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Notice of Rulemaking Hearing

Hearings will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-204. For questions and copies of the notice, contact the person listed below.

Agency/Board/Commission:	Environment and Conservation
Division:	Financial Responsibility Office
Contact Person:	O. J. Wingfield
Address:	8 th Floor, L & C Annex 401 Church Street Nashville, Tennessee 37243
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Any Individuals with disabilities who wish to participate in these proceedings (to review these filings) and may require aid to facilitate such participation should contact the following at least 10 days prior to the hearing:

ADA Contact:	ADA Coordinator
Address:	12 th Floor L&C Tower 401 Church Street Nashville, Tennessee 37243
Phone:	1-866-253-5827 (toll free) or (615) 532-0200 Hearing impaired callers may use the TN Relay Service at 1-800-848-0298.
Email:	Beverly.Evans@tn.gov

Hearing Location(s) (for additional locations, copy and paste table)

Address 1:	Ruth Neff Conference Room – Side B 17 th Floor, L & C Tower		
Address 2:	401 Church Street		
City:	Nashville, Tennessee		
Zip:	37243		
Hearing Date :	11/15/10		
Hearing Time:	1:00 p.m.	<input checked="" type="checkbox"/> X CST	<input type="checkbox"/> EST

Additional Hearing Information:

The Department prepared an initial set of draft rules for public review and comment. Copies of these initial draft rules are available for review at the Tennessee Department of Environment and Conservation's (TDEC's) Environmental Field Offices located as follows:

Memphis Environmental Field Office
8383 Wolf Lake Drive
Memphis, TN 38133
(901) 371-3000/ 1-888-891-8332

Cookeville Environmental Field Office
1221 South Willow Avenue
Cookeville, TN 38506
(931) 432-4015/ 1-888-891-8332

Jackson Environmental Field Office
1625 Hollywood Drive
Jackson, TN 38305

Chattanooga Environmental Field Office
Suite 550 - State Office Building
540 McCallie Avenue

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Chapter 1200-01-07
Solid Waste Processing and Disposal

Amendment

Paragraph (3) of Rule 1200-01-07-.03 Requirements for Financial Assurance is amended by deleting it in its entirety and replacing it with the following paragraph (3):

(3) Financial Assurance Requirements

(a) General Requirement – Owners or operators of facilities must file and maintain financial assurance with the Commissioner as set forth in this paragraph. As used in this paragraph owner or operator includes, but is not limited to, parent corporations and any other person who owns a controlling interest in a corporation.

(b) Amount of Financial Assurance Required

1. The amount of financial assurance required of the owner or operator shall be established by the Commissioner based upon the estimated cost of operating the facility for a thirty (30) day period plus the estimated closure and post-closure care costs included in the approved closure/post-closure care plan established in paragraph (2) of this rule. This required amount may be adjusted as the plan is amended. The owner or operator shall be notified of the required amount as set forth in subparagraph (c) of this paragraph. In no case, however, shall the amount of financial assurance be less than 1,000 dollars per acre, or fraction thereof, affected by the facility operation.

For facilities being developed or to be developed according to a phased development plan, the Commissioner may establish the amount of financial assurance required on a parcel-by-parcel basis.

2. The owner or operator may appeal the Commissioner's decision in part 1 of this subparagraph as set forth in Section 68-211-113 of the act.
3. The owner or operator must file with the Commissioner a financial assurance instrument chosen from subparagraph (d) of this paragraph in the amount determined by the Commissioner. The original of the instrument must be received and approved by the Commissioner prior to construction/operation of the solid waste management facility.
4. During the active life of the solid waste management facility, the owner or operator must annually adjust the closure/post-closure cost estimate and the financial assurance instrument for inflation by no later than the anniversary date of the establishment of the financial assurance instrument(s) used to comply with subparagraph (b) of this paragraph. For owners or operators using the financial test or corporate guarantee, the closure/post-closure cost estimate and the financial assurance instrument must be adjusted for inflation by no later than ninety (90) days after the close of the firm's fiscal year and concurrent with the submission of the updated financial information to the Commissioner as specified in subpart (d)4(v) of this paragraph. The adjustment may be made by recalculating the maximum cost of closure/post-closure in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.
 - (i) The first adjustment is made by multiplying the closure/post-closure cost estimate by the inflation factor. The result is the adjusted closure/post-closure cost estimate.

(ii) Subsequent adjustments are made by multiplying the latest adjusted closure/post-closure cost estimate by the latest inflation factor.

