NEBRASKA ADMINISTRATIVE CODE

Title 132 - NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

Chapter 8 - FINANCIAL ASSURANCE CRITERIA: SOLID WASTE MANAGEMENT FACILITIES

001 The requirements of this chapter are effective April 9, 1996, and are applicable to the owners or operators of all permitted solid waste management facilities except as provided in Sections 001.01 and 001.02 below.

001.01 The requirements of this chapter do not apply to owners or operators who are State or Federal government entities whose debts and liabilities are the debts and liabilities of a State or the United States.

001.02 No county, municipality, or agency shall be required to provide proof of financial responsibility to obtain or renew a permit for a solid waste processing facility.

002 Closure cost estimate. The owner or operator of a solid waste disposal area must have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the largest area of the solid waste disposal area requiring a final cover as required in these regulations at any time during the active life in accordance with the closure plan. The owner or operator must provide the Department with the estimate for approval and place a copy of the estimate in the operating record. If the solid waste disposal area is constructed in phases the closure plan must also provide a detailed written estimate, in current dollars, of the cost of hiring a third party to close each phase of the permitted area in accordance with the closure plan.

002.01 The cost estimate must equal the cost of closing the largest area of a solid waste disposal area requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan.

002.02 During the active life of a solid waste disposal area, the owner or operator must annually adjust the closure cost estimate for inflation by using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross Domestic Product published by the United States Department of Commerce. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

002.03 The owner or operator must increase the closure cost estimate and the amount of financial assurance provided under 004 of this chapter if changes to the closure plan or changes in the solid waste disposal area conditions increase the maximum cost of closure at any time during the remaining active life.

002.04 The owner or operator may reduce the closure cost estimate and the amount of financial assurance provided under 004 of this chapter if the cost estimate exceeds the maximum cost of closure at any time during the remaining life of the solid waste disposal area. The owner or operator must provide the Department the justification for the reduction of the closure cost estimate for approval prior to reducing the amount of financial assurance and place a copy of the documentation in the operating record.

003 The owner or operator of a solid waste processing facility requiring a permit, shall have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the facility and properly dispose of all materials or wastes left at the site. This estimate shall be updated at the time of permit renewal, and shall include the cost of disposing of the most accumulated waste or materials that would ever be stored at the facility any one time.

004 Establishing financial assurance for closure. The owner or operator of each solid waste management facility must establish financial assurance for closure of the facility in compliance with 009. The owner or operator must provide continuous coverage for closure until released from financial assurance requirements.

004.01 The Department will inspect a permitted solid waste management facility when notified by the owner or operator that the closure plan has been implemented and in the case of a solid waste disposal area, compliance with the deed notation and closure certification by a professional engineer as required in these regulations, has been demonstrated. If the inspection reveals that the approved closure plan has been properly effected, the Department shall authorize the release of the financial assurance requirement for closure of that solid waste management facility. If the inspection reveals the closure plan has not been properly implemented, the Department may retain all or part of the remaining financial assurance instrument.

005 Post-closure cost estimate. The owner or operator of a solid waste disposal area must have a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct post-closure care for the solid waste disposal area in compliance with the post-closure plan. The post-closure cost estimate used to demonstrate financial assurance in 006 of this chapter must account for the total costs of conducting post-closure care, including annual and periodic costs as described in the post-closure plan over the entire post-closure care period. The owner or operator must provide the Department with the estimate for approval and place a copy in the operating record.

005.01 The cost estimate for post-closure care must be based on the most expensive costs of post-closure care during the post-closure care period.

005.02 During the active life of a solid waste disposal area and during the post-closure care period, the owner or operator must annually adjust the post-closure cost estimate for inflation by using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross Domestic Product published by the United States Department of

Commerce. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

005.03 The owner or operator must increase the post-closure care cost estimate and the amount of financial assurance provided under 006 of this chapter if changes to the post-closure plan or changes in the solid waste disposal area conditions increase the maximum cost of post-closure care.

005.04 The owner or operator may reduce the post-closure cost estimate and the amount of financial assurance provided under 006 of this chapter if the cost estimate exceeds the maximum costs of post-closure care remaining over the post-closure care period. The owner or operator must provide the Department the justification for the reduction of the post-closure cost estimate for approval prior to reducing the amount of financial assurance and place a copy of the documentation in the operating record.

