

**VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WASTE COORDINATION
OFFICE OF FINANCIAL ASSURANCE**

**FINANCIAL ASSURANCE DEMONSTRATION REVIEW PROCEDURES for
HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES**

The procedures set forth in this document are intended solely for the guidance of employees of the Department of Environmental Quality (Department). They are not intended to, nor do they constitute rulemaking by the Department. They may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how the Department applies these procedures in any given case will depend on the facts of the case.

1. Introduction

The hazardous waste financial assurance program was created to ensure that an owner or operator of a hazardous waste treatment, storage or disposal (TSD) facility bears the cost of facility closure and post-closure care. In many cases, this requires the owner or operator to provide the facility closure and post-closure funds directly to the Department in certain forms. These funds are available for use by the Department in the event of a facility abandonment to protect the public from the health and safety consequences of such abandonment. These review procedures apply to owners or operators of hazardous waste TSD facilities in the following scenarios:

- When an owner/operator of a hazardous waste TSD facility applies for a permit or interim status from the Department of Environmental Quality (Department);
- When an owner/operator of a hazardous waste TSD facility applies for an amendment to an existing permit;
- When an owner/operator of a hazardous waste TSD facility becomes obligated to demonstrate financial assurance to the Department through a negotiated consent order;
- When an owner/operator of a hazardous waste TSD facility submits financial assurance documentation as part of the annual update obligation; when a financial assurance mechanism expires, or is cancelled or terminated; or when the financial assurance provider becomes ineligible to provide financial assurance; and
- When the Department releases the owner/operator of a hazardous waste TSD facility from the obligation to demonstrate financial assurance for a closed facility.

2. Authority

Section 10.1-1428 of the Code of Virginia provides the authority to require an owner/operator of a hazardous waste TSD facility to demonstrate financial assurance for the closure and/or post-closure care costs associated with the facility. The Virginia Hazardous Waste Management Regulations, 9 VAC 20-60-12 *et seq.* incorporates 40 CFR parts 264 and 265 into the Regulation; therefore, the federal financial assurance requirements contained within subpart H of 264 and 265 apply to Virginia hazardous waste facilities. These procedures apply to regulatory requirements found in section 264 (permitted facilities) and 265 (interim¹ facilities).

3. Definitions

The definitions in the Virginia Waste Management Act and the Virginia Hazardous Waste Management Regulations apply to these Procedures.

4. Exemptions

State and federal entities are exempt from the hazardous waste financial assurance requirements.

5. Facility Cost Estimates (264.142, 264.144)

Owners/operators of a hazardous waste TSD facility must demonstrate financial assurance for closure and or post-closure care whichever is applicable, in the amount of the current cost estimate.

5.1 Requirements

Closure Cost Estimate: The closure cost estimate must account for the costs of final closure at the point in the facility's life when closure would be most expensive as indicated by the facility closure plan; must be based on third-party costs and may not incorporate the salvage value of the wastes, facility, structures or equipment, land or other facility assets.

Post-closure cost estimate: The post-closure cost estimate must be based on the total cost of post-closure care over the entire post-closure period and must be based on third party costs. Post-closure estimates must reflect a 30-year post-closure period.

5.2 Formulation of the Cost Estimate

¹ Interim facilities are those facilities that are allowed to operate temporarily without a permit because they meet certain qualifications. Interim status lasts either until the facility fails to furnish a Part B application on time or the Department makes a final determination on the facility's Part B permit application.

Owners and operators must develop and submit a detailed written cost estimate for each TSD facility.

5.3 Review of the Cost Estimate

The Department's Office of Waste Permitting (OWP) is responsible for reviewing all facility cost estimates to ensure that the estimate adequately covers the cost of closure and/or post-closure.

New cost estimates: Generally, OWP reviews the cost estimate for a TSD facility owner/operator as part of the permit application or permit amendment application process. If the facility sends the cost estimate directly to the Office of Financial Assurance (OFA), OFA staff will copy the estimate and send it to OWP along with a request for a review. If OWP receive the cost estimate directly from the facility owner/operator, the permit writer sends a memo or email to OFA staff indicating that he or she has begun a review of the estimate. OWP staff review the cost estimate and determine if the assumptions, units costs, etc., used to calculate the cost estimate are valid. OWP staff then communicates directly with the facility owner/operator to resolve any problems or deficiencies with the estimate. Upon completion of the review, OWP staff will contact OFA with the approved estimate via email or memo and provide a copy of the detailed estimate for the FA file. When the owner/operator of an existing facility submits the cost estimate as part of the permit amendment process, the OWP staff should notify the OFA to ensure the financial assurance mechanism in place is adequate to cover the additional activities at the facility.

Existing cost estimates:

A facility owner/operator may submit a revised estimate during the life of the facility if the cost of the required activity changes. If the facility sends the cost estimate directly to OFA, OFA staff will copy the estimate and send it to OWP along with a request for a review. If OWP receive the cost estimate directly from the facility owner/operator, the permit writer sends a memo or email to OFA staff indicating that he or she has begun a review of the estimate. OWP staff then perform the review as described in the preceding subsection.