5. During the post-closure care period of the solid waste management facility, the cost estimate for post-closure care may be reduced annually by the estimated cost of post-closure work performed the previous year according to the approved post-closure plan. The work must be performed to the satisfaction of the Commissioner. The estimated remaining cost of post-closure care and the post-closure financial assurance instrument must be adjusted annually for inflation by no later than the anniversary date of the issuance of the instrument. The inflation adjustment may be made by recalculating the maximum cost of post-closure care for the remaining years in current dollars or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product or Gross Domestic Product published by the U.S. Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(i) The first adjustment is made by multiplying the post-closure cost estimate by the inflation factor. The result is the adjusted post-closure cost estimate.

(ii) Subsequent annual inflation adjustments to post-closure care cost estimates and financial assurance instruments are made by multiplying the estimated remaining cost of post-closure by the latest inflation factor.

(c) Filing of Financial Assurance

1. Permits - After his final decision to issue a permit for a facility, the Commissioner will notify the owner or operator in writing of the amount of financial assurance required (as established per subparagraph (b) of this paragraph). The owner or operator must, before the permit can be effective, file with the Commissioner financial assurance meeting the requirements of this paragraph in at least that amount, except as provided in part 3 of this subparagraph. The Commissioner will evaluate the financial assurance filed for compliance with the requirements of this paragraph and notify the owner or operator of his findings in writing within thirty (30) days of the filing date.

2. Facilities Permitted Before March 18, 1990.

(i) In his notice to the owner or operator initially approving the closure/post-closure care plan, the Commissioner will specify the amount of financial assurance required (as established per subparagraph (b) of this paragraph). The owner or operator must, within sixty (60) days of receipt of that notice, file with the Commissioner financial assurance meeting the requirements of this paragraph in at least that amount, except as provided in part 3 of this subparagraph.

(ii) After his final decision to issue a modified permit incorporating amendments to the closure/post-closure care plan, the Commissioner will notify the owner or operator in writing of any changes in the amount of financial assurance required (as established per subparagraph (b) of this paragraph). The owner or operator must, within sixty (60) days of receipt of that notice, file with the Commissioner any required additional financial assurance, subject to the provisions of part 3 of this subparagraph. Such additional financial assurance filed must also meet the requirements of this paragraph.

3. Partial Filing

(i) For facilities which are in operation and being developed according to a phased development plan, the owner or operator may initially file financial assurance covering only closure and post-closure care of the parcel currently in operation and post-closure care of closed parcels. For facilities which are not yet in operation and are to be developed according to a phased development plan, the owner or operator may initially file financial assurance covering only closure and post-closure care of the initial parcel to be operated.

- (ii) For facilities being developed according to a phased development plan whose owners or operators initially filed only partial financial assurance as provided in subpart (i) of this part, the owner or operator must, at least thirty (30) days prior to beginning operation of a parcel not covered by financial assurance on file with the Commissioner, file the required financial assurance for that parcel with the Commissioner.
- (d) Mechanisms of Financial Assurance - Following are acceptable financial assurance mechanisms:
 1. Surety Bond - An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by obtaining and filing a surety bond which conforms to the requirements of this part.
 - (i) The surety company issuing the bond must be licensed to do business as a surety in Tennessee and must be among those listed as acceptable by the Commissioner.
 - (ii) The wording of the surety bond must be identical to the wording specified in part (l)1 of this paragraph.
 - (iii) 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. Following a determination by the Commissioner that the operator has failed to so perform, under the terms of the bond the surety will perform final closure and post-closure care as guaranteed by the bond or will forfeit the amount of the penal sum, as provided in subparagraph (j) of this paragraph.
 - (iv) The penal sum of the bond must be in an amount at least equal to the amount of financial assurance required per subparagraph (b) of this paragraph.
 - (v) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Commissioner. Cancellation may not occur, however, during the one hundred twenty (120) days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Commissioner, as evidenced by the return receipts.
 - (vi) The surety will not be liable for deficiencies in the performance of operation or closure and post-closure care by the owner or operator after the Commissioner releases the owner or operator from the financial assurance requirements as provided in subparagraph (i) of this paragraph.
 2. Personal Bond Supported by Securities - An owner or operator may satisfy the requirements of subparagraphs (c) of this paragraph by filing a personal performance guarantee accompanied by collateral in the form of securities. The owner or operator must guarantee to properly operate and perform final closure/post-closure in accordance with the closure/post-closure care plan, other requirements of the permit, the act and the rules whenever required to do so. The securities supporting this guarantee must be fully registered as to principal and to also identify that person filing such collateral. These securities must have a current market value at least equal to the amount of financial assurance required per subparagraph (b) of this paragraph, and must be included among the following types:
 - (i) Negotiable certificates of deposit assigned irrevocably to the state.
 - (l) Such certificates of deposit must be automatically renewable and must be assigned to the state in writing and recorded as such in the records of the financial institution issuing such certificate.

