**Section 727.240 Financial Requirements**

a) Applicability and Substance of the Financial Requirements

1) The regulations in this Section apply to owners and operators who treat or store hazardous waste under a RCRA standardized permit, except as provided in Section 727.100(a)(2) or subsection (a)(4).

2) The facility owner or operator must do each of the following:

A) It must prepare a closure cost estimate as required in subsection (c);

B) It must demonstrate financial assurance for closure as required in subsection (d); and

C) It must demonstrate financial assurance for liability as required in subsection (h).

3) The owner or operator must notify the Agency if the owner or operator is named as a debtor in a bankruptcy proceeding under Title 11 (Bankruptcy) of the United States Code (see also subsection (i)).

4) States and the federal government are exempt from the requirements of this Section.

BOARD NOTE: Subsection (a) is derived from 40 CFR 267.140 (2017).

b) Definitions of Terms as Used in This Section

1) "Closure plan" means the plan for closure prepared in accordance with the requirements of Section 727.210(c).

2) "Current closure cost estimate" means the most recent of the estimates prepared in accordance with subsections (c)(1), (c)(2), and (c)(3).

3) This subsection (b)(3) corresponds with 40 CFR 267.141(c), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

4) "Parent corporation" means a corporation that directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator. In this instance, the owned corporation that is the facility owner or operator is deemed a "subsidiary" of the parent corporation.

5) This subsection (b)(5) corresponds with 40 CFR 267.141(e), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

6) The following terms are used in the specifications for the financial tests for closure and liability coverage. The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices:

"Assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity.

"Current plugging and abandonment cost estimate" means the most recent of the estimates prepared in accordance with 35 Ill. Adm. Code 704.212(a), (b), and (c).

"Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

"Liabilities" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

7) In the liability insurance requirements, the terms "bodily injury" and "property damage" have the meanings given them by applicable State law. However, these terms do not include those liabilities that, consistent with standard industry practices, are excluded from coverage in liability insurance policies for bodily injury and property damage. The Agency intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

"Accidental occurrence" means an accident, including continuous or repeated exposure to conditions, that results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Legal defense costs" means any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

"Sudden accidental occurrence" means an occurrence that is not continuous or repeated in nature.

8) "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A "substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that the Agency can reasonably determine that a substantial business relationship currently exists between the guarantor and the facility owner or operator that is adequate consideration to support the obligation of the guarantee relating to any liability towards a third-party. "Applicable state law", as used in this subsection (b)(8), means the laws of the State of Illinois and those of any sister state that govern the guarantee and the adequacy of the consideration.

BOARD NOTE: Subsection (b) is derived from 40 CFR 267.141 (2017). Subsection (b)(8) is also derived from the discussion at 53 Fed. Reg. 33938, 41-43 (Sept. 1, 1988). The term "substantial business relationship" is also independently defined in 35 Ill. Adm. Code 724.241(h) and 725.241(h). Any Agency determination that a substantial business relationship exists is subject to Board review pursuant to Section 40 of the Act.

c) Cost Estimate for Closure

1) The facility owner or operator must have at the facility a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in Section 727.210(b) through (f) and applicable closure requirements in Sections 727.270(g), 727.290(l), and 727.900(i).

A) The estimate must equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by the closure plan (see Section 727.210(c)(2)).

B) The closure cost estimate must be based on the costs to the owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See the definition of parent corporation in subsection (b)(4).) The owner or operator may use costs for on-site disposal if it can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

C) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous wastes, or non-hazardous wastes, facility structures or equipment, land, or other assets associated with the facility at the time of partial or final closure.

D) The facility owner or operator may not incorporate a zero cost for hazardous wastes, or non-hazardous wastes that might have economic value.

2) During the active life of the facility, the facility owner or operator must adjust the closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instruments used to comply with subsection (d). For an owner or operator using the financial test or corporate guarantee, the closure cost estimate must be updated for inflation within 30 days after the close of the guarantor's fiscal year and before submission of updated information to the Agency as specified in subsection (n)(3). The adjustment may be made by recalculating the maximum costs of closure in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross Domestic Product (Deflator) published by the U.S. Department of Commerce in its Survey of Current Business, as specified in subsections (c)(2)(A) and (c)(2)(B). The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

A) The first adjustment is made by multiplying the closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

B) Subsequent adjustments are made by multiplying the latest adjusted closure cost estimate by the latest inflation factor.

