

3745-66-47

Liability requirements.

(A) Coverage for sudden accidental occurrences. An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must 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 as specified in paragraph (A)(1), (A)(2), (A)(3), (A)(4), (A)(5), or (A)(6) of this rule:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in paragraphs (A) to (A)(7)(c) of this rule.

(a) Each insurance policy must be amended by attachment of the "Hazardous Waste Facility Liability Endorsement" or evidenced by a "Certificate of Liability Insurance." The wording of the endorsement must be identical to the wording specified in paragraph (I) of rule 3745-55-51 of the Administrative Code. The wording of the certificate of insurance must be identical to the wording specified in paragraph (J) of rule 3745-55-51 of the Administrative Code. The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the director. If requested by the director, an owner or operator must provide a signed duplicate original of the insurance policy.

(b) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this rule by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (F) and (G) of this rule.

(3) An owner or operator may meet the requirements of this rule by obtaining a letter of credit for liability coverage as specified in paragraph (H) of this rule.

(4) An owner or operator may meet the requirements of this rule by obtaining a surety bond for liability coverage as specified in paragraph (I) of this rule.

(5) An owner or operator may meet the requirements of this rule by obtaining a

trust fund for liability coverage as specified in paragraph (J) of this rule.

- (6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this rule. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under paragraphs (A) to (A)(7)(c) of this rule, the owner or operator must specify at least one such assurance as "primary" coverage and must specify other assurance as "excess" coverage.
- (7) An owner or operator must notify the director in writing within thirty days whenever:
 - (a) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (A)(1) to (A)(6) of this rule; or
 - (b) A "Certification of Valid Claim" for bodily injury or property damages caused by a sudden or nonsudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (A)(1) to (A)(6) of this rule; or
 - (c) A final court order establishing a judgement for bodily injury or property damages caused by a sudden or nonsudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (A)(1) to (A)(6) of this rule.
- (B) Coverage for nonsudden accidental occurrences. An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. An owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least three million dollars per

occurrence with an annual aggregate of at least six million dollars, exclusive of legal costs. An owner or operator who must meet the requirements of this rule may combine the required per occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least four million dollars per occurrence and eight million dollars annual aggregate. This liability coverage may be demonstrated as specified in paragraph (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), or (B)(6) of this rule:

- (1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in paragraphs (B) to (B)(7)(c) of this rule.
 - (a) Each insurance policy must be amended by attachment of the "Hazardous Waste Facility Liability Endorsement" or evidenced by a "Certificate of Liability Insurance." The wording of the endorsement must be identical to the wording specified in paragraph (I) of rule 3745-55-51 of the Administrative Code. The wording of the certificate of insurance must be identical to the wording specified in paragraph (J) of rule 3745-55-51 of the Administrative Code. The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the director. If requested by the director, the owner or operator must provide a signed duplicate original of the insurance policy.
 - (b) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.
- (2) An owner or operator may meet the requirements of this rule by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (F) and (G) of this rule.
- (3) An owner or operator may meet the requirements of this rule by obtaining a letter of credit for liability coverage as specified in paragraph (H) of this rule.
- (4) An owner or operator may meet the requirements of this rule by obtaining a surety bond for liability coverage as specified in paragraph (I) of this rule.
- (5) An owner or operator may meet the requirements of this rule by obtaining a trust fund for liability coverage as specified in paragraph (J) of this rule.

- (6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amount required by this rule. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under paragraphs (B) to (B)(7)(c) of this rule, the owner or operator must specify at least one such assurance as "primary" coverage and must specify other assurance as "excess" coverage.
- (7) An owner or operator must notify the director in writing within thirty days whenever:
- (a) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (B)(1) to (B)(6) of this rule; or
 - (b) A "Certification of Valid Claim" for bodily injury or property damages caused by a sudden or nonsudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (B)(1) to (B)(6) of this rule; or
 - (c) A final court order establishing a judgement for bodily injury or property damages caused by a sudden or nonsudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (B)(1) to (B)(6) of this rule.
- (C) Request for variance. If an owner or operator can demonstrate to the satisfaction of the director that the levels for financial responsibility required by paragraph (A) or (B) of this rule are not consistent with the degree and duration of risk associated with the treatment, storage, or disposal at each facility or group of facilities, the owner or operator may obtain a variance from the director. The request for a variance must be submitted by certified mail to the director. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of each facility or group of facilities. The director

may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the director to determine a level of financial responsibility other than that required by paragraph (A) or (B) of this rule. Notwithstanding any other provision, the director may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to grant a variance.

