

Readopt with amendment Env-Sw 1400, effective 7-1-14 (Document# 10599), to read as follows:

CHAPTER Env-Sw 1400 FINANCIAL ASSURANCE

Statutory Authority: RSA 149-M:7, RSA 149-M:9

PART Env-Sw 1401 PURPOSE AND APPLICABILITY

Env-Sw 1401.01 Purpose. The purpose of the rules in this chapter is to identify requirements and procedures for providing and maintaining a financial assurance plan to guarantee the cost of closing a facility, including post-closure care, and, for a facility subject to 40 CFR 258.58 ***as applicable, pursuant to Env-Sw 803.02***, the cost of corrective action.

Env-Sw 1401.02 Applicability.

(a) The rules in this chapter shall apply to all facilities, except as provided by (b) below.

(b) The rules in this chapter shall not apply to a:

(1) Permit-exempt facility;

(2) Permit-by-notification facility;

~~(3) Facility for which the closure cost estimate, prepared in accordance with Env-Sw 1403.02, is \$3,000 or less;~~

(43) Emergency permit facility;

~~(54) Limited private non-landfill facility; or~~

~~(65) Limited Publicly owned non-landfill facility; or~~

~~(7) A facility having coverage under Env-Sw 1900.~~

PART Env-Sw 1402 DEFINITIONS

Env-Sw 1402.01 “Binding commitment” means a signed loan agreement between the permittee and the state of New Hampshire and approved by the governor and council.

Env-Sw 1402.02 “Call” means an action by the department to draw on the monies guaranteed in a financial assurance mechanism.

Env-Sw 1402.023 “Debt service” means the amount of principal and interest due on a loan in the current year.

Env-Sw 1402.034 “Deficit” means a negative balance calculated by taking the beginning fund balance plus annual revenue minus total annual expenditures.

Env-Sw 1402.045 “Local government” means a legally-recognized political subdivision in the state of New Hampshire, including solid waste districts.

Env-Sw 1402.06 “Nonaffiliated” means entities which, are not controlled by or under common control of, and are not part of any group acting in concert which controls, directly or indirectly, the applicable entity.

Env-Sw 1402.057 “Total annual revenue” means proceeds from all taxes and fees collected by the local government responsible for landfill closure, but does not include the proceeds from borrowing or asset sales or proceeds earned from funds managed by a local government on behalf of a specific third party.

PART Env-Sw 1403 FINANCIAL ASSURANCE REQUIREMENTS

Env-Sw 1403.01 Financial Assurance Plan Preparation and Submittal.

(a) A permittee shall establish, implement and maintain an approved financial assurance plan to guarantee the cost of facility closure, including post-closure as required by the facility permit and the solid waste rules.

(b) A financial assurance plan shall include:

(1) A closure cost estimate prepared in accordance with Env-Sw 1403.02;

(2) Provisions for guaranteeing the cost of facility closure based on one or any combination of the options specified in Env-Sw 1403.03 through Env-Sw 1403.05;

(3) For the options specified in Env-Sw 1403.03, the identity and contact information of the financial institution providing the guarantee; and

(4) For a local government proposing to use the state approved local government financial test to assure its obligations, as provided in Env-Sw 1403.05:

a. A letter signed by the local government's chief financial officer which:

1. Identifies all current cost estimates covered by a financial test, as described in Env-Sw 1403.05; and

2. Provides evidence of and certifies that the local government meets the conditions of Env-Sw 1403.05(a) through (h);

b. The local government's year-end financial statements for the latest fiscal year, audited by an independent, certified public accountant (CPA) who conducts comprehensive audits, with:

1. The unqualified opinion of the auditor; or

2. The qualified opinion of and a written explanation by the auditor as to why the qualification should be deemed insufficient to warrant disallowance of the financial test;

c. A report to the local government by the local government's independent CPA, as follows:

1. The report shall be based on performing a review of the financial ratios required by Env-Sw 1403.05(a)(3), if applicable, and the requirements of Env-Sw 1403.05(b) and Env-Sw 1403.05(c)(3) and (4); and

2. The report shall state the procedures performed and the CPA's findings; and

d. A copy of the comprehensive annual financial report (CAFR) used to comply with Env-Sw 1403.05(d) or certification that the requirements of Governmental Accounting Standards Board Statement 18, No. 101-A, published August, 1993 have been met.

