

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION - SCRAP TIRE PROGRAM
ADMINISTRATIVE CODE

CHAPTER 335-4-8
FINANCIAL ASSURANCE

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335-4-8-.01 Applicability.

(1) Financial assurance shall be provided by the following persons:

(a) Permitted scrap tire transporters.

(b) Permitted Class One, Class Two and Class Three scrap tire processing facilities.

(c) If a permitted processor is also a permitted transporter, a separate and appropriate financial assurance instrument shall be posted for each permit and each separate facility for which the owner/operator applies.

(2) A fuel user may be subject to 335-4-8 if tire materials are stored in excess of the accumulation limits in its registration approval.

(3) Owners or operators of scrap tire facilities that are state or federal government entities, whose debts and liabilities are the debts and liabilities of the state or the United States, are not required to provide financial assurance.

(4) If financial assurance instruments utilized by persons to comply with 335-4-8 provide that monies shall be directed to ADEM to use for closure or remediation of a scrap tire site or facility, those monies shall be deposited to the STF which shall be used for closure or remediation of the site or facility. If

these funds are inadequate for closure or remediation of the site or facility, ADEM may recover costs as provided in 335-4-2-.03(g). Excess funds may be retained by the STF in 335-4-2-.03(g).

(5) The form of financial assurance instruments shall be approved by ADEM.

Author: James L. Bryant, M. Gavin Adams, Adam N. Rhodes

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335-4-8-.02 Transporters.

(1) Any person proposing to transport scrap tires or processed tire material shall submit with its permit application documentation of financial assurance using one of the following:

(a) A surety bond in which the applicant is the principal obligor and ADEM is the obligee.

1. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the U.S. Department of the Treasury or be a corporate surety licensed to do business in the State of Alabama.

2. The amount of the surety bond for environmental cleanup and restoration resulting from a transportation-related accident or event shall be established as follows:

(i) Transporters proposing to transport tire materials shall be required to provide a surety bond in an amount equal to \$10,000.

(ii) If the surety bond is drawn upon, the transporter shall notify ADEM within twenty-four (24) hours, and shall acquire additional financial assurance in the amount of \$10,000 within five (5) days of the surety bond being drawn. If the owner/operator fails to provide the additional assurance as required, ADEM may terminate the permit as prescribed in 335-4-3-.06(c).

(b) A person proposing to transport tire materials may submit documentation satisfactory to ADEM of a net worth equal to ten (10) times the value of a surety bond required in 335-4-8-.02(1)(a). The documentation shall be submitted with a letter

from the chief financial officer of the applicant or Certified Public Accountant.

(c) Proof of insurance in a minimum amount of \$1,000,000 to abate any problems created as a result of the transporter's failure to properly manage scrap tires, exclusive of legal defense costs. The insurance may not include a pollution exclusion clause. Proof of insurance shall be provided on a Certificate of Insurance form naming ADEM as the certificate holder and giving at least thirty (30) days written Notice of Cancellation to the certificate holder.

(2) A transporter shall demonstrate to the satisfaction of ADEM that the financial instrument submitted with their application as required in 335-4-3-.04 is in force for the duration of the permit. Nothing in 335-4-8-.02 shall be construed to allow a transporter to operate in violation of the U.S. Department of Transportation rules governing financial assurance.

Author: James L. Bryant, M. Gavin Adams, Adam N. Rhodes

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335-4-8-.03 Processors.

(1) The owner or operator of a scrap tire processing facility shall provide financial assurance equal to the sum of the amounts required in 335-4-8-.03(2) and (3) for the following:

(a) Closure of the scrap tire processing facility.

(b) Remediation of the facility if impacted by an incident, such as a fire or a catastrophic natural event, such as a flood, that may affect human health and the environment.