- (D) Adjustments by the director. If the director determines that the levels of financial responsibility required by paragraphs (A) and (B) of this rule are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the director may adjust the level of financial responsibility required under paragraph (A) or (B) of this rule as may be necessary to protect human health and the environment. This adjusted level will be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the director determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill, or land treatment facility, he may require that an owner or operator of the facility comply with paragraph (B) of this rule. The owner or operator must furnish to the director, within a reasonable time, any information which the director requests to determine whether cause exists for such adjustments of level or type of coverage. Notwithstanding any other provisions, the director may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to adjust the level or type of required coverage.
- (E) Period of coverage. Within sixty days after receiving certifications from the owner or operator and a qualified, ~~independent, registered~~ professional engineer that final closure has been completed in accordance with the approved closure plan, the director will notify the owner or operator in writing that he is no longer required by this rule to maintain liability coverage for that facility, unless the director has reason to believe that closure has not been in accordance with the approved closure plan.
- (F) Financial test for liability coverage.
- (1) An owner or operator may satisfy the requirements of this rule by demonstrating that he passes a financial test as specified in paragraphs (F) to (F)(7) of this rule. To pass this test, the owner or operator must meet the criteria of paragraph (F)(1)(a) or (F)(1)(b) of this rule.
- (a) The owner or operator must have:

- (i) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and
 - (ii) Tangible net worth of at least ten million dollars; and
 - (iii) Assets in the United States amounting to either:
 - (a) At least ninety per cent of his total assets; or
 - (b) At least six times the amount of liability coverage to be demonstrated by this test.
- (b) The owner or operator must have:
- (i) A current rating for his 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
 - (ii) Tangible net worth of at least ten million dollars; and
 - (iii) Tangible net worth of at least six times the amount of liability coverage to be demonstrated by this test; and
 - (iv) Assets in the United States amounting to either:
 - (a) At least ninety per cent of his total assets; or
 - (b) At least six times the amount of liability coverage to be demonstrated by this test.
- (2) The phrase "amount of liability coverage" as used in paragraph (F)(1) of this rule refers to the annual aggregate amounts for which coverage is required under paragraphs (A) and (B) of this rule.
- (3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the director:
- (a) A letter signed by the owner's or operator's chief financial officer and worded as specified in paragraph (G) of rule 3745-55-51 of the

Administrative Code. If an owner or operator is using the financial test to demonstrate both assurance for closure or post-closure care, as specified by paragraph (F) of ~~rule~~rule 3745-55-43 and paragraph (F) of rule 3745-55-45 or paragraph (E) of ~~rule~~rule 3745-66-43 and paragraph (E) of rule 3745-66-45 of the Administrative Code, and liability coverage, he must submit the letter specified in paragraph (G) of rule 3745-55-51 of the Administrative Code to cover both forms of financial responsibility; a separate letter as specified in paragraph (F) of rule 3745-55-51 of the Administrative Code is not required.

- (b) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.
 - (c) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:
 - (i) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and
 - (ii) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.
- (4) The owner or operator may obtain a one-time extension of the time allowed for submittal of the documents specified in paragraph (F)(3) of this rule if the fiscal year of the owner or operator ends during the ninety days prior to August 26, 1983 and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than ninety days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by August 26, 1983, a letter to the director. This letter from the chief financial officer must:
- (a) Request the extension;
 - (b) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;
 - (c) Specify for each facility to be covered by the test the U.S. EPA

identification number, name, address, ~~Ohio hazardous waste facility permit number~~, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

- (d) Specify the date ending the owner's or operator's last complete fiscal year before August 26, 1983;
 - (e) Specify the date, no later than ninety days after the end of such fiscal year, when he will submit the documents specified in paragraph (F)(3) of this rule; and
 - (f) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.
- (5) After the initial submittal of items specified in paragraph (F)(3) of this rule, the owner or operator must send updated information to the director within ninety days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (F)(3) of this rule.
- (6) If the owner or operator no longer meets the requirements of paragraph (F)(1) of this rule, he must obtain insurance, a letter of credit, a surety bond, a trust fund, or a guarantee for the entire amount of required liability coverage as specified in this rule. Evidence of liability coverage must be submitted to the director within ninety days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.
- (7) The director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements [see paragraph (F)(3)(b) of this rule]. An adverse opinion or a disclaimer of opinion will be cause for disallowance. The director will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this rule within thirty days after notification of disallowance.

