

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 9 SOLID WASTE
PART 10 FINANCIAL ASSURANCE

20.9.10.1 ISSUING AGENCY. New Mexico Environmental Improvement Board.
[20.9.10.1 NMAC - Rp, 20 NMAC 9.1.I.001, 8/2/2007]

20.9.10.2 SCOPE. This part applies to the transportation, storage, transfer, processing, transformation, recycling, composting, nuisance abatement and disposal of solid waste.
[20.9.10.2 NMAC - Rp, 20 NMAC 9.1.I.002, 8/2/2007]

20.9.10.3 STATUTORY AUTHORITY. NMSA 1978, Sections 74-1-1 to 74-1-15, NMSA 1978, Sections 74-9-1 to 74-9-43, and NMSA 1978 Sections 74-13-1 to 74-13-20.
[20.9.10.3 NMAC - Rp, 20 NMAC 9.1.I.003, 8/2/2007]

20.9.10.4 DURATION. Permanent.
[20.9.10.4 NMAC - Rp, 20 NMAC 9.1.I.004, 8/2/2007]

20.9.10.5 EFFECTIVE DATE. August 2, 2007, unless a later date is cited at the end of a section.
[20.9.10.5 NMAC - Rp, 20 NMAC 9.1.I.005, 8/2/2007]

20.9.10.6 OBJECTIVE. The objective of Part 10 of Chapter 9 is to establish a rule governing financial assurance requirements for solid waste facilities, composting facilities and recycling facilities.
[20.9.10.6 NMAC - Rp, 20 NMAC 9.1.I.006, 8/2/2007]

20.9.10.7 DEFINITIONS. [RESERVED]
[See 20.9.2.7 NMAC for Definitions.]

20.9.10.8 APPLICABILITY AND EFFECTIVE DATE.

A. The requirements of 20.9.10 NMAC apply to owners and operators of all solid waste facilities and composting and recycling facilities required to provide financial assurance pursuant to Subsection C of 20.9.3.28 NMAC and Subsection E of 20.9.3.29 NMAC, except owners and operators who are the United States, the state of New Mexico, or any agency, department, instrumentality, office, or institution of those governments whose debts and liabilities are the debts and liabilities of the United States or the state of New Mexico. Owners or operators of composting and recycling facilities required to provide financial assurance pursuant to Subsection C of 20.9.3.28 NMAC and Subsection E of 20.9.3.29 NMAC are not required to provide financial assurance for post-closure care, phase I and II assessments or corrective action.

B. The owner or operator of a category 5 landfill or any solid waste facility modified after the initial effective date of this section shall submit to the department proof of financial assurance prior to the initial receipt of waste.

C. For municipal landfills operating on or after April 9, 1997, or solid waste facilities permitted after January 30, 1992, the requirements of 20.9.10 NMAC apply. For landfills that have been granted a waiver under 20.9.2.14 NMAC, the requirements of 20.9.10 NMAC apply.

D. Multiple facilities under one permit shall be treated individually for the purposes of 20.9.10 NMAC. Estimates and assurance must be given for each facility, but multiple facilities may be covered by the same mechanism(s).

[20.9.10.8 NMAC - Rp, 20 NMAC 9.1.IX.901, 8/2/2007]

20.9.10.9 FINANCIAL ASSURANCE FOR CLOSURE AND NUISANCE ABATEMENT.

A. The owner or operator of a solid waste facility shall develop a detailed written estimate, in current dollars, of the cost of hiring a third party to close the largest area of the facility ever requiring closure under 20.9.6 NMAC at any time during the active life. This estimated cost should include estimated costs for an independent project manager and contract administration. The estimate may contain a subsidiary schedule showing the amount necessary to perform closure of the facility in each year of the permit life of the facility. The owner or operator shall file a copy of the estimate with the department concurrently with proof of financial assurance and shall notify the department that copies have also been placed in the operating record.

(1) For landfills, the cost estimate shall be based upon the cost of closing the largest area of all landfill cells ever requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan. Should the owner or operator submit a subsidiary schedule, the amount guaranteed annually may be in accordance with this schedule upon approval by the secretary. If the owner or operator is found to be utilizing acreage in excess of the amount shown in the subsidiary schedule, final closure on the excess acreage shall be completed within sixty days or the subsidiary schedule and the amount of financial assurance shall be increased to reflect the excess acreage.

(2) For all other solid waste facilities, the cost estimate must be a detailed written estimate of the cost of closure to be performed in accordance with the applicable portions of 20.9.6.12 NMAC and also shall include the cost of hiring a third party to clean up and dispose of the largest inventory of material and end product expected at the facility and to clean up and dispose of all fugitive trash, solid waste, or other materials that could potentially create a nuisance at the facility. The cost estimate shall also include costs of an independent project manager and contract administration. For a recycling or composting facility required to provide financial assurance for nuisance abatement pursuant to Subsection C of 20.9.3.28 NMAC or Subsection E of 20.9.3.29 NMAC, the owner or operator shall develop a detailed written estimate, in current dollars, of the cost of hiring a third party to clean up and dispose of the largest inventory of compostable or recyclable material and end product expected at the facility and to clean up and dispose of all fugitive trash, solid waste, or other materials that could potentially create a nuisance at the facility. The cost estimate shall also include the costs of an independent project manager and contract administration.

