

Solid Waste Financial Assurance

Reflecting the “FASIT” amendments to the rules, as directed by
Minnesota Legislature in 2010

Authority

The bulk of Minnesota’s financial assurance requirements, Minn. R. ch. 7035.2665, were adopted in November 1988, and closely parallel the Environmental Protection Agency’s (EPA’s) Subtitle D. EPA rules allow states to establish requirements that are more stringent than those set by the federal government, but states cannot fall below the EPA requirements. In order to minimize financial liabilities in the future and assure the success of our financial assurance program, key points of the Minnesota Rules include:

1. Up-front coverage of corrective action costs, meaning that money is available prior to a corrective action event;
2. Simplified administration and avoidance of ambiguity that can lead to expensive litigation (MPCA rules include “boilerplate” mechanism language that must be used rather than general criteria to be satisfied);
3. Requirements that facility owners submit financial assurance cost estimates, mechanism documents, annual cost updates, and annual mechanism status reports for state review and approval;
4. Guarantees and financial tests to be accompanied by 100% collateral, since Minnesota Rules do not allow insurance as a financial assurance mechanism;
5. Specific financial-assurance requirements for most types of new landfills that received their initial permits after January 1, 2011. These provisions were adopted in response to legislative directives passed in 2010.

Minnesota solid waste financial assurance rules can be found by contacting the MPCA or linking to the Internet at: <http://www.revisor.leg.state.mn.us/arule/7035/>.

Applicability

Financial assurance is required for all owners and operators of mixed municipal solid waste (MMSW) land disposal facilities and MMSW combustor ash disposal facilities, and certain types of other landfills that received their initial permits after January 1, 2011.

Compliance with financial assurance rules may also be a permit requirement for owners and operators of demolition debris and industrial solid waste disposal facilities that operated before January 1, 2011. The criteria to determine whether financial assurance is required include size, site hydrogeology, operating life, ongoing expenses, past and current operational practices, corrective action if any, and types of waste accepted.

Newly permitted or re-permitted sites must provide proof of financial assurance with the final permit application.

Compliance methods

Permittees are required to demonstrate, in advance, their financial ability to meet expenses that may be incurred during closure, postclosure care and contingency action operations. The financial assurance rules were

adopted to standardize methods for permittees so they could demonstrate financial ability to pay and provide adequate financial security.

Financial security takes the form of either a guarantee from a financial intermediary or collateral that is held by the MPCA.

Permittees can choose the financial assurance mechanism that best suits their individual needs as long as the value equals the sum of current cost estimates for closure, postclosure care, and contingency action operations. The permittee can switch from one mechanism to another if the permittee's needs change. They can use more than one mechanism to cover a facility. Permittees who have more than one facility may also use a single financial mechanism to cover all sites.

Financial assurance mechanisms for landfills permitted prior to January 1, 2011

The financial assurance mechanism requirements are found in Minn. R. ch. 7035.2805 and include specific language that must be used verbatim when establishing the mechanism. The MPCA must review and approve the mechanism and any amendments made.

For landfills that received permits prior to January 1, 2011, the mechanisms allowed are:

Trust funds (Minn. R. ch. 7035.2705)

A trust can be set up, with the MPCA named as beneficiary, through a trust agreement. An independent trustee manages the reserve funds and has authority to engage in trust operations. Permittees must make monthly payments into the fund until it equals the sum of the current cost estimates and is considered fully funded. The rule provides a method for calculating the monthly payment amount. The MPCA site engineer will assist you with this calculation if needed.

Dedicated long-term care trust funds (Minn. R. ch. 7035.2720)

This is a special kind of trust fund that may be used only by public sector permittees. The elements are similar to those of the trust fund described above except that the trustee, under a dedicated fund, is a local government official and the trust set up is a part of the municipal treasury. The dedicated trust fund is set up by a resolution enacted by the appropriate local governmental body (example – a city council or county board).

Surety bond guaranteeing payment into a trust fund (Minn. R. ch. 7035.2725)

A surety bond is a contract which assures that if the permittee fails to establish a trust fund before beginning final site closure, the surety will deposit the required amount (the penal sum of the bond which must equal current cost estimates) into the trust account before final site closure. A surety bond has no expiration date.

Standby trust (Minn. R. ch. 7035.2705)

If a permittee provides a surety bond, a letter of credit, or self-insurance as financial assurance, the permittee must also establish a "standby" trust account that receives payment from either the surety or the bank which issues the letter of credit. Payment would be made into the standby trust account if the permittee fails to perform as promised or before final closure operations begin.

Surety bond guaranteeing performance (Minn. R. ch. 7035.2735)

This bond has basic provisions similar to the payment guarantee bond, but makes a different guaranty. The surety, in this case, guarantees that the permittee will perform closure, postclosure care, and corrective action activities in accordance with appropriate plans and MPCA orders. If the permittee does not perform as required, the surety promises to deposit the required funds into a standby trust.

