

CHAPTER 33.1-20-14 FINANCIAL ASSURANCE REQUIREMENTS

Section

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33.1-20-14-01. Financial assurance for solid waste disposal facilities.

1. The requirements of this chapter apply to all new and expanded solid waste disposal facilities and to existing solid waste disposal facilities that have not been closed by April 9, 1994. These requirements do not apply to inert waste landfills.
2. New or expanded facilities must demonstrate financial assurance prior to acceptance of solid waste and existing facilities by the date given in subsection 1.
3. Owners of facilities may set up one mechanism or multiple mechanisms to demonstrate financial assurance for both closure and postclosure care of each facility. The amount of funds available through the mechanisms must be no less than the sum of funds that would be available if a single mechanism had been established and maintained for financial assurance of closure and of postclosure care.
4. Mechanisms used to demonstrate financial assurance under this chapter must ensure that the amount of funds assured is adequate to cover the costs of closure and postclosure care and that the funds will be available in a timely fashion whenever needed, until released from the financial assurance requirement by the department.
5. Mechanisms must be legally valid and binding under North Dakota law.

History: Effective January 1, 2019; amended effective July 1, 2020.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-02. Cost estimates for closure and postclosure.

1. Each owner or operator shall prepare separate written closure and postclosure estimates of the costs of hiring a third party to complete identified activities of the facility closure and postclosure plans.
 - a. The initial cost estimates must be in current dollars, and cost estimates must be adjusted annually for inflation.
 - b. The cost estimate for closure must equal the cost of closing the largest area requiring a final cover during the active life of the facility.
 - c. The owner or operator must increase the cost estimates if changes in the closure plan or postclosure plan increase the maximum costs of closure or postclosure care, respectively. The owner or operator may reduce a cost estimate for closure if it exceeds the maximum costs of closure during the remaining life of the facility or a cost estimate for postclosure care if it exceeds the maximum costs of postclosure during the remaining postclosure period.

- d. The cost estimate for postclosure must account for the total costs of postclosure care over the entire postclosure period, including the most expensive costs of postclosure during the postclosure period.
2. Each owner or operator shall prepare a new closure or postclosure cost estimate whenever any of the following occurs:
 - a. Changes in operating plans or facility design affect the closure or postclosure plans;
 - b. There is a change in the expected year of closure; and
 - c. The department directs the owner or operator to revise the closure or postclosure plan.

History: Effective January 1, 2019.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-03. Financial assurance mechanism for closure and postclosure.

1. Each owner or operator of an applicable solid waste disposal facility shall establish one or more financial assurance mechanisms which together total an amount equal to the closure cost estimate or postclosure cost estimate prepared in accordance with section 33.1-20-14-02.
2. An owner or operator may satisfy the requirements for financial assurance for both closure and postclosure care by using a trust fund, surety bond, letter of credit, insurance, financial test, or corporate guarantee. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a single mechanism had been established and maintained for financial assurance of closure and of postclosure care.
3. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be specified in this section, except that it is the combination of mechanisms, rather than the single mechanism which must provide financial assurance for an amount at least equal to the current closure or postclosure, or both, cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, the owner or operator may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The department may use any or all of the mechanisms to provide for closure or postclosure, or both, care of the facility.
4. Each financial assurance mechanism must be approved by the department. The following financial assurance mechanisms are acceptable, provided respective requirements of section 33.1-20-14-07 are met:
 - a. Trust fund;
 - b. Surety bond;
 - c. Irrevocable letter of credit;
 - d. Financial test;
 - e. Insurance policy; and
 - f. Corporate guarantee.

5. A trust fund, surety bond, letter of credit, corporate guarantee, financial test, or insurance policy may be terminated or canceled only if alternate financial assurance is substituted or if the owner or operator is released from the requirement by the department.

History: Effective January 1, 2019; amended effective July 1, 2020.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-04. Implementation of financial assurance for closure and postclosure.

1. The closure plan and postclosure plan required by this article must specify the financial assurance mechanisms required by this chapter and, if a trust fund, surety bond, or insurance policy, the methods and schedules for funding the mechanisms.
2. During the active life of the facility, the owner or operator shall adjust the closure cost estimate and postclosure cost estimate for inflation and shall submit the following information to the department no later than August thirty-first of each year:
 - a. Updated inflation adjusted closure cost estimate and postclosure cost estimate;
 - b. A summary of financial assurance in place;
 - c. The submittal date of the most recent detailed cost estimates for closure and postclosure;
 - d. The maximum allowed open area and quantities;
 - e. Current estimated open area and quantities; and
 - f. The mechanisms in use.

History: Effective January 1, 2019; amended effective July 1, 2020.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-05. Financial assurance for corrective action.

