

TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION

Control 335 Department or Agency Environmental Management
Rule No. 335-6-13-.07
Rule Title: Allowable Mechanisms for Financial Assurance
 New X Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? YES

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? YES

Is there another, less restrictive method of regulation available that could adequately protect the public? NO

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? NO

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? NO

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? YES

Does the proposed action relate to or affect in any manner any litigation which the agency is a party to concerning the subject matter of the proposed rule? NO

Does the proposed rule have an economic impact? NO

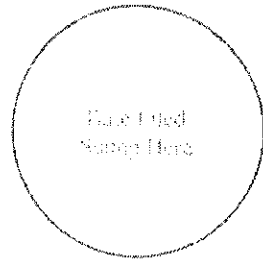
If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Services Agency.

Signature of certifying officer Marilyn Elliott

Date May 22, 2018



ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
WATER DIVISION

NOTICE OF INTENDED ACTION

Agency Name: Alabama Department of Environmental Management
Rule No. & Title: 335-6-13-.07 Allowable Mechanisms for Financial Assurance
(Amend)
Intended Action: The Alabama Department of Environmental Management proposes
to amend rule 335-6-13-.07

Substance of Proposed Action:


The Department proposes revisions to this rule to remove an allowed financial assurance mechanism, to add a requirement for an annual certification to the Department that financial assurance mechanisms are current and valid, to specify that the original copy of a financial assurance mechanism should be submitted to the Department, and to make other revisions that are administrative in nature to correct errors, provide clarity, or promote consistency.

Time, Place, Manner of Presenting Views:

Comments may be submitted in writing or orally at a public hearing to be held at 1:00 PM, July 12, 2018, in the ADEM Main Hearing Room, 1400 Coliseum Boulevard, Montgomery, Alabama 36110.

Final Date for Comment and Completion of Notice: July 12, 2018

Contact Person at Agency: Christy Monk, (334) 394-4364



Lance R. Lefleur
Director

335-6-13-.07 Allowable Mechanisms for Financial Assurance. Allowable mechanisms used to demonstrate financial assurance under rule 335-6-13-.07 shall ensure that the funds necessary to meet the costs of closure will be available when they are needed. Owners and/or operators shall choose from Only the mechanisms options specified in 335-6-13-.07 paragraphs (1) through (6) of this rule are allowable.

(1) Reserved Trust Fund.

~~(a) — An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements below. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency. A copy of the trust agreement shall be placed in the facility's record and a copy submitted to the Department.~~

~~(b) — Payments into the trust fund shall be made annually by the owner or operator over the life of the permit or over the remaining expected life of the facility, whichever is shorter, in the case of a trust fund for closure. This period is referred to as the pay-in period.~~

~~(c) — For a trust fund used to demonstrate financial assurance for closure, the first payment into the fund shall be at least equal to the current cost estimate for closure, except as provided in 335-6-13-.07(6) divided by the number of years in the pay-in period as defined in 335-6-13-.07(1)(b). The amount of subsequent payments shall be determined by the following formula:~~

$$\text{Next Payment} = [\text{CE} - \text{CV}] / \text{Y}$$

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

~~(d) — The initial payment into the trust fund shall be made before the initial start-up of operations for new facilities or before the reissuance or modification of a permit for existing facilities.~~

~~(e) — If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in 335-6-13-.07, the initial payment into the trust fund shall be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of 335-6-13-.07(1).~~

~~(f) — The owner or operator, or other person authorized to conduct closure activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if sufficient funds are remaining in the trust fund to cover the remaining costs of closure and if justification and documentation of the cost is placed in the facility's record, submitted to and approved by the Department. The owner or operator shall place the documentation of the justification for reimbursement in the~~

facility's record and notify the Department that reimbursement has been received.

~~(g) The trust fund may be terminated by the owner or operator only if the owner or operator substitutes alternate financial assurance as specified in 335-6-13-.07 or if he is no longer required to demonstrate financial responsibility in accordance with the requirements of 335-6-13-.08.~~

(2) Surety Bond Guaranteeing Payment or Performance.

(a) An owner or operator may demonstrate financial assurance for closure by obtaining a payment or performance surety bond ~~that~~ which conforms to the requirements of ~~335-6-13-.07(2)~~ subparagraphs (2)(a)1. through (2)(a)5. of this rule.

1. The bond shall be effective before the initial start-up of operations for new centralized waste treatment facilities, or before the reissuance or modification of a permit for existing facilities. ~~The owner or operator shall place a copy of the bond in the facility record and submit a copy of the bond to the Department for approval.~~

2. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the U.S. Department of the Treasury.

~~(b)3.~~ 3. The penal sum of the bond shall be in an amount at least equal to the current closure cost estimate, except as provided in 335-6-13-.07 paragraph (6) of this rule.

