

3745-400-18

Financial assurance for post-closure care of construction and demolition debris facilities.

(A) The owner or operator of a construction and demolition debris facility shall establish and maintain financial assurance for post-closure care of the facility as required by this rule. Financial assurance may be established and maintained through the use of one of the options specified in paragraphs (B) to (F) of this rule, unless it is demonstrated to the satisfaction of the health commissioner or director of the licensing authority that an alternate option will guarantee funding for post-closure care. The owner or operator may use the options in combination as specified in paragraph (G) of this rule.

(1) Post-closure care cost estimate. Financial assurance documentation shall include an itemized written post-closure care cost estimate that calculates the cost of conducting the post-closure care activities required by rule 3745-400-16 of the Administrative Code for all active licensed disposal areas and for all inactive licensed disposal areas containing debris. The amount shall be calculated in current dollars and be based upon a third party conducting all of the post-closure care activities required by rule 3745-400-16 of the Administrative Code.

(2) Amount and funding of financial assurance. Post-closure care financial assurance shall be funded in an amount not less than the post-closure care cost estimate calculated in accordance with paragraph (A)(1) of this rule unless the owner or operator has chosen the five year transition in accordance with rule 3745-400-25 of the Administrative Code. If the funded post-closure care financial assurance for the facility is less than the post-closure care cost estimate, the owner or operator shall fund an amount not less than the post-closure care cost estimate not later than thirty days after each of the following:

(a) License issuance.

(b) The updated post-closure care financial assurance documentation required by paragraph (E)(11) of rule 3745-400-12 of the Administrative Code.

(c) The updated post-closure care financial assurance documentation required by paragraph (E)(7) of rule 3745-400-16 of the Administrative Code.

If a portion of the increase in the post-closure care cost estimate is due to the addition of active licensed disposal area for which a construction certification report has not been submitted in accordance with rule 3745-400-08 of the Administrative Code, the owner or operator may delay funding that portion of the post-closure care cost estimate necessary to conduct post-close activities for that uncertified active licensed disposal area until the date of submittal of the construction certification report. The owner or operator shall use any single or combination of financial assurance instruments as specified in

paragraphs (B) to (F) of rule 3745-400-13 of the Administrative Code.

(3) Review of post-closure care financial assurance.

(a) The post-closure cost care estimate shall be recalculated for each of the following:

(i) Renewal of the annual license application.

(ii) Any application for a facility modification

(iii) Prior to submittal of the updated post-closure care financial assurance documentation required by paragraph (E)(11) of rule 3745-400-12 of the Administrative Code

(iv) Prior to submittal of the updated post-closure care financial assurance documentation required by paragraph (E)(7) of rule 3745-400-16 of the Administrative Code.

(b) The post-closure cost care estimate shall be recalculated if there is a change in the acreage of the active licensed disposal area or inactive licensed disposal area containing debris.

(c) If there is no change in the acreage of the active licensed disposal area or inactive licensed disposal area containing debris, the owner or operator may as an alternative to recalculating the post-closure care cost estimate, adjust the post-closure cost estimate established in the facility's most recent issued license for inflation in accordance with paragraph (A)(3)(d) of this rule.

(d) Adjustment of the post-closure cost estimate for inflation. The adjustment shall be made as specified in this paragraph, using an inflation factor derived from the annual implicit price deflator for gross domestic product as published by the U.S. department of commerce in the most recent February issue of "Survey of Current Business." The inflation factor is the result of dividing the latest published annual deflator by the deflator for the previous year.

(i) The first adjustment is made by multiplying the post-closure care cost estimate by the inflation factor. The result is the adjusted post-closure care cost estimate.

(ii) Subsequent adjustments are made by multiplying the most recently adjusted post-closure care cost estimate by the most recent inflation factor.

[Comment: The text of the incorporated materials is not included in this rule and are hereby made a part of this rule. The "Survey of Current Business" document is available at <http://www.bea.gov> or by writing to the "United States Bureau of Economic Analysis, 1441 L Street NW, Washington, DC 20230."]

