mechanisms;
- Identification and Retention of Qualified Engineers, Consultants and Attorneys at Favorable Rates;
- Optional Drafting and Filing of Institutional Controls in Conformance with Regulatory Requirements;
- Cost-Effective "Institutional Controls" Database available to the Public, including both responsible parties and prospective purchasers of impacted property;
- Comfort that Certification is being conducted by a Qualified and Reputable Certification Entity; and
- Increased Marketability of Impacted Properties due to:
 - Quantification of Verification Costs;
 - Issuance of "Corrective Action Complete with Controls" determination; and
 - Unbiased Assurance to Prospective Purchasers as to the Continued Viability of Control Mechanisms

Structure of the Sentinel Trust

Each state Sentinel Trust would provide certification of control mechanisms and related services at facilities at which corrective action is "Complete with Controls," including financial assurance products, utilizing the following model:

- *Responsible for Retention of Outside Engineers, Contractors and Attorneys.* Given the potential for a large volume of work, the Sentinel Trust could enter into contracts with verification agents at more favorable rates than could be negotiated by all but the largest of individual responsible parties.

- *Administrative Services.* Administrative services to the individual Sentinel Trusts are provided by the American Brownfields Assurance Company ("ABAC"). ABAC is uniquely qualified to provide financial, technical and legal services relating to both Sentinel Trust and 468B Trust entities. These services would include the provision of qualified Trustees, necessary technical expertise associated with the effective monitoring of engineered controls, marketing expertise, as well as legal and financial services associated with complex trust structures, tax scenarios, and financial assurance mechanisms.

- *Internal Agents.* If it is deemed more efficient to utilize in-house agents for

certification and related activities, the Sentinel Trust may either employ those agents directly or contract with the ABAC to provide such services. For example, it may be more cost-effective to utilize Sentinel Trust employees to travel to county recorder of deeds offices to verify deed restrictions and notices, rather than retaining third parties, such as title companies, to provide such services.

- *Interaction with Units of Government.* The Sentinel Trust would interact with units of government at two primary levels. Initially, the Trust would regularly consult with Agency or state regulatory authorities to ensure the long-term viability of all control mechanisms. In addition, the Trust would work with local government to assure proper zoning and land use controls are maintained so as to assure continued protectiveness of human health and the environment.

- *Transfer of Interests to the Trust.* It is anticipated that certain control interests, such as easements which assure access to properties for verification purposes, will be transferred from responsible parties or current land owners to the Sentinel Trust. Such transfers would be especially beneficial in states that prohibit governmental authorities from directly holding such interests.

- *Payments to the Sentinel Trust.* Payments to would generally be made directly from responsible parties to the Sentinel Trust. Alternatively, if a particular facility qualifies, the Sentinel Trust would be paid from a facility-specific "468B" Trust (see discussion regarding 468B Trusts below), potentially providing significant tax benefits to the responsible parties.

- *Voluntary or Mandatory Participation.* Depending on the regulatory program designed by regulatory authorities, participation in the Sentinel Trust program might be either voluntary or mandatory. However, in the corrective action context, it is anticipated that participation would be voluntary, primarily by responsible parties seeking a "Complete with Controls" determination. Either way, the goal of the Sentinel Trust program is to provide reliable and accurate verification services at the lowest possible overall cost to both regulators and the regulated community.

- *Tax Advantages.* Since each Sentinel Trust is created under Section 501(c) of the internal revenue code as a "not-for-profit" organization, payments to the Trust would not be taxable to the Trust. This structure leaves more funds available for the certification and other activities of the Trust, while simultaneously reducing the payments required from the regulated community.

Use of Site Specific 468B "Qualified Settlement Funds" or Trusts

In addition to the 501(c) Sentinel Trust that would be created in each state, the Sentinel Trust Concept anticipates that responsible parties will utilize a separate Trust, also known as 468B Qualified Settlement Fund or Trust, for each facility which qualifies for such treatment. These "468B Trusts" will:

- Act solely as a financial vehicle or "savings account," from which payments are made to the Sentinel Trust. It is the Sentinel Trust which actually performs certification and related activities on behalf of the responsible party.

- Allow responsible parties to realize immediate tax benefits for payments associated with certification and related activities performed on their behalf.

Note: The circumstances allowing the use of 468B Trusts are prescribed by the Internal Revenue Service, and not all facilities will qualify for such treatment. However, while 468B Trusts can further lower the overall cost of certification and related services, their use is not critical to the Sentinel Trust Concept.

