ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT WATER DIVISION - WATER QUALITY PROGRAM ADMINISTRATIVE CODE

CHAPTER 335-6-13 CENTRALIZED WASTE TREATMENT FACILITY FINANCIAL ASSURANCE REQUIREMENTS

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335-6-13-.01 Purpose.

To require certain centralized waste treatment facilities to post a performance bond or other financial assurance in an amount sufficient to close the facility if the facility owner or operator ceases operation, abandons the facility, or fails to properly maintain the facility to ensure compliance with state environmental regulations.
Author: Chris Sasser; Daphne Smart
Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2.
History: Amended: Filed February 19, 2013; effective March 26, 2013.

335-6-13-.02 Applicability.

(1) The requirements of this chapter apply to owners or operators of centralized waste treatment facilities, as defined by federal effluent guidelines set forth at 40 CFR Part 437, when applying for issuances, reissuances, or modifications of a permit for a facility that processes or treats industrial wastes, industrial wastewater, or used material. The following facilities are exempt from the requirements of this chapter:

(a) Waste treatment facilities which treat waste only from sources owned or operated by the owner of the waste treatment facilities, or

(b) Waste treatment facilities which treat waste pursuant to a contract at a waste treatment facility which also treat waste from sources owned or operated by the owner.

Author: Chris Sasser; Daphne Lutz
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335-6-13-.03 Definitions.

Wherever used in this chapter, unless a different meaning clearly appears from the context or unless a different meaning is stated in a definition applicable to only a portion of this chapter, the following shall mean:

(a) "Active life" means the period of operation beginning with the initial receipt of wastes, wastewater, or other used material and ending at completion of closure of the facility.

(b) "Annual" shall mean a calendar year.

(c) "Application" means the information required by chapter 335-6-6 or 335-6-5 to be submitted when applying for an NPDES permit or SID permit, respectively.

(d) "Centralized waste treatment facility" (also referred to as "waste treatment facility") means a facility as defined by federal effluent guidelines set forth at 40 CFR Part 437.

(e) "Certification" means a statement of professional opinion based upon knowledge and belief.

(f) "CFR" means Code of Federal Regulations.

(g) "Closure" for the purpose of this chapter only means removal and proper disposal, processing, or handling of industrial wastes, wastewaters, used materials, sludge, and any other materials, including but not limited to raw materials, byproducts, additives, and products at a water treatment facility.

(h) "Current closure cost estimate" as used in rule 335-6-13-.06 means the most recent of the estimates prepared in accordance with rule 335-6-13-.06.

(i) "Department" means the Alabama Department of Environmental Management as established by Code of Alabama 1975, § 22-22A-4.

(j) "Director" means the Director of the Alabama Department of Environmental Management, designated pursuant to Code of Ala. 1975, §22-22A-4, or his or her designee.

(k) "Discharge" means the addition, introduction, leaking, spilling, or emitting of any sewage, industrial wastes, pollutant or other wastes into waters of the state.

(l) "Engineer" means a person currently licensed as a professional engineer with the State of Alabama Board of Licensure for Professional Engineers and Land Surveyors.

(m) "Final closure" means the completion of closure of a waste treatment facility.

(n) "Financial Assurance" means a financial arrangement by the owner or operator of a centralized waste treatment facility which guarantees the availability of funds that may be used for closure of the facility if determined necessary by the Department should the owner or operator cease proper operation of the facility, abandon the facility, or fail to properly maintain the facility to ensure compliance with state environmental regulations.

(o) "NPDES permit" means a National Pollutant Discharge Elimination System permit issued pursuant to chapter 335-6-6.

(p) "Operator" means the person(s) having direct supervision over and responsibility for the daily operation of the centralized waste treatment facility.

(q) "Owner" means the person(s) who owns a centralized waste treatment facility or part of a facility.

(r) "Permit" means an issued NPDES permit or SID permit.

(s) "SID permit" means a State Indirect Discharge permit pursuant to chapter 335-6-5.

(t) "State" means the State of Alabama.

Author: Chris Sasser; Daphne Lutz
Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2.
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335-6-13-.04 Other Closure Requirements.

These rules and regulations do not supersede any other Departmental regulations regarding closure of any type of facility. Owners or operators of affected waste treatment facilities shall comply with this chapter and any other applicable rules and regulations.

Author: Chris Sasser; Daphne Lutz
Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2.

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335-6-13-.05 Financial Assurance Violations.

Failure of the obligor of the bond or financial assurance to provide service satisfactory to the Department shall constitute a cause of action for recovery in a civil action at the instance of the Department.
Author: Chris Sasser; Daphne Smart
Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2.
History: Amended: Filed February 19, 2013; effective March 26, 2013.

335-6-13-.06 Financial Assurance Criteria.

(1) Prior to the issuance a permit or prior to the reissuance or modification of an existing permit for a centralized waste treatment facility subject to the requirements of this chapter, the owner or operator shall post a performance bond or other financial assurance as described in this chapter in an amount sufficient for closure of the facility.