006 Establishing financial assurance for post-closure. The owner or operator of each solid waste disposal area must establish, in a manner in accordance with 009, financial assurance for the costs of post-closure care as required under these regulations. The owner or operator must provide continuous coverage for post-closure care until released from financial assurance requirements for post-closure care.

006.01 Within one year of the end of the designated post-closure care period, the Department will make an inspection of a solid waste disposal area to determine if the approved post-closure plan has been properly implemented. If the inspection reveals that the post-closure plan has been properly implemented, the remaining amount of the financial assurance mechanism will be released. If the inspection reveals that the post-closure plan has not been properly implemented, the Department may retain all or part of the remaining financial assurance instrument or require an extension of the post-closure period.

007 Remedial action program cost estimate. An owner or operator of a solid waste disposal area required to undertake a remedial action program under Chapter 7, Section 006 must have a detailed written cost estimate, in current dollars, of the cost of hiring a third party to perform the remedial action in accordance with the program required under Chapter 7, Section 006. The remedial action cost estimate must account for the total costs of remedial action activities as described in the remedial action plan submitted to the Department in accordance with Title 118 - Groundwater Quality Standards and Use Classification, and for any other activities established as necessary by the Director for protection of human health and the environment for the entire remedial action period. The owner or operator must provide the Department with the estimate for approval and place a copy in the operating record.

007.01 The owner or operator must annually adjust the estimate for inflation until the remedial action program is completed as determined by the Department. The inflation factor is derived from the most recent annual Implicit Price Deflator for Gross Domestic Product published by the United States Department of Commerce. The inflation factor is

the result of dividing the latest published annual Deflator by the Deflator for the previous year.

007.02 The owner or operator must increase the remedial action cost estimate and the amount of financial assurance provided under 008 of this chapter if changes in the remedial action program, or changes in the solid waste disposal area conditions increase the maximum costs of the remedial action.

007.03 The owner or operator may reduce the amount of the remedial action cost estimate and the amount of financial assurance provided under 008 of this chapter if the cost estimate exceeds the maximum remaining costs of the remedial action. The owner or operator must provide the Department the justification for the reduction of the remedial action cost estimate for approval prior to reducing the amount of financial assurance and place a copy of the documentation in the operating record.

008 Establishing financial assurance for remedial action program. The owner or operator of each solid waste disposal area required to undertake a remedial action program under Chapter 7, Section 006 must establish, in a manner in accordance with 009, financial assurance for the most recent remedial action program submitted to the Department in accordance with Title 118 - Groundwater Quality Standards and Use Classification, and for any other activities established as necessary by the Director for protection of human health and the environment. The owner or operator must provide continuous coverage for remedial action until the remedial action program is completed as determined by the Department in accordance with Title 118 - Groundwater Quality Standards and Use Classification, and all other established requirements.

009 Allowable mechanisms. Allowable mechanisms used to demonstrate financial assurance under Sections 010 to 018 must ensure that the funds necessary to meet the costs of closure, post-closure care, and remedial action for known releases will be available whenever they are needed. Any mechanism under Sections 010, 011, 012 and, where applicable, 018 shall be made payable to or held in trust for the benefit of the State and shall be approved by the Department. Owners and operators must choose from the options specified in 010 to 018 of this chapter.

009.01 Incapacity of owners or operators, guarantors, or financial institutions. An owner or operator will be considered to be without financial assurance in the event of bankruptcy of the trustee, insurance company, financial institution, guarantor, or other issuer of any mechanism used to demonstrate financial assurance. The owner or operator must establish alternate financial assurance within sixty (60) days after such an event.

010 Trust Fund.

010.01 An owner or operator may satisfy the requirements of this chapter by establishing a trust fund which conforms to the requirements of this section. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State Agency. The owner or operator must provide the

Department with an originally signed duplicate of the trust agreement that has been placed in the operating record.

010.02 Payments into the trust fund must be made annually by the owner or operator over the estimated life or over the remaining life of the solid waste disposal area, whichever is shorter, in the case of a trust fund for closure or post-closure care, or over one-half of the estimated length of the remedial action program in the case of remedial action for known releases. This period is referred to as the "pay-in period".

010.03 For a trust fund used to demonstrate financial assurance for closure and post-closure care, the first payment into the fund must be at least equal to the current cost estimate for closure or post-closure care, divided by the number of years in the pay-in period as defined in Section 010.02 of this chapter. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{(CE - CV)}{Y}$$

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.