(3) During the active life of the facility, the owner or operator shall annually adjust the closure cost estimate for inflation, installation of final cover material on any areas at final grade, and any other factors affecting closure costs. A copy of the adjusted closure cost estimate shall be placed in the operating record.

(4) The owner or operator shall increase the amount of financial assurance if changes to the closure plan or facility conditions increase the maximum cost of closure at any time during the remaining active life by over three percent of the current financial assurance amount.

(5) The owner or operator may reduce the amount of financial assurance for closure if the cost estimate exceeds the maximum cost of closure at any time during the remaining life of the facility, upon specific approval by the secretary. To seek approval, the owner or operator shall provide the adjusted cost estimate and supporting documentation to the department. If approved, the owner or operator may revise any financial assurance documents to reflect the adjusted closure cost estimate, and shall file a duplicate original of each financial assurance document with the department within 15 days following approval, and shall place a copy of the estimate and approval in the operating record.

B. The owner or operator of each solid waste facility shall establish a financial assurance mechanism for closure of the facility in compliance with 20.9.10.13 - 20.9.10.23 NMAC. The owner or operator shall provide continuous coverage for closure until released from financial assurance requirements by a written verification issued by the secretary pursuant to Subsection O of 20.9.6.8 NMAC.
[20.9.10.9 NMAC - Rp, 20 NMAC 9.1.IX.902, 8/2/2007]

20.9.10.10 FINANCIAL ASSURANCE FOR POST-CLOSURE CARE.

A. The owner or operator of a solid waste facility shall develop a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct post-closure care for the facility in compliance with the post-closure care plan developed under 20.9.6 NMAC. The post-closure care cost estimate shall account for the total costs of conducting post-closure care, including annual and periodic costs as described in the post-closure care plan over the entire post-closure care period. This estimated cost should also include estimated costs for an independent project manager and contract administration. The owner or operator may submit a subsidiary schedule showing, for the permit life of the facility, the annual incremental acreage and total acreage needing post-closure care and the corresponding estimate of post-closure costs. The owner or operator shall file a copy of the estimate with the department concurrently with proof of financial assurance and shall notify the department that copies have also been placed in the operating record.

(1) The cost estimate for post-closure care shall be based on the most expensive costs for care during the post-closure period. Should the owner or operator submit a subsidiary schedule as described in Subsection A of this section, the amount guaranteed annually for post-closure care during the permit life of the facility may be in accordance with this schedule upon approval by the secretary. If the owner or operator, upon inspection, is found to have exceeded the acreage shown on the subsidiary schedule, the subsidiary schedule and the amount of financial assurance shall be increased within sixty days.

(2) During the active life of the facility and during the post-closure care period, the owner or operator shall annually adjust the post-closure care estimate for inflation, and any other factors affecting post-closure care costs. The owner or operator shall place a copy of the adjusted estimate in the operating record.

(3) The owner or operator shall increase the amount of financial assurance if changes in the post-closure care plan or facility conditions increase the maximum cost of post-closure care by over three percent of the current financial assurance amount.

(4) The owner or operator may reduce the amount of financial assurance if the adjusted cost estimate exceeds the maximum cost of care remaining over the post-closure period, upon specific approval by the secretary. To seek approval, the owner or operator shall provide the reduced post-closure care cost estimate and any justification for the reduced estimate in a request to the department.

B. The owner or operator of each solid waste facility shall establish financial assurance for the costs of post-closure care in compliance with 20.9.10.13 - 20.9.10.23 NMAC. An originally signed duplicate of each financial assurance document shall be filed with the department. The owner or operator shall provide continuous coverage for post-closure care until released from financial assurance requirements by a written verification issued by the secretary pursuant to Subsection O of 20.9.6.8 NMAC.
[20.9.10.10 NMAC - Rp, 20 NMAC 9.1.IX.903, 8/2/2007]

20.9.10.11 FINANCIAL ASSURANCE FOR PHASE I & PHASE II ASSESSMENTS.

A. Unless suspended from the requirements of 20.9.9.9 - 20.9.9.13 NMAC in accordance with Subsection C of 20.9.9.8 NMAC, the owner or operator shall develop a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct activities of the phase I (20.9.9.13 NMAC) and phase II (20.9.9.15 - 20.9.9.16 NMAC) assessments. The phase I and phase II assessments cost estimate shall account for the entire cost of the phase I and phase II assessments for the entire assessment period. This estimated cost should also include estimated costs for an independent project manager and contract administration. The owner or operator shall file a copy of the estimate with the department concurrently with proof of financial assurance and shall notify the department that copies have also been placed in the operating record. The estimate may contain a subsidiary schedule showing the amount necessary to perform a phase I assessment if a release is detected. Should the owner or operator submit a subsidiary schedule, the amount guaranteed annually may be in accordance with this schedule upon approval by the secretary.

(1) During the permit life of the facility and during the post-closure care period, the owner or operator shall annually adjust the phase I and phase II assessments estimate for inflation and any other factors affecting phase I and phase II assessment costs.

(2) The owner or operator shall increase the amount of financial assurance for phase I and phase II assessment costs if changes in the phase I and phase II assessments or facility conditions increase the maximum costs of the phase I and phase II assessments by over three percent of the current financial assurance amounts for phase I and phase II costs.