6. Corrective Action Requirements [Reserved]

7. Liability Requirements (264.147)

An owner/operator of any hazardous waste TSD facility must maintain third party liability coverage for sudden, accidental releases stemming from operations at the facility. Owners/operators of particular types of TSD facilities must maintain liability coverage for nonsudden, accidental releases as well. The types of facilities requiring nonsudden, accidental insurance coverage include surface impoundments, landfills, land treatment units, or disposal miscellaneous units. Generally, nonsudden liability coverage is designed to provide coverage in

the event of third party damages caused by ground water contamination; therefore, in most cases, if the waste is disposed of in or on the ground, or is treated by direct contact with the land, nonsudden liability coverage is required.

7.1. Liability Insurance Amounts

- Sudden, accidental releases: Owners/operators must maintain liability coverage in the amount of \$1 M per occurrence with a \$2 M annual aggregate for any hazardous waste TSD facility or group of facilities. Regardless of the number of facilities, the \$2 M is the maximum amount required per owner or operator.
- Nonsudden accidental releases: Owners/operators must maintain liability coverage in the amount of \$3 M per occurrence with a \$6 M annual aggregate for any hazardous waste TSD facility or group of facilities. Regardless of the number of facilities, \$6 M is the maximum required amount. The total required amount for a facility requiring both sudden and nonsudden liability insurance coverage is \$4 M per occurrence with an \$8 M annual aggregate.
- Term of coverage: Owners/operators must maintain liability insurance for active facilities until the completion of final closure. Facilities in the post-closure phase do not require liability coverage.

8. Financial Assurance Mechanism Review

Facility owners/operators may choose one or a combination of mechanisms to demonstrate financial assurance. The regulation allows the owner/operator to choose from eight separate mechanisms. The owner/operator may use the same mechanism for closure and post-closure costs. The amount available must be no less than the sum that would be available if a separate mechanism had been established for closure and post-closure. Each mechanism requires specific documentation. When combining mechanisms, the owner/operator may combine letters of credit, financial guarantee bonds, insurance policies and trust funds only.

8.1 Trust Fund or Standby Trust Fund (264.143(a), 264.145(a), 264.147(j))

A trust fund is a mechanism through which an owner/operator deposits money into a fund that is held and administered by a third party on behalf of the Department. The owner/operator pays into the trust fund over the term of the initial permit (10 years) or over the remaining operating life of the facility, whichever is shorter. The fund should be fully funded at closure.

When reviewing a trust fund for compliance with the regulation, OFA staff should verify that the following requirements have been met:

Trustee: The trustee must be a bank or financial institution that has the authority to act

as a trustee and whose operations are regulated and examined by a Federal or State agency.

Payment Amount: The owner/operator must make the appropriate deposit before any waste is received at the facility.

New Facilities: The owner/operator's first payment into the trust must be made according to the following calculation:

$$\frac{\text{Current cost estimate}}{\text{\# of years in pay-in period}}$$

Existing Facilities: If the owner/operator is switching from another mechanism to the trust fund, then the first payment is equal to the estimated value of the trust fund if the owner/operator had been using a trust fund to demonstrate all along. For example, assume the current cost estimate is \$1,000,000 and the owner/operator has been demonstrating financial assurance for 5 years using a surety bond. If the remaining operating life of the facility is 15 years, then his first payment is equal to the following:

$$\text{\$1,000,000/20 X 5} = \text{\$250,000.}$$

Interim Status Facilities: Payments are made annually for 20 years beginning with the effective date of the regulation or over the remaining life of the facility as estimated in the closure plan, whichever is shorter.

Payment Date: For new facilities the deposit should be made at least 60 days before the initial receipt of waste. For existing facilities, the deposit should be made before the existing mechanism is released.

Required Documentation: The owner/operator must provide the following documents to OFA:

Trust Agreement: A signed, notarized, original trust agreement with language *identical* to that described in section 264.151 (a). The trust agreement must have a Schedule A, Schedule B, Exhibit A, and Certification of Acknowledgement attached.

- Schedule A: This document should provide the facility name, physical address and permit number along with the current applicable cost estimate.
- Schedule B: This document should provide the amount of the initial deposit.
- Exhibit A: This document should list the individuals authorized to sign trust-related documents on behalf of the owner/operator.
- Certification of Acknowledgement: This document certifies that the person signing is authorized to sign for the Grantor.

Trustee verification: A letter from the trustee confirming the initial deposit into the trust.

Liability Coverage: The requirements for using the trust fund for liability coverage are the same as when using it for closure and post-closure except that the trust fund for liability coverage must be funded at establishment for the full amount of the liability coverage that is required to be provided by the owner/operator. The language must be *identical* to that described in section 264.151 (m).

8.2 Standby Trust Fund (264.143(a), 264.145(a), 264.147(j))

A standby trust fund is an empty trust fund that an owner/operator establishes with a bank or trust company to receive funds from a letter of credit, performance or payment bond, or guarantee. If the Department determines that it is necessary to access the funds guaranteed by any one of these mechanisms, it will “cash” the mechanism and place the funds into the standby trust fund. This ensures immediate access to funds when they are required (i.e., in the event of an abandoned facility) so that the Department can fund closure and/or post-closure at the facility as needed.