- (e) The amount of financial assurance shall not be less than the recalculated post-closure cost estimate for each renewal of the annual license application, application for a facility modification, submittal of the updated post-closure care financial assurance documentation required by paragraph (E)(11) of rule 3745-400-12 of the Administrative Code, and submittal of the updated post-closure care financial assurance documentation required by paragraph (E)(7) of rule 3745-400-16 of the Administrative Code. Established and funded financial assurance may be utilized to fulfill the financial assurance requirements if the dollar amount of the financial assurance is equal to or greater than the amount required in paragraph (A) of this rule.
- (4) Post-closure care financial assurance documentation shall also include the original copy of the financial assurance instruments necessary to achieve compliance with the financial assurance provisions of this rule. The wording contained in the instruments shall be in accordance with the appropriate paragraph of rule 3745-400-14 of the Administrative Code, unless an option other than those specified in paragraphs (B) to (F) of this rule is proposed.
- (5) Release of funds. Reimbursement shall be made as follows:

 - (a) Release of funds prior to completion of post-closure care. The owner or operator, or any other person authorized to perform post-closure care activities on behalf of the owner or operator, may request and receive authorization for reimbursement from or a reduction of the financial assurance required under this rule. In accordance with paragraph (A)(3)(e) of this rule, the amount of financial assurance remaining shall not be less than the recalculated post-closure care cost estimate. A request for reimbursement from or reduction of financial assurance shall be submitted to the licensing authority and include the following:

 - (i) The amount of reimbursement or reduction of the financial assurance calculated based upon the unit cost of the completed post-closure care activities contained in the current approved financial assurance cost estimate.
 - (ii) A post-closure care cost estimate recalculated in accordance with paragraph (A)(1) of this rule.
 - (iii) A comparison of the recalculated post-closure care cost estimate to

the amount of financial assurance remaining if the requested amount of reimbursement or reduction of the financial assurance is released or reduced.

(b) Release of funds after completion of post-closure care period. The owner or operator or any other person authorized to perform post-closure care activities may request and receive authorization for reimbursement of all remaining funds or termination of the financial assurance required under this rule after post-closure care has been completed in accordance with rule 3745-400-16 of the Administrative Code.

(c) The licensing authority shall make a determination not later than ninety days after receipt of a complete request.

(B) Post-closure care trust fund.

(1) The owner or operator may satisfy the requirements of this rule by establishing a post-closure care trust fund that conforms to this rule and by submitting an originally signed duplicate of the trust agreement to the health commissioner or director of the licensing authority. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(2) The wording of the trust agreement shall be identical to the wording specified in paragraph (A)(1) of rule 3745-400-14 of the Administrative Code and the trust agreement shall be accompanied by a formal certification of acknowledgment.

(3) Unless the owner or operator has chosen the five year transition in accordance with rule 3745-400-25 of the Administrative Code or the owner or operator is delaying funding of a portion of the post-closure cost estimate until submittal of a construction certification report in accordance with (A)(2) of this rule, the owner or operator shall fully fund the total dollar amount of the trust fund not later than thirty days after each of the following:

(a) License issuance.

(b) The updated post-closure care financial assurance documentation required by paragraph (E)(11) of rule 3745-400-12 of the Administrative Code.

(c) The updated post-closure care financial assurance documentation required by paragraph (E)(7) of rule 3745-400-16 of the Administrative Code.

The owner or operator shall submit to the licensing authority a receipt from the trustee for the deposit made into the trust fund.

(4) If the owner or operator establishes a post-closure care trust fund to replace one

or more alternative mechanisms specified in this rule, the owner or operator shall fully fund the trust fund in an amount at least equal to the post-closure care cost estimate determined in accordance with paragraph (A) of this rule.

(5) The owner or operator, or any other person authorized to perform post-closure care, may request release of funds for post-closure care expenditures in accordance with paragraph (A)(5) of this rule. The health commissioner or director of the licensing authority shall calculate in accordance with paragraph (A)(5) of this rule the amount to be released and shall instruct the trustee, in writing, to make such release.