(c) A proposed financial assurance plan shall be:

(1) Submitted by the permittee in accordance with Env-Sw 303; and

(2) Reviewed and approved by the department pursuant to Env-Sw 1404.

Env-Sw 1403.02 Closure Cost Estimation.

(a) The dollar amount guaranteed by a financial assurance plan shall be no less than the estimated total closure, including post-closure costs determined pursuant to (b) through (g), below.

(b) The closure cost estimate shall be figured based on representative current market rates for having a ***nonaffiliated*** third party perform all required closure activities at the point in the facility's active life when the extent and manner of facility operations in compliance with permit conditions and applicable laws and rules makes closure the most expensive, as indicated by the approved facility closure plan. For landfills, the closure cost estimate shall also include the cost of having a ***nonaffiliated*** third party perform all required post-closure activities for a period of 30 years from the date of the ***most recent estimate which is required to be updated pursuant to Env-Sw 1405.02***, unless the post-closure period has been modified pursuant to Env-Sw 807.05(d).

(c) For a landfill constructed in phases, the permittee may figure closure costs in accordance with (b) above based on the constructed area of the facility only, instead of the entire permitted footprint.

(d) Any facility subject to the corrective action requirements specified in 40 CFR 258.58, shall comply with the financial assurance requirements specified in 40 CFR 258, Subpart G.

(e) The cost of removing and disposing of all wastes not permitted to remain at the facility following closure shall be included in the closure cost estimate, excluding actively managed ~~select~~ processed recyclable materials ***as defined in Env-Sw 104***.

(f) Salvage value from the sale of facility structures, equipment or other assets associated with the facility and profits from the sale of recyclable materials shall not be treated as a credit to reduce total closure costs.

(g) The closure cost estimate shall:

(1) Be itemized and documented to show the unit cost and quantity of each item, service, and activity required to close the facility in accordance with the solid waste rules and the approved facility closure plan;

(2) ~~For landfills, include a line item for qualified professional oversight of all closure activities~~***Be submitted with documentation, including nonaffiliated third-party cost estimates, that support the unit cost of each item, service, and activity required to close the facility in accordance with the solid waste rules and the approved facility closure plan; and***

(3) ~~For facilities other than landfills, whose most recent closure cost estimate is \$50,000 or more, include a line item for qualified professional oversight of all closure activities;~~***bear the signature and seal of a qualified professional engineer.***

(4) ~~Include a line item for contingencies equaling no less than 10% of the total itemized costs;~~

(5) ~~For landfills, include a line item for the following costs if final design plans and specifications for landfill closure are not yet approved:~~

a. ~~The cost of preparing final design plans and specifications for closure; and~~

b. ~~The cost of the fee specified in Env-Sw 310.08(b) for filing an application for a type II permit modification to obtain final design plan approval for construction of all required landfill closure systems;~~

(6) ~~For landfills, be certified by a qualified professional engineer; and~~

(7) ~~For lined landfills subject to 40 CFR 258 operated on or after October 9, 1993, include the cost of replacing 20% of the active gas collection system within the footprint of the landfill that has already been built.~~

(h) A permittee of a collection, storage, and transfer facility, or processing and treatment facility shall complete a "Cost Estimate for Closure of Solid Waste Collection, Storage, and Transfer Facility or

Processing and Treatment Facility”, NHDES-S-05-024, October 2023, available at:
<https://onlineforms.nh.gov/?formtag=nhdes-s-05-024>.

