

WAC 173-351-600 Financial assurance criteria. (1) Applicability and effective date.

(a) The requirements of this section apply to owners and operators of all MSWLF units.

(b) The requirements of this section are effective on the effective date of this rule.

(2) Financial assurance for closure.

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party under a contract subject to chapter 39.12 RCW, Prevailing wages on public works, to close the largest area of all MSWLF units ever requiring a final cover as required under WAC 173-351-500(1), Closure criteria, at any time during the active life in accordance with the closure plan. The owner or operator must submit the detailed written estimate for approval by the jurisdictional health department in the application for a permit under WAC 173-351-700 or through the permit modification process of WAC 173-351-720(6).

(i) The cost estimate must equal the cost of closing the largest area of all MSWLF units ever requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive, as indicated by the closure plan as required in WAC 173-351-500 (1)(b)(ii).

(ii) During the active life of all MSWLF units, the owner or operator must annually adjust the closure cost estimate for inflation.

(iii) The owner or operator must increase the closure cost estimate and the amount of financial assurance provided under (b) of this subsection if changes to the closure plan or MSWLF unit conditions increase the maximum cost of closure at any time during the remaining active life.

(iv) The owner or operator may reduce the closure cost estimate and the amount of financial assurance provided under (b) of this subsection if the cost estimate exceeds the maximum cost of closure at any time during the remaining life of all MSWLF units. The owner or operator must submit justification for the reduction of the closure cost estimate and the amount of financial assurance to the jurisdictional health department for approval as a condition of the solid waste permit.

(b) The owner or operator of each MSWLF unit must establish financial assurance for closure of the MSWLF unit in compliance with subsection (5) of this section. The owner or operator must provide continuous coverage for closure until released from financial assurance requirements by demonstrating compliance with WAC 173-351-500 (1)(g) and (h).

(3) Financial assurance for post-closure care.

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party under a contract subject to chapter 39.12 RCW, Prevailing wages on public works, to conduct post-closure care for all MSWLF units in compliance with the post-closure plan developed under WAC 173-351-500(2). The post-closure cost estimate must account for the total costs of conducting post-closure care, including annual and periodic costs as described in the post-closure plan over the entire post-closure care period. The owner or operator must submit the detailed written estimate for approval by the jurisdictional health department in the application for a permit under WAC 173-351-700 or through the permit modification process of WAC 173-351-720(6).

(i) The cost estimate for post-closure care must be based on the most expensive costs of post-closure care during the post-closure care period.

(ii) During the active life of each MSWLF unit and during the post-closure care period, the owner or operator must annually adjust the post-closure cost estimate for inflation.

(iii) The owner or operator must increase the post-closure care cost estimate and the amount of financial assurance provided under (b) of this subsection if changes in the post-closure plan or MSWLF unit conditions increase the maximum costs of post-closure care.

(iv) The owner or operator may reduce the post-closure cost estimate and the amount of financial assurance provided under (b) of this subsection if the cost estimate exceeds the maximum costs of post-closure care remaining over the post-closure care period. The owner or operator must submit justification for the reduction of the post-closure cost estimate and the amount of financial assurance to the jurisdictional health department for approval as a condition of the solid waste permit.

(b) The owner or operator of each MSWLF unit must establish, in a manner in accordance with subsection (5) of this section, financial assurance for the costs of post-closure care as required under WAC 173-351-500(2). The owner or operator must provide continuous coverage for post-closure care until released from financial assurance requirements for post-closure care by demonstrating compliance with WAC 173-351-500 (2) (e).

(4) Financial assurance for remedial action.

(a) An owner or operator of a MSWLF unit required to undertake a remedial action program under WAC 173-351-440(7) must have a detailed written estimate, in current dollars, of the cost of hiring a third party under a contract subject to chapter 39.12 RCW, Prevailing wages on public works, to perform the remedial action in accordance with the program required under WAC 173-351-440(7). The remedial action cost estimate must account for the total costs of remedial action activities as described in the cleanup action plan for the entire remedial action period. Cost estimates are not required for interim actions when the estimated time required to complete the interim action is less than the remaining active life of the MSWLF unit. The owner or operator must submit the remedial action cost estimate to the department for approval.

(i) The owner or operator must annually adjust the estimate for inflation until the remedial action program is completed in accordance with WAC 173-351-440(7).

(ii) The owner or operator must increase the remedial action cost estimate and the amount of financial assurance provided under (b) of this subsection if changes in the remedial action program or MSWLF unit conditions increase the maximum costs of remedial action.

(iii) The owner or operator may reduce the amount of the remedial action cost estimate and the amount of financial assurance provided under (b) of this subsection if the cost estimate exceeds the maximum remaining costs of remedial action. The owner or operator must submit justification for the reduction of the remedial action cost estimate and the amount of financial assurance to the department for approval.