010.04 For a trust fund used to demonstrate financial assurance for remedial action, the first payment into the fund must be at least equal to one-half of the current cost estimate for remedial action, divided by the number of years in the remedial action pay-in period as defined in Section 010.02 of this chapter. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{(RB - CV)}{Y}$$

where RB is the most recent estimate of the required trust fund balance for remedial action (i.e., the total costs that will be incurred during the second half of the remedial action period), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

010.05 The initial payment into the trust fund must be made before the initial receipt of waste in the case of closure or post-closure care, or no later than 120 days after the remedial action workplan has been approved by the Department.

010.06 If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in this chapter, the initial payment into the trust fund must 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 Section 010, as applicable.

010.07 The owner or operator or other person authorized to conduct closure, post-closure care, or remedial action activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if the Department determines sufficient funds are remaining in the trust fund to cover the remaining costs of closure, post-closure care, or remedial action, and if justification and documentation of the cost is approved by the Department and a copy placed in the operating record. The Department will provide written notice to the owner or operator of the determination to withhold reimbursement and the reasons for the determination.

010.08 The trust fund may be terminated by the owner or operator only if the owner or operator substitutes alternate financial assurance as specified in this chapter or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with the requirements of Sections 004, 006, and 008.

010.09 Discounting. If the owner or operator establishes a trust fund, the Department may allow discounting of closure cost estimates in Section 003, post-closure cost estimates in Section 005, and/or remedial action costs in Section 007 up to a rate of return for essentially risk free investments, net of inflation, under the following conditions:

010.09A The Department determines that the cost estimates are complete and accurate and the owner or operator has submitted a statement from a registered professional engineer so stating;

010.09B The Department finds the facility in compliance with applicable and appropriate permit conditions;

010.09C The Department determines that the closure date is certain and the owner or operator certifies that there are no foreseeable factors that will change the estimate of site life; and

010.09D Discounted cost estimates must be adjusted annually to reflect inflation and years of remaining facility life.

011 Surety Bond Guaranteeing Payment or Performance.

011.01 The owner or operator may demonstrate financial assurance for closure or post-closure care by obtaining a payment or performance surety bond which conforms to the requirements of this section. An owner or operator may demonstrate financial assurance for remedial action by obtaining a performance bond which conforms to the requirements of this section. The bond must be effective before the initial receipt of waste in the case of a closure or post-closure care, or no later than 120 days after the remedial action workplan has been approved by the Department. The surety company issuing the bond, at a minimum, must be listed as an acceptable surety of federal bonds in Circular 570 of the United States Department of the Treasury and approved by the Department. The

owner or operator must provide the Department with an originally signed duplicate of the bond that has been placed in the operating record.

011.02 The penal sum of the bond must be in an amount at least equal to the current closure, post-closure care or remedial action cost estimate, whichever is applicable, except as provided in Section 019.

011.03 Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

011.04 Payments made under the terms of the bond will be paid by the surety directly to the Department.

011.05 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 one-hundred and twenty (120) days in advance of cancellation. If the surety cancels the bond, the owner or operator must obtain alternate financial assurance as specified in this chapter.

011.06 If the owner or operator fails to establish alternate financial assurance, as specified in this chapter, within 90 days after the Department receives a notice of cancellation, the Director will notify the surety of the failure of the owner or operator to perform as guaranteed by the bond.

011.07 The owner or operator may cancel the bond only if alternate financial assurance is substituted as specified in this chapter or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with the requirements of Sections 004, 006, and 008.

012 Letter of Credit.

012.01 An owner or operator may satisfy the requirements of this chapter by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section. The letter of credit must be effective before the initial receipt of waste in the case of closure and post-closure care, or no later than 120 days after the remedial action workplan has been approved by the Department. The owner or operator must provide the Department with an originally signed duplicate of the letter of credit that has been placed in the operating record. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State Agency.

012.02 A letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: Name and address of the facility, and the amount of funds assured, must be included with the letter of credit in the operating record.

012.03 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, post-closure care, or remedial action, whichever is applicable, except as provided in 010. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution has canceled the letter of credit 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 letter of credit is canceled by the issuing institution, the owner or operator must obtain alternate financial assurance.

012.04 If the owner or operator fails to establish alternate financial assurance, as specified in this chapter, within 90 days after the Department receives a notice of cancellation, the Director will draw on the letter of credit. ~~The requirements of this subsection are effective January 1, 2001.~~

012.05 The owner or operator may cancel the letter of credit only if alternate financial assurance is substituted as specified in this chapter or if the owner or operator is released from the requirements of Sections 004, 006 or 008.