(2) Cost Estimate for Closure. The owner or operator shall have a detailed written estimate, in current dollars, of the cost to utilize a third party to complete closure of the processing facility during the active life in accordance with the Closure Plan described in 335-4-6-.06. The owner or operator shall electronically submit a copy of the estimate to ADEM as a part of the permit application for approval and retain the estimate in the operating record.

(a) The cost estimate shall equal the cost to remove, transport and process the largest volume of tire materials present and the cost to remove the contents and cleanup tanks, process equipment or other appurtenances during the active life of the facility when the extent and manner of its operation may make closure the most expensive.

(b) During the active life of the facility, the owner or operator shall annually adjust the closure cost estimate for inflation.

(c) The closure cost estimate and the amount of financial assurance provided shall be increased if changes to the facility or its operation increase the maximum cost of closure.

(d) The owner or operator of a processing facility shall establish financial assurance for closure in compliance with 335-4-8-.04 and shall maintain continuous coverage until released from financial assurance requirements by ADEM.

(e) The minimum financial assurance for closure of a permitted scrap tire processing facility shall be \$20,000.

(3) The owner or operator shall provide financial assurance for remediation of an incident, such as a fire or flood or other catastrophic natural event that impacts public health and the environment, based on the following:

(a) An amount equal to two dollars (\$2) per whole tire for the maximum number of tires allowed to be stored at the facility. ADEM may require a higher amount per whole tire if the types of tires being processed are larger than typical passenger and light truck tires.

(b) An amount equal to two hundred (\$200) per ton of processed tire material allowed to be stored at the facility.

(4) If whole tires and processed tire material are stored at a facility at the same time, the amount of financial assurance required shall equal the total as described in 335-4-8-.03(3)(a) and (b).

(5) The minimum financial assurance required for remediation at a permitted scrap tire processor shall be \$20,000.

Author: James L. Bryant, Adam N. Rhodes

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335-4-8-.04 Financial Assurance Instruments For Closure.

The following instruments may be used to provide financial assurance for closure. The instruments selected shall ensure that the funds necessary to meet the costs of closure will be available whenever needed. The instruments must be in effect for a new facility at least sixty (60) days prior to receiving tire

materials for processing, and must be in effect for an existing facility when submitting a permit application in accordance with 335-4-3-.04.

(a) Trust Fund. An owner or operator may establish a trust fund that conforms to the following requirements:

1. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are examined by the State of Alabama.

2. Payments into the Trust.

(i) The owner or operator shall make a payment into the trust fund each year during the pay-in period.

(ii) The pay-in period is five (5) years. The pay-in period commences on the date the facility first receives scrap tires or processed tire material.

(iii) Annual payments are determined by the following formula:

$$\text{Annual payment} = (\text{CE} - \text{CV}) / Y$$

where:

CE = Current cost estimate

CV = Current value of the trust fund

Y = Number of years remaining in the pay-in period.

(iv) The owner or operator shall make the first annual payment prior to the beginning of the pay-in period. Prior to the beginning of the pay-in period, the owner or operator shall submit to ADEM, electronically as provided by the Department, a receipt from the trustee for the first annual payment.

(v) Subsequent annual payments shall be made no later than thirty (30) days after each anniversary of the first payment.

(vi) The owner or operator may accelerate payments into the trust fund, or deposit the full amount of the current cost estimate at the time the fund is established.

(vii) If the owner or operator establishes a trust fund after having used one or more alternative instruments, the first payment shall be at least

equal to the amount the fund may contain if the trust fund were established initially and payments made as provided in 335-4-8-.04(a)3.

3. The trustee shall evaluate the trust fund annually, as of the day the trust was created. The trustee shall notify the owner or operator and ADEM of the value within thirty (30) days after the evaluation date.

(i) Whenever the current closure cost estimate exceeds the amount of the trust fund, the owner or operator, within sixty (60) days after the new estimate, shall either cause the amount of the trust fund to be increased to equal the current closure cost estimate and submit documentation of the increase to ADEM, or obtain other or additional financial assurance as specified in 335-4-8-.04 to meet the current closure cost estimate.