(b) The owner or operator of each MSWLF unit required to undertake a remedial action program under WAC 173-351-440(7), must establish, in a manner in accordance with subsection (5) of this section, financial assurance for the costs of remedial actions identified in the cleanup action plan. The owner or operator must provide continuous

coverage for remedial action until released from remedial action under the Model Toxics Control Act regulation, chapter 173-340 WAC. Financial assurance is not required for interim actions when the estimated time required to complete the interim action is less than the remaining active life of the MSWLF unit.

(5) Allowable mechanisms. Owners and operators of MSWLF units must use the financial mechanisms specified in (a), (b), or (c) of this subsection.

(a) Municipal corporations owning or operating MSWLF units must establish closure, post-closure, and remedial action reserve accounts in one of the following ways:

(i) Reserve account. Cash and investments accumulated in a reserve fund restricted for the purpose of closure, post-closure care, or remedial action for known releases;

(ii) Cash and investments in a trust fund;

(iii) Surety bond(s);

(iv) Letter of credit; or

(v) Municipal corporations may satisfy the financial assurance requirements of this section for remedial action in one of the following additional ways:

(A) An interlocal agreement entered into under the Interlocal Cooperation Act, chapter 39.34 RCW, obligating the participating local governments to pay for the remedial action; and

(B) Local government financial test in conformance with 40 C.F.R. 258.74(f). All records required under 40 C.F.R. Part 358.74 (f)(3) must be submitted to the jurisdictional health department and the department.

(b) Private companies owning or operating MSWLF units must establish closure, post-closure, and remedial action financial assurance in one of the following ways:

(i) Cash or investments in a trust fund;

(ii) Surety bond(s);

(iii) Letter of credit.

(c) Use of multiple financial mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. The mechanisms must be as specified in (a) and (b) of this subsection, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current cost estimate for closure, post-closure, or remedial action, whichever is applicable. Mechanisms guaranteeing performance rather than payment may not be combined with other instruments.

(d) The language of the financial assurance mechanisms listed in this section must ensure that the instruments satisfy the following criteria:

(i) The amount of funds assured is sufficient to cover the costs of closure, post-closure, and remedial action for known releases when needed;

(ii) The funds will be available in a timely fashion when needed; and

(iii) The owner or operator must obtain financial assurance by the effective date of these requirements or prior to the initial receipt of solid waste for closure and post-closure, and no later than one hundred twenty days after establishment of the cleanup action plan for remedial action.

(e) The financial assurance mechanisms must be legally valid, binding, and enforceable under state and federal law.

(f) An owner or operator satisfying the requirements of this section using a reserve account or trust fund must file with the jurisdictional health department and the department audit reports of the financial assurance accounts established for closure, post-closure, and remedial action, and a statement of the percentage of user fees, as applicable, diverted to the financial assurance instruments:

(i) For facilities owned and operated by municipal corporations, the financial assurance accounts must be audited according to the audit schedule of the office of state auditor. A certification of audit completion and summary findings must be filed with the jurisdictional health department and the department, including during the post-closure care period and while required to undertake remedial action.

(ii) For facilities not owned or operated by municipal corporations:

(A) Annual audits must be conducted by a certified public accountant licensed in the state of Washington. A certification of audit completion and summary findings must be filed with the jurisdictional health department and the department, including during the post-closure care period and while required to undertake remedial action.

(B) The audit must also include, as applicable, calculations demonstrating the proportion of closure, post-closure, or remedial action activities completed during the preceding year as specified in the closure, post-closure, or cleanup action plans.

(6) Financial assurance instruments established under this section must meet the following criteria.

(a) Trust fund. An owner or operator may satisfy the requirements of this section by establishing a trust fund which conforms to the requirements of (a)(i) through (viii) of this subsection.

(i) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency. The owner or operator must place a copy of the trust agreement for approval by the jurisdictional health department in the application for a permit under WAC 173-351-700 or through the permit modification process of WAC 173-351-720(6) for closure and post-closure financial assurance and to the department for approval for remedial action financial assurance.

(ii) Pay-in period. Payments into the trust fund must be made annually by the owner or operator over the duration (as defined in WAC 173-351-750) of the initial or reissued permit or over the remaining life of the MSWLF unit, whichever is shorter, in the case of a trust fund for closure or post-closure care, or over one-half of the estimated length of the remedial action program in the case of remedial action for known releases. This period is referred to as the pay-in period.

(iii) For a trust fund used to demonstrate financial assurance for closure and post-closure care, the first payment into the fund must be at least equal to the current cost estimate for closure or post-closure care, except when using multiple mechanisms as provided in subsection (5)(c) of this section, divided by the number of years in the pay-in period as defined in (a)(ii) of this subsection. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{CE-CV}{Y}$$

where CE is the current cost estimate for closure or post-closure care (updated for inflation or other changes), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(iv) For a trust fund used to demonstrate financial assurance for remedial action, the first payment into the trust fund must be at least equal to one-half of the current cost estimate for remedial action, except when using multiple mechanisms as provided in subsection (5)(c) of this section, divided by the number of years in the remedial action pay-in period as defined in (a)(ii) of this subsection. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{RB-CV}{Y}$$

where RB is the most recent estimate of the required trust fund balance for remedial action (i.e., the total costs that will be incurred during the second half of the remedial action period), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(v) The initial payment into the trust fund must be made before the initial receipt of waste or before the effective date of this section, whichever is later, in the case of closure and post-closure care, or no later than one hundred twenty days after the cleanup action plan has been established in accordance with the requirements of WAC 173-351-440 (6) and (7).