013 Insurance.

013.01 An owner or operator may demonstrate financial assurance for closure and post-closure care by obtaining insurance which conforms to the requirements of this section. The insurance must be effective before the initial receipt of waste. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States. The owner or operator must provide the Department with an originally signed duplicate of the insurance policy that has been placed in the operating record.

013.01A An owner or operator using insurance as a financial assurance mechanism must disclose whether the insurer is a subsidiary or has a corporate, legal or financial affiliation with the owner or operator.

013.01A1 An owner or operator using insurance issued by a subsidiary or affiliate must provide a detailed description of the relationship between the owner or operator and insurer, and must demonstrate the owner or operator can satisfy the financial test criteria in Section 014.01.

013.01B An insurer issuing an insurance policy for a parent company or affiliate, or for a group of companies in the same industry, must meet the following qualifications:

013.01B1 The most recent A.M.Best rating must be at least A- (minus);

013.01B2 The insurer must be domiciled in the United States;

013.01B3 The most recent Report on Examination from the State Insurance Department from the insurer's State of Domicile must be satisfactory;

013.01B4 The insurer must have capital and surplus of at least $100,000,000; and

013.01B5 The insurer must receive an unqualified opinion of their annual financial statements from an independent certified public accountant, with the potential exception for qualified opinions as follows. The Department may evaluate qualified opinions on a case-by-case basis and allow use of the insurer in cases where the Department determines the matters which form the basis for the qualification are insufficient to warrant disqualification of the insurer.

013.02 The closure or post-closure care insurance policy must guarantee that funds will be available to close the solid waste management facility whenever final closure occurs or to provide post-closure care for the solid waste management facility whenever the post-closure care period begins, which ever is applicable. If the owner or operator fails to properly implement the closure or post-closure plan, the insurer will be responsible for the paying out of funds to the owner or operator or other person authorized to conduct closure or post-closure care, up to an amount equal to the face amount of the policy.

013.03 The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure or post-closure care, whichever is applicable, except as provided in Section 019. 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.

013.04 An owner or operator, or any other person authorized to conduct closure or post-closure care, may receive reimbursement for closure or post-closure expenditures, whichever is applicable. Requests for reimbursements will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure or post-closure care, and if justification and documentation of the cost is placed in the operating record. The owner or operator must provide the Department the documentation of justification for reimbursement and place a copy of the documentation in the operating record.

013.05 Each 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, provided that such consent is not unreasonably refused.

013.06 Each policy must contain a provision that a Certificate of Insurance verifying coverage will be provided to the Department on an annual basis.

013.07 The insurance policy must provide that the insurer may not cancel, terminate or fail to renew the policy except for the failure to pay the premium. The automatic renewal of the policy must, 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 owner and operator and to the Department 120 days in advance of cancellation. If the insurer cancels the policy, the owner or operator must obtain alternate financial assurance as specified in this chapter.

013.07A 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:

013.07A2 The permit is terminated or revoked or a new permit is denied by the NDEQ Director; or

013.07A3 Closure is ordered by the NDEQ Director or U.S. district court or other court of competent jurisdiction; or

013.07A4 The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), US Code; or

013.07A5 The owner or operator pays the premium due.

013.08 For insurance policies providing coverage for the post-closure care, commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to eighty-five percent (85%) of the most recent investment rate or the equivalent coupon-issue yield announced by the U.S. Treasury for 26-week Treasury securities.

013.09 The owner or operator may cancel the insurance policy only if alternate financial assurance is substituted as specified in this chapter, or if the owner or operator is no longer required to demonstrate financial responsibility, in accordance with the requirements of Sections 004 or 006.

014 Corporate Financial Test. An owner or operator that satisfies the requirements of this section may demonstrate financial assurance up to the amount specified in this section:

014.01 Financial Component.

014.01A The owner or operator must satisfy one of the following three conditions:

014.01A1 A current rating for its senior unsubordinated debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa, as issued by Moody's; or

014.01A2 A ratio of less than 1.5 comparing total liabilities to net worth; or

014.01A3 A ratio of greater that 0.10 comparing the sum of net income plus depreciation, depletion and amortization, minus $10 million, to total liabilities.