(6) The health commissioner or director of the licensing authority shall agree to termination of the trust fund when either of the following occurs:

(a) The owner or operator substitutes alternative financial assurance for post-closure care as specified in this rule.

(b) The health commissioner or director of the licensing authority notifies the owner or operator that the owner or operator is no longer required by this rule to maintain financial assurance for post-closure care of the construction and demolition debris facility.

(C) Surety bond guaranteeing payment into a post-closure care trust fund.

(1) The owner or operator may satisfy the requirements of this rule by obtaining a surety bond that conforms to this rule and by submitting the originally signed surety bond to the health commissioner or director of the licensing authority. At a minimum, the surety bond company issuing the surety bond shall be among those listed as acceptable sureties on federal bonds in the most recent "Circular 570" of the U.S. department of the treasury.

[Comment: The text of the incorporated materials is not included in this rule and are hereby made a part of this rule. "Circular 570" is published in the "Federal Register" annually on the first day of July; interim changes in the circular are also published in the "Federal Register." This United States department of treasury document is available at <http://www.fms.treas.gov>.]

(2) The wording of the surety bond shall be identical to the wording specified in paragraph (B) of rule 3745-400-14 of the Administrative Code.

(3) The owner or operator who uses a surety bond to satisfy the requirements of this rule shall also establish a standby trust fund not later than the date the surety bond is obtained. Under the terms of the surety bond, all payments made thereunder shall be deposited by the surety bond company directly into the standby trust fund in accordance with instructions from the health commissioner or director of the licensing authority. This standby trust fund shall meet the requirements specified in paragraph (B) of this rule, except as

follows:

- (a) An originally signed duplicate of the trust agreement shall be submitted with the surety bond.
 - (b) Until the standby trust fund is funded, pursuant to the requirements of this rule, a deposit into the standby trust fund as specified in paragraph (B) of this rule is not required.
- (4) The surety bond shall guarantee that the owner or operator will do one of the following:
- (a) Fund the standby trust fund in an amount equal to the penal sum of the surety bond before the beginning of post-closure care.
 - (b) Fund the standby trust fund in an amount equal to the penal sum of the surety bond not later than fifteen days after post-closure care is required in compliance with paragraph (A) of rule 3745-400-16 of the Administrative Code.
 - (c) Provide alternative financial assurance as specified in this rule and obtain written approval of the alternative financial assurance from the health commissioner or director of the licensing authority not later than ninety days after both the owner or operator and the health commissioner or director of the licensing authority receive notice of cancellation of the surety bond from the surety bond company.
- (5) Under the terms of the surety bond, the surety bond company shall become liable on the surety bond obligation when the owner or operator fails to perform as guaranteed by the surety bond.
- (6) Except as provided in paragraph (G) of this rule, the penal sum of the surety bond shall be in an amount at least equal to the post-closure care cost estimate determined in accordance with paragraph (A) of this rule.
- (7) Under the terms of the surety bond, the surety bond shall remain in full force and effect unless the surety bond company sends written notice of cancellation by certified mail or other form of mail accompanied by a receipt to the owner or operator, the approved board of health, and the director. Cancellation shall not occur during the one hundred twenty day period beginning on the first day that both the owner or operator and the health commissioner or director of the licensing authority have received the notice of cancellation, as evidenced by the return receipts.
- (8) The owner or operator may cancel the surety bond if the licensing authority has given prior written approval. The health commissioner or director of the licensing authority shall provide such written approval when one of the

following occurs:

- (a) The owner or operator substitutes alternative financial assurance for post-closure care as specified in this rule.
- (b) The health commissioner or director of the licensing authority notifies the owner or operator that the owner or operator is no longer required to maintain financial assurance for post-closure care of the construction and demolition debris facility.

(D) Surety bond guaranteeing performance of post-closure care.