BOARD NOTE: The table of Deflators is available as Table 1.1.9. in the National Income and Product Account Tables, published by U.S. Department of Commerce, Bureau of Economic Analysis, National Economic Accounts, available on-line at the following web address: www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&903=13.

3) During the active life of the facility, the facility owner or operator must revise the closure cost estimate no later than 30 days after the Agency has approved the request to modify the closure plan, if the change in the closure plan increases the cost of closure. The revised closure cost estimate must be adjusted for inflation as specified in subsection (c)(2).

4) The facility owner or operator must keep the following at the facility during the operating life of the facility: the latest closure cost estimate prepared in accordance with subsections (c)(1) and (c)(3) and, when this estimate has been adjusted in accordance with subsection (c)(2), the latest adjusted closure cost estimate.

BOARD NOTE: Subsection (c) is derived from 40 CFR 267.142 (2017).

d) Financial Assurance for Closure. The facility owner or operator must establish financial assurance for closure of each storage or treatment unit that it owns or operates. In establishing financial assurance for closure, the owner or operator must choose from among the financial assurance mechanisms in subsections (d)(1) through (d)(7). The owner or operator can also use a combination of mechanisms for a single facility if the combination meets the requirement in subsection (d)(8), or it may use a single mechanism for multiple facilities as in subsection (d)(9). The Agency must release the owner or operator from the requirements of this subsection (d) after the owner or operator meets the criteria pursuant to subsection (d)(10).

1) Closure Trust Fund. An owner or operator may use the "closure trust fund" that is specified in 35 Ill. Adm. Code 724.243(a)(1), (a)(2), and (a)(6) through (a)(11). For purposes of this subsection (d)(1), the following provisions also apply:

A) Payments into the trust fund for a new facility must be made annually by the owner or operator over the remaining operating life of the facility as estimated in the closure plan, or over three years, whichever period is shorter. This period of time is hereafter referred to as the "pay-in period".

B) For a new facility, the facility owner or operator must make the first payment into the closure trust fund before the facility may accept the initial storage. A receipt from the trustee must be submitted by the owner or operator to the Agency before this initial storage of waste. The first payment must be at least equal to the current closure cost estimate, divided by the number of years in the pay-in period, except as provided in subsection (d)(8) for multiple mechanisms. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The owner or operator determines the amount of each subsequent payment by subtracting the current value of the trust fund from the current closure cost estimate, and dividing this difference by the number of years remaining in the pay-in period. Mathematically, the formula is as follows:

|  |  |  |
| --- | --- | --- |
| NP | = | (CCE - CVTF) |
| YRPP |

Where:

NP = the amount of the next payment

CCE = the current closure cost estimate

CVTF = the current value of the trust fund

YRPP = the years remaining in the pay-in period

C) The owner or operator of a facility existing on the effective date of this subsection (d)(1) can establish a trust fund to meet the financial assurance requirements of this subsection (d)(1). If the value of the trust fund is less than the current closure cost estimate when a final approval of the permit is granted for the facility, the owner or operator must pay the difference into the trust fund within 60 days.

D) The facility owner or operator may accelerate payments into the trust fund or deposit the full amount of the closure cost estimate when establishing the trust fund. However, the owner or operator must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in subsections (d)(1)(B) or (d)(1)(C).

E) The facility owner or operator must submit a trust agreement with the wording specified by the Agency pursuant to subsection (l)(3).

2) Surety Bond Guaranteeing Payment into a Closure Trust Fund. An owner or operator may use the "surety bond guaranteeing payment into a closure trust fund", as specified in 35 Ill. Adm. Code 724.243(b), including the use of the surety bond instrument designated by the Agency pursuant to subsection (1)(3), and the standby trust specified at 35 Ill. Adm. Code 724.243(b)(3).