014.01B The tangible net worth of the owner or operator must be greater than:

014.01B1 The sum of the current closure, post-closure care, remedial action cost estimates and any other environmental obligations, including guarantees, covered by a financial test plus $10 million except as provided in Section 014.01B2.

014.01B2 $10 million in net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements provided all of the current closure, post-closure care, and remedial action costs and any other environmental obligations covered by a financial test are recognized as liabilities on the owner's or operator's audited financial statements, and subject to the approval of the Department.

014.01C The owner or operator must have assets located in the United States amounting to at least the sum of current closure, post-closure care, remedial action cost estimates and any other environmental obligations covered by a financial test as described in Section 014.03.

014.02 Recordkeeping and Reporting Requirements.

014.02A The owner or operator must provide the Department the following items and place a copy into the facility's operating record:

014.02A1 A letter signed by the owner's or operator's chief financial officer that:

014.02A1(a) Lists all current cost estimates covered by a financial test, including, but not limited to, cost estimates required for municipal solid waste management facilities under this chapter, cost estimates required for underground injection control facilities, if applicable, cost estimates required for petroleum underground storage tank facilities, if applicable, cost estimated required for PCB storage facilities, if applicable, and cost estimates required for

hazardous waste treatment, storage and disposal facilities, if applicable; and

014.02A1(b) Provides evidence demonstrating that the firm meets the conditions of either Section 014.01A1 or 014.01A2 or 014.01A3 and Section 014.01B and 014.01C.

014.02A2 A copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance, with the potential exception for qualified opinions provided in the next sentence. The Department may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Department deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the Department does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirement of this chapter.

014.02A3 If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that owner or operator satisfies Sections 014.01A2 and 014.01A3 that are different from data in the audited financial statements referred to in Section 014.02A2 or any other audited financial statement or data filed with the SEC, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report shall be based upon an agreed upon procedures engagement in accordance with professional auditing standards and shall describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of that comparison, and the reasons for any differences.

014.02A4 If the chief financial officer's letter provides a demonstration that the firm has assured for environmental obligations as provided in Section 014.01B2, then the letter shall include a report from the independent certified public accountant that verifies that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, how these obligations have been measured and reported, and that the tangible net

worth of the firm is at least $10 million plus the amount of any guarantees provided.

014.02B An owner or operator must provide the Department the items specified in Section 014.02A and place a copy into the operating record. before the initial receipt of waste in the case of closure, and post-closure care, or no later than 120 days after the remedial action workplan has been approved by the Department.

014.02C After the initial placement of items specified in Section 014.02A in the operating record, the owner or operator must annually update the information, provide the Department the updated information, and place a copy into the operating record within 90 days following the close of the owner or operator's fiscal year. The Department may provide up to an additional 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. The updated information must consist of all items specified in Section 014.02A.

014.02D The owner or operator is no longer required to submit the items specified in Section 014.02 or comply with the requirements of this section when:

014.02D1 The owner or operator substitutes alternate financial assurance as specified in this chapter that is not subject to these recordkeeping and reporting requirements: or

014.02D2 The owner or operator is released from the requirements of this chapter in accordance with Sections 004, 006 and 008.

014.02E If the owner or operator no longer meets the requirements of Section 014.01, the owner or operator must, within 120 days following the close of the owner or operator's fiscal year, notify the Department that the owner or operator no longer meets the criteria of the financial test, obtain alternative financial assurance that meets the requirements of this chapter, provide the Department the required submissions for that assurance, and place a copy into the operating record.

014.02F The Department may, based on a reasonable belief that the owner or operator may no longer meet the requirements of Section 014.01, require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in Section 014.02. If the Department finds that the owner or operator no longer meets the requirements of Section 014.01, the owner or operator must provide alternate financial assurance that meets the requirements of this chapter.

014.03 Calculations of Costs to be Assured. When calculating the current cost estimates for closure, post-closure care, remedial action, or the sum of the combination of such

costs to be covered, and any other environmental obligations assured by a financial test referred to in this section, the owner or operator must include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if it assures them through a financial test: obligations associated with underground injection control facilities, petroleum underground storage tank facilities, PCB storage facilities, and hazardous waste treatment, storage and disposal facilities.