- (II) Such certificates of deposit must also include a statement signed by an officer of the issuing financial institution which waives all rights of lien which the institution has or might have against the certificate.
 - (ii) Negotiable U.S. Treasury securities assigned irrevocably to the state.
 - (iii) Negotiable general obligation municipal or corporate bonds which have at least an "A" rating by Moody's and/or Standard and Poor's rating services and which are assigned irrevocably to the state.
3. Personal Bond Supported by Cash - An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by filing a personal performance guarantee accompanied by cash in an amount at least equal to the amount of financial assurance required per subparagraph (b) of this paragraph. The owner or operator must guarantee to perform final closure/post-closure in accordance with the closure/post-closure care plan, other requirements of the permit, the act and the rules whenever required to do so.
4. Corporate Financial Test of Self-Assurance for Closure and/or Post-closure Care
- (i) An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by demonstrating that it passes a financial test as specified in this part. To pass this test the owner or operator must meet the criteria of item (I) and either items (II) or (III) of this subpart as follows:
 - (I) Financial Ratios. The owner or operator must have:
 - I. Two of the following three ratios: a ratio of total liabilities to net worth shall be less than 1.5; a ratio of the sum of net income plus depreciation, depletion and amortization minus ten million dollars (\$10,000,000) to total liabilities shall be greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
 - II. Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and all other environmental financial assurance obligations covered by a financial test; and
 - III. Tangible net worth of at least \$10 million plus the dollar amount of the current closure and post-closure cost estimates and all other environmental financial assurance obligations covered by a financial test; and
 - IV. Assets located in the United States amounting to at least ninety (90) percent of total assets or at least six times the sum of the current closure and post-closure cost estimates and all other environmental financial assurance obligations covered by a financial test.
 - (II) Corporate Bonds. The owner or operator must have:
 - I. An outstanding corporate bond issuance of senior unsecured debt registered with the U.S. Securities and Exchange Commission (SEC); and
 - II. A bond issuance used to comply with the financial test requirements that is the most recent senior unsecured debt issued by the corporation and is outstanding for the duration of the fiscal year of the corporation for which the financial test is intended to serve as financial assurance; and
 - III. A rating of the submitted bond issuance by Standard and Poor's,

or Moody's, or Fitch debt rating agencies of not less than "BBB" by Standard and Poor's, "Baa2" by Moody's, and "BBB" by Fitch. Ratings of "BBB-" by Standard and Poor's, "Baa3" by Moody's, and "BBB-" by Fitch are not acceptable to the Commissioner; and

- IV. If a corporate owner or operator, using the financial test, has bond ratings by more than one rating agency, all of the ratings must be submitted to the Commissioner, and "all" of the ratings must meet the rating allowed by these regulations as listed in subitem III of this item.
- (III) Corporate Credit Rating. The owner or operator must have:
- I. A corporate credit rating that has been issued or confirmed by no more than one year prior to the date of the submission of the financial test; and
 - II. A corporate credit rating of not less than the Standard and Poor's long term debt rating of "BBB" and short term debt rating of "A-2", Moody's long term debt rating of "Baa2" and short term debt rating of "P-2", and Fitch's long term debt rating of "BBB" and short term debt rating of "F2"; and
 - III. Corporate credit long term ratings of "BBB-" by Standard and Poor's, "Baa3" by Moody's, and "BBB-" by Fitch are not acceptable to the Commissioner; and
 - IV. If a corporate owner or operator, using the financial test, has a corporate credit rating by more than one rating agency, "all" of the ratings must meet the ratings allowed by these regulations as listed in subitems II and III of this item.
- (ii) If the owner or operator submits corporate bond ratings or corporate credit ratings made by rating agencies other than those listed in subpart (i), items (II) and (III) of this part, the acceptability of such ratings for purposes of qualifying to use the Financial Test of Self-assurance shall be made by the Commissioner.
- (iii) To demonstrate that the corporation meets this Corporate Financial Test, the owner or operator must submit the following items to the Commissioner:
- (I) A letter signed by the owner's or operator's chief financial officer and worded as specified in subparagraph (I) of this paragraph; and
 - (II) 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; and
 - (III) 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; and