(2) The owner or operator shall obtain a minimum of two detailed, written estimates, in current dollars, of the cost of hiring a third party to perform closure of the centralized waste treatment facility. The owner or operator shall submit the closure cost estimates with the permit application.

(3) The owner or operator shall re-evaluate the closure cost estimate and the amount of financial assurance required if:

(a) Changes to the closure plan or waste treatment facility conditions significantly increase the maximum cost of closure at any time during the active life of the facility. The owner or operator shall submit any updated closure cost estimates and documentation of the increase in required financial assurance to the Department at least 30 days prior to initiating changes at the facility which would significantly increase the maximum cost of closure at any time during the active life of the facility.

(b) The Department requests such in order to verify there is adequate funding for closure. This re-evaluation shall be due as requested by the Department.

(4) The owner or operator demonstrating financial assurance shall provide continuous coverage for closure until:

(a) The owner or operator is released from financial assurance requirements by the Department or

(b) If ownership or operation of the waste treatment facility is transferred to another person, the new owner or operator has demonstrated financial assurance to the Department as required by this chapter.

(5) The bond or other financial assurance may be declared forfeited if required by the Department when the owner or operator abandons the centralized waste treatment facility, ceases operation of the facility, or fails to properly maintain the facility to ensure compliance with state environmental regulations.
Author: Chris Sasser; Daphne Smart
Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2.
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335-6-13-.07 Allowable Mechanisms For Financial Assurance.

Mechanisms used to demonstrate financial assurance under rule 335-6-13-.06 shall ensure that the funds necessary for closure will be available when they are needed. Only the mechanisms specified in paragraphs (2) through (6) of this rule are allowable.

(1) Reserved.

(2) Surety Bond Guaranteeing Payment or Performance.

(a) An owner or operator may demonstrate financial assurance by obtaining a payment or performance surety bond that conforms to the requirements of subparagraphs (2)(a)1. through (2)(a)5. of this rule.

1. The bond shall be effective before the initial start-up of operations for new centralized waste treatment facilities, or before the reissuance or modification of a permit for existing facilities.

2. The surety 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.

3. The penal sum of the bond shall be in an amount at least equal to the current closure cost estimate, except as provided in paragraph (6) of this rule.

4. Under the terms of the bond, the surety will become liable on the bond obligation when the principal (i.e., the owner or operator) fails to perform as guaranteed by the bond.

5. Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the principal and to the Department 120 days in advance of cancellation.

(b) The owner or operator shall retain a duplicate copy of the bond in the waste treatment facility's record and shall submit the original copy of the bond to the Department, as specified in rule 335-6-13-.06(1).

(c) The owner or operator shall establish a standby trust fund. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency. If the bond is forfeited, the surety shall deposit the payments made under the terms of the bond directly into the standby trust fund in accordance with instructions from the Department. Payments from the trust fund shall be approved by the Department.

(d) The owner or operator shall retain a duplicate copy of the trust agreement in the waste treatment facility's record and shall submit the original copy to the Department, as specified in rule 335-6-13-.06(1).

(e) If the surety cancels the bond, the owner or operator shall obtain an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(f) The owner or operator may cancel the bond only if an alternate allowable financial assurance mechanism is demonstrated or if the owner or operator is released from the financial assurance requirements in accordance with rule 335-6-13-.08.

(3) Letter of Credit.

(a) An owner or operator may demonstrate financial assurance by obtaining an irrevocable standby letter of credit that conforms to the requirements of subparagraphs (3)(a)1. through (3)(a)3. of this rule.

1. The letter of credit shall be effective before the initial start-up of operations for new centralized waste treatment facilities or before the reissuance or modification of a permit for existing facilities.

2. The issuing institution shall 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 letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current closure cost estimate except as provided in paragraph (6) of this rule. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution has cancelled the letter of credit by sending notice of cancellation by certified mail to the letter of credit applicant (i.e., the owner or operator) and to the Department 120 days in advance of cancellation.

(b) The owner or operator shall submit the original copy of the letter of credit to the Department, as specified in rule 335-6-13-.06(1). The submittal shall be accompanied by a transmittal letter that refers to the letter of credit by number, issuing institution, and date and that provides the name and address of the centralized waste treatment facility, name and address of the owner/ operator, and the amount of funds assured.

(c) The owner or operator shall retain a duplicate copy of the letter of credit and a copy of the transmittal letter required by subparagraph (3)(b) of this rule in the centralized waste treatment facility's record.

(d) If the issuing institution cancels the letter of credit, the owner or operator shall obtain an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(e) The owner or operator may cancel the letter of credit only if an alternate allowable financial assurance mechanism is demonstrated or if the owner or operator is released from the financial assurance requirements in accordance with rule 335-6-13-.08.

(4) Insurance.