015 Local Government Financial Test. An owner or operator that meet the criteria of a local government as identified in 017 of this Chapter, and satisfies the requirements of Sections 015.01 through 015.03, may demonstrate financial assurance up to the amount specified in Section 015.04:

015.01 Financial component.

015.01A The owner or operator must satisfy Section 015.01A1 or 015.01A2 as applicable:

015.01A1 If the owner or operator has outstanding, rated, general obligation bonds that are not secured by insurance, a letter of credit, or other collateral or guarantee, it must have a current rating of Aaa, Aa, A or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such general obligation bonds; or

015.01A2 The owner or operator must satisfy each of the following financial ratios based on the owner or operator's most recent audited annual financial statement:

015.01A2(a) A ratio of cash plus marketable securities to total expenditures greater that or equal to 0.05; and

015.01A2(b) A ratio of annual debt service to total expenditures less than or equal to 0.20.

015.01B The owner or operator must prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments and have its financial statements audited by an independent certified public accountant (or appropriate State agency).

015.01C A local government is not eligible to assure its obligations under this section if it:

015.01C1 Is currently in default on any outstanding general obligation bonds; or

015.01C2 Has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's; or

015.01C3 Operated at a deficit equal to five percent (5%) or more of total annual revenue in each of the past two (2) fiscal years; or

015.01C4 Receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate State agency) auditing its financial statement as required under Section 015.01B. However, the Director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Director deems the qualification insufficient to warrant disallowance of use of the test.

015.01D The following terms used in this section are defined as follows:

015.01D1 "Deficit" equals total annual revenues minus total annual expenditures;

015.01D2 "Total Revenues" include revenues from all taxes and fees but does not include the proceeds from borrowing or asset sales, excluding revenue from funds managed by local government on behalf of a specific third party;

015.01D3 "Total Expenditures" include all expenditures excluding capital outlays and debt repayment;

015.01D4 "Cash Plus Marketable Securities" is all the cash plus marketable securities held by the local government on the last day of the fiscal year, excluding cash and marketable securities designated to satisfy past obligations such as pensions: and

015.01D5 "Debt Service" is the amount of principal and interest due on a loan in a given time period, typically the current year.

15.02 Public notice component. The local government owner or operator must place a reference to the closure and post-closure care costs assured though the financial test into its next comprehensive annual financial report (CAFR) after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later. Disclosure must include the nature and source of closure and post-closure care requirements, the reported liability at the balance sheet date, the estimated total closure and post-closure care cost remaining to be recognized, the percentage of landfill capacity used to date, and the estimated landfill life in years. A reference to remedial action costs must be placed in the CAFR not later than 120 days after the remedial action workplan has been approved by the Department. For the first year the financial test is used to assure costs at a

particular facility, the reference may instead be provided to the Department, and placed in the operating record until issuance of the next available CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget. For closure and post-closure costs, conformance with Government Accounting Standards Board Statement 18 assures compliance with this public notice component.

015.03 Recordkeeping and Reporting Requirements.

015.03A The local government owner or operator must provide the Department the following items and place a copy into the facility's operating record:

015.03A1 A letter signed by the local government's chief financial officer that:

015.03A1(a) Lists all the current cost estimates covered by a financial test, as described in Section 015.04;

015.03A1(b) Provides evidence and certifies that the local government meets the conditions of Sections 015.01A, 015.01B and 015.01C; and

015.03A1(c) Certifies that the local government meets the conditions of Sections 015.02 and 015.04.

015.03A2 The local government's independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor who must be an independent, certified public accountant or an appropriate State agency that conducts equivalent comprehensive audits;

015.03A3 A report to the local government from the local government's independent, certified public accountant (CPA) or an appropriate State agency based on performing an agreed upon procedures engagement relative to the financial ratios required by Section 015.01A2, if applicable, and the requirements of Sections 015.01B, 015.01C3 and 015.01C4. The CPA or State agency's report should state the procedures performed and the CPA or State agency's finding; and

015.03A4 A copy of the comprehensive annual financial report (CAFR) used to comply with Section 015.02 or certification that the requirements of General Accounting Standards Board Statement 18 have been met.

015.03B The items required in Section 015.03A must be provided to the Department and a copy placed in the facility operating record as follows:

015.03B1 In the case of closure and post-closure care, prior to the initial receipt of waste at the facility, or

015.03B2 In the case of remedial action, not later than 120 days after the remedial action workplan has been approved by the Department.

015.03C After the initial placement of the items in the facility's operating record, the local government owner or operator must update the information and provide to the Department the updated information and place a copy into the operating record within 180 days following the close of the owner or operator's fiscal year.