When reviewing a trust fund for compliance with the regulation, OFA staff verifies that the following requirements have been met:

Trustee: The trustee must be a bank or financial institution that has the authority to act as a trustee and whose operations are regulated and examined by a Federal or State agency.

Payment Amount: The owner/operator is not required to make an initial deposit into a standby trust agreement.

Required Documentation: The owner/operator must provide the following documents to OFA:

Trust Agreement: A signed, notarized, original standby trust agreement with language *identical* to that described in section 264.151 (a)(1). The trust agreement must have a Schedule A, Schedule B and Exhibit A attached.

- Schedule A: This document should provide the facility name, physical address and permit number along with the current applicable cost estimate.
- Schedule B: This document should state that the initial deposit is zero dollars and that the trust agreement is established as a standby to receive funds from either a financial guarantee bond, performance bond, letter of credit, or guarantee.
- Exhibit A: This document should list the individuals authorized to sign trust-related documents on behalf of the owner/operator.

8.3 Financial Guarantee Bond (264.143(b), 264.144(b), 264.147(i))

A payment bond is a guarantee, issued by a surety company, that it will meet the obligations of an owner/operator in the event an owner/operator defaults on the conditions of the bond. The surety guarantees to deposit the entire sum of the bond into the standby trust fund.

When reviewing a payment bond for compliance with the Regulation, OFA staff will verify that the following requirements have been met:

Circular 570 Listing: Staff confirms that the surety is listed as an acceptable surety of federal bonds in Circular 570. This information can be found at www.fins.treas.gov/c570/index.html

Power of Attorney: This document confirms the authority of the individual signing the bond to sign on behalf of the surety company. Staff will verify that the power of attorney of the attorney-in-fact is recorded pursuant to § 38.2-2416 of the Code of Virginia. Staff may obtain this information by contacting the Richmond City Circuit Court.

Bond Amount: If an owner/operator is using a financial guarantee bond alone to demonstrate financial assurance then the bond amount must be equal to the total current cost estimate. If the owner/operator is using a combination of cash mechanisms to demonstrate, then the combined amount of the mechanisms must equal the total current cost estimate.

Required Documentation: The owner/operator must provide the following documents to OFA:

Financial Guarantee Bond: The bond must be a signed, original document with a signed, notarized Power of Attorney attached. The bond language must be identical to that described in section 264.151 (b) and the bond must name the facility owner/operator as the principal and the Department as the obligee. Finally, the bond must identify the facility by name, physical address and permit number, if applicable.

Standby Trust Agreement: The bond must be accompanied by a signed, original standby trust agreement. See section 8.2 for requirements applicable to the standby trust.

Liability Coverage: When using the payment bond as liability coverage, the surety agrees to be responsible for the payment of claims against the owner/operator. The requirements for using the payment bond for liability coverage are the same as when using it for closure and post-closure except that the language must be identical to that described in section 264.151 (l).

8.4 Performance Bond (264.143(c), 264.144(c), 264.147(i))

A performance bond is a guarantee, issued by a surety company, that it will meet the obligations of an owner/operator in the event an owner/operator defaults on the conditions of the bond. The surety guarantees to either deposit the entire sum of the bond into the standby trust fund or perform the activities on behalf of the owner/operator.

When reviewing a performance bond for compliance with the Regulation, OFA staff will verify that the following requirements have been met:

Circular 570 Listing: Staff will confirm that the surety is listed as an acceptable surety of federal bonds in Circular 570. This information can be found at www.fins.treas.gov/c570/index.html

Power of Attorney: This document confirms the authority of the individual signing the bond to sign on behalf of the surety company. Staff will verify that the power of attorney of the attorney-in-fact is recorded pursuant to § 38.2-2416 of the Code of Virginia. Staff may obtain this information by contacting the Richmond City Circuit Court.

Bond Amount: If an owner/operator is using a performance bond alone to demonstrate financial assurance then the bond amount must be equal to the total current cost estimate. If the owner/operator is using a combination of performance mechanisms to demonstrate, then the combined amount of the mechanisms must equal the total current cost estimate.

Required Documentation: The owner/operator must provide the following documents to OFA:

Performance Bond: The bond must be a signed, original document with a signed, notarized Power of Attorney attached. The bond language must be identical to that described in section 264.151(c) and the bond must name the facility owner/operator as the principal and the Department as the obligee. Finally, the bond must identify the facility by name, physical address, and permit number, if applicable.

Standby Trust Agreement: The bond must be accompanied by a signed, original standby trust agreement. See section 8.2 for requirements applicable to the standby trust.

8.5 Letter of Credit (264.143(d), 264.144(d), 264.147(h))

A letter of credit is a mechanism that is essentially a “check” written to the Department in the amount of the facility cost estimate. In the event the owner/operator abandons the facility or is otherwise unable to conduct closure, post-closure, and/or corrective action the Department can cash the letter of credit, place the funds into a standby trust and use the money to ensure that the required activities are completed.