Activities Outside the Scope of Trust Responsibilities

Just as important as the duties and obligations of the Sentinel Trust are the activities and obligations which fall outside the scope of the Sentinel Trust's responsibilities. Such activities and obligations include:

- *No Enforcement Activities* - the Sentinel Trust would not engage in any enforcement activities on behalf of the regulatory authorities. Rather, the Trust's responsibilities would focus on inspections and verification, the results of which would be referred to regulatory authorities for any appropriate enforcement action. This critical reporting function would be overseen directly by the Trustee(s) appointed by the Agency or state regulators;

- *No Exclusive Inspection Responsibilities* - the Sentinel Trust's inspection responsibilities are not exclusive. That is, the Trust's inspection responsibilities would in no way impact or limit regulators' ability to inspect or verify any control or financial assurance mechanism;

- *No Remedial or Removal Activities* - the Sentinel Trust would not be responsible in any way for the design or implementation of remedial or removal activities on behalf of responsible parties at any site; and

- *No Implementation of Engineered Controls* - similarly, the Sentinel Trust would not be responsible in any way for the initial design or implementation of engineered controls on behalf of responsible parties at any facility.

Again, it should be noted that participation in the Sentinel Trust by a member of the regulated community may be either voluntary or mandatory. However, voluntary participation in the Sentinel Trust has at least two benefits:

- *No Legislative Action* - is likely to be required for voluntary responsible party participation in a private entity; and

- *Additional Incentive for Competitive Rates* - Although the Sentinel Trust is

committed to maintain the lowest possible costs in any instance, if the cost of participation is not competitive in the voluntary participation context, there will not be sufficient participation to make the Sentinel Trust construct viable.

Differences Between the Sentinel Trust and Other Trust Approaches

There currently exists at least one other private Trust approach being marketed to address the long-term verification of institutional and engineered controls. Some similarities between the Sentinel Trust and alternative approaches exist, such as utilizing economies of scale associated with providing services to a large number of sites throughout a state to keep verification costs low.

However, based on currently available information, the approaches utilized by others differ significantly from the Sentinel Trust concept in several key respects. For instance, alternative products revolve around insurance products, while purporting to provide a "complete release" of responsible parties from any Agency obligations and liability. ABAC principals believe both that an absolute liability shift may be contrary to public policy and, at any rate, that such as shift is not a necessary component of a viable control verification program. In addition, heavy reliance on insurance/liability-shifting mechanisms drives up the cost of participation in alternative trust products.

Alternative trust approaches also include, as an essential component, the implementation of engineered controls, and even the completion of underlying remedial actions, on behalf of responsible parties by the same private trust entity charged with certifying the protectiveness and effectiveness of those remedies and controls. In cases involving trust design or implementation of remedial action or engineered controls, a potential conflict of interest exists with respect to the trust's certification role.

Finally, alternative trust approaches depend on the long-term viability of the verification trust and, more critically, on the perpetual viability of the insurance company providing long-term control assurances. However, given the substantial financial risks associated with one time up-front payment and the significant uncertainties attached to insuring a broad spectrum of varying long-term risks, it is unclear whether reliance on such long-term viability is warranted. Prospective failure of a trust to which all liabilities and obligations have been transferred, or the failure of its insurer, would be complicated by difficulties in identifying responsible parties at some future date. Such a failure would place substantial burdens on regulatory authorities and could pose substantial risk to human health and the environment. Since the Sentinel Trust relies on periodic payments, it has the ability to closely match fees to actual verification expenses, thereby significantly reducing any financial uncertainties and assuring the viability of the construct. Such small periodic payments are especially insignificant relative to the substantial benefits of receiving a "Complete with Controls" determination.

Conclusion

To date, the American Brownfields Assurance Company has received widespread expressions of interest regarding its Sentinel Trust concept from regional EPA staff, state regulators from a number of states and industry. As the low cost alternative to existing trust proposals, its function is both simple and efficient. In fact, as an independent, not-for-profit entity, the Sentinel Trust concept is uniquely poised to provide a cost-effective mechanism to assure the long-term implementation of control mechanisms following a "Corrective Action Complete with Controls" decision. Given the thoroughness of the Sentinel Trust verification process, the involvement of an Agency Trustee, and independent nature of the Sentinel Trust, such assurance could even be made with enough certainty to justify the elimination of existing permits and orders. Importantly, all four general categories of institutional controls, including governmental controls, proprietary controls; enforcement tools, and informational controls, would be addressed through the Sentinel Trust concept.

Representatives of the American Brownfields Assurance Company are prepared to address comments and questions from either the Agency or the regulated community regarding this important verification tool.

Submitted: Monday, April 29, 2002

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