015.03D The local government owner or operator is no longer required to meet the requirement of Section 015.03 when:

015.03D1 The owner or operator substitutes alternate financial assurance as specified in this chapter; or

015.03D2 The owner or operator is released from the requirements of this chapter in accordance with Sections 004, 006, and 008.

015.03E A local government must satisfy the requirements of the financial test at the close of each fiscal year. If the local government owner or operator no longer meets the requirements of the local government financial test it must, within 210 days following the close of the owner or operator's fiscal year, notify the Department that the owner or operator no longer meets the criteria of the financial test, obtain alternative financial assurance that meets the requirement of this chapter, provide the Department the required submissions for that assurance, and place a copy into the operating record.

015.03F The Department, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If Department finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of the local government financial test, the local government must provide alternate financial assurance in accordance with this chapter.

015.04 Calculation of Costs to be Assured. The portion of the closure, post-closure and remedial actions costs for which an owner or operator can assure under this section is determined as follows:

015.04A If the local government owner or operator does not assure other environmental obligations through a financial test, it may assure closure, post-closure, and remedial action costs that equal up to forty-three percent (43%) of the local government's total annual revenue.

015.04B If the local government assures other environmental obligations through a financial test, including those associated with underground injection control facilities, petroleum underground storage tank facilities, PCB storage facilities, and hazardous waste treatment, storage and disposal facilities, it must add those costs to the closure, post-closure, and remedial action costs it seeks to assure under this section. The total that may be assured must not exceed forty-three percent (43%) of the local government's total annual revenue.

015.04C The owner or operator must obtain an alternate financial assurance instrument for those costs that exceed the limits set in Sections 015.04A and 015.04B.

016 Corporate Guarantee.

016.01 An owner or operator may meet the requirements of this chapter by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in Section 014 and must comply with the terms of the guarantee. A certified copy of the guarantee must be provided to the Department and a copy placed into the facility's operating record along with the copies of the letter from the guarantor's chief financial officer and accountants' opinions. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter from the guarantor's chief financial officer must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

016.02 The guarantee must be effective and all required submissions provided to the Department and a copy placed into the operating record before the initial receipt of waste in the case of closure and post-closure care, or in the case of remedial action no later than 120 days after the remedial action workplan has been approved by the Department.

016.03 The terms of the guarantee must provide that:

016.03A If the owner or operator fails to perform closure, post-closure care, and/or remedial action of a facility covered by the guarantee, the guarantor will:

016.03A1 Perform, or pay a third party to perform, closure, post-closure care, and/or remedial action as required (performance guarantee); or

016.03A2 Establish a fully funded trust fund as specified in Section 010 in the name of the owner or operator (payment guarantee).

016.03B The guarantee will remain in force for as long as the owner or operator must comply with the applicable financial assurance requirements of this chapter unless the guarantor sends prior notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipts.

016.03C If notice of cancellation is given, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the Department, provide alternate financial assurance to the Department and place evidence of that alternate financial assurance in the facility operating record. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days of the cancellation notice, submit alternative assurance, to the Department and place evidence of the alternate assurance in the facility operating record.

016.04 If a corporate guarantor no longer meets the requirements of Section 014.01, the owner or operator must, within 90 days, provide alternate assurance to the Department and, place evidence of the alternate assurance in the facility operating record. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance to the Department within the next 30 days.

016.05 The owner or operator is no longer required to meet the requirements of this section when:

016.05A The owner or operator substitutes alternate financial assurance as specified in this chapter; or

016.05B The owner or operator is released from the requirements of this chapter in accordance with 004, 006, or 008.

017 Local Government Guarantee. An owner or operator may demonstrate financial assurance for closure, post-closure and remedial action, as required by Sections 004, 006, and 008, by obtaining a written guarantee provided by a local government. A Local government must be a general purpose primary government, a legally separate and fiscally independent entity, and must have clear responsibility for meeting their own financial commitments. Enterprise funds, joint ventures, agencies, coalitions, special districts, and other such government units, are not eligible to use the local government financial test or guarantee as a separate government entity; however the individual local government partners in these government units or the overseeing general purpose government in the case of the enterprise fund are eligible to provide a local government guarantee. The guarantor must meet the requirements of the local government financial test in Section 015, and must comply with the terms of a written guarantee.