When reviewing a letter of credit for compliance with the Regulation, OFA staff should verify the following requirements have been met:

Bank: Staff will contact the Bureau of Financial Institutions at the State Corporation Commission to ensure that the issuing institution is a bank or other financial institution that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by the Commonwealth, a federal agency or an agency in another state.

Signature: Staff will contact the bank to ensure that the person signing the letter of credit is authorized to sign the document.

Letter of Credit Amount: If the owner/operator is using the letter of credit alone to demonstrate financial assurance then the letter of credit amount must be equal to the total current cost estimate. If the owner/operator is using a combination of cash mechanisms to demonstrate, then the combined amount must equal the current cost estimate.

Required Documentation: The owner/operator must provide the following documents to OFA:

Letter of Credit: The letter of credit must be a signed, original document. The language of the letter of credit must be identical to that described in section 264.151(d) and must name the Department as beneficiary. The letter of credit must be issued for one year and renew each year on the anniversary date Letter from Owner/operator: The owner/operator must provide a letter referring to the letter of credit by number and listing the name, physical address and EPA Id number for each facility covered by the letter of credit.

Standby Trust Agreement: The letter of credit must be accompanied by a signed, original standby trust agreement. See section 8.2 for requirements applicable to the standby trust.

Liability Coverage: The requirements for using the letter of credit for liability coverage are the same as when using it for closure and post-closure costs, except that the language of the letter of credit must be identical to that described in section 264.151(k).

8.6 Insurance (264.143(e), 264.144(e))

An insurance policy is a mechanism issued by an insurance company. It guarantees that funds will be available to close the facility whenever final closure occurs and/or provides post-closure care for the facility whenever the post-closure care period begins.

When reviewing the insurance policy for compliance with the Regulation, OFA staff should verify that the following requirements have been met:

Policy Amount: The policy must be issued for a face amount at least equal to the current cost estimate. If the owner/operator is using a combination of mechanisms to demonstrate, then the combined amount of the mechanisms must equal the total current

cost estimate.

Required Documentation: The owner/operator must provide the following documents to OFA:

Insurance Policy: The owner/operator must provide the entire policy including the declarations page and all endorsements. The declaration page must specify the named insured, the policy amount, and all covered facilities. It should also list the physical locations of the covered facilities. Finally the declarations page should indicate the face amount of the policy.

Certificate of Insurance: The certificate of insurance must be a signed, original document. The certificate language must be identical to that described in 264.151(e). For each facility covered, it must list the facility name, physical address, permit number (if available), and the amount of insurance provided for each facility.

Policy Review: OFA reviews the policy to determine whether the facility has appropriate coverage under the policy. OFA first reviews the declarations page to ensure that the facility is adequately identified and the policy limits are at least equal to the current cost estimate. OFA then reviews the policy language and each endorsement to ensure that the policy offers the necessary coverage. OFA also ensures that the policy provides the appropriate notice to the Department in the event of cancellation.

Liability Coverage: The requirements for using insurance for liability coverage are the same as when using it for closure and post-closure costs, except that the language of the certificate of insurance must be identical to that described in section 264.151(j). An existing policy can also be amended by attaching the Hazardous Waste Facility Liability Endorsement.

8.7 Financial Test (264.143(f), 264.144(f), 264.147 (f))

The corporate financial test is a mechanism through which an owner/operator “self-insures” the cost to close the facility, conduct post-closure and/or conduct corrective action. The test is based on the corporation’s financial strength.

When reviewing the financial test, OFA staff should verify that the following requirements have been met:

Financial Test Amount: The demonstration amount must be equal to the total current cost estimate.

Required Documentation: The owner/operator must provide the following documents to OFA:

Financial Test: The owner/operator must submit an original, signed financial test to OFA. The firm’s CEO must sign the document. The language must be

identical to the language in section 264.151(f). The test must be based on the owner/operator's most recently closed fiscal year. The covered facilities should be listed along with physical address, permit number (if available), and the closure, post-closure and/or corrective action costs. All calculations should be checked for accuracy.

Audited Financial Statements and CPA's report: The audited financial information is contained in the corporation's annual report along with the CPA's report. The CPA's report should contain an unqualified opinion.

Independent Accountant's Report: This report must state the accounting procedures the accountant used when comparing the data in the financial statements to the data reported on the financial test. It must also state the accountant's findings.

Liability Coverage: The requirements for using the financial test for liability coverage are the same as when using it for closure and post-closure costs, except that the language of the financial test must be identical to that described in section 264.151(g).

8.8 Corporate Guarantee (264.143(f), 264.144(f), 264.147 (g))

A corporate guarantee is provided on behalf of the owner/operator who cannot meet the financial test requirements based on its own financial net worth. The written guarantee must provide that if the owner/operator fails to perform closure, post-closure or corrective action, the guarantor will perform or pay a third party to perform the closure, post-closure or corrective action or establish a fully funded trust fund in the name of the owner/operator.

When reviewing the corporate guarantee, OFA staff should verify that the following requirements have been met:

Financial Test Amount: The demonstration amount must be equal to the total current cost estimate. For example, if the owner/operator is using the financial test to cover post-closure costs, the amount on the financial test must reflect the cost for the entire post-closure period, rather than the annual cost.