1. The department may require an owner or operator to undertake remedial measures, including corrective action, under the provisions of subsection 10 of North Dakota Century Code section 23.1-08-03 and chapter 61-28 when a release occurs.
2. An owner or operator required to undertake corrective action must have a detailed estimate, in current dollars, of the cost of hiring a third party to perform the corrective action.
 - a. The cost estimate must account for the total costs of corrective action for the entire corrective action period.
 - b. The owner or operator must annually adjust the cost estimate for inflation until corrective action is completed.
 - c. The owner or operator shall increase the cost estimate if changes in corrective action or conditions increase the total costs. The owner or operator may reduce the cost estimate if the total costs exceed the maximum remaining costs of corrective action.
3. An owner or operator required to undertake corrective action shall establish financial assurance in accordance with section 33.1-20-14-07 no later than one hundred twenty days after the corrective action remedy has been selected. The owner or operator shall provide continuous coverage for corrective action until demonstrating compliance with article 33.1-16.

History: Effective January 1, 2019.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-06. Liability requirements for industrial waste landfills.

An owner or operator of an industrial waste landfill shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility. The owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount of at least one million dollars per occurrence with an annual aggregate of at least two million dollars, exclusive of legal defense costs. This liability coverage may be demonstrated with one or more of the mechanisms listed in subsection 2 of section 33.1-20-14-03.

History: Effective January 1, 2019.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-07. Specific requirements of mechanisms for financial assurance.

1. **Trust fund.** A trust fund must satisfy the requirements of this subsection.
 - a. The trustee must be an entity which has authority to act as a trustee in this state and whose trust operations are regulated and examined by a federal or state agency.
 - b. Payments into the trust fund must be made annually over the initial permit or over the remaining life of the solid waste management unit or facility, whichever is shorter. This is the pay-in period.
 - c. The first payment into the trust fund must equal or exceed the current cost estimate for closure or postclosure, whichever is applicable, divided by the number of years defined in subdivision b. The amount of subsequent payments must be determined by the following formula:

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

Where CE is the current cost estimate, 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 must be made for new or expanded facilities before the initial receipt of solid waste or for existing facilities before the effective date as provided by subsection 1 of section 33.1-20-14-01.
- e. If an owner or operator establishes a trust fund after having used one or more alternative mechanisms specified in section 33.1-20-14-03, the initial payment into the trust fund must equal or exceed the amount that the fund would contain if the fund were established initially and annual payments made according to subdivision c.
- f. The owner or operator, or other person authorized to conduct closure or postclosure care may request reimbursement from the trustee for these expenses. Requests for reimbursement will be approved by the trustee only if sufficient funds are remaining in the trust fund.

2. **Surety bond.** A surety bond guaranteeing payment or performance must satisfy to the requirements of this subsection.
 - a. The penal sum of the bond must be in an amount equal to or greater than the current closure or postclosure cost estimate, whichever is applicable. The surety company issuing the bond, at a minimum, must be among those acceptable sureties on federal bonds in Circular 570 of the United States department of treasury and be authorized to do business within this state.
 - b. Under the terms of the bond, the surety must become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.
 - c. The owner or operator must establish a standby trust fund that meets the requirement of subsection 1, except for payment provisions in subdivisions b, c, and d.
 - d. Payments made under the terms of the bond must be deposited by the surety into the standby trust fund. Payments from the trust fund must be approved by the trustee.
 - e. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the surety cancels the bond, the owner or operator must obtain alternate financial assurance.
3. **Letter of credit.** A letter of credit must satisfy the requirements of this subsection.
 - a. The issuing institution of a letter of credit must have authority to issue letters of credit in this state and its operations must be 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 and including the name and address of the solid waste management unit or facility and the amount of funds assured, must be provided with the letter of credit to the department.
 - c. The letter of credit must be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. The letter of credit must provide that the expiration date will be automatically extended for a period of one year unless the issuing institution has canceled the letter of credit by sending notice of cancellation to the owner or operator and to the department one hundred twenty days or more in advance of the cancellation. If the letter of credit is canceled by the issuing institution, the owner or operator must obtain alternate financial assurance.
 - d. The owner or operator shall establish a standby trust fund that meets the requirement of subsection 1, except for payment provisions in subdivisions b, c, and d.
4. **Insurance.** Insurance must satisfy the requirements of this subsection.
 - a. The insurer must be licensed to transact the business of insurance in this state, or eligible to provide insurance as an excess or surplus lines insurer in one or more states.
 - b. The insurance policy must guarantee that funds will be available to close the solid waste management unit or facility whenever closure occurs or to provide postclosure care whenever the postclosure period begins, whichever is applicable. The policy must also guarantee that, once closure or postclosure care begins, the insurer will be responsible for paying out funds up to an amount equal to the face amount of the policy upon the direction of the department to such party or parties as the department specifies.

- c. The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure or postclosure care, whichever is applicable. 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. Each insurance policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer.
- e. The insurance policy must 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 must provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay a premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the owner or operator and to the department one hundred twenty days or more in advance of cancellation. If the insurer cancels the policy, the owner or operator must obtain alternate financial assurance.