(ii) Whenever the current closure cost estimate is less than the trust fund amount, the trust fund may be reduced accordingly with ADEM approval.

4. Release of Excess Funds.

(i) If the value of the financial assurance is greater than the current cost estimates for closure, the owner or operator may submit a written request to ADEM for a release of the amount in excess of the current cost estimate.

(ii) Not later than sixty (60) days after receiving a request from the owner or operator for a release of funds for which the value of the financial assurance instrument is greater than the current closure cost estimate, ADEM shall instruct the trustee in writing to release to the owner or operator the funds to be in excess of the current cost estimates.

5. Reimbursement for Closure Expenses.

(i) After initiating closure, an owner or operator, or another person allowed to perform closure, may request reimbursement electronically as provided by the Department, for work performed by submitting itemized invoices to ADEM.

(ii) Not later than sixty (60) days after receiving the itemized invoices, ADEM shall determine if the expenditures are consistent with the approved Closure Plan. If the expenditures are in accordance with the approved Closure Plan, ADEM shall instruct the trustee electronically or in writing to make

reimbursement in the amounts specified for work performed.

(iii) If ADEM determines that the cost of closure will be greater than the value of the trust fund, it shall withhold reimbursement of the amount it determines is necessary to preserve the trust corpus in order to accomplish closure until it determines that the owner or operator is no longer required to maintain financial assurance for closure.

(iv) If the owner or operator is named as a debtor in a voluntary or involuntary proceeding under the U.S. Bankruptcy Code, the trustee shall release all trust fund monies to ADEM for the purpose of completing required closure activities. In the event the bankruptcy proceeding results in the liquidation or dissolution of the assets of the owner or operator, any funds so released which remain upon completion of all required closure activities may be used by ADEM at other STF sites in the state.

(b) Letter of Credit. An owner or operator may obtain an irrevocable standby letter of credit which conforms to the following requirements:

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

2. An owner or operator who uses a letter of credit shall also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by ADEM will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from ADEM. This standby trust fund shall meet the requirements in 335-4-8-.04(a), except:

- (i) An originally signed duplicate of the trust agreement shall be submitted to ADEM with the letter of credit; and

- (ii) The initial payment and subsequent annual payments specified in 335-4-8-.04(a)3. are not required.

3. The letter of credit shall be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution and date, and provide the ADEM Permit Number, name, and address of the

facility, and the amount of funds assured for closure of the facility.

4. The letter of credit shall be irrevocable and issued for a period of at least one (1) year in an amount at least equal to the current closure cost estimate. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one (1) year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and ADEM by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator and ADEM have received the notice, as evidenced by return receipts.

5. Whenever the current closure cost estimate exceeds the amount of the credit, the owner or operator, within sixty (60) days after the new estimate, shall either cause the amount of the credit to be increased to equal the current closure cost estimate and submit documentation of the increase to ADEM, or obtain other or additional financial assurance as specified in 335-4-8-.04. Whenever the current closure cost estimate is less than the amount of the credit, the letter of credit may be reduced following approval by ADEM.

6. After all administrative and judicial remedies have been exhausted in which a determination has been made that the owner or operator has failed to perform in accordance with the approved Closure Plan and other permit requirements when required to do so, ADEM may draw on the letter of credit.

7. If the owner or operator does not establish alternate financial assurance as specified in 335-4-8-.06 and obtain approval of the alternate assurance from ADEM within ninety (90) days after receipt by both the owner or operator and ADEM of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, ADEM will draw on the letter of credit. ADEM may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last thirty (30) days of an extension ADEM will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in 335-4-8-.04 and obtain approval of the assurance from ADEM.

8. ADEM will return the letter of credit to the issuing institution for termination when one of the following is accomplished:

(i) An owner or operator substitutes alternate financial assurance as specified in 335-4-8-.06; or

(ii) ADEM releases the owner or operator from the requirements in accordance with 335-4-8-.07.