- (IV) A written statement or statements from the rating agency or agencies of all existing bond ratings or corporate credit ratings; and
 - (V) A Corporate or Corporate Parent Financial Test Guarantee Agreement for Closure and/or Post Closure Care completed and signed by the chief financial officer with the proper notarization and with the original of the document being submitted to the Commissioner as an accompaniment to the Letter from the Chief Financial Officer.
- (iv) An owner or operator wanting to use the financial test of self-assurance for the first time or an owner or operator previously disqualified from continuing to use the financial test but desiring to use the financial test again, must demonstrate its qualification as evidenced in its year-end financials for two years prior to the beginning of the fiscal year in which it seeks to use the financial test. Subparts (i) through (iii) of this part must be submitted for each of the two years to evidence its qualification to use the financial test of self-assurance.
 - (v) After the initial submission of items specified in subparts (i), (ii), and (iii) of this part and the approval of the submittals by the Commissioner, the owner or operator desiring to continue use of the financial test must send the same information, updated, to the Commissioner within ninety (90) days after the close of each succeeding fiscal year.
 - (vi) If the owner or operator no longer meets the requirements of this part as a direct result of its independently audited year-end financials, the owner or operator must send notice to the Commissioner of intent to establish alternate financial assurance as specified in this paragraph. The notice must be sent by certified mail within ninety (90) 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 requirements. The owner or operator must provide the alternate financial assurance within one hundred twenty (120) days after the end of such fiscal year.
 - (vii) The Commissioner 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 items (II) and (III) of subpart (iii) of this part). An adverse opinion or a disclaimer of opinion will be cause for disallowance.
 - (viii) In evaluating the sufficiency of the documentation submitted to qualify to use the corporate financial test, the Commissioner may consider the following factors:
 - (I) Timely submission of the test denoting that the test can only be used as a financial instrument if submitted during the ninety (90) day period following the end of the owner's or operator's fiscal year;
 - (II) Accuracy and validity of the financial data submitted in the test;
 - (III) Changes by the rating agencies in the rating systems and nomenclature that affect the determination of which ratings are acceptable to the Commissioner as listed in these regulations. In the event such changes are made by the rating agencies, the Commissioner may determine which corporate bond and corporate credit ratings are acceptable to coincide with the changes by the rating agencies;
 - (IV) Any other factors relating to split bond and credit ratings that significantly affect the owner or operator's financial posture;
 - (V) Owner's or operator's failure to include in the test, the sum of all environmental financial assurance amounts for which the financial test serves as financial assurance in the United States and internationally; and

- (VI) Any other items or concerns that affect the acceptability of the submitted financial test and its comparability to other allowed financial assurance instruments.
- (ix) If the Commissioner disallows the use of the test, the owner or operator must provide alternate financial assurance as specified in this paragraph within thirty (30) days after notification of the disallowance.
- (x) If the owner or operator determines at any time during its fiscal year, by sources internal or external to the corporation, that the corporation can no longer meet the financial test criteria it shall notify the Commissioner in writing within seventy two (72) hours of such determination and shall establish an approved alternative financial assurance instrument within thirty (30) days of such notification.
- (xi) The Commissioner may, based on a reasonable belief that the owner or operator no longer meets the requirements of subpart (i), (ii), and (iii) of this part, require reports of financial condition at any time from the owner or operator. If the Commissioner finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subpart (i), (ii), and (iii) of this part, the owner or operator must provide alternate financial assurance as specified in this paragraph within thirty (30) days after notification by the Commissioner that the owner or operator no longer meets the requirements to use the financial test of self-assurance.
- (xii) If the amount of any increase in financial assurance occurring, after the initial annual submittal of the financial test, would disqualify the owner or operator from using the financial test based on current year-to-date financials, the owner or operator must provide an interim alternative financial assurance mechanism to the Commissioner. This interim financial assurance instrument, in the amount of the increase, must be filed with the Commissioner within thirty (30) days of such determination by the owner or operator or the Commissioner. The subsequent annual re-submittal of the Financial Test must include all environmental financial obligations including the amount provided by the interim financial instrument
- (xiii) The owner or operator is no longer required to submit the items specified in subparts (i), (ii), and (iii) of this part, when:
 - (I) An owner or operator substitutes alternate financial assurance as specified in this paragraph; or
 - (II) The Commissioner or Board releases the owner or operator from the requirements of this paragraph in accordance with subparagraph (i) of this paragraph.
- (xiv) An owner or operator may meet the requirements of subparagraph (c) of this paragraph by obtaining a written guarantee, hereafter referred to as "Corporate Parent Financial Test Guarantee Agreement". The guarantor must be the direct or higher-tier parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators in subparts (i) through (xii) of this part and must comply with the terms of the corporate guarantee. The wording of the Corporate Parent Financial Test Guarantee Agreement must be identical to the wording specified in Rule 1200-01-07-.03(3)(I). A certified copy of the guarantee agreement must accompany the items sent to the Commissioner as specified in subpart (iii) of this part. The terms of the Corporate Parent Financial Test Guarantee Agreement must provide that:
 - (I) If the owner or operator fails to perform final closure and/or post closure of a facility covered by the Corporate Parent Financial Test Guarantee Agreement in accordance with the closure and/or post-closure plan and other requirements whenever required to do so, the guarantor shall do so

or establish a trust fund as specified in part 6 of this subparagraph in the name of the owner or operator or shall forfeit to the State monies in an amount equal to the current closure and/or post-closure cost estimate for the facility as provided in subparagraph (b) of this paragraph as directed by the Commissioner.