(3) The owner or operator may reduce the amount of the phase I and phase II financial assurance if the cost estimate exceeds the maximum remaining cost for the phase I and phase II assessments, upon specific approval by the secretary. To seek approval, the owner or operator shall provide a revised cost estimate and supporting documentation to the department. If approved, the owner or operator shall place a copy of the revised cost estimate in the operating record, shall notify the secretary that the estimate has been placed in the operating record and shall file a copy with the department.

B. Unless suspended from the requirements of 20.9.9.9 - 20.9.9.13 NMAC in accordance with Subsection C of 20.9.9.8 NMAC, the owner or operator of each solid waste facility shall secure financial assurance for the costs of phase I and phase II assessments as required under 20.9.9.13 - 20.9.9.16 NMAC. The owner or operator shall provide continuous coverage for the phase I and phase II assessments until released from financial assurance requirements by a written verification issued by the secretary pursuant to Subsection O of 20.9.6.8 NMAC.

[20.9.10.11 NMAC - Rp, 20 NMAC 9.1.IX.904, 8/2/2007]

20.9.10.12 FINANCIAL ASSURANCE FOR CORRECTIVE ACTION.

A. An owner or operator of a facility required to undertake a corrective action program under 20.9.9.13 - 20.9.9.17 NMAC, or required to guarantee any portion of a corrective action program as a condition of any permit or order by the secretary, shall develop a detailed written estimate, in current dollars, of the cost of hiring a third party to perform the corrective action. The corrective action cost estimate shall account for the total costs of activities as described in the corrective action plan for the entire corrective action period. This estimated cost should

also include estimated costs for an independent project manager and contract administration. The owner or operator shall file a copy of the estimate with the department concurrently with proof of financial assurance and shall notify the department that copies have also been placed in the operating record.

(1) The owner or operator shall annually adjust the estimate for inflation and any other factors affecting the corrective action costs until the corrective action program is completed.

(2) The owner or operator shall increase the amount of financial assurance if changes in the corrective action program or facility conditions increase the maximum costs of corrective action by over three percent of the current financial assurance amounts for corrective action costs.

(3) The owner or operator may reduce the amount of the financial assurance if the cost estimate exceeds the maximum remaining cost of corrective action, upon specific approval by the secretary. To seek approval, the owner or operator shall provide the revised cost estimate and supporting documentation to the department. If approved, the owner or operator shall notify the secretary when notice of the amount of financial assurance has been placed in the operating record.

B. The owner or operator of each solid waste facility required to implement a corrective action program shall secure financial assurance for the corrective action program in compliance with 20.9.10.13 - 20.9.10.23 NMAC. The owner or operator shall provide continuous coverage for corrective action until released from corrective action financial assurance requirements by a written verification issued by the secretary pursuant to Subsection O of 20.9.6.8 NMAC.

[20.9.10.12 NMAC - Rp, 20 NMAC 9.1.IX.905, 8/2/2007]

20.9.10.13 ALLOWABLE MECHANISMS.

A. The owner or operator shall establish a financial assurance mechanism to ensure that the funds necessary to meet the costs of closure, post-closure care, phase I and phase II assessments, and corrective action for known releases will be available whenever they are needed. The allowed mechanisms are:

- (1) trust fund;
- (2) surety bond;
- (3) irrevocable letter of credit;
- (4) insurance;
- (5) risk management pool;
- (6) local government financial test;
- (7) local government guarantee;
- (8) local government reserve fund;
- (9) corporate financial test; or
- (10) multiple mechanisms.

B. Owners or operators shall implement one or more of the financial assurance mechanisms specified in 20.9.10.14 - 20.9.10.23 NMAC. Each selected mechanism shall be made payable to or name the New Mexico governmental entity or entities that own or operate the facility as the beneficiary of the instrument, but if no New Mexico governmental entity or entities own or operate the facility, then the instrument shall be made payable to or name the New Mexico environment department as the beneficiary.

[20.9.10.13 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.14 TRUST FUND. An owner or operator may demonstrate financial assurance for closure, post-closure care, phase I and phase II assessments, or corrective action by establishing a trust fund that is worded as shown in forms supplied by the department. This trust fund may also be used as a repository for funds received from other financial assurance mechanisms. The trust fund shall be established as follows:

A. in the case of a trust fund for closure, post-closure care, or phase I and phase II assessments, payments into the trust fund shall be made at least annually over the term of the initial permit or over the remaining life of the facility, whichever is shorter; in the case of a trust fund for corrective action for known releases, payments into the trust fund shall be made annually over the first half of the estimated length of the corrective action period, or in the time period specified by the permit condition or the secretary's decision; this period is referred to as the pay-in period;

B. for a trust fund used to demonstrate financial assurance for closure, post-closure care, and phase I and phase II assessments, the first payment into the fund shall be at least equal to the current approved cost estimate divided by the number of years in the pay-in period; the amount of subsequent payments shall be determined by the following formula:

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

where CE is the current cost estimate (updated for inflation or other changes), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period;

C. for a trust fund used to demonstrate financial assurance for corrective action, the first payment into the trust fund shall be at least one-half of the current approved cost estimate for corrective action; the amount of subsequent annual payments shall be determined by the following formula:

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

where CE is the current remaining cost estimate for corrective action, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period;