(i) ***A permittee of a closed landfill shall complete a “Cost Estimate for Post-Closure Care of a Solid Waste Landfill”***, NHDES-S-05-025, October 2023, available at:
<https://onlineforms.nh.gov/?formtag=nhdes-s-05-025>.

(j) ***A permittee of an operating landfill shall complete a:***

(1) ***“Cost Estimate for Closure of a Solid Waste Landfill”***, NHDES-S-05-023, October 2023, available at: <https://onlineforms.nh.gov/?formtag=nhdes-s-05-023>; and

(2) ***“Cost Estimate for Post-Closure Care of a Solid Waste Landfill”***, NHDES-S-05-025, October 2023, available at: <https://onlineforms.nh.gov/?formtag=nhdes-s-05-025>.

(k) ***The permittee or authorized contact shall sign and date the closure cost estimate form(s).***

(l) ***Completed closure cost estimate form(s) shall be submitted in accordance with Env-Sw 1405.02.***

Env-Sw 1403.03 Financial Assurance Mechanisms, All Facilities.

(a) Financial assurance shall be provided in one, or any combination, of the following forms:

(1) An irrevocable letter of credit issued for a period of at least one year from an institution whose operations are regulated and examined by a federal or New Hampshire state agency and found to be in good standing;

(2) A claims incurred insurance policy, except that insurance issued by an affiliated captive insurance company shall not be acceptable;

(3) A surety bond issued by a surety company listed as an acceptable surety on federal bonds in the version of the U.S. Department *of the Treasury* Circular 570 that is current as of the date the bond is acquired;

(4) A trust fund established in accordance with the laws of the state of New Hampshire;

(5) For a landfill, a binding commitment between the permittee and the state of New Hampshire for a state revolving fund loan designated for closure of the landfill; or

(6) Another mechanism that meets the criteria provided in 40 CFR 258.74(i).

(b) If using a surety bond, insurance policy or letter of credit, the permittee shall also establish a standby trust to receive the proceeds of the surety bond, insurance policy or letter of credit.

(c) The standby trust shall be established with a financial institution that has the authority to act as a trustee and whose operations are regulated and examined by a federal or New Hampshire state agency.

(d) Each financial assurance instrument specified in (a) and (b) above, except (a)(5), shall specifically identify the state of New Hampshire as the beneficiary.

(e) Funds held in trust accounts may be invested, but shall provide for the preservation of principal.

(f) Financial assurance documents, including a standby trust, shall be as specified by 40 CFR 264.151, with the following revisions:

(1) The phrase “hazardous waste” shall be replaced with the phrase “solid waste”;

(2) The phrase “EPA administrator” shall be replaced with the phrase “department on behalf of the state of New Hampshire”;

(3) All cites to “40 CFR” shall be replaced with “RSA 149-M and the solid waste rules”; and

(4) The term “RCRA C” shall be omitted.

(g) Letters of credit shall include *a* provisions to:

~~(1) Automatically extend the expiration date by at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies the permittee and the department by certified mail, return receipt requested, of a decision to not extend the expiration date; and~~

~~(2) Provide written notification of pending insolvency or bankruptcy of the issuer to the permittee and the department, sent by certified mail, return receipt requested within 3 days of the date the issuing institution initiates proceedings to declare insolvency or bankruptcy.~~

(h) Insurance policies and surety bonds shall include a provision to prohibit any cancellation without prior notice of cancellation being sent to the permittee and the department by certified mail, return receipt requested, at least 120 days before the effective date of cancellation.

Env-Sw 1403.04 Financial Assurance Mechanisms, Public Facilities. A public landfill subject to 40 CFR 258 shall provide financial assurance by:

(a) Any of the mechanisms identified in Env-Sw 1403.03;

(b) A capital reserve fund that shall be funded in a manner to provide sufficient funds for closure and post-closure care at the scheduled time of closure; or

(c) The local government financial test specified in Env-Sw 1403.05, for a facility owned and operated by a single municipality.

Env-Sw 1403.05 Local Government Financial Test.