Cancellation, termination, or failure to renew may not occur; however, during the one hundred twenty days beginning with the date of receipt of a notice by the department and the owner or operator as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur, and the policy will remain in full force and effect in the event that on or before the date of expiration:

- (1) The department deems the facility abandoned;
 - (2) The permit is terminated or revoked, or a new permit is denied;
 - (3) Closure is ordered by the department or a state court or other court of competent jurisdiction;
 - (4) The owner or operator is named as debtor in a voluntary or involuntary proceeding under United States Code title 11 (bankruptcy); or
 - (5) The premium due is paid.
- f. After beginning partial or final closure or during the postclosure period, or both, an owner or operator or any other person authorized to perform closure or postclosure may request reimbursement for closure or postclosure expenditures by submitting itemized bills to the department. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum cost of closing the facility over its remaining operating life. After receiving bills for closure or postclosure activities, the department shall determine whether the expenditures are in accordance with the partial or final closure or postclosure plan or otherwise justified and if so, the department shall instruct the insurer to make reimbursement in such amounts as the department specifies in writing. If the department has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, the department may withhold reimbursement of such amounts as the department deems prudent until the department determines, in accordance with section 33.1-20-14-08, that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the department does not instruct the insurer to make such reimbursement, the department will provide the owner or operator with a detailed written statement of reasons.

- 5. **Financial test and corporate guarantee.** A financial test or corporate guarantee must satisfy the requirements of this subsection.

- a. For the financial test, the owner or operator must have:
 - (1) A ratio of current assets to current liabilities greater than one and five-tenths, or a current rating for the owner's or operator's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and
 - (2) Net working capital and tangible net worth each at least four times the sum of the current cost estimates for closure or postclosure, whichever is applicable; and
 - (3) Tangible net worth of at least two million dollars; and
 - (4) Assets located in the United States amounting to at least four times the current cost estimates for closure or postclosure care, whichever is applicable.
- b. To demonstrate the financial test, the owner or operator must submit the following items to the department in a letter which transmits:
 - (1) A copy of an independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest fiscal year; and
 - (2) A report from an independent certified public accountant to the owner or operator stating that:
 - (a) The accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, yearend financial statements for the latest fiscal year; and
 - (b) In connection with that procedure, no matters came to lead the accountant to believe that specified data should be adjusted.
- c. After initial submission of the items in subdivision b, the owner or operator must send updated information to the department no later than August thirty-first of each succeeding fiscal year. This information must consist of all items specified in subdivision b.
- d. If the owner or operator no longer meets the requirements of subdivision a, the owner or operator must send notice by certified mail to the department within ninety days and establish alternate financial assurance within one hundred twenty days.
- e. The department may disallow use of the financial test on the basis of qualification in the opinion expressed by the certified public accountant in the accountant's report on examination of owner's or operator's statements. An adverse opinion or a disclaimer of opinion may be cause for disallowance. The owner or operator shall provide alternate financial assurance within thirty days after notification of the disallowance.
- f. An owner or operator may meet the requirements of this subsection 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 of subdivisions a through e and a certified copy of the guarantee must accompany the items in subdivision b. The terms of the guarantee must provide that:
 - (1) Guarantor will complete closure or postclosure care, whichever is applicable, if the owner or operator fails to do so; and

- (2) The corporate guarantee will remain in effect unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the department; and
- (3) Guarantor will provide alternate financial assurance within ninety days if the corporate guarantee is canceled and if the owner or operator fails to provide approved alternate financial assurance.

History: Effective January 1, 2019; amended effective July 1, 2020.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23

33.1-20-14-08. Release of the owner or operator from the requirements of this chapter.

1. **Release of financial assurance for completion of closure.** After receiving certification from the owner or operator and a qualified professional engineer that final closure has been completed in accordance with the approved closure plan and upon review and approval by the department, the department shall notify the owner or operator, in writing, that the owner or operator is no longer required by this chapter to maintain financial assurance for final closure of the facility. If the department has reason to believe that the final closure has not been in accordance with the approved closure plan, the department shall provide the owner or operator a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.
2. **Release of financial assurance for completion of postclosure care.** After receiving certification from the owner or operator and a qualified professional engineer that postclosure care has been completed in accordance with the approved postclosure care plan and upon review and approval by the department, the department shall notify the owner or operator, in writing, that the owner or operator is no longer required by this chapter to maintain financial assurance for postclosure care of the facility. If the department has reason to believe that the postclosure care has not been in accordance with the approved postclosure care plan, the department shall provide the owner or operator a detailed written statement of any such reason to believe that postclosure care has not been in accordance with the approved postclosure care plan.

History: Effective July 1, 2020.

General Authority: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 1

Law Implemented: NDCC 23.1-08-03; S.L. 2017, ch. 199, § 23