D. in the case of closure, post-closure care, and phase I and phase II assessments, the initial payment into the trust fund shall be made prior to the initial receipt of waste; in the case of corrective action, the initial payment into the trust fund shall be made no later than 120 days after the corrective action remedy has been approved by the secretary;

E. if the owner or operator establishes a trust fund after having used one or more other mechanisms, the initial payment into the trust fund shall be at least equal to the amount that the fund would contain if the trust fund had been established initially and annual payments had been made according to the specifications of Paragraphs (1), (2) and (3) of Subsection C of this section, as applicable;

F. the owner or operator, or other person authorized to conduct closure, post-closure care, phase I and phase II assessments, or corrective action activities may request reimbursement from the trust fund for these expenditures by submitting itemized bills to the secretary; unless there is an imminent threat to public health, welfare and safety or the environment, or undue economic hardship would delay or cease the required activities, requests for reimbursement shall be granted by the secretary only if the trust fund assets are sufficient to cover the remaining costs of required activities, and if justification and documentation of the expenditure is filed with the secretary and placed in the operating record; withdrawals of any funds from the trust fund shall be directed in writing to the trustee by the secretary;

G. the trust fund may be terminated only if the owner or operator substitutes alternate financial assurance as approved in writing by the secretary as specified in 20.9.10.13 - 20.9.10.23 NMAC or if the secretary determines that the owner or operator is no longer required to demonstrate financial assurance;

H. the trustees shall be a trust company or banks authorized to do business as a trust company in New Mexico under the Trust Company Act, NMSA 1978 Section 58-9-4 or 58-10-35, or authorized under federal law;

I. the trustee shall file annual reports on the trust fund balance with the department.
[20.9.10.14 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.15 SURETY BOND GUARANTEEING PAYMENT OR PERFORMANCE. An owner or operator may demonstrate financial assurance for closure, post-closure care, phase I and phase II assessments, or corrective action by obtaining a surety bond guaranteeing payment into a trust fund or standby trust fund established by the owner or operator. The surety bond and standby trust fund shall be worded as in the forms supplied by the department.

A. In the case of closure, post-closure care, and phase I and phase II assessments, the surety bond shall be effective prior to the initial receipt of waste. In the case of corrective action, the surety bond shall be effective no later than 120 days after the corrective action remedy has been approved by the secretary.

B. The owner or operator who uses a surety bond to satisfy its financial assurance requirements must also establish a trust fund or standby trust fund. Under the terms of the bond, all payments made thereunder must be deposited by the surety directly into the trust fund or standby trust fund in accordance with instructions from the secretary. A standby trust fund must meet all the requirements of the trust fund specified in 20.9.10.14 NMAC as applicable, except that, until the standby trust fund is funded pursuant to the requirements of this 20.9.10.14 NMAC and the surety agreement, annual payments into the standby trust fund are not required, updating of Schedule A to the trust agreement is not required, annual valuation as required by the trust agreement is not required, and notices of non-payment are not required.

C. Companies providing surety bonds shall be admitted carriers, licensed carriers, or registered carriers of surplus lines of insurance and authorized in the state of New Mexico to do business and be among those listed as acceptable sureties on federal bonds in circular 570 of the U.S. department of the treasury.

D. Except as provided in 20.9.10.23 NMAC, the penal sum of the bond shall be in an amount at least equal to the estimated costs to perform the activities assured by the bond.

E. Under the terms of the bond, the surety shall become liable on the bond obligation when the secretary determines that the owner or operator has failed to perform as guaranteed by the bond.

F. Payments made under the terms of the bond shall be deposited by the surety directly into the trust fund or standby trust fund in accordance with instructions by the secretary. No payments shall be made from the trust fund or standby trust fund unless approved in writing by the secretary.

G. The bond shall remain in effect until the closure and post-closure care or phase I and phase II assessments or any corrective action for which the bond was acting as financial assurance is certified as complete, or until it is replaced by an alternate financial assurance mechanism.

[20.9.10.15 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.16 IRREVOCABLE STANDBY LETTER OF CREDIT. An owner or operator may demonstrate financial assurance for closure, post-closure care, phase I and phase II assessments, and corrective action by obtaining an irrevocable standby letter of credit worded as in forms supplied by the department and payable to a trust fund or standby trust fund established in conformance with 20.9.10.14 NMAC.

A. In the case of closure, post-closure care, and phase I and phase II assessments, the letter of credit shall be effective prior to the initial receipt of waste. In the case of corrective action, the letter of credit shall be effective no later than 120 days after the corrective action remedy has been approved by the secretary.

B. 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 of New Mexico agency. The issuing institution shall be authorized to transact business in the state of New Mexico.

C. A letter from the owner or operator referring to the letter of credit by number, issuing institution, issue date, and providing the name and address of the facility, and the amount of funds assured, shall be submitted to the secretary along with the letter of credit. A copy of the letter from the owner or operator and a copy of the letter of credit shall be placed in the operating record.

D. The institution issuing the letter of credit shall be an institution with assets of at least one billion dollars (\$1,000,000,000). If the assets of the issuing institution are less than this amount, the letter of credit shall be fully collateralized by the owner or operator.