(a) A local government proposing to assure its obligations under the state approved local government financial test shall meet the following requirements as applicable:

(1) If the local government has outstanding, rated, general obligation bonds not secured by insurance, a letter of credit, or other collateral or guarantee, all such general obligation bonds shall 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;

(2) The local government shall be included in an outstanding bond issue through the New Hampshire municipal bond bank and shall not be in default; or

(3) The local government shall satisfy each of the following financial ratios based on the local government’s most recent audited annual financial statement:

a. The ratio of cash plus marketable securities to total expenditures shall be greater than or equal to 0.05, using available cash and 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 or special purposes other than landfill closure such as pensions and capital reserve funds not held for landfill closure purposes; and

b. The ratio of annual debt service to total expenditures shall be less than or equal to 0.20, where total expenditures shall exclude capital outlays, debt repayment, capital reserve funds not expended for landfill closure purposes, trust funds, and pension funds.

(b) The local government proposing to assure its obligations under the state approved local government financial test shall:

- (1) Prepare its financial statements in conformity with generally accepted accounting principles for governments; and
- (2) Have its financial statements audited by an independent certified public accountant.

(c) A local government shall not be eligible to assure its obligations under the state approved local government financial test if it:

- (1) Is currently in default on any outstanding general obligation bonds or outstanding bonds with the New Hampshire municipal bond bank;
- (2) Has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's;
- (3) Operated at a deficit equal to 5% or more of total annual revenue in each of the past 2 fiscal years; or
- (4) Receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant auditing its financial statement and negatively impacting the current financial position of the local government.

(d) A local government shall disclose in each comprehensive annual financial report (CAFR) all closure and post-closure care costs and corrective action costs, if any, which the local government has assured through the financial test provisions in 40 CFR 258.50.

(e) Disclosure pursuant to (d) above shall include:

- (1) The nature and source of the closure and post-closure care requirements;
- (2) The reported liability at the balance sheet date;
- (3) The estimated total closure and post-closure care costs remaining to be recognized;
- (4) The percentage of landfill capacity used to date; and
- (5) The estimated landfill life in years.

(f) Conformance with Governmental Accounting Standards Board Statement 18, No. 101-A, published August, 1993 shall be deemed in compliance with (d) above.

(g) Subject to (h) below, a local government may use the state approved local government financial test to assure closure, post-closure, and corrective action costs that equal up to 43% of the local government's total annual revenue.

(h) If the local government assures other environmental obligations through a financial test, including those associated with underground injection control wells (UIC facilities) under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR 280, polychlorinated biphenyls (PCB) storage facilities under 40 CFR 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR 264 and 265, it shall:

- (1) Add those costs to the closure, post-closure, and corrective action costs it seeks to assure through use of the state approved local government financial test; and
- (2) Assure that the total shall not exceed 43% of the local government's total annual revenue.

(i) A local government shall obtain an alternate financial assurance instrument as specified in Env-Sw 1403.03 for those costs that exceed the limits set in (g) and (h) above.

PART Env-Sw 1404 REVIEW AND APPROVAL

Env-Sw 1404.01 Review. The department shall review a proposed ~~ed~~ for financial assurance ***plan*** as part of the permit application or closure plan review process, as applicable.

Env-Sw 1404.02 Approval. A proposed ~~ed~~ for financial assurance ***plan*** shall not be approved if the department determines that the proposed ~~ed~~ plan does not:

- (a) Meet the requirements for financial assurance specified in this part; or
- (b) Satisfy the requirements of RSA 149-M:9, X.

PART Env-Sw 1405 ADJUSTMENTS AND CHANGES

Env-Sw 1405.01 Modifications.

(a) An approved financial assurance plan shall not be modified unless the permittee obtains written approval from the department.

(b) To obtain written approval to modify an approved financial assurance plan, the permittee shall apply for a permit modification pursuant to Env-Sw 315.