3) Surety Bond Guaranteeing Performance of Closure. An owner or operator may use the "surety bond guaranteeing performance of closure", as specified in 35 Ill. Adm. Code 724.243(c), the submission and use of the surety bond instrument designated by the Agency pursuant to subsection (1)(3), and the standby trust specified at 35 Ill. Adm. Code 724.243(c)(3).

4) Closure Letter of Credit. An owner or operator may use the "closure letter of credit" specified in 35 Ill. Adm. Code 724.243(d), the submission and use of the irrevocable letter of credit instrument designated by the Agency pursuant to subsection (1)(3), and the standby trust specified in 35 Ill. Adm. Code 724.243(d)(3).

5) Closure Insurance. An owner or operator may use "closure insurance", as specified in 35 Ill. Adm. Code 724.243(e), utilizing the certificate of insurance for closure designated by the Agency pursuant to subsection (1)(3).

6) Corporate Financial Test. An owner or operator that satisfies the requirements of this subsection (d)(6) may demonstrate financial assurance up to the amount specified in this subsection (d)(6).

A) Financial component. See subsection (m).

BOARD NOTE: It was necessary for the Board to codify corresponding 40 CFR 267.143(f)(1) as subsection (m) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to this subsection (d), (d)(6), or (d)(6)(A) also include added subsection (m), as applicable.

B) Recordkeeping and Reporting Requirements. See subsection (n).

BOARD NOTE: It was necessary for the Board to codify 40 CFR 267.143(f)(2) as subsection (n) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to this subsection (d), (d)(6), or (d)(6)(B) also include added subsection (n), as applicable.

7) Corporate Guarantee

A) A facility owner or operator may meet the requirements of this subsection (d) by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in subsection (d)(6) and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording designated by the Agency pursuant to subsection (1)(3). The certified copy of the guarantee must accompany the letter from the guarantor's chief financial officer and accountants' opinions. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter from the guarantor's chief financial officer must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

B) For a new facility, the guarantee must be effective and the guarantor must submit the items in subsection (d)(7)(A) and the items specified in subsection (n)(1) to the Agency at least 60 days before the owner or operator places waste in the facility.

C) The terms of the guarantee must provide as required by subsection (o).

BOARD NOTE: It was necessary for the Board to codify 40 CFR 267.143(g)(3) as subsection (o) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to this subsection (d), (d)(7), or (d)(7)(C) also include added subsection (o), as applicable.

D) If a corporate guarantor no longer meets the requirements of subsection (d)(6)(A), the owner or operator must, within 90 days, obtain alternative assurance, and submit the assurance to the Agency for approval. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within the next 30 days, and submit it to the Agency for approval.

E) The guarantor is no longer required to meet the requirements of this subsection (d)(7) when either of the following occurs:

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

ii) The facility owner or operator is released from the requirements of this subsection (d) in accordance with subsection (d)(10).

8) Use of Multiple Financial Mechanisms. An owner or operator may use more than one mechanism at a particular facility to satisfy the requirements of this subsection (d). The acceptable mechanisms are trust funds, surety bonds guaranteeing payment into a trust fund, letters of credit, insurance, the financial test, and the guarantee, except owners or operators cannot combine the financial test with the guarantee. The mechanisms must be as specified in subsections (d)(1), (d)(2), (d)(4), (d)(5), (d)(6), and (d)(7), respectively, except it is the combination of mechanisms rather than a single mechanism that must provide assurance for an amount at least equal to the cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or letter of credit, it may use the trust fund as the standby trust for the other mechanisms. A single trust fund can be established for two or more mechanisms. The Agency may use any or all of the mechanisms to provide for closure of the facility.

9) Use of a Financial Mechanism for Multiple Facilities. An owner or operator may use a financial mechanism for multiple facilities, as specified in 35 Ill. Adm. Code 724.243(h).

10) Release of the Owner or Operator from the Requirements of this Subsection (d). Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Agency will notify the owner or operator in writing that the owner or operator is no longer required by this subsection (d) to maintain financial assurance for final closure of the facility, unless the Agency has reason to believe that final closure has not been completed in accordance with the approved closure plan. The Agency must provide the owner or operator with a detailed written statement of any such reasons to believe that closure has not been conducted in accordance with the approved closure plan.