Letter of credit (Minn. R. ch. 7035.2745)

A letter of credit extends the credit of the issuing bank or institution to the MPCA, on behalf of the permittee. The MPCA commissioner may draw on the credit if the permittee fails to perform required closure, postclosure care, or corrective action work. The letter of credit is issued for the sum of the current cost estimates. It must be irrevocable and must be issued for at least one year. It must be extended automatically from year to year unless the lender gives the MPCA prior notice of intent not to renew it. A standby trust fund must also be established with a letter of credit.

Self-insurance (Minn. R. ch. 7035.2750)

The self-insurance option differs from the other mechanisms because the self-insured permittee will not have an independent guarantor or trustee. (A trustee will be needed, but only in a standby capacity.) The self-insured permittee demonstrates its ability to pay for corrective actions and closure with collateral, municipal bonds, or corporate bonds (equal to the relevant cost estimates). Public sector permittees must provide municipal bonds. Private sector permittees must provide bonds known as unsubordinated debentures. The state treasurer holds these bonds. If the self-insured permittee does not perform closure, postclosure care, or corrective action as required, the bonds will be sold and the sale proceeds will be used to complete the required work. A standby trust fund must also be established. Self-insured permittees must pass a series of financial tests designed to determine financial strength. Written proof of the permittee's qualifications, including financial data and reports, must be updated each year.

Landfills initially permitted after January 1, 2011

The following provisions are based on MPCA rules as directed by the Minnesota Legislature in 2010, and apply to landfills that receive their initial Solid Waste permits from the MPCA after January 1, 2011, and that meet the descriptions in item (1).

- Types of newly permitted landfills covered:** The list of landfill types that by rule must provide financial assurance is broader than before, including not only MMSW landfills and MSW combustor ash landfills, but also industrial waste land disposal facilities, and demolition debris land disposal facilities (except those solid waste land disposal facilities that accept only demolition and construction debris and incidental nonrecyclable packaging and certain industrial wastes limited to wood, concrete, porcelain fixtures, shingles, or window glass resulting from the manufacture of building materials). (See Minn. R. 7035.2695, item B).
- Self-insurance no longer allowed as a mechanism:** Such landfills may employ any of the mechanisms listed above under "Financial Assurance Mechanisms," except for self-insurance.
- New mechanism available:** Such landfills can propose an alternative means of financial assurance as described in Minn. R. 7035.2751. With the assistance of an independent expert, MPCA will review each "alternative means" proposal as to whether it satisfies all conditions set out in 7035.2751. If the alternative-means proposal does not satisfy the conditions, the landfill owner may employ the other, conventional mechanisms available by rule for such landfills.
- Endpoint for financial assurance responsibility:** These facilities must maintain financial assurance as long as the facility poses a potential risk to human health, wildlife, or the environment, as determined by the MPCA following an empirical assessment conducted under the postclosure care provisions of Minn. R. 7035.2655.

Cost estimates for financial assurance

Estimates are made in connection with the closure plans required under Minn. R. ch. 7035.2625. Estimates assume that closure occurs when costs incurred will be the greatest and when the open area is greatest. Estimates are made in connection with postclosure care and maintenance plans required under Minn. R. ch. 7035.2645. The estimates must allow for inflation expected to occur after closure and before the end of the postclosure care period.

Estimates are made in connection with the contingency action plans required under Minn. R. ch. 7035.2615. The financial assurance required equals the expected value of the sum of the worst case series of events identified in the contingency action plan. The expected value equals the cost of an event multiplied by its likelihood to occur. Typically, the expected value of contingency action costs is between 50% and 60% of the total value. Therefore, the MPCA has allowed facilities to use 60% of the total value as the expected value. However, if a contingency action has occurred, the cost estimate for that contingency item is not subject to the 60% reduction and must be fully funded at 100% (probability = 1).

Annual cost adjustments for inflation

Every year an inflation adjustment must be made. The submittal date for the adjustment is the one-year anniversary of the financial instrument's effective date. However, the MPCA has allowed submittal of updated cost information with the facility's annual report that is due each year on February 1.

The inflation measure used is derived from federal statistics. The source is the implicit price deflator for gross national product that is published in the Commerce Department's Survey of Current Business. The adjusted current value cost estimate is calculated by multiplying the inflation measure by the facility's approved current value cost estimate. Facility owners making payments into a trust fund and applying all interest earnings to their trust fund may base their trust fund payment on their total present value cost estimate. The Federal Reserve Bank's discount rate, in effect, is used to calculate a present value amount for each year of the facility's postclosure care period. The MPCA will notify permittees, annually, of the appropriate amount for the inflation adjustment and discount rate.

The cost estimates used to set financial assurance levels will change from time to time. The rules for each compliance method contain procedures to be followed when cost estimates change.

Termination

The termination process:

- Compliance responsibilities end when the MPCA commissioner sends a written release to the facility.
- Closure responsibilities end after facility closure is certified and approved.
- Postclosure care and corrective action responsibilities continue at least 20 years after the date of approved closure and MPCA commissioner approval. Release of any remaining funds will depend the status of the closed landfill at the time of the application. EPA regulations require 30 years of postclosure care at MMSW landfills.
- Regarding release of financial assurance funds, note that special conditions apply to certain types of landfills that are newly permitted after January 1, 2011, described above.

For more information go to MPCA's website: <https://www.pca.state.mn.us/>, or contact the project engineer assigned to your facility.