(c) Applications to modify an approved financial assurance plan shall include all of the information required by Env-Sw 1404~~3~~.01.

Env-Sw 1405.02 Updates.

(a) A permittee shall submit at least one update of the facility's closure cost estimate to the department no later than March 31 of the third calendar year after submitting an initial closure cost estimate or the ~~last~~ most recent updated closure cost estimate, as applicable.

(b) During the years in which submittal of a closure cost estimate is not required by (a), above, lined landfills subject to 40 CFR 258 operated on or after October 9, 1993, ***collection, storage, and transfer facilities with an unlimited service area as defined in Env-Sw 104, and processing/treatment facilities as defined in Env-Sw 104***, shall obtain an updated cost estimate and place it in the facility's operating record.

(c) If a permittee obtains an updated closure cost estimate, ~~pursuant to (b), above,~~ that exceeds ***both*** the ~~last~~ most recent estimate, ***and the total cost is greater \$15,000***, the permittee shall ~~update~~ ***modify*** its financial assurance mechanism in an amount consistent with the most ~~current~~ ***recent*** closure cost estimate, ***pursuant to Env-Sw 1405.01***.

(d) If a permittee obtains an updated closure cost estimate that exceeds the most recent estimate, but the total cost is below \$15,000, the permittee shall continue to complete and submit updated closure cost estimates in accordance with Env-Sw 1405.02, but is not subject to the financial assurance provisions in Env-Sw 1403.03.

~~(d)~~(e) A local government using the state approved local government financial test shall:

- (1) Annually update and place in the facility's operating record all documentation required by Env-Sw 1403.01(b)(4) within 180 days following the close of the local government's fiscal year; and
- (2) Produce its financial records for inspection by the department upon request.

Env-Sw 1405.03 Replacement.

(a) A permittee shall submit a revised financial assurance plan for approval pursuant to Env-Sw 1405.01 within 30 days of learning that any portion of its financial assurance ***mechanism*** shall be canceled or not renewed by the issuer.

(b) The permittee shall demonstrate that it has obtained replacement financial assurance promptly upon receiving the department's approval of a revised plan, but no later than 30 days before the cancellation or expiration date of the existing financial assurance ***mechanism***.

(c) A local government using the state approved local government financial test to assure its obligations shall satisfy the requirements of the financial test at the close of each fiscal year. If the local government no longer meets the requirements of the local government financial test it shall, within 210 days following the close of the local government's fiscal year, obtain alternative financial assurance as specified in Env-Sw 1403.03.

Env-Sw 1405.04 Release of Financial Assurance Obligation. An approved financial assurance plan, or any part thereof, shall remain in effect unless:

(a) A facility meets the requirements in Env-Sw 1405.02(d);

(b) The facility is no longer defined as a facility in accordance with Env-Sw 103 and has completed the general closure requirements specified in Env-Sw 1006.02, Env-Sw 1106, Env-Sw 1205 and other rules as applicable;

(c) The permittee obtains written approval from the department to replace a financial assurance mechanism specified in Env-Sw 1403.03(a), Env-Sw 1403.03(b), Env-Sw 1403.04(b), and Env-Sw 1403.04(c).

PART Env-Sw 1406 CALLING A FINANCIAL ASSURANCE MECHANISM

Env-Sw 1406.01 Calling a Financial Assurance Mechanism. The department shall call a financial assurance mechanism when:

(a) The permittee declares or files for bankruptcy;

(b) The permittee does not replace their financial assurance mechanism in accordance with Env-Sw 1405.03;

(c) The permittee fails to conduct closure obligations;

(d) The facility's permit is revoked or suspended in accordance with Env-Sw 306.04; or

(e) One or more of the trigger events for closure as specified in Env-Sw 1006.01 exist.

APPENDIX

Rule	State Statute(s) Implemented	Federal Regulations Implemented
Env-Sw 1400	RSA 149-M:7, II, III, and XIV; RSA 149-M:9, X	40 CFR 258