E. The letter of credit shall be irrevocable and issued for a period of at least one year. 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 canceled the letter of credit by sending notice of cancellation by certified mail to the owner or operator and to the secretary 120 days in advance of cancellation. If the issuing institution notifies the owner or operator that it plans to cancel the letter of credit, the owner or operator shall obtain alternate financial assurance at least 30 days prior to the cancellation date. If the owner or operator fails to obtain alternate financial assurance in a timely manner, the secretary shall draw funds guaranteed by the letter of credit and place them in the trust fund or standby trust fund.

F. The trust fund or standby trust fund established by the owner or operator shall be worded as in forms supplied by the department.

G. The owner or operator may cancel the letter of credit only if alternate financial assurance is substituted as specified in 20.9.10.13 - 20.9.10.23 NMAC or if the owner or operator is notified in writing by the secretary that financial assurance is no longer required.

H. The owner or operator shall file an originally signed duplicate of the standby trust agreement and originally signed duplicate of the letter of credit with the department.

[20.9.10.16 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.17 INSURANCE. An owner or operator may demonstrate financial assurance for closure, post-closure care, and phase I and phase II assessments by obtaining insurance which conforms to the requirements of 20.9.10 NMAC. In the case of closure, post-closure care, and phase I and phase II assessments, the insurance shall be effective prior to the initial receipt of waste. In the case of corrective action, the insurance shall be effective no later than 120 days after the corrective action remedy has been approved by the secretary.

A. The insurer shall be authorized to transact the business of insurance in the state of New Mexico and:

(1) have assets of one hundred million dollars (\$100,000,000) or more; or
(2) be an admitted carrier, a licensed carrier or a registered carrier of surplus lines of insurance or reinsurance in one or more states and have either a surplus of not less than twenty-five million dollars (\$25,000,000) above undiscounted actuarial reserves (including incurred but not reported (IBNR) claims), or have an A.M. best rating of not less than a B+ or the equivalent rating of other recognized rating companies.

B. The certificate of insurance shall be worded as in a form supplied by the department.

C. The insurance policy shall guarantee that funds will be available for closure post-closure care, phase I and phase II assessments, and corrective action, as applicable. The policy shall also guarantee that the insurer will, as necessary, provide funds up to the face amount of the policy to persons authorized by the secretary to conduct activities covered by the policy. The face amount of the policy shall be at least equal to the most recent cost estimate for each of the covered activities.

D. Each 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.

E. 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 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 owner or operator, and to the secretary, 120 days in advance of cancellation. If the insurer notifies the owner or operator that it plans to cancel the policy, the owner or operator shall obtain alternate financial assurance at least 60 days prior to cancellation of the policy. 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:

- (1) the secretary deems the facility abandoned;
- (2) the permit is terminated or revoked or a new permit is denied;
- (3) closure is ordered by the secretary or a court of competent jurisdiction;
- (4) the owner or operator is named a debtor in a voluntary or involuntary bankruptcy proceeding;
- (5) the premium due is paid.

F. For insurance policies providing coverage for post-closure care, commencing on the date that liability to make payments pursuant to the policy accrues, the insurer shall thereafter annually increase the face amount of the policy. Such increase shall be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85 percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. treasury for 26-week treasury securities.

G. The owner or operator may cancel the insurance policy only if alternate financial assurance is substituted or if the secretary notifies the owner or operator that financial assurance is no longer required.

H. The owner or operator shall file a copy of the certificate of insurance and insurance policy with the department. The owner or operator shall report any changes in either surplus or rating to the secretary. In addition, a copy of the latest annual rating (if applicable) and a copy of the latest audited financial statements shall be forwarded by the insurer to the owner or operator and the secretary.

[20.9.10.17 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.18 RISK MANAGEMENT POOL. An owner or operator may demonstrate financial assurance for closure, post-closure care, phase I and phase II assessments, or corrective action by joining a risk management pool. In the case of closure, post-closure care, and phase I and phase II assessments, participation in an approved risk management pool shall be effective prior to the initial receipt of waste. In the case of corrective action, participation shall be effective no later than 120 days after the corrective action remedy has been approved by the secretary.

A. A risk management pool shall not be an allowed mechanism unless the pool is approved by the secretary. Approved pools shall incorporate any mechanisms or combination of mechanisms in 20.9.10.13 - 20.9.10.23 NMAC and have the following characteristics:

- (1) be evidenced by a written contractual agreement among participating private entities or a joint powers agreement among participating governmental entities;
- (2) would not be in violation of the anti-donation clause of the New Mexico State Constitution if funds were used;
- (3) is liquid in nature, allowing for prompt initiation and payment of closure, post-closure care, phase I and phase II assessments, or corrective action activities;
- (4) has a defined annual contribution table that provides for timely periodic payments from the risk sharers;

(5) provides for guaranteed and timely supplemental funding in the event of an incident that depletes the assets of the pool;

(6) has incorporated in its framework a trust fund or standby trust fund that conforms with 20.9.10.14 NMAC.

B. The risk management pool shall provide an explicit guarantee that funding in the amount of estimated closure, post closure care, phase I and phase II assessments and any corrective action costs will be paid by the pool into the trust fund or standby trust fund established by the facility in the event the owner or operator fails to undertake and complete the covered activities.

C. The owner or operator shall file a copy of the agreement establishing the risk management pool and the contribution table. The owner operator shall file an original duplicate of the trust fund agreement or standby trust fund agreement, and the guarantee by the pool to pay into the standby trust fund or trust fund for covered activities for the particular facility.