- (II) The Corporate Parent Financial Test Guarantee Agreement shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Commissioner. Cancellation may not occur, however, during the one hundred twenty (120) days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Commissioner, as evidenced by the return receipts.
 - (III) If the owner or operator fails to provide alternate financial assurance as specified in this paragraph and obtain the written approval of such alternate assurance from the Commissioner within ninety (90) days after receipt by both the owner or operator and the Commissioner of a notice of cancellation of the Guarantee from the Guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator before the expiration of the ninety (90) days.
5. Municipality or County Contract of Obligation - A municipality or county may execute a contract of obligation with the Commissioner. Such contract of obligation shall be a binding agreement on the municipality or county, allowing the Commissioner to collect the required amount from any funds being disbursed or to be disbursed from the State to the municipality or county. The contract shall be filed with the State Commissioner of Environment and Conservation and with the State Commissioner of Finance and Administration.
6. Closure/post-closure trust fund - An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by establishing a closure and/or post-closure trust fund which conforms to the requirements of this part and filing an originally signed duplicate of the trust agreement. 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.
- (i) The wording of the trust agreement must be worded as required at subparagraph (l) of this paragraph and the trust agreement must be accompanied by a formal certification of acknowledgment worded as required at subparagraph (l) of this paragraph. Schedule A of the trust agreement must be updated within sixty (60) days after a change in the amount of the current closure and/or post-closure cost estimate covered by the agreement as specified in subparagraph (c)2(ii) of this paragraph.
 - (ii) Payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in-period." The payments into the closure and/or post-closure trust fund must be made as follows:
 - (l) For a new facility, the first payment must be made before the initial operation is begun. A receipt from the trustee for this payment must be filed by the owner or operator before the operation begins. The first payment must be at least equal to the current closure cost estimate, divided by the number of years in the pay-in-period. Subsequent payments must be made no later than thirty (30) days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

CE-CV

$$\text{Next Payment} = \frac{\text{-----}}{Y}$$

In this formula, CE is the current closure and/or post-closure cost estimate; CV is the current value of the trust fund; Y is the number of years remaining in the pay-in period.

- (II) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current closure and/or post-closure cost estimate at the time the fund is established. However, the owner or operator must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in item (I) of this subpart.
- (III) If the owner or operator establishes a closure and/or post-closure trust fund after having used on or more alternate mechanisms specified in this subparagraph, the first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to specifications of this part.
- (iii) After the pay-in-period is completed, whenever the current closure and/or post-closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within sixty (60) days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure and/or post-closure cost estimate, or obtain other financial assurance as specified in this subparagraph to cover the difference.
- (iv) If the value of the trust fund is greater than the total amount of the current closure and/or post-closure cost estimate, the owner or operator may submit a written request for release of the amount in excess of the current cost estimate.
- (v) If an owner or operator substitutes other financial assurance as specified in this subparagraph for all or part of the trust fund, he may submit a written request for release of the amount in excess of the current cost estimate covered by the trust fund.
- (vi) Within sixty (60) days after receiving a request from the owner or operator for release of funds as specified in subparts (iv) and (v) of this part, the Commissioner will instruct the trustee to release to the owner or operator such funds as the Commissioner specifies in writing.
- (vii) After beginning partial or final closure of a facility, an owner or operator may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Commissioner. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum cost of closing the facility over its remaining operating life. Within sixty (60) days after receiving bills for partial or final closure activities, the Commissioner will instruct the trustee to make reimbursements in those amounts as the Commissioner specifies in writing, if the Commissioner determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Commissioner has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, that the owner or operator is no longer required to maintain financial assurance for the final closure of the facility. If the Commissioner does not instruct the trustee to make such reimbursements, he will provide the owner of operator with a detailed written statement of reasons.

- (viii) Within sixty (60) days after receiving bills for post-closure activities, the Commissioner will instruct the trustee to make reimbursements in those amounts as the Commissioner specifies in writing, if the Commissioner determines that the post-closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Commissioner has reason to believe that the maximum cost of post-closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, that the owner or operator is no longer required to maintain financial assurance for post-closure of the facility. If the Commissioner does not instruct the trustee to make such reimbursements, he will provide the owner or operator with a detailed written statement of reason.
- (ix) The Commissioner will agree to termination of the trust when:
 - (I) An owner or operator substitutes alternate financial assurance as specified in this subparagraph.
 - (II) The Commissioner releases the owner or operator from the requirements of this paragraph.