BOARD NOTE: Subsection (d) is derived from 40 CFR 267.143 (2017).

e) This subsection (e) corresponds with 40 CFR 267.144, which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

f) This subsection (f) corresponds with 40 CFR 267.145, which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

g) This subsection (g) corresponds with 40 CFR 267.146, which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

h) Liability Requirements

1) Coverage for Sudden Accidental Occurrences. The owner or operator of a hazardous waste treatment or storage facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in subsections (h)(1)(A) through (h)(1)(G):

A) Trust Fund for Liability Coverage. The owner or operator may meet the requirements of this subsection (h) by obtaining a trust fund for liability coverage as specified in 35 Ill. Adm. Code 724.247(j).

B) Surety Bond for liability coverage. The owner or operator may meet the requirements of this subsection (h) by obtaining a surety bond for liability coverage as specified in 35 Ill. Adm. Code 724.247(i).

C) Letter of Credit for Liability Coverage. The owner or operator may meet the requirements of this subsection (h) by obtaining a letter of credit for liability coverage as specified in 35 Ill. Adm. Code 724.247(h).

D) Insurance for Liability Coverage. The owner or operator may meet the requirements of this subsection (h) by obtaining liability insurance as specified in 35 Ill. Adm. Code 724.247(a)(1).

E) Financial Test for Liability Coverage. The owner or operator may meet the requirements of this subsection (h) by passing a financial test as specified in subsection (h)(6).

F) Guarantee for Liability Coverage. The owner or operator may meet the requirements of this subsection (h) by obtaining a guarantee as specified in subsection (h)(7).

G) Combination of Mechanisms. The owner or operator may demonstrate the required liability coverage through the use of combinations of mechanisms as allowed by 35 Ill. Adm. Code 724.247(a)(6).

H) An owner or operator must notify the Agency in writing within 30 days whenever either of the following occurs:

i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in subsections (h)(1)(A) through (h)(1)(G); or

ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage pursuant to subsections (h)(1)(A) through (h)(1)(G); or

iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage pursuant to subsections (h)(1)(A) through (h)(1)(G).

2) This subsection (h)(2) corresponds with 40 CFR 267.147(b), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

3) This subsection (h)(3) corresponds with 40 CFR 267.147(c), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

4) This subsection (h)(4) corresponds with 40 CFR 267.147(d), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

5) Period of Coverage. Within 60 days after receiving certifications from the facility owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Agency must notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage from that facility, unless the Agency has reason to believe that closure has not been in accordance with the approved closure plan.

6) Financial Test for Liability Coverage. A facility owner or operator that satisfies the requirements of this subsection (h)(6) may demonstrate financial assurance for liability up to the amount specified in this subsection (h)(6):

A) Financial Component

i) If using the financial test for only liability coverage, the owner or operator must have tangible net worth greater than the sum of the liability coverage to be demonstrated by this test plus $10 million.

ii) The owner or operator must have assets located in the United States amounting to at least the amount of liability covered by this financial test.

iii) An owner or operator who is demonstrating coverage for liability and any other environmental obligations, including closure pursuant to subsection (d)(6), through a financial test must meet the requirements of subsection (d)(6).

B) Recordkeeping and Reporting Requirements. See subsection (p).

BOARD NOTE: It was necessary for the Board to codify 40 CFR 267.147(f)(2) as subsection (p) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to this subsection (h), (h)(6), or (h)(6)(B) also include added subsection (p), as applicable.

7) Guarantee for Liability Coverage

A) Subject to subsection (h)(7)(B), a facility owner or operator may meet the requirements of this subsection (h) by obtaining a written guarantee, hereinafter referred to as "guarantee". The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in subsections (h)(6)(A) and (h)(6)(B). The wording of the guarantee must be identical to the wording designated by the Agency pursuant to subsection (1)(3). A certified copy of the guarantee must accompany the items sent to the Agency, as specified in subsection (h)(6)(B). One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

i) If the facility owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden accidental occurrences arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

ii) This subsection (h)(7)(A)(ii) corresponds with 40 CFR 267.147(g)(1)(ii), which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

B) Foreign Corporations. See subsection (q).

