

WAC 173-350-600 Financial assurance requirements. (1) Financial assurance requirements - Applicability. This section is applicable to:

- (a) Waste tires storage facilities subject to WAC 173-350-350;
- (b) Moderate risk waste facilities storing more than nine thousand gallons of MRW on-site, excluding used oil, subject to WAC 173-350-360; and
- (c) Limited purpose landfills subject to WAC 173-350-400.

(2) **Financial assurance requirements - Instrument options.** Financial assurance options are available, based on facility type as specified in subsection (3) of this section. Contents of all instruments must be acceptable to the jurisdictional health department. The following instrument options exist:

(a) Reserve accounts consisting of cash and investments accumulated in a reserve fund restricted for the purpose of closure or post-closure care;

(b) Cash and investments in a trust fund to receive, manage, and disburse funds for activities identified in the approved closure and post-closure plans. Trust funds must be established with an entity that has authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

(c) Surety bond(s) issued by a surety company listed as acceptable in Circular 570 of the United States Treasury Department. A standby trust fund for closure or post-closure must also be established by the owner or operator to receive any funds that may be paid by the operator or surety company. The surety must become liable for the bond obligation if the owner or operator fails to perform as guaranteed by the bond. 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 acceptable under this section within ninety days of the cancellation notice, the surety must pay the amount of the bond into the standby closure or post-closure trust account. The following types of surety bonds are options:

- (i) Surety bond; or
- (ii) Surety bond guaranteeing that the owner or operator will perform final closure or post-closure activities.

(d) Irrevocable letter of credit issued by 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. Standby trust funds for closure and post-closure must also be established by the owner or operator to receive any funds deposited by the issuing institution resulting from a draw on the letter of credit. The letter of credit must be irrevocable and issued for a period of at least one year, and automatically renewed annually, 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. If the owner or operator fails to perform activities according to the closure or post-closure plan and permit requirements, or if the owner or operator fails to provide alternate financial assurance acceptable to the jurisdictional health department within ninety days after notification that the letter of credit will not be extended, the jurisdictional health department may require that the financial institution provide the funds from the letter of credit to the jurisdictional health department to be used to complete the required closure and post-closure activities;

(e) Insurance policies issued by an insurer who is licensed to transact the business of insurance or is eligible as an excess or surplus line insurer in one or more states, and meeting the following:

(i) Guarantees that the funds will be available to complete those activities identified in the approved closure or post-closure plans;

(ii) Guarantees that the insurer will be responsible for paying out funds for those activities;

(iii) Provides that the insurance is automatically renewable and that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium;

(iv) Provides that if there is a failure to pay the premium, the insurer may not terminate the policy until at least one hundred twenty days after the notice of cancellation has been received by the owner or operator, the jurisdictional health department and the department;

(v) Provides that termination of the policy may not occur and the policy must remain in full force and effect if:

(A) The jurisdictional health department determines the facility has been abandoned;

(B) Closure has been ordered by the jurisdictional health department or a court of competent jurisdiction;

(C) The owner or operator has been named as debtor in a voluntary or involuntary proceeding under Title 11 U.S.C., Bankruptcy; or

(D) The premium due is paid.

(vi) The owner or operator is required to maintain the policy in full force and until an alternative financial assurance guarantee is provided or when the jurisdictional health department has verified that closure, and/or post-closure, as appropriate, have been completed in accordance with the approved closure or post-closure plan; and

(vii) For purposes of this rule, "captive" insurance companies as defined in WAC 173-350-100, are not an acceptable insurance company.

(f) Financial Test/corporate guarantee allows for a private corporation meeting the financial test to provide a corporate guarantee those activities identified in the closure and post-closure plans will be completed;

(i) To qualify, a private corporation owner or operator shall meet the criteria of either option A or B:

(A) Option A - To pass the financial test under this option the private corporation must have:

(I) Two of the following three ratios: A ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; or a ratio of current assets to current liabilities greater than 1.5;

(II) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates;

(III) Tangible net worth of at least ten million dollars; and

(IV) Assets in the United States amounting to at least ninety percent of its total assets or at least six times the sum of the current closure and post-closure cost estimates.

(B) Option B - To pass this alternative financial test, the private corporation must have:

(I) A current rating of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(II) Tangible net worth at least six times the sum of the current closure and post-closure cost estimates;

(III) Tangible net worth of at least ten million dollars; and

(IV) Assets in the United States amounting to at least ninety percent of its total assets or at least six times the sum of the current closure and post-closure cost estimates.