(c) Closure Insurance. An owner or operator may obtain closure insurance which conforms to the following requirements:

1. The insurer shall be licensed to transact the business of insurance, or be eligible to provide insurance as an excess or surplus lines insurer in the State of Alabama.

(i) The use of insurance to demonstrate financial assurance for closure pertains exclusively to those insurance policies underwritten by commercial property and casualty insurers (primary or excess and surplus lines), each having a Standard and Poor's Insurer Financial Strength Rating of 'BBB' or higher, through which, in the insurance contract, the financial burden for closure is transferred to the third-party insurer. Except as provided in 335-4-8-.07, the third-party insurer shall assume financial responsibility for this accepted risk, using its own pool of resources that is independent, separate, and unrelated to that of the insured owner or operator.

(ii) The use of insurance policies underwritten by captive insurers is prohibited.

2. The closure insurance policy shall be issued for a face amount equal to the current closure cost estimate. There shall be no policy deductible. 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.

3. The closure insurance policy shall guarantee that funds will be available to close the facility whenever closure occurs. The policy shall also guarantee that once closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of ADEM, to the party or parties as ADEM specifies in writing.

4. After beginning closure, an owner or operator or another person allowed to conduct closure may request reimbursements for closure expenditures by submitting itemized bills to ADEM. Within sixty (60) days after receiving itemized invoices, ADEM shall determine if the expenditures are consistent with the approved closure

plan. ADEM shall instruct the insurer in writing to make reimbursements in the amounts ADEM specifies. If ADEM believes that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, ADEM may instruct the insurer to withhold reimbursements of the amounts as the insurer considers prudent until ADEM determines in accordance with 335-4-8-.07 that the owner or operator is no longer required to maintain financial assurance for closure of the facility. If ADEM does not instruct the insurer to make the reimbursements, ADEM will provide the owner or operator with a statement of reasons.

5. The owner or operator shall maintain the policy in full force and effect until ADEM consents to termination of the policy in accordance with 335-4-8-.07. Failure to pay the premium without substitution of alternate financial assurance as specified in 335-4-8-.06 will constitute a violation of 335-4. The violation will be considered to begin upon receipt by ADEM of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

6. Each policy shall contain a provision allowing assignment of the policy to a successor owner or operator. The assignment may be conditional upon consent of the insurer, provided the consent is not unreasonably refused.

7. The policy shall provide that the insurer may not terminate, cancel or not renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to terminate, cancel or not renew the policy by sending notice by certified mail to the owner or operator and ADEM. Cancellation, termination, or non-renewal may not occur, however, during the 120 days beginning with the date of receipt of the notice by both ADEM and the owner or operator, as evidenced by return receipts. Cancellation, termination, or non-renewal may not occur and the policy will remain in full force and effect in the event that, on or before the date of expiration:

- (i) ADEM considers the facility abandoned; or
- (ii) The permit is terminated or revoked or a new permit is denied; or

(iii) Closure is ordered by ADEM or a court of competent jurisdiction; or

(iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(v) The premium due is paid.

8. Whenever the current closure cost estimate exceeds the face amount of the policy, the owner or operator, within sixty (60) days after the new estimate, shall either cause the face amount to be increased to the current closure cost estimate and submit documentation of the increase to ADEM, or obtain other or additional financial assurance as specified in 335-4-8-.06. Whenever the current closure cost estimate is less than the face amount, the policy face amount may be reduced following approval by ADEM.

9. ADEM will give consent to the owner or operator that it may terminate the insurance policy when:

(i) An owner or operator substitutes alternate financial assurance as specified in 335-4-8-.06; or

(ii) ADEM releases the owner or operator in accordance with 335-4-8-.07.

(d) Surety Bond Guaranteeing Payment or Performance. An owner or operator may obtain a performance or surety bond which conforms to the following requirements:

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

2. The penal sum of the bond shall be in an amount equal to the current closure cost estimate and shall guarantee that funds will be available to close the facility whenever closure occurs.