(a) An owner or operator may demonstrate financial assurance by obtaining insurance that conforms to the requirements of subparagraphs (4)(a)1. through (4)(a)6. of this rule.

1. The insurance shall be effective before the initial start-up of operations for new centralized waste treatment facilities or before the reissuance or modification of a permit for existing facilities.

2. At a minimum, the insurer shall be licensed to transact the business of insurance, or shall be eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

3. The insurance policy shall guarantee that funds will be available for closure of the waste treatment facility when final closure occurs. The policy shall also guarantee that once closure begins, the insurer will be responsible for the paying out of funds to the insured (i.e., the owner or operator) or to other person(s) authorized to conduct closure up to an amount equal to the face amount of the policy upon the direction of the Department.

4. The insurance policy shall be issued for a face amount at least equal to the current closure cost estimate except as provided in paragraph (6) of this rule. 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.

5. The insurance policy shall 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.

6. The insurance policy shall provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy 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 cancel the policy by sending notice of cancellation by certified mail to the insured and to the Department 120 days in advance of cancellation.

(b) The owner or operator shall retain a duplicate copy of the insurance policy in the facility's record and shall submit the original copy of the insurance policy to the Department, as specified in rule 335-6-13-.06(1).

(c) An owner or operator, or other person(s) authorized to conduct closure, may receive reimbursements for closure. Requests for reimbursement will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure. Any person seeking reimbursement for closure costs shall provide justification and documentation of the closure

costs to the Department for approval prior to requesting reimbursement from the insurer. Persons receiving reimbursement shall notify the Department of the reimbursement within 30 days of receipt. Persons receiving reimbursement shall retain the documentation of the justification for reimbursement and confirmation of receipt of reimbursement in the waste treatment facility's record or other record, as applicable.

(d) If the insurer cancels the policy, the owner or operator shall obtain an alternate allowable financial assurance mechanism within 90 days of the notice of cancellation.

(e) The owner or operator may cancel the insurance policy only if an alternate allowable financial assurance mechanism is demonstrated or if the owner or operator is released from the financial assurance requirements in accordance with rule 335-6-13-.08.

(5) State-Approved Mechanism. An owner or operator may demonstrate financial assurance by obtaining other mechanisms that meet the criteria of this rule and that are approved by the Department.

(6) Use of Multiple Mechanisms. An owner or operator may demonstrate financial assurance by obtaining more than one financial mechanism per centralized waste treatment facility. The mechanisms used shall meet the applicable criteria specified in paragraphs (2) through (5) of this rule except that financial assurance for an amount at least equal to the current closure cost estimate may be provided by multiple mechanisms, rather than a single mechanism.

(7) General Criteria for Financial Assurance Mechanisms.

(1) The language of the financial assurance mechanisms listed in paragraphs (2) through (5) of this rule shall ensure that the instruments satisfy the following criteria:

(a) The amount of funds assured is sufficient to cover the costs of closure.

(b) Funds will be available in a timely fashion if needed.

(c) The owner or operator is obtaining the mechanism by the required dates as indicated in this rule and is maintaining the mechanism until released from the financial assurance requirements under rule 335-6-13-.08.

(d) The financial assurance mechanism is legally valid, binding, and enforceable under State and federal law.

(8) Discounting. The Department may allow discounting of closure cost estimates obtained in accordance with paragraphs 335-6-13-.06 (2) and (3) up to the rate of return for essentially risk free investments, net of inflation, under the following conditions:

(a) The Department determines that cost estimates are complete and accurate and the owner or operator has submitted a statement from an engineer so stating;

(b) The Department finds the waste treatment facility in significant compliance with applicable and appropriate permit conditions; and

(c) The owner or operator adjusts the discounted closure cost estimates annually to reflect inflation and years of remaining life.

(9) The owner or operator subject to the requirements of this chapter shall certify in writing to the Department that each mechanism used to demonstrate financial assurance as required by rule 335-6-13-.06 remains current and valid and that changes to the closure plan or waste treatment facility conditions have not occurred that would significantly increase the maximum cost of closure. If one or both conditions cannot be certified as true, the owner or operator shall so indicate and provide an explanation. The certification shall be submitted annually no later than the anniversary of the date the mechanism initially became effective.

Author: Chris Sasser; Daphne Lutz
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335-6-13-.08 Release From Financial Assurance Requirements By The Department.

Upon the submission of a certification by the owner or operator and a determination by the Department that the centralized waste treatment facility has been properly closed, the owner and operator shall be released from the financial assurance requirements of this chapter. This certification shall be submitted to the Director by registered mail and shall be signed by the owner or operator and by an engineer. Documentation supporting the engineer's certification shall be furnished to the Director upon request.

Author: Chris Sasser; Daphne Lutz

Statutory Authority: Code of Ala. 1975, §§22-25C-1, 22-25C-2. **History: Amended:** Filed February 19, 2013; effective March 26, 2013. **Amended:** Filed August 21, 2018; effective October 5, 2018.