Guarantor: The guarantor must be a parent of the owner/operator, a firm whose parent corporation is also the parent corporation of the owner/operator, or a firm with a substantial business relationship with the owner/operator.

Required Documentation: The owner/operator must provide the following documents to OFA:

Financial Test Documentation: The guarantor must submit the same documentation that is required for the financial test (see section 7.6); however the financial test and

supplemental information must be based on the *guarantor's* financial performance.

Guarantee Form: The guarantor must submit a signed, original guarantee form. The language of the guarantee form must be *identical* to the language specified in section 264.151(h)(1).

Liability Coverage: The requirements for using insurance for liability coverage are the same as when using it for closure and post-closure costs, except that the language of the guarantee must be identical to that described in section 264.151(h)(2).

9. Submission and Recordkeeping Requirements

9.1 Submission Requirements (264.143, 264.145)

The owner/operator of a new hazardous waste TSD facility should submit the selected financial responsibility mechanism to the Department at least 60 days prior to initial receipt of waste at the facility. If the owner/operator sends the financial mechanism to OWP with the permit application, OWP forwards the mechanism to OFA with a cover memo requesting a review and response. In many cases, the applicant contacts OFA staff directly for guidance concerning the appropriate demonstration procedures. In these cases, the owner/operator generally submits the mechanism directly to OFA.

In the case of permit amendments, the owner/operator must increase the facility's financial assurance if the cost of closure or post-closure is increased as a result of the amendment or provide an additional mechanism in the amount of the increase. Regardless of the financial assurance mechanism chosen, the owner/operator must submit the original signed mechanism.

9.2 Record Keeping Requirements (264.142, 264.144)

Closure cost estimate: a facility owner/operator must keep a copy of the closure cost estimate in the operating record during the active life of the facility.

Post-closure cost estimate: A facility owner/operator must keep a copy of the post-closure cost estimate in the facility operating recording during the active life of the facility and throughout the entire post-closure period.

10. General OFA Review Procedures

Although review procedures for the financial mechanisms are the same regardless of the scenario, the communication chain may be different depending on why the review is performed.

Reviews pursuant to a permit or permit amendment application: The Hazardous Waste Regulation does not give the Department a time period in which to review a financial assurance submission and determine compliance; however, OFA staff generally attempt to review these

documents within 60 days. Staff will attempt to shorten the review time if a permit or permit amendment is pending. Upon receipt of a financial assurance mechanism through the permit or permit amendment application process, OFA staff review the mechanism and contact the applicant by letter or telephone with any problems or concerns. Upon resolution of all issues, OFA staff sends a compliance memo or email to the appropriate OWP staff and a compliance letter to the applicant, with copies to the OWP Manager, Regional Office (RO) Waste Compliance Manager and the RCRA Info Database Manager.

Reviews of annual updates: OFA staff reviews the annual submission and contacts the facility owner/operator within 60 days. If the documents have been prepared in accordance with the Regulation, OFA sends a compliance letter to the owner/operator with copies to the Waste Compliance Manager, the OWP Manager and the RCRA Info Database Manager. If there is a problem with the submission, OFA contacts the owner/operator in writing detailing the corrections that must be made. A copy of the letter is sent to RO staff. The letter imposes a thirty-day deadline; however, the RO may pursue a compliance or enforcement action against the facility at any time during the thirty-day period, depending on the circumstances of the case. Generally, the RO staff will pursue compliance first through a warning letter.

If a facility owner/operator fails to update his financial assurance mechanism annually, then OFA staff will contact the facility in writing and copy the RO. Again, the letter imposes a thirty-day deadline to submit; however, the RO may pursue a compliance or enforcement action against the facility at any time during the thirty-day period, depending on the circumstances of the case. Again, generally, the RO staff will pursue compliance first through a warning letter. Upon resolution of all issues, OFA staff sends a compliance memo or email to the appropriate OWP staff and a compliance letter to the applicant, with copies to the OWP Manager, RO Waste Compliance Manager and the RCRA Info Database Manager. OFA staff also complete a RCRA Information form for the facility and submit it to the RCRA Info Database Manager.

Reviews pursuant to an Enforcement Action: RO enforcement staff should send a copy of any executed consent order or unilateral order that requires financial assurance to OFA. OFA staff will send a letter to the owner/operator describing the available options and reiterating the submission deadlines imposed by the Order. If OFA receives the Order after the deadline has passed, OFA contacts the owner/operator in writing reminding him of the obligation to demonstrate and imposing a thirty-day deadline for submission of financial assurance.

OFA staff reviews the mechanism and contacts the facility owner/operator within 60 days. If the documents have been prepared in accordance with the Regulation, OFA sends a compliance letter to the owner/operator and copies RO enforcement staff. If there is a problem with the submission, OFA contacts the owner/operator in writing detailing the corrections that must be made. A copy of the letter is sent to RO enforcement staff. The letter imposes a thirty-day deadline; however, the RO may pursue further enforcement action against the facility at any time during the thirty-day period, depending on the circumstances of the case. Upon resolution of all issues, OFA staff sends a compliance memo or email to the appropriate RO enforcement and OWP staff and a compliance letter to the applicant, with copies to the OWP Manager, RO enforcement staff, Waste Compliance Manager and the RCRA Info Database Manager.