[20.9.10.18 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.19 LOCAL GOVERNMENT FINANCIAL TEST. A local government that satisfies the requirements of Subsections A through E of this section may demonstrate financial assurance pursuant to Subsection A of 20.9.10.13 NMAC up to the amount specified in Subsection F of this section for closure, post-closure care, phase I and phase II assessments, and corrective action.

A. Financial component. The local government shall satisfy one of the following:

(1) if the local government has outstanding general obligations bonds, it must 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 on all outstanding general obligation bonds; or,

(2) if the local government does not have outstanding general obligation bonds, it must satisfy each of the following financial ratios based on the local government's most recent audited annual financial statement: a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05; and a ratio of annual debt service to total expenditures less than or equal to 0.20.

B. The local government shall prepare its financial statements in conformity with generally accepted accounting principles for governments and have its financial statements audited by an independent certified public accountant or appropriate state agency.

C. A local government is not eligible to assure its obligations using the local government financial test if it is currently in default on any outstanding general obligation bonds; has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's; operated at a deficit equal to five percent or more of total annual revenue in either of the past two fiscal years; or receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate state agency) auditing its financial statement. However, the secretary may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the secretary deems the qualification insufficient to warrant disallowance of the test.

D. Public notice component. The local government shall place a reference to all closure, post-closure care, phase I and phase II assessments, and corrective action costs assured through the financial test into its comprehensive annual financial reports (CAFR) and budgets. Upon initial receipt of waste at the facility, the reference must be included in the next CAFR. In the case of existing facilities, for closure, post closure care, and the phase I and phase II assessment, the reference must be included prior to the effective date of 20.9.10.19 NMAC. In the case of corrective action, the reference must be included not later than 120 days after the corrective action remedy has been selected in accordance with the requirements of 20.9.9 NMAC, the permit issuance, or the secretary's decision. For the first year the financial test is used to assure costs at a particular facility, the reference may instead be placed in the operation record until insurance of the next available CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget. The reference shall include the amount of each cost estimate and the year in which the local government expects these costs to be incurred. References in the budget must occur as budgeted line items if the activities are to occur in the period covered by the budget, but may appear in a supplemental data section if the activities will not occur until after the period covered by the budget.

E. Record keeping and reporting requirements.

(1) The local government shall submit the following items to the department:

(a) a letter signed by the local government's chief financial officer that lists all the current cost estimates covered by a financial test, as described in Subsection F of 20.9.10.19 NMAC, provides evidence and

certifies that the local government meets the conditions of Subsections A, B and C of 20.9.10.19 NMAC, and certifies that the local government meets the conditions of Subsections D and F of 20.9.10.19 NMAC;

(b) the local government's independently audited year-end financial statements for the latest fiscal year (except for local governments where audits are required every two years and where unaudited statements may be used in years when audits are not required), including the unqualified opinion of the auditor who must be an independent, certified public accountant or an appropriate state agency that conducts equivalent comprehensive audits; and

(c) a report to the local government from the local government's independent certified public accountant or the appropriate state agency stating that the certified public accountant or state agency has compared the data in the chief financial officer's letter with the owner's or operator's most recent independently audited, year-end financial statements, and in connection with that examination, no matters came to his attention which caused him to believe that the data in the chief financial officer's letter should be adjusted; a copy of the supporting documentation shall also be placed in the facility operating record.

(2) The items required in Subsection E of 20.9.10.19 NMAC must be placed in the facility operating record as follows: in the case of closure, post-closure care, and the phase I and phase II assessment, prior to the initial receipt of waste at the facility, or for existing facilities, prior to the effective date of this part; or in the case of corrective action, not later than 120 days after the corrective action remedy is selected in accordance with the requirements of 20.9.9 NMAC, the permit issuance, or the secretary's decision.

(3) After the initial placement of the items in the facility's operating record, the local government owner or operator shall update the information and place the updated information in the operating record within 180 days following the close of the local government's fiscal year.

(4) The local government owner or operator is no longer required to meet the requirements of Subsection E of 20.9.10.19 NMAC when the owner or operator substitutes alternate financial assurance as specified in 20.9.10.13 NMAC, or the owner or operator is released from the requirements of 20.9.10.13 - 20.9.10.23 NMAC in accordance with Subsection B of 20.9.10.9 NMAC, Subsection B of 20.9.10.10 NMAC, Subsection B of 20.9.10.11 NMAC, or Subsection B of 20.9.10.12 NMAC.

(5) A local government shall satisfy the requirements of the financial test at the close of each fiscal year. If the local government owner or operator no longer meets the requirements of the local government financial test it shall, within 210 days following the close of the owner or operator's fiscal year, obtain alternative or supplemental financial assurance, and place the required submissions for that assurance in the operating record.

(6) The secretary, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If the secretary finds that the local government no longer meets the requirements of the local government financial test, the local government shall provide alternate financial assurance that meets the requirements of 20.9.10 NMAC.