BOARD NOTE: It was necessary for the Board to codify 40 CFR 267.147(g)(2) as subsection (q) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to this subsection (h), (h)(7), or (h)(7)(B) also include added subsection (q), as applicable. See the further explanation of the differences between subsection (q) and 40 CFR 267.147(g)(2) in the Board note appended to subsection (q).

BOARD NOTE: Subsection (h) is derived from 40 CFR 267.147 (2017).

i) Incapacity of Owners or Operators, Guarantors, or Financial Institutions

1) The facility owner or operator must notify the Agency by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) of the United States Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A guarantor of a corporate guarantee as specified in subsections (d)(7) and (h)(7) must make such a notification if it is named as debtor, as required under the terms of the corporate guarantee designated by the Agency pursuant to subsection (1)(3).

2) An owner or operator who fulfills the requirements of subsection (d) or (h) by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must establish other financial assurance or liability coverage within 60 days after such an event.

BOARD NOTE: Subsection (i) is derived from 40 CFR 267.148 (2017).

j) This subsection (j) corresponds with 40 CFR 267.149, which USEPA has marked "Reserved". This statement maintains structural consistency with the corresponding federal rules.

k) State Assumption of Responsibility

1) If the State either assumes legal responsibility for an owner's or operator's compliance with the closure care or liability requirements of this Part or assures that funds will be available from State sources to cover those requirements, the owner or operator will be in compliance with the requirements of subsection (d) or (h) if USEPA Region 5 determines that the State's assumption of responsibility is at least equivalent to the financial mechanisms specified in this Section. USEPA has stated that USEPA Region 5 will evaluate the equivalency of State guarantees principally in terms of the following: the certainty of the availability of funds for the required closure care activities or liability coverage; and the amount of funds that will be made available. USEPA has stated that USEPA Region 5 may also consider other factors as it deems appropriate. The facility owner or operator must submit to USEPA Region 5 a letter from the State describing the nature of the State's assumption of responsibility together with a letter from the owner or operator requesting that the State's assumption of responsibility be considered acceptable for meeting the requirements of this Section. The letter from the State must include, or have attached to it, the following information: the facility's USEPA identification number, the facility name and address, and the amount of funds for closure care or liability coverage that are guaranteed by the State. USEPA has stated that USEPA Region 5 will notify the owner or operator of its determination regarding the acceptability of the State's guarantee in lieu of financial mechanisms specified in this Section. USEPA has stated that USEPA Region 5 may require the owner or operator to submit additional information as is deemed necessary to make this determination. Pending this determination, the owner or operator will be deemed to be in compliance with the requirements of subsection (d) or (h), as applicable.

2) If a State's assumption of responsibility is found acceptable as specified in subsection (k)(1) except for the amount of funds available, the owner or operator may satisfy the requirements of this Section by use of both the State's assurance and additional financial mechanisms as specified in this Section. The amount of funds available through the State and federal mechanisms must at least equal the amount required by this Section.

BOARD NOTE: Subsection (k) is derived from 40 CFR 267.150 (2017).

l) Wording of the Instruments

1) Forms for using the corporate financial test to demonstrate financial assurance for closure. The chief financial officer of an owner or operator of a facility with a RCRA standardized permit who uses a financial test to demonstrate financial assurance for that facility must complete a letter as specified in subsection (d)(6). The letter must be worded as designated by the Agency pursuant to subsection (1)(3).

2) Forms for using the financial test to demonstrate financial assurance for third-party liability. The chief financial officer of an owner or operator of a facility with a RCRA standardized permit who use a financial test to demonstrate financial assurance only for third party liability for that (or other RCRA standardized permit) facility (or those facilities) must complete a letter as specified in subsection (h)(6). The letter must be worded as designated by the Agency pursuant to subsection (1)(3).

3) The Agency must designate standardized forms based on 40 CFR 264.151 and 40 CFR 267.151 (Wording of the Instruments), each incorporated by reference in 35 Ill. Adm. Code 720.111(b), with such changes in wording as are necessary under Illinois law. Any owner or operator required to establish financial assurance under this Section must do so only upon the standardized forms promulgated by the Agency. The Agency must reject any financial assurance document that is not submitted on such standardized forms.