(ii) The owner or operator's chief financial officer must provide a corporate guarantee that the corporation passes the financial test at the time the closure plan is filed. This corporate guarantee must be reconfirmed annually ninety days after the end of the corporation's fiscal year by submitting to the jurisdictional health department a letter signed by the chief financial officer that:

(A) Provides the information necessary to document that the owner or operator passes the financial test;

(B) Guarantees that the funds to finance closure and post-closure activities according to the closure or post-closure plan and permit requirements are available;

(C) Guarantees that closure and post-closure activities will be completed according to the closure or post-closure plan and permit requirements;

(D) Guarantees that within thirty days if written notification is received from the jurisdictional health department that the owner or operator no longer meets the criteria of the financial test, the owner or operator must provide an alternative form of financial assurance consistent with the requirements of this section;

(E) Guarantees that the owner or operator's chief financial officer will notify in writing the jurisdictional health department and the department within fifteen days any time that the owner or operator no longer meets the criteria of the financial test or is named as debtor in a voluntary or involuntary proceeding under Title 11 U.S.C., Bankruptcy;

(F) Acknowledges that the corporate guarantee is a binding obligation on the corporation and that the chief financial officer has the authority to bind the corporation to the guarantee;

(G) Attaches a copy of the independent certified public accountant's report on examination of the owner or operator's financial statements for the latest completed fiscal year; and

(H) Attaches a special report from the owner or operator's independent certified public accountant (CPA) stating that the CPA has reviewed the information in the letter from the owner or operator's chief financial officer and has determined that the information is true and accurate.

(iii) The jurisdictional health department may, based on a reasonable belief that the owner or operator no longer meets the criteria of the financial test, require reports of the financial condition at any time in addition to the annual report. The jurisdictional health department will specify the information required in the report. If the jurisdictional health department finds, on the basis of the reports or other information, that the owner or operator no longer meets the criteria of the financial test, the owner or operator must provide an alternative form of financial assurance consistent with the requirements of this section, within thirty days after notification by the jurisdictional health department;

(iv) If the owner or operator fails to perform final closure and, where required, provide post-closure care of a facility covered by the guarantee in accordance with the approved closure and post-closure plans, the guarantor will be required to complete the appropriate activities;

(v) The guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator, the

jurisdictional health department, and the department. Cancellation may not occur, however, during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by the owner or operator, the jurisdictional health department, and the department.

(vi) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of alternate assurance from the jurisdictional health department within ninety days after receipt of a notice of cancellation of the guarantee from the guarantor, the guarantor will provide alternative financial assurance in the name of the owner or operator.

(3) **Financial assurance requirements - Eligible financial assurance instruments.** The financial assurance instruments identified in subsection (2) of this section are available for use based on facility category and whether the permittee is a public or private entity as follows:

(a) For a public facility, when the permittee is a public entity, the following options are available:

- (i) Reserve account;
- (ii) Trust fund;
- (iii) Surety bond (payment or performance); or
- (iv) Insurance.

(b) For a public facility, when the permittee is a private entity, the following options are available:

- (i) Trust fund;
- (ii) Surety bond (payment or performance);
- (iii) Letter of credit; or
- (iv) Insurance.

(c) For private facilities, the following options are available:

- (i) Trust fund;
- (ii) Surety bond (payment or performance);
- (iii) Letter of credit;
- (iv) Insurance; or
- (v) Financial test/corporate guarantee.

(4) **Financial assurance requirements - Cost estimate for closure.** The owner or operator must:

(a) Prepare a detailed written closure cost estimate as part of the facility closure plan. The closure cost estimate must:

(i) Be stated in current dollars and represent the cost of hiring a third party under a contract subject to chapter 39.12 RCW, Prevailing wages on public works, to close the facility at any time during the active life when the extent and manner of its operation would make closure the most expensive in accordance with the approved closure plan;

(ii) Project a schedule for withdrawal of closure funds from the closure financial assurance instrument to complete the activities identified in the approved closure plan; and

(iii) Not use any sale value of salvage, equipment, or property or land to offset or reduce the estimated costs of activities conducted in compliance with the approved closure plan.

(b) Prepare a new closure cost estimate in accordance with (a) of this subsection whenever:

(i) Changes in plans of operation or facility design affect the closure plan; or

(ii) There is a change in the expected year of closure that affects the closure plan.

(c) Review the closure cost estimate annually. The review must be submitted to the jurisdictional health department, with a copy to the

department, by April 1st of each calendar year stating that the review was completed and the findings of the review. The review will examine all factors, including inflation, involved in estimating the closure cost. Any cost changes must be factored into a revised closure cost estimate and submitted to the jurisdictional health department for review and approval. The jurisdictional health department must evaluate each cost estimate for completeness, and may accept, or require a revision of the cost estimate in accordance with its evaluation. If the jurisdictional health department approves a change in the closure cost estimate, the financial assurance instrument must be revised accordingly and submitted to the jurisdictional health department and a copy sent to the department.