7. Closure and/or post-closure letter of credit. An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by obtaining and filing an irrevocable standby letter of credit which conforms to the requirements of this part. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State agency.

- (i) The wording of the letter of credit must be worded according to the wording provided by the Department through subparagraph (l) of this paragraph.
- (ii) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the permit identification Number, name, and address of the facility, and the amount of funds assured for closure and/or post-closure of the facility by the letter of credit.
- (iii) The letter of credit must be irrevocable and issued for a period of at least one (1) year. The letter of credit must provide that the expiration date will be automatically extended each year for a period of at least one (1) year unless, at least one hundred twenty (120) days before the current expiration date, the issuing institution notifies both the owner or operator and the Commissioner by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the one hundred twenty (120) days will begin on the date when both the owner or operator and the Commissioner have received the notice, as evidenced by the return receipts.
- (iv) The letter of credit must be issued in an amount at least equal to the current closure and/or post-closure cost estimate, except as provided in subparagraph (e) of this paragraph.
- (v) Whenever the current closure and/or post-closure cost estimate increases to an amount greater than the amount of the letter of credit, the owner or operator, within sixty (60) days after the increase, must either cause the amount of the letter of credit to be increased so that it at least equals the current cost estimate and submit evidence of such increase to the Commissioner, or obtain other financial assurance as specified in this subparagraph to cover the increase. Whenever the current closure and/or post-closure cost estimate decreases, the amount of the letter of credit may be reduced to the amount of the current cost estimate following written approval by the Commissioner.

- (vi) Following a final administrative determination that the owner or operator has failed to perform final closure and/or post-closure activities in accordance with the closure and/or post-closure plan and other permit requirements when required to do so, the Commissioner may draw on the letter of credit.
 - (vii) If the owner or operator does not establish alternate financial assurance as specified in this subparagraph and obtain written approval of such alternate assurance from the Commissioner within ninety (90) days after receipt by both the owner or operator and the Commissioner of a notice from issuing institution that it has decided not extend the letter of credit beyond the current expiration date, the Commissioner will draw on the letter of credit. The Commissioner may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last thirty (30) days of any such extension the Commissioner will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this part and obtain written approval of such assurance from the Commissioner.
 - (viii) The Commissioner will return the letter of credit to the issuing institution for termination when:
 - (I) An owner or operator substitutes alternate financial assurance as specified in this subparagraph; or
 - (II) The Commissioner releases the owner or operator from the requirements of this paragraph.
8. Closure and/or post-closure insurance. An owner or operator may satisfy the requirements of subparagraph (c) of this paragraph by obtaining insurance which conforms to the requirements of this part and filing a certificate of such insurance. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer in the State of Tennessee and have an A. M. Best rating of at least A or A- or have special approval from the Commissioner.
- (i) The wording of the certificate of insurance must be worded as required at subparagraph (l) of this paragraph. The wording of the policy itself is subject to the review and approval of the Commissioner prior to acceptance as a financial assurance mechanism.
 - (ii) The insurance policy must be issued for a face amount at least equal to the current closure and/or post-closure cost estimate, except as provided in subparagraph (e) of this subparagraph. 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.
 - (iii) The insurance policy must guarantee that funds will be available to close the facility whenever final closure occurs and to provide post-closure care requirements. The policy must also guarantee that during the period of final closure and post-closure, 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 the Commissioner, to such party or parties as the Commissioner specifies.
 - (iv) After beginning partial or final closure and during post-closure, an owner or operator may request reimbursements for closure expenditures by submitting itemized bills to the Commissioner. The owner or operator may request reimbursement for partial closure only if the remaining value of the policy is sufficient to cover the maximum cost of closing the facility over its remaining operating life and to cover the cost of post-closure care requirements. Within sixty (60) days after receiving bills for closure activities, the Commissioner will instruct the insurer to make reimbursements in such amounts as the

Commissioner specifies in writing, if the Commissioner determines that the partial or final closure expenditures are in accordance with the approved closure and/or post-closure plan or otherwise justified. If the Commissioner has reason to believe that the maximum cost of closure over the remaining life of the facility and the cost of post-closure will be significantly greater than the face amount of the policy, he may withhold reimbursements of such amounts as he deems prudent until he determines that the owner or operator is no longer required to maintain financial assurance for final closure and/or post-closure care of the facility. If the Commissioner does not instruct the insurer to make such reimbursements, he will provide the owner or operator with a detailed written statement of reasons.