BOARD NOTE: Subsection (l) is derived from 40 CFR 267.151 (2017).

m) Financial Component for Using the Corporate Financial Test to Demonstrate Financial Assurance for Closure

1) The facility owner or operator must satisfy one of the following three conditions:

A) A current rating for its senior unsecured debt of AAA, AA, A, or BBB, as issued by Standard and Poor's, or Aaa, Aa, A or Baa, as issued by Moody's; or

B) A ratio of less than 1.5 comparing total liabilities to net worth; or

C) A ratio of greater than 0.10 comparing the sum of net income plus depreciation, depletion and amortization, minus $10 million, to total liabilities.

2) The tangible net worth of the owner or operator must be greater than both of the following:

A) The sum of the current environmental obligations (see subsection (n)(1)(A)(i)), including guarantees, covered by a financial test plus $10 million, except as provided in subsection (m)(2)(B); and

B) $10 million in tangible net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements provided all of the environmental obligations (see subsection (n)(1)(A)(i)) covered by a financial test are recognized as liabilities on the owner's or operator's audited financial statements, and subject to the approval of the Agency.

3) The facility owner or operator must have assets located in the United States amounting to at least the sum of environmental obligations covered by a financial test as described in subsection (n)(1)(A)(i).

BOARD NOTE: Subsection (m) is derived from 40 CFR 267.143(f)(1) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (d), (d)(6), or (d)(6)(A) also include this added subsection (m), as applicable.

n) Recordkeeping and Reporting Requirements for Using the Corporate Financial Test to Demonstrate Financial Assurance for Closure

1) The facility owner or operator must submit the following items to the Agency:

A) A letter signed by the owner's or operator's chief financial officer that provides the following information:

i) It lists all the applicable current types, amounts, and sums of environmental obligations covered by a financial test. These obligations include both obligations in the programs that USEPA directly operates and obligations where USEPA has delegated authority to a State or approved a State's program. These obligations include, but are not limited to the information described in subsection (n)(1)(E).

BOARD NOTE: It was necessary for the Board to codify 40 CFR 267.143(f)(2)(i)(A)(*1*) through (f)(2)(i)(A)(*1*)(*vii*) as subsections (n)(1)(E) through (n)(1)(E)(vii) to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (d), (d)(6), or (d)(6)(B) or to this subsection (n), (n)(1), (n)(1)(A), or (n)(1)(A)(i) also include added subsection (n)(1)(E) through (n)(1)(E)(vii), as applicable.

ii) It provides evidence demonstrating that the firm meets the conditions of either subsection (m)(1)(A), (m)(1)(B), or (m)(1)(C) and subsections (m)(2) and (m)(3).

B) A copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance, with the potential exception for qualified opinions provided in the next sentence. The Agency may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Agency deems that the matters that form the basis for the qualification are insufficient to warrant disallowance of the test. If the Agency does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this section within 30 days after the notification of disallowance.

C) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that the owner or operator satisfies subsection (m)(1)(B) or (m)(1)(C) that are different from data in the audited financial statements referred to in subsection (n)(1)(B) or any other audited financial statement or data filed with the SEC, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report must be based upon an agreed upon procedures engagement in accordance with professional auditing standards and must describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of that comparison, and the reasons for any differences.

D) If the chief financial officer's letter provides a demonstration that the firm has assured for environmental obligations as provided in subsection (m)(2)(B), then the letter must include a report from the independent certified public accountant that verifies that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, how these obligations have been measured and reported, and that the tangible net worth of the firm is at least $10 million plus the amount of any guarantees provided.

E) Contents of the letter signed by the chief financial officer (for the purposes of subsection (n)(1)(A)(i)):

i) The liability, closure, post-closure and corrective action cost estimates required for hazardous waste treatment, storage, and disposal facilities pursuant to the applicable provisions of 35 Ill. Adm. Code 724.201, 724.242, 724.244, 724.247, 725.242, 725.244, and 725.247;

ii) The cost estimates required for municipal solid waste management facilities pursuant to the applicable provisions of Subpart G of 35 Ill. Adm. Code 811;

iii) The current plugging cost estimates required for UIC facilities pursuant to 35 Ill. Adm. Code 704.212;

iv) The federally required cost estimates required for petroleum underground storage tank facilities pursuant to 40 CFR 280.93;

v) The federally required cost estimates required for PCB storage facilities pursuant to 40 CFR 761.65;

vi) Any federally required financial assurance required by or as part of an action undertaken pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC 9601 et seq.); and

vii) Any other environmental obligations that are assured through a financial test.