- (1) The owner or operator may satisfy the requirements of this rule by obtaining a surety bond that conforms to this rule and by submitting the originally signed surety bond to the health commissioner or director of the licensing authority. The surety bond company issuing the surety bond shall at a minimum be among those listed as acceptable sureties on federal bonds in the most recent "Circular 570" of the U.S. department of the treasury.

[Comment: Comment: The text of the incorporated materials is not included in this rule and are hereby made a part of this rule. "Circular 570 is published in the "Federal Register" annually on the first day of July; interim changes in the circular are also published in the "Federal Register." This United States department of treasury document is available at <http://www.fms.treas.gov>.]

- (2) The wording of the surety bond shall be identical to the wording specified in paragraph (C) of rule 3745-400-14 of the Administrative Code.
- (3) The owner or operator who uses a surety bond to satisfy the requirements of this rule shall also establish a standby trust fund not later than the date the surety bond is obtained. Under the terms of the surety bond, all payments made thereunder shall be deposited by the surety bond company directly into the standby trust fund in accordance with instructions from the health commissioner or director of the licensing authority. This standby trust fund shall meet the requirements specified in paragraph (B) of this rule except as follows:
 - (a) An originally signed duplicate of the trust agreement shall be submitted with the surety bond.
 - (b) Until the standby trust fund is funded, pursuant to the requirements of this rule, a deposit into the standby trust fund as specified in paragraph (B) of this rule is not required.
- (4) The surety bond shall guarantee that the owner or operator shall do one of the following:

- (a) Perform post-closure care in accordance with rule 3745-400-16 of the Administrative Code and other requirements of any authorizing documents.
- (b) Provide alternative financial assurance as specified in this rule, and obtain written approval of the alternative financial assurance from the health commissioner or director of the licensing authority not later than ninety days after both the owner or operator and the health commissioner or director of the licensing authority receive notice of cancellation of the surety bond from the surety bond company, as evidenced by the return receipts.
- (5) Under the terms of the surety bond, the surety bond company shall become liable on the surety bond obligation when the owner or operator fails to perform as guaranteed by the surety bond. Following a determination by the approved board of health or the director that the owner or operator has failed to perform post-closure care activities in accordance with rule 3745-400-16 of the Administrative Code and requirements of any authorizing documents, the surety bond company shall perform post-closure care activities in accordance with rule 3745-400-16 of the Administrative Code and requirements of any authorizing documents or shall deposit the amount of the penal sum of the surety bond into the trust fund.
- (6) The penal sum of the surety bond shall be in an amount at least equal to the post-closure care cost estimate determined in accordance with paragraph (A) of this rule.
- (7) Under the terms of the surety bond, the surety bond shall remain in full force and effect unless the surety bond company sends written notice of cancellation by certified mail or other form of mail accompanied by a receipt to the owner or operator, the approved board of health, and the director. Cancellation shall not occur during the one hundred twenty day period beginning on the first day that both the owner or operator and the health commissioner or director of the licensing authority have received the notice of cancellation, as evidenced by the return receipts.
- (8) The owner or operator may cancel the surety bond if the health commissioner or director of the licensing authority has given prior written approval. The health commissioner or director of the licensing authority shall provide such written approval when one of the following occurs:

 - (a) The owner or operator substitutes alternative financial assurance for post-closure care as specified in this rule.
 - (b) The health commissioner or director of the licensing authority notifies the owner or operator that the owner or operator is no longer required to

maintain financial assurance for post-closure care of the construction and demolition debris facility.

(9) The surety bond company shall not be liable for deficiencies in the completion of post-closure care activities by the owner or operator after the owner or operator has been notified by the health commissioner or director of the licensing authority in accordance with this rule that the owner or operator is no longer required to maintain financial assurance for post-closure care of the construction and demolition debris facility.

(E) Post-closure care letter of credit.

(1) The owner or operator may satisfy the requirements of this rule by obtaining an irrevocable standby letter of credit that conforms to the requirements of this rule and by having the originally signed letter of credit delivered to the health commissioner or director of the licensing authority. The issuing institution shall be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(2) The wording of the letter of credit shall be identical to the wording specified in paragraph (D) of rule 3745-400-14 of the Administrative Code.