- (v) The owner or operator must maintain the policy in full force and effect until the Commissioner consents to termination of the policy by the owner or operator. Failure to pay the premium, without substitution of alternate financial assurance will constitute a significant violation of these regulations, warranting such remedy as the Commissioner deems necessary. Such violation will be deemed to begin upon receipt by the Commissioner of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.
- (vi) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.
- (vii) The policy must 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 must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Commissioner. Cancellation, termination, or failure to renew may not occur, however, during the one hundred twenty (120) days beginning with the date of receipt of the notice by both the Commissioner and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:
 - (I) The Commissioner deems the facility abandoned; or
 - (II) The permit is terminated or revoked or a new permit is denied; or
 - (III) Closure is ordered by the Commissioner or a U.S. District court of competent jurisdiction; or
 - (IV) The owner or operator is named as debtor in a voluntary or involuntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or
 - (V) The premium due is paid.
- (viii) Whenever the current closure and/or post-closure cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within sixty (60) days after the increase, must either cause the face amount to be increased to an amount at least equal to the current closure and/or post-closure cost estimate and submit evidence of such increase to the Commissioner, or obtain other financial assurance as specified in this subparagraph to cover the increase. Whenever the current closure and/or post-closure cost estimate decreases, the face amount may be reduced to the amount of the current cost estimate following written approval by the Commissioner.

- (ix) The Commissioner will give written consent to the owner or operator that he may terminate the insurance policy when:
 - (I) An owner or operator substitutes alternate financial assurance as specified in this subparagraph.
 - (II) The Commissioner releases the owner or operator from the requirements of this paragraph.
9. Other financial Assurance Mechanisms - An owner or operator may satisfy the requirements of subparagraph (c) by use of financial assurance instruments other than those specified in parts 1 through 8 if such mechanisms are as authorized by and in accordance with criteria required by 40 CFR 258.74 (Solid Waste Disposal Facility Criteria Final Rules, October 9, 1991, Allowable Mechanism(s) and a variance is applied for and granted in accordance with procedure specified in Rule 1200-01-07-.01(5).
- (e) Use of Multiple Financial Mechanisms - In meeting the requirements of subparagraph (c) of this paragraph, an owner or operator may utilize more than one financial assurance mechanism per facility.
 - (f) Use of a Financial Mechanism for Multiple Facilities - An owner or operator may use a financial assurance mechanism allowed in subparagraph (d) of this paragraph to meet the requirements of subparagraph (c) of this paragraph for more than one facility the owner or operator operates in Tennessee. If so, the mechanism submitted to the Commissioner must include a list showing, for each facility, the permit number, name, address, and amount of funds for closure and post-closure care assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been filed and maintained for each facility. In a financial assurance forfeiture action taken under subparagraph (j) of this paragraph for closure and post-closure care of any of the facilities covered by the mechanism, the Commissioner may order forfeiture of only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.
 - (g) Substituting Alternate Financial Assurance - In meeting the requirements of subparagraph (c) of this paragraph, an owner or operator may substitute alternate financial assurance meeting the requirements of this paragraph for the financial assurance already filed with the Commissioner for the facility. However, the existing financial assurance shall not be released by the Commissioner until the substitute financial assurance has been received and approved by him.
 - (h) Incapacity of Operator or Financial Institutions
 - 1. An owner or operator must notify the Commissioner by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within ten (10) days after commencement of the proceeding.
 - 2. In the event of the bankruptcy of the institution issuing a financial assurance instrument, or a suspension or revocation of the authority of the institution to issue such instruments, the owner or operator must establish other financial assurance within sixty (60) days after such an event.
 - (i) Maintenance/Release of Financial Assurance - The financial assurance must be maintained until the Commissioner releases it as specified in this subparagraph, or until the Commissioner orders forfeiture of the financial assurance as provided in subparagraph (j) of this paragraph.
 - 1. If the closure/post-closure care plan is amended and the amendments result in a reduction in the amount of financial assurance required under that currently filed with the Commissioner, the Commissioner shall, upon the owner or operator's request, cause to be released to the owner or operator (or issuing institution, if appropriate) the excess financial assurance.