BOARD NOTE: Subsections (n)(1)(E) through (n)(1)(E)(vi) are derived from 40 CFR 267.143(f)(2)(i)(A)(*1*) through (f)(2)(i)(A)(*1*)(*vi*) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (d), (d)(6), (d)(6)(B), (n), (n)(1), (n)(1)(A), or (n)(1)(A)(i) also include added subsections (n)(1)(E) through (n)(1)(E)(vi), as applicable.

2) The owner or operator of a new facility must submit the items specified in subsection (n)(1) to the Agency at least 60 days before placing waste in the facility.

3) After the initial submission of items specified in subsection (n)(1), the owner or operator must send updated information to the Agency within 90 days following the close of the owner's or operator's fiscal year. The Agency may provide up to an additional 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. The updated information must consist of all items specified in subsection (n)(1).

4) The owner or operator is no longer required to submit the items specified in this subsection (n) or comply with the requirements of subsection (d)(6) when either of the following occurs:

A) The owner or operator substitutes alternate financial assurance as specified in subsection (d) that is not subject to these recordkeeping and reporting requirements; or

B) The Agency releases the owner or operator from the requirements of subsection (d) in accordance with subsection (d)(10).

5) An owner or operator who no longer meets the requirements of subsection (m) cannot use the financial test to demonstrate financial assurance. Instead an owner or operator who no longer meets the requirements of subsection (m), must do the following:

A) It must send notice to the Agency of intent to establish alternate financial assurance as specified in this section. The owner or operator must send this notice by certified mail within 90 days following the close of the owner's or operator's fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements of this subsection (n) and subsections (d), (m), and (o); and

B) It must provide alternative financial assurance within 120 days after the end of such fiscal year.

6) The Agency may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (m), require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in this subsection (n). If the Agency finds that the owner or operator no longer meets the requirements of subsection (m), the owner or operator must provide alternate financial assurance that meets the requirements of subsection (d).

BOARD NOTE: Subsection (n) is derived from 40 CFR 267.143(f)(2) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (d), (d)(6), or (d)(6)(B) also include this added subsection (n), as applicable.

o) The terms of the guarantee for using the corporate guarantee to demonstrate financial assurance for closure must provide as follows:

1) If the facility owner or operator fails to perform closure at a facility covered by the guarantee, the guarantor will accomplish the following:

A) It will perform, or pay a third party to perform closure (performance guarantee); or

B) It will establish a fully funded trust fund as specified in subsection (d)(1) in the name of the owner or operator (payment guarantee).

2) The guarantee will remain in force for as long as the facility owner or operator must comply with the applicable financial assurance requirements of this Section unless the guarantor sends prior notice of cancellation by certified mail to the owner or operator and to the Agency. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Agency as evidenced by the return receipts.

3) If notice of cancellation is given, the facility owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the Agency, obtain alternate financial assurance, and submit documentation for that alternate financial assurance to the Agency. If the owner or operator fails to provide alternate financial assurance and obtain the written approval of such alternative assurance from the Agency within the 90-day period, the guarantor must provide that alternate assurance in the name of the owner or operator and submit the necessary documentation for the alternative assurance to the Agency within 120 days after the cancellation notice.