Post-closure reductions: (Reserved)

Agency Files: For each facility, OFA staff create a correspondence file, a safe file for the original financial mechanism (except financial tests and guarantees), and a duplicate file for a copy of the original financial mechanism.

Database Maintenance: OFA staff update financial assurance on the Comprehensive Environmental Data System (CEDS) and the OFA spreadsheet within 15 days of a change.

EPA Hazardous Waste Financial Assurance Report: OFA staff update this report annually to provide the financial assurance compliance status of each TSD facility requiring financial assurance and send a copy to EPA by September 30th of each year.

11. Annual Update and Submission Requirements (264.142, 264.144)

A facility owner/operator must update his cost estimate annually to account for the effects of inflation. He accomplishes this by adjusting the total cost estimate to current dollars using the current inflation rate. The Regulation allows an owner/operator to use one of two methods to adjust the cost estimate for inflation.

- An owner/operator may recalculate the maximum cost of closure in current dollars; or
- An owner/operator may multiply the total current cost estimate by an annual inflation factor derived from the Gross National Product implicit price deflators (IPD).

The Department also allows owners/operators to adjust for inflation by multiplying the total current cost estimate by an annual inflation derived from the Gross Domestic Product IPDs as well as those from the Gross National Product.

The inflation factor for the current year may be calculated by dividing the previous year's implicit price deflator by the implicit price deflator for the year before the previous year. For example, to calculate the 2002 inflation factor, the following formula should be used:

$$\frac{2001 \text{ IPD}}{2000 \text{ IPD}}$$

Sources of Information. Owners and operators may obtain the annual and quarterly IPDs and inflation factors from the following sources:

- RCRA/Superfund Hotline: 800/424/9346
**IPDs and inflation factor available
- Internet web site: <http://www.bea.doc.gov/bea/dn/nipaweb/NIPATableIndex.htm>
Scroll down to Gross National Product-command basis, select 7.3

**IPDs only available

- Survey of Current Business: (published by the Department of Commerce)
Phone: 202/512/-1800, <http://bookstore.gpo.gov/index.html> **IPDs only available
- Office of Financial Assurance, Virginia DEQ: 804/698-4123
** inflation factor available

The facility owner/operator must adjust the facility cost estimate for inflation annually within sixty (60) days prior to the financial assurance anniversary date.

In addition to adjusting the cost estimate, the facility owner/operator must update the amount of the facility financial assurance mechanism(s) annually by the anniversary date of the mechanism(s). The anniversary date and method of adjustment differs for each type of mechanism. The following are the anniversary dates and submission requirements for each mechanism:

Trust Agreement: The anniversary date for a **trust agreement** is the effective date of the trust agreement or the date on which the agreement was executed. The owner/operator must deposit funds into the trust no later than thirty (30) days after the anniversary date and provide verification to the Department of the amount and date of the deposit through a trust account statement. Annual payments into the trust fund are determined by the following formula:

$$\frac{\text{Current cost estimate}-\text{Current value of fund}}{\text{Remaining years in landfill's operating life.}}$$

Payment or Performance Bond: The anniversary date for a **surety bond** is the effective date of the bond. The owner /operator must submit an originally signed rider to the existing bond in the amount of the increase or submit a new, original bond in the amount of the total adjusted cost estimate.

Letter of Credit: The anniversary date for a **letter of credit** is the effective date of the letter of credit. The owner/operator must submit an original amendment to the existing letter of credit in the amount of the increase or submit a new original letter of credit in the amount of the total adjusted cost estimate.

Insurance Policy: The anniversary date of an **insurance policy** is the effective date of the policy. The owner/operator must submit an endorsement to the existing policy or a new declarations page increasing the face amount of the policy to the amount of the total adjusted cost estimate and a new, original Certificate of Insurance reflecting the new current cost estimate. If the insurance policy is one that has a policy period of three (3) years, then the insurer must build the cost of inflation for those 3 years into the policy limits when it issues the policy.

Corporate Financial Test: The anniversary date of the **corporate financial test** is ninety (90)

days following the close of the entity's fiscal year. The owner/operator must submit a new financial test in the amount of the adjusted cost estimate, along with the supplemental financial information described in section 8.7.

Corporate Guarantee: The anniversary date of the **corporate guarantee** is ninety (90) days from the close of the entity's fiscal year. Because the guarantee does not require that the guarantor specify the facility cost estimates, the guarantor is not required to update it each year, unless the guarantor includes the cost estimates on the guarantee. However, the financial test which underlies the guarantee must be updated annually.

12. Cancellation or Termination of a Mechanism, Cashing or Drawing on Mechanisms

A financial assurance provider can cancel a performance bond, letter of credit, or guarantee or allow it to expire. In those cases, the Department will act to cash the mechanism or obtain alternate financial assurance before the mechanism expires. The following procedures will apply.