2. In his notice to the owner or operator that closure of the facility or facility parcel is approved (refer to rule 1200-01-07-.04(8)(c)9), the Commissioner will also notify the owner or operator that he is no longer required by this paragraph to maintain financial assurance for such closure. At such time the Commissioner shall cause to be released to the owner or operator (or issuing institution, if appropriate) the financial assurance filed to provide for such closure.
 3. During the period of post-closure care, the Commissioner may reduce the amount of financial assurance required for the facility if the owner or operator demonstrates to the Commissioner that the amount currently filed exceeds the remaining cost of post-closure care. Upon such occurrence, the Commissioner shall cause to be released to the owner or operator the excess financial assurance on file.
 4. When an owner or operator has completed, to the satisfaction of the Commissioner, all post-closure care requirements in accordance with the approved closure/post-closure care plan the Commissioner will, at the request of the owner or operator, notify him in writing that he is no longer required by this paragraph to maintain financial assurance for such post-closure care. At such time the Commissioner shall also cause to be released to the owner or operator (or issuing institution, if appropriate) the financial assurance filed to provide for such post-closure care.
 5. Financial assurance will normally be released in the form(s) it was submitted. However, where such release involves an amount equal to only a portion of the funds assured by a financial assurance mechanism (see subparagraphs (e) and (f) of this paragraph), the Commissioner shall, as appropriate considering the type of mechanism involved, either cause to be released to the owner or operator cash or collateral equal to that amount or allow the owner or operator to substitute for the mechanism(s) on file a new mechanism(s) reduced by that amount.
- (j) Forfeiture of Financial Assurance - The Commissioner may order that any financial assurance filed by an operator pursuant to this paragraph be forfeited if the Commissioner determines that the owner or operator has failed to comply with the act, rules and regulations adopted pursuant thereto, or orders of the Commissioner, or to perform closure and/or post-closure care when required to do so, or to perform closure and/or post-closure care in accordance with the closure/post-closure care plan and other permit requirements. Any such forfeiture action shall follow the procedures provided in this subparagraph.
1. Upon his determination that the owner or operator has failed to comply with the act, rules and regulations adopted pursuant thereto, or orders of the Commissioner, or to perform closure and/or post-closure care when required to do so, or to perform closure and/or post-closure care in accordance with the closure/post-closure care plan and/or other permit requirements, the Commissioner shall cause a notice of noncompliance to be served upon the owner or operator. Such notice shall be hand delivered or served by certified mail. The notice of noncompliance shall specify in what respects the owner or operator has failed to perform as required, and shall establish a schedule of compliance.
 2. If the Commissioner determines that the owner or operator has failed to perform as specified in the notice of non compliance, or as specified in any subsequent compliance agreement which may have been reached by the owner or operator and the Commissioner, the Commissioner may order forfeiture of the financial assurance filed to guarantee such performance and may revoke the facility's permits.
 3. Upon issuance, a copy of the order shall be hand delivered or forwarded by certified mail to the owner or operator. Any such order issued by the Commissioner shall become final thirty (30) days after receipt by the operator unless it is appealed to the Board as provided in section 68-211-113 of the act.
 4. If necessary, upon the effective date of the order of forfeiture, the Commissioner shall give notice to the State Attorney General who shall collect the forfeiture.

5. All forfeited funds shall be deposited in a special departmental account known as the "solid waste disposal site restoration fund" for use by the Commissioner as set forth in T.C.A. § 68-211-116.
- (k) Effect on Transfer of Permits - No permit may be transferred until the proposed new owner or operator has filed, in accordance with the requirements of this paragraph, the required financial assurance. When such is done, the Commissioner shall cause to be released to the former owner or operator (or the issuing institution, if appropriate) the financial assurance that owner or operator had filed.
- (l) Wording of the Instruments
1. The financial mechanisms and supporting documents guaranteeing proper operation and performance of closure and/or post-closure care, as specified in subparagraph (d) of this paragraph, must utilize the wording required by the Department.
 2. Copies of approved financial mechanisms and supporting documents may be obtained by contacting the Office of Financial Responsibility, Department of Environment and Conservation. Approved financial mechanisms include at least the following:
 - (i) Surety Bond
 - (ii) Personal Bond Supported By Securities
 - (iii) Personal Bond Supported By Cash
 - (iv) Letter from the Chief Financial Officer
 - (v) Financial Test of Self-Assurance Guarantee Agreements
 - (I) Corporate Financial Test Guarantee Agreements
 - (II) Corporate Parent Financial Test Guarantee Agreement
 - (vi) Municipality and/or County Contract of Obligation
 - (vii) Closure/Post-Closure Care Trust Fund
 - (viii) Closure/Post-Closures Care Letter of Credit
 - (ix) Closure/Post-Closure Care Insurance

Authority: T.C.A. §§ 68-211-101 et seq. and 4-5-201 et seq.

I certify that the information included in this filing is an accurate and complete representation of the intent and scope of rulemaking proposed by the agency.

Date: 9-20-10

Signature: J. Mann

Name of Officer: Johnnie M. Apple

Title of Officer: Director, Div. Solid Waste Mgmt



Subscribed and sworn to before me on: September 20, 2010

Notary Public Signature: Mary Evans

My commission expires on: January 6, 2014

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Filed with the Department of State on: 9/21/10

Tre Hargett

Tre Hargett
Secretary of State

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