3. 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 or when ADEM determines that the bond amount is necessary to pay for closure.

4. If the bond is called, the owner or operator shall establish a standby trust fund that meets the requirements of 335-4-8-.04(a) except the requirements for initial payment and subsequent annual payments

specified in 335-4-8-.04(a)3. Payments made under the terms of the bond will be deposited by the surety directly into the standby trust fund in accordance with instructions from ADEM. Payments from the trust fund shall be approved by the trustee and ADEM. Any forfeiture money remaining after completion of closure shall be returned to the surety.

5. 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 ADEM 120 days in advance of cancellation. If the surety cancels the bond, the owner or operator shall obtain alternate financial assurance as specified in 335-4-8-.06.

6. The owner or operator may cancel the bond only if alternate financial assurance is substituted as specified in 335-4-8-.06 or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with 335-4-8-.07.

7. Whenever the current closure cost estimate exceeds the penal sum of the bond, the owner or operator, within sixty (60) days of the new estimate, shall cause the penal sum of the bond to be increased to the current closure cost estimate and submit documentation of the increase to ADEM or obtain other financial assurance as specified in 335-4-8-.06 to meet the current closure cost estimate.

8. Failure of the owner or operator to report an increase in the current closure cost estimate shall be grounds for revocation of the processor permit.

9. ADEM may decrease the penal sum of the bond if the owner or operator adequately demonstrates to ADEM that the penal sum exceeds the current closure cost estimate. Penal sum reduction is not mandatory if the sum exceeds the estimate. ADEM shall consider the following to determine the penal sum of the bond:

(i) The current closure cost estimate submitted by an applicant for a scrap tire processor permit.

(ii) The 30-day supply capacity submitted as part of an application for a scrap tire processor permit.

(e) For transporters and processors of scrap tires permitted or licensed under the authority of Code of Ala. 1975, §§22-40-01 to 22-40A-11 (promulgated pursuant to Act 1999-597 and 2001-976 and repealed by Act 2003-332) on the effective date of 335-4, financial assurance instruments shall be in

effect on the date a permit application is submitted to ADEM in accordance with 335-4-3-.04.

(f) Self-insurance. Only agencies of the State of Alabama or the U.S. Government may qualify for self-insurance.

Author: James L. Bryant, Adam N. Rhodes

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335-4-8-.05 Financial Assurance Instruments For Remediation.

The owner or operator of a scrap tire processing facility may utilize the following instruments to provide financial assurance for remediation. The instruments used to demonstrate financial assurance shall ensure that the level of financial assurance in 335-4-8-.03(3) will be available whenever they are needed.

(a) Trust Fund. An owner or operator may establish a trust fund conforming to the requirements of 335-4-8-.04(a).

(b) Letter of Credit. An owner or operator may obtain an irrevocable standby letter of credit conforming to the requirements of 335-4-8-.04(b).

(c) Insurance. An owner or operator may obtain remediation insurance conforming to the requirements of 335-4-8-.04(c).

(d) Surety Bond. An owner or operator may obtain a surety bond conforming to the requirements of 335-4-8-.04(d).

Author: James L. Bryant

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335-4-8-.06 Use Of Multiple Financial Assurance Instruments.

An owner or operator may satisfy the requirements of 335-4-8-.03 to .05 by establishing more than one (1) financial instrument per site. These instruments are limited to trust funds, letters of credit and surety bonds.

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335-4-8-.07 Release Of Financial Institution.

ADEM shall release a trustee, bank, surety or other financial institution when either of the following occur:

(a) An owner or operator substitutes alternative financial assurance so that the total financial assurance for the facility is equal to or greater than the current cost estimate for closure and remediation, without counting the amounts to be released.

(b) ADEM releases the owner or operator from the requirements of 335-4-8-.02 and .03 following completion of closure or remediation.

Author: James L. Bryant

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