F. Calculation of costs to be assured. The portion of the closure, post-closure care, phase I and phase II assessments, and corrective action costs which a local government can assure under 20.9.10.19 NMAC is determined as follows:

(1) if the local government does not assure other environmental obligations through a financial test, it may assure closure, post-closure care, phase I and phase II assessments, and corrective action costs in an amount not to exceed 43 percent of the local government's total annual revenue;

(2) if the local government assures other environmental obligations through a financial test, including those associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR Part 280, PCB storage facilities under 40 CFR Part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR Parts 264 and 265, it must add those costs to the closure, post-closure care, the phase I and phase II assessments, and corrective action costs it seeks to assure under this paragraph; the total shall not exceed 43 percent of the local government's total annual revenue;

(3) the local government shall obtain an alternate financial assurance instrument for those costs that exceed the limits set in Paragraphs (1) and (2) of Subsection F of 20.9.10.19 NMAC.

[20.9.10.19 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.20 LOCAL GOVERNMENT RESERVE FUND. A local government may demonstrate financial assurance for closure, post-closure care, phase I and phase II assessments, and corrective action by establishing a reserve fund within its existing financial accounting system.

A. The reserve fund shall be created by resolution of the governing body specifying the use of funds only for purposes of closure, post-closure care, phase I and phase II assessments, or corrective action for the facility.

The reserve fund shall specify that the funds shall be used for closure, post-closure care, phase I and phase II assessments and corrective action costs in compliance with 20.9.2 - 20.9.10 NMAC and orders issued pursuant to such rules by the secretary. In the case of closure, post-closure care, and phase I and phase II assessments for new facilities, the resolution shall be effective prior to the initial receipt of waste. In the case of corrective action, the resolution shall be effective not later than 120 days after the corrective action remedy has been approved by the secretary. The resolution shall specify withdrawals from the fund will only occur with approval by the secretary. Funding of the reserve fund shall be in conformance with the formulas specified for trust funds in 20.9.10.14 NMAC. The reserve fund shall be audited annually by the state auditor under the Single Audit Act.

B. The local government shall file a copy of the resolution with the department. The local government shall file audit reports of the reserve fund annually with the department.
[20.9.10.20 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.21 LOCAL GOVERNMENT GUARANTEE.

A. An owner or operator may demonstrate financial assurance for closure, post-closure, phase I and phase II assessment, and corrective action, as required by 20.9.10.9 - 20.9.10.12 NMAC by obtaining a written guarantee provided by a local government. The guarantor must meet the requirements of the local government financial test in 20.9.10.19 NMAC, and must comply with the terms of a written guarantee.

B. Terms of the written guarantee. The guarantee must be effective prior to the initial receipt of waste, or in the case of existing facilities, prior to the effective date of this part. In the case of closure, post-closure care, or phase I and phase II assessments, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of 20.9.9 NMAC, the permit issuance, or the secretary's decision. The guarantee must provide that if the owner or operator fails to perform closure, post-closure care, phase I and phase II assessments, or corrective action of a facility covered by the guarantee, the guarantor will perform, or pay a third party to perform, closure, post-closure care, and corrective action as required; or establish a fully funded trust fund as specified in 20.9.10.14 NMAC in the name of the owner or operator.

(1) The guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the secretary. Cancellation shall not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the secretary, as evidenced by the return receipts.

(2) If a guarantee is canceled, the owner or operator must within 90 days following receipt of the cancellation notice by the owner or operator and the secretary, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the secretary. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days following the close of the guarantor's fiscal year, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record and notify the secretary.

C. Record keeping and reporting.

(1) The owner or operator must place a certified copy of the guarantee along with the items required under Subsection E of 20.9.10.19 NMAC into the facility's operating record prior to the initial receipt of waste, or in the case of existing facilities, prior to the effective date of this part. In the case of closure, post-closure care, or phase I and phase II assessments, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of 20.9.9 NMAC, the permit issuance, or the secretary's decision.

(2) The owner or operator is no longer required to maintain the items specified in Subsection C of 20.9.10.21 NMAC when the owner or operator substitutes alternate financial assurance as specified in 20.9.10.13 NMAC through 20.9.10.23 NMAC; or the owner or operator is released from the requirements of 20.9.10.13 NMAC through 20.9.10.23 NMAC in accordance with Subsection B of 20.9.10.9 NMAC, Subsection B of 20.9.10.10 NMAC; Subsection B of 20.9.10.11 NMAC, or Subsection B of 20.9.10.12 NMAC.

(3) If a local government guarantor no longer meets the requirements of Subsection E of 20.9.10.19 NMAC the owner or operator must, within 90 days following the close of the guarantor's fiscal year obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the secretary. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days.

[20.9.10.21 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.22 CORPORATE FINANCIAL TEST. A private entity that satisfies the financial test requirements of this section may provide a corporate guarantee for financial assurance up to the amounts specified in this section for closure, post-closure care, phase I and phase II assessments, and corrective action.

A. Financial component.

- (1) The owner or operator shall satisfy at least one of the following three conditions:
 - (a) a current rating for its senior unsubordinated debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A or Baa as issued by Moody's;
 - (b) a ratio of less than 1.5 comparing total liabilities to net worth; or
 - (c) a ratio of greater than 0.10 comparing the sum of net income plus depreciation, depletion and amortization, minus \$10 million, to total liabilities.
- (2) The tangible net worth of the owner or operator shall be greater than:
 - (a) the sum of the current closure, post-closure care, phase I and phase II assessments, and corrective action cost estimates and any other environmental obligations, including guarantees, covered by a financial test plus \$10 million; or
 - (b) \$10 million in net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements, provided all of the current closure, post-closure care, phase I and phase II assessments and corrective action costs and any other environmental obligations covered by a financial test are recognized as liabilities on the owner's or operator's audited financial statements;
 - (c) the owner or operator shall have assets located in the United States amounting to at least the sum of current closure, post-closure care, phase I and phase II assessments, corrective action cost estimates, and any other environmental obligations covered by a financial test as described in Subsection C of 20.9.10.22 NMAC.