017.01 Terms of the written guarantee. The guarantee must be effective and all required submissions provided to the Department and a copy placed in the operating record before the initial receipt of waste in the case of closure, post-closure care, or no later that 120 days after the remedial action workplan has been approved by the Department. The guarantee must provide that:

017.01A If the owner or operator fails to perform closure, post-closure care, and /or remedial action of a facility covered by the guarantee, the guarantor will:

017.01A1 Perform, or pay a third party to perform, closure, post-closure care, and/or remedial action as required (performance guarantee); or

017.01A2 Establish a fully funded trust fund as specified in Section 010 in the name of the owner or operator (payment guarantee).

017.01B The guarantee will remain in force as long as the owner or operator must comply with the applicable financial assurance requirements of this chapter unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Department. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Department, as evidenced by the return receipts.

017.01C If the guarantor sends notice of cancellation, the owner or operator must, within 90 days following the receipt of the cancellation notice by the owner or operator and the Department, provide alternate financial assurance to the Department and place evidence of that alternate financial assurance in the facility operating record. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide to the Department alternate assurance within 120 days following the guarantor's notice of cancellation and place evidence of the alternate assurance in the facility operating record.

017.02 Recordkeeping and reporting.

017.02A The owner or operator must provide a certified copy of the guarantee along with the items required in Section 015.03 to the Department and place a copy into the facility's operating record before the initial receipt of waste in the case of closure, post-closure care, or no later that 120 days after the remedial action workplan has been approved by the Department.

017.02B The owner or operator is no longer required to maintain the items specified in Section 017.02 when:

017.02B1 The owner or operator substitutes alternate financial assurance as specified in this chapter; or

017.02B2 The owner or operator is released from the requirements of this chapter in accordance with Sections 004, 006, or 008.

017.02C If the local government guarantor no longer meets the requirements of Section 015, the owner or operator must, within 90 days, provide alternative assurance to the Department, and place evidence of the alternate assurance in the facility operating record. If the owner or operator fails to obtain alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance to the Department within the next 30 days, and place evidence of the alternate assurance in the facility operating record.

018 State-Approved Mechanism. An owner or operator may satisfy the requirements of this chapter by obtaining any other mechanism that meets the criteria specified in 009, and that is approved by the Department.

019 Use of Multiple Financial Mechanisms. An owner or operator may demonstrate financial assurance for closure, post-closure and remedial action, as required in Section 004, 006 and 008, by establishing more than one financial mechanism per solid waste management facility, except that mechanisms guaranteeing performance, rather that payment, may not be combined with other instruments. The mechanisms must be as specified in 010 to 018 of the chapter, except that financial assurance for an amount at least equal to the current cost estimate for closure, post-closure care, or remedial action, may be provided by a combination of mechanisms, rather than a single mechanism.

020 The language of the mechanisms listed in 010 to 018 must ensure that the instruments satisfy the following criteria:

020.01 The financial assurance mechanisms must ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care and remedial action for known releases when needed;

020.02 The financial assurance mechanism must ensure that funds will be available to the Department in a timely fashion when needed;

020.03 The financial assurance mechanisms must be obtained by the owner or operator by the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the remedial action workplan has been approved by the Department, and must be maintained until the owner or operator is released from the financial assurance requirements under Sections 002 to 007.

020.04 The financial assurance mechanisms must be legally valid, binding, and enforceable under State and Federal law.

021 Forfeiture. If the owner or operator of a solid waste management facility fails to properly implement the applicable closure or post-closure plan or remedial action program, or does not comply with a directive from the Department to implement the applicable closure or post-closure plan, or remedial action program, or the Department deems the solid waste management facility abandoned, the Department shall declare all or any appropriate part of the financial assurance as forfeited. For purposes of this chapter, abandonment shall mean the failure to initiate closure within thirty (30) days after receipt of the final volume of waste.

022 In the event a determination to forfeit financial assurance is made, the Department shall:

022.01 Send written notification by certified mail, return receipt requested, to the owner or operator and the surety, escrow agent, or other person responsible for financial assurance of the Department's determination to forfeit all or part of the financial assurance and the reasons for the forfeiture, including a finding of amount to be forfeited;

022.02 The owner or operator may request a hearing on the issue of whether the financial assurance, or part thereof, shall be forfeited in accordance with the procedures specified in Neb. Rev. Stat. §81-1507 (1)(2) and the Department's Title 115 - Rules of Practice and Procedure.

Enabling Legislation: Neb. Rev. Stat. §§13-2034; 81-1505(1)(13)(21); 81-1528(7)

Legal Citation: Title 132, Ch. 8, Nebraska Department of Environmental Quality