~~(e)4.~~ 4. Under the terms of the bond, the surety will become liable on the bond obligation when the principal (i.e., the owner or operator) fails to perform as guaranteed by the bond.

5. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the principal and to the Department 120 days in advance of cancellation.

(b) The owner or operator shall retain a duplicate copy of the bond in the waste treatment facility's record and shall submit the original copy of the bond to the Department, as specified in rule 335-6-13-.06(1).

~~(e)c~~ (c) The owner or operator shall establish a standby trust fund. The standby trust fund shall meet the requirements of 335-6-13-.07(1) except the requirements for initial payment and subsequent annual payments specified in 335-6-13-.07(1) b through e. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency. If the bond is forfeited, the surety shall deposit the payments made under the terms of the bond directly into the standby trust fund in accordance with instructions from the Department. Payments from the trust fund shall be approved by the Department.

(d) The owner or operator shall retain a duplicate copy of the trust agreement in the waste treatment facility's record and shall submit the original copy to the Department, as specified in rule 335-6-13-.06(1).

~~(e) Payments made under the terms of the bond will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Department. Payments from the trust fund shall be approved by the Department.~~

~~(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner and operator and to the Department 120 days in advance of cancellation. If the surety cancels the bond, the owner or operator shall obtain alternate financial assurance as specified in 335-6-13-.07 within 90 days of the notice of cancellation.~~

(e) If the surety cancels the bond, the owner or operator shall obtain an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(gf) The owner or operator may cancel the bond only if an alternate allowable financial assurance mechanism is demonstrated substituted as specified in 335-6-13-.07 or if the owner or operator is released from the financial assurance requirements no longer required to demonstrate financial responsibility in accordance with rule 335-6-13-.08.

(3) Letter of Credit.

(a) An owner or operator may satisfy the requirements of 335-6-13-.07 demonstrate financial assurance by obtaining an irrevocable standby letter of credit that which conforms to the requirements of 335-6-13-.07(1) subparagraphs (3)(a)1. through (3)(a)3. of this rule.

1. The letter of credit shall be effective before the initial start-up of operations for new centralized waste treatment facilities or before the reissuance or modification of a permit for existing facilities. ~~The owner or operator shall place a copy of the letter of credit in the facility's record and submit a copy of the letter of credit to the Department for approval.~~

2. The issuing institution shall be an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency.

~~(b) A letter from the owner or operator referring to the letter of credit by number, issuing institution, and date shall be included with the letter of credit in the facility record and a copy shall be submitted to the Department. The letter shall provide the name and address of the facility, name and address of the owner/operator, and the amount of funds assured.~~

(e)3. The letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current closure cost estimate

~~for closure except as provided in 335-6-13-.07 paragraph (6) of this rule. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution has cancelled the letter of credit by sending notice of cancellation by certified mail to the letter of credit applicant (i.e., the owner and operator) and to the Department 120 days in advance of cancellation. ~~If the letter of credit is cancelled by the issuing institution, the owner or operator shall obtain alternate financial assurance within 90 days of the notice of cancellation.~~~~

(b) The owner or operator shall submit the original copy of the letter of credit to the Department, as specified in rule 335-6-13-.06(1). The submittal shall be accompanied by a transmittal letter that refers to the letter of credit by number, issuing institution, and date and that provides the name and address of the centralized waste treatment facility, name and address of the owner/operator, and the amount of funds assured.

(c) The owner or operator shall retain a duplicate copy of the letter of credit and a copy of the transmittal letter required by subparagraph (3)(b) of this rule in the centralized waste treatment facility's record.

(d) If the issuing institution cancels the letter of credit, the owner or operator shall obtain an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(de) The owner or operator may cancel the letter of credit only if an alternate allowable financial assurance mechanism is substituted demonstrated as specified in 335-6-13-.07 or if the owner or operator is released from the financial assurance requirements in accordance with rule 335-6-13-.08.

(4) Insurance.

(a) An owner or operator may demonstrate financial assurance for closure by obtaining insurance ~~that~~ which conforms to the requirements of 335-6-13-.07 subparagraphs (4)(a)1. through (4)(a)6. of this rule.-

1. The insurance shall be effective before the initial start-up of operations for new centralized waste treatment facilities or before the reissuance or modification of a permit for existing facilities.-

2. At a minimum, the insurer shall be licensed to transact the business of insurance, or shall be eligible to provide insurance as an excess or surplus lines insurer, in one or more Sstates. ~~The owner or operator shall place a copy of the insurance policy in the facility's record and submit a copy of the insurance policy to the Department for approval.~~

(b)3. The ~~closure~~ insurance policy shall guarantee that funds will be available for closure of the waste treatment facility when final closure occurs. The policy shall also guarantee that once closure begins, the insurer will be responsible for the paying out of funds to the insured (i.e., the owner or operator) or to other person(s) authorized to conduct closure up to an amount equal to the

face amount of the policy upon the direction of the Department.