12.1 Letter of Credit (264.143(d), 264.145(d))

The Regulation requires a financial institution to provide one-hundred twenty (120) days notice of cancellation or termination of the letter of credit to the Department and the owner/operator. When the Department receives the notice of cancellation, OFA notifies the owner /operator by letter and directs the owner/operator to provide a replacement mechanism in the amount of the expiring one. The letter will direct the owner/operator to submit the alternate mechanism to the Department *no later than thirty days* before the stated expiration date. The letter should warn the owner/operator that the Department intends to cash the mechanism if alternate financial assurance is not provided.

If the Department has not received an acceptable replacement mechanism within thirty (30) days of the stated expiration date, OFA sends a demand letter via express mail to the financial assurance provider directing the provider to cash the letter of credit and transmit the entire amount of the letter of credit into the facility's standby trust account. Before sending the letter, OFA contacts the trustee of the standby trust for specific wiring instructions and includes those instructions in the demand letter. OFA also notifies the trustee, at this time, of the pending wire transaction. A copy of the letter of credit and a signed sight draft should accompany the letter. Generally, the demand letter instructs the financial provider to cash the letter of credit on the expiration date before close of business. OFA copies the owner/operator on the demand letter and reiterates the Department's request for an alternate mechanism.

If there is no standby trust then the demand letter will instruct the financial assurance provider to issue a check to the Department. OFA copies the Office of Financial Management (OFM) on the demand letter and sends an email providing the facts of the situation so that OFM may prepare to create an account for the funds.

If the Department receives an alternate mechanism from the facility owner/operator, OFA reviews the documents according to the procedures outlined in Section 8. If the mechanism complies with the Regulation and is in the amount of the previous mechanism, the Department issues a letter to the financial assurance provider retracting the demand for funds. The letter will be faxed to the provider and the owner/operator and the original mailed certified to the provider with copies to the appropriate RO staff, and OFM, if necessary. If the replacement mechanism does not comply with the Regulation, OFA contacts the facility owner/operator immediately with the required changes. If the facility owner/operator submits a corrected mechanism before the cashing date, then the procedures described above should be followed.

If the owner/operator does not submit a replacement mechanism or submits a mechanism that does not comply with the Regulation and fails to correct the problems in a timely manner, the Department will not issue a retraction letter and the financial assurance provider will cash the mechanism. The trustee of the standby trust or OFM will be notified that the funds are forthcoming. OFA should request a faxed notification from the trustee of receipt of the funds.

Upon receipt of an acceptable mechanism in the amount of the expired mechanism, the Department will instruct the trustee or OFM to return the funds to the owner/operator.

12.2 Surety Bonds (264.143(b) & (c), 264.145 (b) & (c))

The Regulation requires a surety company to provide 120 days notice of cancellation or termination of a performance bond to the Department and the owner/operator. When the Department receives the notice of cancellation, OFA notifies the owner/operator by letter and directs the owner/operator to provide a replacement mechanism in the amount of the expiring one. The letter directs the owner/operator to submit the alternate mechanism to the Department *no later than sixty days* before the stated expiration date. The letter should warn the owner/operator that the Department intends to make a claim on the bond if alternate financial assurance is not provided.

If the Department has not received an acceptable replacement mechanism within thirty (30) days of the stated expiration date, OFA sends a letter via overnight mail to the financial assurance provider directing the provider to pay out the full amount of the bond to the Department and transfer the funds into the facility's standby trust account. Before sending the letter, OFA contacts the trustee of the standby trust for specific wiring instructions and includes those instructions in the demand letter. OFA also notifies the trustee of the pending wire transaction. A copy of the bond should accompany the letter. Generally, the demand letter requests that the surety pay out on the bond on the bond's expiration date before close of business. OFA also copies the owner/operator on the demand letter and reiterates the Department's request for an alternate mechanism.

If there is no standby trust then the demand letter will instruct the financial assurance provider to issue a check to the Department. OFA copies the OFM on the demand letter

and sends an email providing the facts of the situation so that OFM may prepare to create an account for the funds.

If the Department receives an alternate mechanism from the facility owner/operator, OFA reviews the documents according to the procedures outlined in Section 8. If the mechanism complies with the Regulation and is in the amount of the previous mechanism, the Department issues a letter to the financial assurance provider retracting the demand for funds. The letter will be faxed to the provider and the owner/operator and the original mailed certified to the provider. RO staff (and OFM, if necessary) and the owner/operator will be copied on the letter.

If the replacement mechanism does not comply with the Regulation, OFA contacts the facility owner/operator immediately with the required changes. If the facility owner/operator submits a corrected mechanism before the cashing date then the procedures described above should be followed.

If the owner/operator does not submit a replacement mechanism or submits a mechanism that does not comply with the Regulation and fails to correct the problems in a timely manner, the Department will not issue a retraction letter and the financial assurance provider will cash the mechanism. The trustee of the standby trust or OFM will be notified that the funds are forthcoming. OFA should request a faxed notification from the trustee of receipt of the funds.

Upon receipt of an acceptable mechanism in the amount of the expired mechanism, the Department will instruct the trustee or OFM to return the funds to the owner/operator.