(G) Guarantee for liability coverage.

- (1) Subject to paragraph (G)(2) of this rule, an owner or operator may meet the requirements of this rule by obtaining a written guarantee, hereinafter referred to as "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 firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (F)(1) to (F)(6) of this rule. The wording of the guarantee must be identical to the wording specified in paragraph (H)(2) of rule 3745-55-51 of the Administrative Code. A certified copy of the guarantee must accompany the items sent to the director as specified in paragraph (F)(3) of this rule. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter 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.

- (a) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.
 - (b) Reserved.
- (2) In the case of corporations incorporated in Ohio, a guarantee executed as described in this rule and paragraph (H)(2) of rule 3745-55-51 of the Administrative Code may be used to satisfy the requirements of this rule. In the case of a corporation incorporated in a state other than Ohio, a guarantee may be used to satisfy the requirements of this rule only if the attorney general or insurance commissioners of that state have submitted a written statement to the director that a guarantee executed as described in this rule and paragraph (H)(2) of rule 3745-55-51 of the Administrative Code is a legally valid and enforceable obligation in that state.
- (3) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this rule only if:
- (a) The non-U.S. corporation has identified a registered agent for service of process in Ohio and in the state in which it has its principal place of business; and
 - (b) The attorney general or insurance commissioner of the state in which the

guarantor corporation has its principal place of business has submitted a written statement to the director that a guarantee executed as described in this rule and paragraph (H)(2) of rule 3745-55-51 of the Administrative Code is a legally valid and enforceable obligation in that state.

(H) Letter of credit for liability coverage.

- (1) An owner or operator may satisfy the requirements of this rule by obtaining an irrevocable standby letter of credit that conforms to the requirements of paragraphs (H) to (H)(5) of this rule and submitting a copy of the letter of credit to the director.
- (2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.
- (3) The wording of the letter of credit must be identical to the wording specified in paragraph (K) of rule 3745-55-51 of the Administrative Code.
- (4) An owner or operator who uses a letter of credit to satisfy the requirements of this rule may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund 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.
- (5) The wording of the standby trust fund must be identical to the wording specified in paragraph (N)(1) of rule 3745-55-51 of the Administrative Code.

(I) Surety bond for liability coverage.

- (1) An owner or operator may satisfy the requirements of this rule by obtaining a surety bond that conforms to the requirements of (I) to (I)(4)(b) of this rule and submitting a copy of the bond to the director.
- (2) The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the most recent "Circular 570" of the U.S. Department of the Treasury.

- (3) The wording of the surety bond must be identical to the wording specified in paragraph (L) of rule 3745-55-51 of the Administrative Code.
- (4) A surety bond may be used to satisfy the requirements of this rule only if the attorney general or insurance commissioners of:
 - (a) The state in which the surety is incorporated; and
 - (b) Each state in which a facility covered by the surety bond is located have submitted a written statement to Ohio EPA that a surety bond executed as described in this rule and is a legally valid and enforceable obligation in that state.

(J) Trust fund for liability coverage.

- (1) An owner or operator may satisfy the requirements of this rule by establishing a trust fund that conforms to the requirements of (J) to (J)(4) of this rule and submitting an originally signed duplicate of the trust agreement to the director.
- (2) 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.
- (3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this rule. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this rule to cover the difference. For purposes of paragraphs (J) to (J)(4) of this rule, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this rule, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanism being used to demonstrate financial assurance by the owner or operator.
- (4) The wording of the trust fund must be identical to the wording specified in paragraph (M) of rule 3745-55-51 of the Administrative Code.

~~[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules, and federal statutory provisions referenced in this rule, see rule 3745-50-11 of the Administrative Code titled "Incorporated by reference."]~~

(K) Reserved.

[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules, and federal statutory provisions referenced in this rule, see rule 3745-50-11 of the Administrative Code titled "Incorporated by reference."]

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