(e)4. The insurance policy shall be issued for a face amount at least equal to the current closure cost estimate ~~for closure except as provided in 335-6-13-.07 paragraph (6) of this rule.~~ The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

~~(d) An owner or operator, or other person authorized to conduct closure may receive reimbursements for closure. Requests for reimbursement will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure and if justification and documentation of the cost is placed in the facility's record and approved by the Department. The owner or operator shall place the documentation of the justification for reimbursement in the facility's record and notify the Department that reimbursement has been received.~~

(e)5. The insurance policy shall contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided that such consent is not unreasonably refused.

~~(f)6. The insurance policy shall provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the insured owner and operator and to the Department 120 days in advance of cancellation. ~~If the insurer cancels the policy, the owner or operator shall obtain alternate financial assurance as specified in 335-6-13-.07 within 90 days of the notice of cancellation.~~~~

(b) The owner or operator shall retain a duplicate copy of the insurance policy in the facility's record and shall submit the original copy of the insurance policy to the Department, as specified in rule 335-6-13-.06(1) .

(c) An owner or operator, or other person(s) authorized to conduct closure, may receive reimbursements for closure. Requests for reimbursement will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure. Any person seeking reimbursement for closure costs shall provide justification and documentation of the closure costs to the Department for approval prior to requesting reimbursement from the insurer. Persons receiving reimbursement shall notify the Department of the reimbursement within 30 days of receipt. Persons receiving reimbursement shall retain the documentation of the justification for reimbursement and confirmation of receipt of reimbursement in the waste treatment facility's record or other record, as applicable.

(d) If the insurer cancels the policy, the owner or operator shall obtain

an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(ge) The owner or operator may cancel the insurance policy only if an alternate allowable financial assurance mechanism is demonstrated~~substituted as specified in 335-6-13-07~~ or if the owner or operator is ~~no longer required to demonstrate financial responsibility released from the financial assurance requirements~~ in accordance with the requirements of rule 335-6-13-08.

(5) State-Approved Mechanism. An owner or operator may ~~satisfy the requirements of 335-6-13-07~~ demonstrate financial assurance by obtaining other mechanisms that meet the criteria ~~specified in 335-6-13-07~~ of this rule and that are approved by the Department.

(6) Use of Multiple Mechanisms. An owner or operator may demonstrate financial assurance ~~for closure as required by 335-6-13-06(4) and (5)~~, by establishing~~obtaining~~ more than one financial mechanism per centralized waste treatment facility. The mechanisms used must be as specified in 335-6-13-07(1) to (5)~~shall meet the applicable criteria specified in paragraphs (2) through (5) of this rule~~; except that financial assurance for an amount at least equal to the current closure cost estimate for closure may be provided by multiple a combination of mechanisms, rather than a single mechanism.

(7) General Criteria for Financial Assurance Mechanisms.

(1) The language of the financial assurance mechanisms listed in 335-6-13-07 paragraphs (1) to (5) of this rule shall~~must ensure that the instruments satisfy the following criteria:~~

(a) ~~The financial assurance mechanisms must ensure that the amount of funds assured is sufficient to cover the costs of closure.~~

(b) ~~The financial assurance mechanisms must ensure that fFunds will be available in a timely fashion if needed.~~

(c) ~~The financial assurance mechanisms must be obtained by the owner or operator~~ is obtaining the mechanism by the required dates as indicated ~~in these requirements~~ this rule and is maintaining the mechanism until the owner or operator is released from the financial assurance requirements under rule 335-6-13-08.

(d) The financial assurance mechanism iss~~is~~ must be legally valid, binding, and enforceable under sState and federal law.

(8) Discounting. The Department may allow discounting of closure cost estimates in obtained in accordance with paragraphs 335-6-13-06 (2) and (3) up to the rate of return for essentially risk free investments, net of inflation, under the following conditions:

(a) The Department determines that cost estimates are complete and

accurate and the owner or operator has submitted a statement from an engineer so stating;

(b) The Department finds the waste treatment facility in significant compliance with applicable and appropriate permit conditions; and

(c) The owner or operator adjusts the discounted closure cost estimates ~~must be adjusted~~ annually to reflect inflation and years of remaining life.

(9) The owner or operator subject to the requirements of this chapter shall certify in writing to the Department that each mechanism used to demonstrate financial assurance as required by rule 335-6-13-.06 remains current and valid and that changes to the closure plan or waste treatment facility conditions have not occurred that would significantly increase the maximum cost of closure. If one or both conditions cannot be certified as true, the owner or operator shall so indicate and provide an explanation. The certification shall be submitted annually no later than the anniversary of the date the mechanism initially became effective.

Author: Chris Sasser; Daphne SmartLutz

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: March 26, 2013.

Amended: XXXX XX, 2018.