(vi) If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in this subsection, the initial payment into the trust fund must be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of (a)(iii) and (iv) of this subsection as applicable.

(vii) The owner or operator, or other person authorized to conduct closure, post-closure care, or remedial action activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if:

(A) Sufficient funds are remaining in the trust fund to cover the remaining costs of closure, post-closure care, or remedial action;

(B) If justification and documentation of the cost is submitted to the jurisdictional health department for closure and post-closure or the department for remedial action for review and approval; and

(C) The owner or operator has a post-closure permit in effect according to WAC 173-351-720 (4)(c).

(viii) The trust fund may be terminated by the owner or operator only if:

(A) The owner or operator substitutes alternate financial assurance as specified in this subsection; or

(B) The owner or operator is no longer required to demonstrate financial responsibility in accordance with the requirements of subsection (2)(b), (3)(b), or (4)(b) of this section.

(b) Surety bond guaranteeing payment or performance. An owner or operator may satisfy the requirements of this section with a surety bond guaranteeing payment or performance which conforms to the requirements of (b)(i) through (viii) of this subsection.

(i) The owner or operator must place a copy of the bond and standby trust agreement for approval by the jurisdictional health department in the application for a permit under WAC 173-351-700 or through the permit modification process of WAC 173-351-720(6) for closure and post-closure financial assurance and the department for approval for remedial action financial assurance.

(ii) The surety company must be listed as acceptable in Circular 570 of the United States Treasury Department.

(iii) The penal sum of the bond must be in an amount at least equal to the current closure, post-closure, or remedial action cost estimate except when using multiple financial mechanisms as provided in subsection (5)(d) of this section.

(iv) The surety must become liable for the bond obligation if the owner or operator fails to perform as guaranteed by the bond.

(v) The owner or operator must also establish a standby trust fund meeting the requirements of (6)(a) of this subsection except for specified initial and subsequent annual payments. Payments made under the terms of the bond will be deposited by the surety directly into the standby trust fund. Payments from the trust fund must be approved by the trustee.

(vi) The surety may not cancel the bond until at least one hundred twenty days after the owner or operator, the jurisdictional health department, and the department have received notice of cancellation. If the owner or operator has not provided alternate financial assurance conforming to this section within ninety days of the cancellation notice, the surety must pay the amount of the bond into the standby trust fund.

(vii) The owner or operator may cancel the bond only by substituting alternate financial assurance conforming to this section or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with subsection (2)(b), (3)(b), or (4)(b) of this section.

(viii) The following types of surety bonds are allowed:

(A) Surety bond; or

(B) Surety bond guaranteeing that the owner or operator will perform final closure, post-closure, or remedial action activities.

(c) Irrevocable letter of credit. An owner or operator may satisfy the requirements of this section with an irrevocable letter of credit which conforms to the requirements of (c)(i) through (v) of this subsection. The issuing institution must have the authority to issue letters of credit and its letter of credit operations must be regulated and examined by a federal or state agency.

(i) The owner or operator must also establish a standby trust fund meeting the requirements of (a) of this subsection except for specified initial and subsequent annual payments. Payments made under the terms of the irrevocable letter of credit will be deposited by the institution directly into the standby trust fund. Payments from the trust fund must be approved by the trustee.

(ii) The following must be submitted for approval by the jurisdictional health department in the application for a permit under WAC 173-351-700 for closure and post-closure financial assurance, and to the department for approval for remedial action financial assurance:

(A) The letter of credit;

(B) A letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: Name, address of the facility, and the amount of funds assured; and

(C) A copy of the standby trust agreement.

(iii) The letter of credit must be irrevocable and issued for a period of at least one year in an amount at least equal to the current closure, post-closure, or remedial action cost estimate except when using multiple financial mechanisms as provided in subsection (5)(d) of this section. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution notifies the owner or operator, the jurisdictional health department, and the department at least one hundred twenty days before the current expiration date.

(iv) If the owner or operator fails to perform activities according to the closure, post-closure, or cleanup action plans, or if the owner or operator fails to provide alternate financial assurance conforming to this section within ninety days after notification that the letter of credit will not be extended, the issuing institution must deposit the funds from the letter of credit to the standby trust fund.

(v) The owner or operator may cancel the letter of credit only by substituting alternate financial assurance conforming to this section or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with subsection (2)(b), (3)(b), or (4)(b) of this section.

[Statutory Authority: RCW 70.95.020(3), 70.95.060(1), and 70.95.260(1), (6). WSR 12-23-009 (Order 07-15), § 173-351-600, filed 11/8/12, effective 12/9/12. Statutory Authority: Chapter 70.95 RCW and 40 C.F.R. 258. WSR 93-22-016, § 173-351-600, filed 10/26/93, effective 11/26/93.]