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this rule shall also establish a standby trust fund not later than the date the letter of credit is obtained. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the health commissioner or director of the licensing authority shall be deposited directly by the issuing institution into the standby trust fund in accordance with instructions from the health commissioner or director of the licensing authority. The standby trust fund shall meet the requirements of the trust fund specified in paragraph (B) of this rule, except as follows:

(a) An originally signed duplicate of the trust agreement shall be submitted with the letter of credit.

(b) Until the standby trust fund is funded, pursuant to the requirements of this rule, a deposit into the standby trust fund as specified in paragraph (B) of this rule is not required.

(4) The letter of credit shall be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the names and addresses of the construction and demolition debris facility and the owner or operator and the amount of funds assured for post-closure care of the construction and demolition debris facility by the letter of credit.

- (5) The letter of credit shall be irrevocable and issued for a period of at least one year. The letter of credit shall provide that the expiration date shall be automatically extended for a period of at least one year unless, at least one hundred twenty days prior to the current expiration date, the issuing institution notifies the owner or operator, the approved board of health, and the director by certified mail or any other form of mail accompanied by a receipt of a decision not to extend the expiration date. Under the terms of the letter of credit, the one hundred twenty day period shall begin on the day when the owner or operator, licensing authority, and director have received the notice, as evidenced by the return receipts.
- (6) Except as provided in paragraph (G) of this rule, the letter of credit shall be in an amount at least equal to the post-closure care cost estimate determined in accordance with paragraph (A) of this rule.
- (7) Following a determination by the approved board of health or the director that the owner or operator has failed to perform post-closure care activities in accordance with rule 3745-400-16 of the Administrative Code and requirements of any authorizing documents, the approved board of health or director may draw on the letter of credit.
- (8) If the owner or operator does not establish alternative financial assurance as specified in this rule and obtain written approval of such alternative financial assurance from the health commissioner or director of the licensing authority not later than ninety days after the owner or operator, licensing authority, and director have received notice from the issuing institution that it shall not extend the letter of credit beyond the current expiration date, the approved board of health or director shall draw on the letter of credit. The approved board of health or the director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the final thirty days of any such extension, the approved board of health or the director shall draw on the letter of credit if the owner or operator has failed to provide alternative financial assurance as specified in this rule and has failed to obtain written approval of such alternative financial assurance from the health commissioner or director of the licensing authority.
- (9) The health commissioner or director of the licensing authority shall return the original letter of credit to the issuing institution for termination when one of the following occurs:
- (a) The owner or operator substitutes alternative financial assurance for post-closure care as specified in this rule.
 - (b) The health commissioner or director of the licensing authority notifies the owner or operator that the owner or operator is no longer required to

maintain financial assurance for post-closure care of the construction and demolition debris facility.

(F) Post-closure care insurance.

- (1) The owner or operator may satisfy the requirements of this rule by obtaining post-closure care insurance that conforms to this rule and by submitting an originally signed certificate of such insurance to the health commissioner or director of the licensing authority.
- (2) The owner or operator using insurance as a financial assurance mechanism shall submit documentation stating whether the insurer is a subsidiary or has a corporate, legal, or financial affiliation with the owner or operator. If the post-closure care insurance is issued by a subsidiary or affiliate, the owner or operator shall include a detailed written description of the relationship between the insurer and the owner and the operator.
- (3) An insurer issuing an insurance policy in satisfaction of this rule shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states. The owner or operator shall submit to the licensing authority the following information regarding the insurer's qualifications:
 - (a) The most recent A.M. Best rating of the insurer.
 - (b) Documentation demonstrating that the insurer is domiciled in the United States.
 - (c) The most recent report on examination from the insurance department from the insurer's state of domicile.
 - (d) Documentation demonstrating that the insurer has capital and surplus of at least one hundred million dollars.
 - (e) Documentation demonstrating that the insurer received an unqualified opinion of the insurer's annual financial statements from an independent certified public accountant.
- (4) The licensing authority may disallow use of the insurer by the owner or operator on the basis of one or more of the following:
 - (a) The A.M. Best rating is less than A-.
 - (b) The report on examination does not demonstrate that the status of the insurer is satisfactory.
 - (c) The opinion expressed by the independent certified public accountant in

the report on examination of the insurer's financial statements.