12.3 Guarantee (264.143(f), 264.145(f))

A guarantor must give the Department and the owner/operator at least one hundred twenty (120) days notice of cancellation. Upon receipt of the cancellation notice, OFA sends a letter to the owner/operator requesting alternate financial assurance and setting a submission date that is ninety (90) days from receipt of the cancellation notice. OFA sends a separate letter to the guarantor reminding him that he remains responsible for providing financial assurance until the facility owner/operator submits a replacement mechanism. Upon receipt of a replacement mechanism, OFA reviews it according to the procedures set out in Section 8.

13. Trust Disbursement Procedures (264.143(a), 264.145(a))

Facility owners/operators who demonstrate financial assurance through a trust fund may request reimbursement from the trust for partial or final closure and for post-closure care expenditures. The Department approves disbursement requests only when it is clear from the itemized cost estimate, the closure/post-closure plan, and the trust fund balance that sufficient funds remain in the trust to pay for completion of the remaining activities. If staff cannot ascertain from the information available that authorizing the disbursement request will not result

in a shortfall in funds before completion of all required activities, the disbursement request will be denied.

The disbursement approval process is a cooperative one between OFA, OWP, and RO compliance staff. Upon receipt of a disbursement request from a facility owner/operator, OFA contacts OWP to confirm that the activities for which the owner/operator is requesting reimbursement were completed pursuant to an approved closure, post-closure or corrective action plan, whichever is applicable. OFA also contacts the appropriate RO to request an inspection to confirm completion of the activities. At the same time, OFA staff compare the disbursement request to the trust fund balance to ensure that sufficient funds will remain after disbursement to cover the remaining activities in the approved plan(s). OWP staff compares the completed activities to the approved plan and informs OFA staff whether the completed activities were appropriate. RO compliance staff inspects the facility to confirm that the facility owner/operator completed the activities for which reimbursement has been requested in accordance with the approved plan. Upon receipt of OWP's approval and the RO's confirmation of completion, OFA sends a letter to the trustee authorizing release of the funds.

14. Facility Abandonment [Reserved]

The procedures for accessing and using a financial assurance mechanism to effect closure, post-closure, or corrective action of an abandoned facility are under development.

15. Incapacity of Providers or owners or operators (264.148)

The owner/operator must notify the Department immediately if a financial provider has filed for bankruptcy or if the provider's authority to issue the mechanism has been suspended or revoked (removal from the Circular 570). The owner/operator must provide a replacement mechanism in the amount of the existing mechanism within sixty (60) days of the date upon which the financial provider became ineligible. The replacement mechanism will be reviewed according to the procedures set out in Section 8.

An owner/operator must notify the Department by certified mail of the commencement of voluntary or involuntary bankruptcy within ten (10) days after commencement of the proceeding. Upon receipt of this notification, OFA staff notifies the appropriate RO and provides a draft letter to send to the facility owner/operator reminding him of his compliance obligations. Upon receipt of the draft letter, RO staff revise the letter to add any specific current compliance issues and send it to the facility owner/operator.

16. Release from Demonstration Requirements (264.143(i), 264.145(i))

The Regulation requires the Department to release a facility owner/operator from the obligation to demonstrate financial assurance upon the completion of closure, post-closure or corrective action activities. Typically, OWP staff reviews the facility closure/post-closure certification and issues an approval letter if everything is in order and approval is appropriate.

OWP staff copies OFA on the approval letter. Upon receipt of the approval letter, OFA sends notice to the owner/operator that financial assurance is no longer required for the particular completed activity. OFA returns the original financial assurance mechanism to the provider, if necessary, via express mail along with a letter agreeing to the termination of the mechanism. A copy of the termination letter is provided to the owner/operator, RO staff, Hazardous Waste Permit Manager, and the RCRA Info Database Manager.

Waste Division Director

Date

**APPENDIX I
HAZARDOUS WASTE REVIEW PROCEDURES**

REVIEW FORMS

General Review Form for Hazardous/Solid Waste

REVIEWER: _____ DATE: _____

FACILITY NAME: _____

EPA, PERMIT OR PBR #: _____

PARENT COMPANY: _____

FINANCIAL ASSURANCE FOR: (circle all that apply)

Closure Post-Closure Sudden Liability Non-Sudden Liability

CLOSURE COST ESTIMATE: _____

POST-CLOSURE COST ESTIMATE: _____

TYPE OF FINANCIAL MECHANISM FOR CLOSURE AND/OR POST-CLOSURE:

AMOUNT DEMONSTRATED:

CLOSURE: _____

POST-CLOSURE: _____

THIRD PARTY COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE:

SUDDEN LIABILITY AMOUNT: _____

NON-SUDDEN LIABILITY AMOUNT: _____

TYPE OF FINANCIAL MECHANISM FOR SUDDEN AND/OR NON-SUDDEN LIABILITY:

IF INSURANCE FOR LIABILITY: NAME OF INSURER: _____

DEDUCTIBLE: _____ SCC REGISTERED: Y OR N

DATE OF SUBMISSION: _____

Is owner/operator in compliance? Yes _____ No _____