BOARD NOTE: Subsection (o) is derived from 40 CFR 267.143(g)(3) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (d), (d)(7), or (d)(7)(C) also include this added subsection (o), as applicable.

p) Recordkeeping and Reporting Requirements

1) The owner or operator must submit the following items to the Agency:

A) A letter signed by the owner's or operator's chief financial officer that provides evidence demonstrating that the firm meets the conditions of subsections (h)(6)(A)(i) and (h)(6)(A)(ii). If the firm is providing only liability coverage through a financial test for a facility or facilities with a permit pursuant to this Part 727, the letter should use the wording in subsection (l)(2). If the firm is providing only liability coverage through a financial test for facilities regulated pursuant to this Part 727, it should use the letter designated by the Agency pursuant to subsection (1)(3). If the firm is providing liability coverage through a financial test for a facility or facilities with a permit pursuant to this Part 727, and it assures closure costs or any other environmental obligations through a financial test, it must use the letter in subsection (l)(1) for the facilities issued a permit pursuant to this Part 727.

B) A copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance, with the potential exception for qualified opinions provided in the next sentence. The Agency may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Agency deems that the matters that form the basis for the qualification are insufficient to warrant disallowance of the test. If the Agency does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this subsection (h) within 30 days after the notification of disallowance.

C) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that the owner or operator satisfies subsections (h)(6)(A)(i) and (h)(6)(A)(ii) that are different from data in the audited financial statements referred to in subsection (p)(1)(B) or any other audited financial statement or data filed with the SEC, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report must be based upon an agreed upon procedures engagement in accordance with professional auditing standards and must describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of that comparison, and the reasons for any differences.

2) The owner or operator of a new facility must submit the items specified in subsection (p)(1) to the Agency at least 60 days before placing waste in the facility.

3) After the initial submission of items specified in subsection (p)(1), the facility owner or operator must send updated information to the Agency within 90 days following the close of the owner's or operator's fiscal year. The Agency may provide up to an additional 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. The updated information must consist of all items specified in subsection (p)(1).

4) The owner or operator is no longer required to submit the items specified in this subsection (p) or comply with the requirements of subsection (h)(6) when either of the following occurs:

A) The facility owner or operator substitutes alternate financial assurance as specified in subsection (h) that is not subject to these recordkeeping and reporting requirements; or

B) The Agency releases the facility owner or operator from the requirements of subsection (h) in accordance with subsection (d)(10).

5) An owner or operator that no longer meets the requirements of subsection (h)(6)(A) cannot use the financial test to demonstrate financial assurance. An owner or operator who no longer meets the requirements of subsection (h)(6)(A), must do the following:

A) Send notice to the Agency of intent to establish alternate financial assurance as specified in this section. The facility owner or operator must send this notice by certified mail within 90 days following the close of the owner's or operator's fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements of this Section.

B) Provide alternative financial assurance within 120 days after the end of that fiscal year.

6) The Agency may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (h)(6)(A), require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in this subsection (p). If the Agency finds that the owner or operator no longer meets the requirements of subsection (h)(6)(A), the owner or operator must provide alternate financial assurance that meets the requirements of subsection (h).

BOARD NOTE: Subsection (p) is derived from 40 CFR 267.147(f)(2) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (h), (h)(6), or (h)(6)(B) also include this added subsection (p), as applicable.

q) Foreign Corporations

1) The guarantor must execute the guarantee in Illinois. The guarantee must be accompanied by a letter signed by the guarantor that states as follows:

A) The guarantee was signed in Illinois by an authorized agent of the guarantor;

B) The guarantee is governed by Illinois law; and

C) The name and address of the guarantor’s registered agent for service of process.

2) The guarantor must have a registered agent pursuant to Section 5.05 of the Business Corporation Act of 1983 [805 ILCS 5/5.05] or Section 105.05 of the General Not-for-Profit Corporation Act of 1986 [805 ILCS 105/105.05].

BOARD NOTE: Subsection (q) is derived from 40 CFR 267.147(g)(2) (2017). The Board moved the corresponding federal provision to comport with Illinois Administrative Code indent level codification requirements. The Board intends that any citation to subsection (h), (h)(7), or (h)(7)(B) also includes this added subsection (q), as applicable. The text of 40 CFR 267.147(g)(2) is substantially identical to that of 40 CFR 264.147(g)(2). The Board has substituted the language of 35 Ill. Adm. Code 724.247(g)(2), which corresponds with 40 CFR 264.147(g)(2), for that of 40 CFR 267.147(g)(2).

(Source: Amended at 42 Ill. Reg. 24055, effective November 19, 2018)