- (5) The wording of the certificate of insurance shall be identical to the wording specified in paragraph (E) of rule 3745-400-14 of the Administrative Code.
- (6) Except as provided in paragraph (G) of this rule, the post-closure care insurance policy shall be issued for a face amount at least equal to the amount of the post-closure care cost estimate determined in accordance with paragraph (A) of this rule. The face amount shall be the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer shall not change the face amount, but the insurer's future liability shall be lowered by the amount of the payments.
- (7) The post-closure care insurance policy shall guarantee that funds shall be available to conduct post-closure care of the construction and demolition debris facility whenever post-closure care begins. The policy shall also guarantee that once post-closure care of the construction and demolition debris facility begins, the insurer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the health commissioner or director of the licensing authority, to such party or parties as the health commissioner or director of the licensing authority specifies.
- (8) After beginning post-closure care, the owner or operator, or any other person authorized to perform post-closure care activities, may request reimbursement for post-closure care expenditures. The health commissioner or director of the licensing authority shall calculate in accordance with paragraph (A) of this rule the amount to be reimbursed and shall instruct the insurer, in writing, to make such reimbursement.
- (9) The owner or operator shall maintain the policy in full force and effect until the health commissioner or director of the licensing authority consents to termination of the policy by the owner or operator as specified in paragraph (F)(13) of this rule. Failure to pay the premium, without substitution of alternative financial assurance as specified in this rule, constitutes a violation of these rules, warranting such remedy as the health commissioner or director of the licensing authority deems necessary. Such violation shall be deemed to begin upon receipt by the health commissioner or director of the licensing authority of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.
- (10) Each policy shall contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.
- (11) The policy shall provide that the insurer may not cancel, terminate, or fail to

renew the policy except for failure to pay the premium. The automatic renewal of the policy shall at a minimum provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending written notice by certified mail or other form of mail accompanied by a receipt to the owner or operator, health commissioner, and director of the licensing authority not later than one hundred twenty days prior to the date of cancellation, termination, or failure to renew. Cancellation, termination, or failure to renew shall not occur during the one hundred twenty day period beginning on the first day that both the owner or operator and the health commissioner or director of the licensing authority have received the notice, as evidenced by the return receipts.

(12) If the health commissioner or director of the licensing authority disallows use of the insurer, the owner or operator shall provide alternative financial assurance as specified in this rule not later than thirty days after notification of the disallowance of the insurer.

(13) The health commissioner or director of the licensing authority shall give written approval that the owner or operator may terminate the insurance policy when one of the following occurs:

(a) The owner or operator substitutes alternative financial assurance for post-closure care as specified in this rule.

(b) The health commissioner or director of the licensing authority notifies the owner or operator that the owner or operator is no longer required to maintain financial assurance for post-closure care of the construction and demolition debris facility.

(G) Use of multiple financial assurance mechanisms. The owner or operator may satisfy the requirements of this rule by establishing more than one financial assurance mechanism for the construction and demolition debris facility. The mechanisms are limited to trust funds, surety bonds guaranteeing payment into a post-closure care trust fund, letters of credit, and insurance. The mechanisms shall conform to paragraphs (B), (C), (E), and (F) of this rule, except that it is the combination of mechanisms, rather than each single mechanism, that shall provide financial assurance for an amount at least equal to the post-closure care cost estimate calculated in accordance with paragraph (A) of this rule. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, the owner or operator may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The licensing authority may invoke use of any or all of the mechanisms in accordance with paragraphs (B), (C), (E), and (F) of this rule to provide for post-closure care of the construction and demolition debris facility.

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Certification

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