(5) Financial assurance requirements - Cost estimate for post-closure. The owner or operator must:

(a) Prepare a detailed written post-closure cost estimate as part of the facility post-closure plan. The post-closure estimate must:

(i) Be stated in current dollars and represent 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 activities in compliance with the approved post-closure plan for the facility;

(ii) Project a schedule for withdrawal of post-closure funds from the post-closure financial assurance instrument to complete the activities identified in the post-closure plan; and

(iii) Not use the sale value of salvage, equipment, or property or land to offset or reduce the estimated costs of activities conducted in compliance with the post-closure plan.

(b) Prepare a new post-closure cost estimate for the remainder of the post-closure care period in accordance with (a) of this subsection, whenever a change in the post-closure plan increases or decreases the cost of post-closure care; and

(c) During the operating life of the facility, the owner or operator must review the post-closure cost estimate annually. The review must be submitted to the jurisdictional health department, with a copy to the department, by April 1st of each calendar year stating that the review was completed and the finding of the review. The review must examine all factors, including inflation, involved in estimating the post-closure cost estimate. Any cost changes must be factored into a revised post-closure cost estimate and submitted to the jurisdictional health department for review and approval. The jurisdictional health department will evaluate each cost estimate for completeness, and may accept, or require a revision of the cost estimate in accordance with its evaluation. If the jurisdictional health department approves a change in the post-closure cost estimate, the financial assurance instrument must be revised accordingly and submitted to the jurisdictional health department and a copy sent to the department.

(6) Financial assurance requirements - Closure/post-closure financial assurance account establishment and reporting.

(a) Closure and post-closure financial assurance funds generated must be provided to the selected financial assurance instrument at the schedule specified in the closure and post-closure plans, such that adequate closure and post-closure funds will be available to ensure full implementation of the approved closure and post-closure plans.

(b) The facility owner or operator with systematic deposits must establish a procedure with the financial assurance instruments trustee for notification of nonpayment of funds to be sent to the jurisdictional health department and the department.

(c) Except for item (i) of this subdivision, the owner or operator satisfying the requirements of this section using a reserve or trust fund must file with the jurisdictional health department and the department, no later than April 1st of each year, an annual audit report of the financial assurance accounts established for closure and post-closure activities, and a statement of the percentage of user fees, as applicable, diverted to the financial assurance instruments, for the previous calendar year, including during each of the post-closure years.

(i) For facilities owned and operated by a public entity, the audit must be conducted according to the audit schedule of the office of the state auditor. The audit report must be filed with the jurisdictional health department and the department and must include a certification of audit completion and summary findings.

(ii) For facilities not owned or operated by a public entity:

(A) The annual audits must be conducted by a certified public accountant licensed in the state of Washington. The annual audit report filed with the jurisdictional health department and the department must include a certification of audit completion and summary findings; and

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

(d) Established financial assurance accounts must not constitute an asset of the facility owner or operator.

(e) Any income in the established financial assurance account(s) may be used at the owner's discretion upon approval by the jurisdictional health department.

(7) Financial assurance requirements - Fund withdrawal for closure and post-closure activities.

(a) The owner or operator will withdraw funds from the closure and/or post-closure financial assurance instrument as specified in the approved closure/post-closure plans.

(b) If the withdrawal of funds from the financial assurance instrument exceeds by more than five percent the withdrawal schedule stated in the approved closure and/or post-closure plan over the life of the permit, the closure and/or post-closure plan must be amended.

(c) After verification by the jurisdictional health department of facility closure, excess funds remaining for closure in a financial assurance account must be released to the facility owner or operator.

(d) After verification by the jurisdictional health department of facility post-closure, excess funds remaining for post-closure in a financial assurance account must be released to the facility owner or operator.

[Statutory Authority: Chapter 70.95 RCW, and RCW 70.95.060, 70.95.215, 70.95.218, 70.95.260(6), 70.95.300, 70.95.305, 70.95.310, 70.95.440. WSR 18-17-008 (Order 13-08), § 173-350-600, filed 8/1/18, effective 9/1/18. Statutory Authority: Chapter 70.95 RCW. WSR 03-03-043 and 03-04-103 (Order 99-24 and Order 99-24A), § 173-350-600, filed 1/10/03 and 2/4/03, effective 3/7/03 and 3/31/03.]