B. Recordkeeping and reporting requirements.

- (1) An owner or operator seeking to demonstrate that it meets the corporate financial test shall file the following items with the department:
 - (a) a letter signed by the owner's or operator's chief financial officer that lists all the current cost estimates covered by a financial test, including, but not limited to, cost estimates required for municipal solid waste management facilities and cost estimates required for any facilities described in Subsection C of 20.9.10.22 NMAC, and provides evidence demonstrating that the firm meets the conditions of Subsection A of this section;
 - (b) a copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year; to be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant; an adverse opinion, disclaimer of opinion, or other qualified opinion shall be cause for disallowance, except that the secretary may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the secretary deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test;
 - (c) if the chief financial officer's letter providing evidence of financial assurance includes financial data showing that the owner or operator satisfies Subparagraphs (b) or (c) of Paragraph (1) of Subsection A of 20.9.10.22 NMAC that are different from data in the audited financial statements referred to in Subparagraph (b) of Paragraph (1) of Subsection B of 20.9.10.22 NMAC or any other audited financial statement or data filed with the securities and exchange commission, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required; the special report shall be based upon an agreed upon procedures engagement in accordance with professional auditing standards and shall describe the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements, the findings of that comparison, and the reasons for any differences; and
 - (d) if the chief financial officer's letter provides a demonstration that the firm has assured for environmental obligations as provided in Subparagraph (b) of Paragraph (2) of Subsection A of 20.9.10.22 NMAC, then the letter shall include a report from the independent certified public accountant that verifies that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, how these obligations have been measured and reported, and that the tangible net worth of the firm is at least \$10 million plus the amount of any guarantees provided.
- (2) The owner or operator shall meet the requirements of 20.9.10.22 NMAC unless the owner or operator provides alternate financial assurance that is approved in writing by the secretary or if the secretary notifies him in writing that he is no longer required to provide financial assurance.
- (3) The owner or operator shall satisfy the requirements of the corporate financial test at the close of each fiscal year. If the owner or operator no longer meets the requirements of the test, the owner or operator shall, within 60 days following the close of the owner or operator's fiscal year, obtain alternate financial assurance approved in writing by the secretary.

(4) The secretary, based on a reasonable belief that the owner or operator may no longer meet the requirements of the corporate financial test, may require the owner or operator to provide reports of its financial condition at any time. If the secretary finds that the owner or operator no longer meets the requirements of the corporate financial test, the owner or operator shall provide alternate financial assurance.

C. Calculation of costs to be assured. When calculating the current cost estimates for closure, post-closure care, phase I and phase II assessments, corrective action, or the sum of the combination of such costs to be covered, and any other environmental obligations assured by a corporate financial test, the owner or operator shall include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if they are assured through a corporate financial test: obligations associated with UIC facilities under 40 CFR Part 144, petroleum underground storage tank facilities under 40 CFR Part 280, PCB storage facilities under 40 CFR Part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR Parts 264 and 265.

[20.9.10.22 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

20.9.10.23 MULTIPLE FINANCIAL MECHANISMS. An owner or operator may satisfy financial assurance requirements by establishing more than one financial mechanism per facility. The mechanisms shall be as specified in Subsection A of 20.9.10.13 NMAC, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current cost estimate approved by the secretary for closure, post-closure care, the phase I and phase II assessments, or corrective action, as applicable. The language of the mechanism listed in 20.9.10.13 NMAC through 20.9.10.23 NMAC must ensure that the instruments satisfy the following criteria:

A. the financial assurance mechanisms must ensure that amount of funds assured is sufficient to cover the cost of closure, post-closure care, phase I and phase II assessments, or corrective action for known releases when needed, as applicable;

B. the financial assurance mechanisms must ensure that funds will be available in a timely fashion when needed;

C. the financial assurance mechanisms must be obtained by the owner or operator by the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, in the case of closer and post-closure care, and no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of 20.9.9.17 NMAC, until the owner of operation is released from the financial assurance requirements under 20.9.10.9.9 - 20.9.10.12 NMAC;

D. the financial assurance mechanisms must be legally valid, binding, and enforceable under state and federal law.

[20.9.10.23 NMAC - Rp, 20 NMAC 9.1.IX.906, 8/2/2007]

HISTORY OF 20.9.10 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives:

EIB 74-1, Solid Waste Management Regulations, filed 05/03/1974;

EIB/SWMR-2, Solid Waste Management Regulations, filed 04/14/1989;

EIB/SWMR-3, Solid Waste Management Regulations, filed 12/31/1991;

EIB/SWMR-4, Solid Waste Management Regulations, filed 07/18/1994.

History of Repealed Material: 20 NMAC 9.1, Solid Waste Management Regulations (filed 10/27/1995), repealed 8/2/2007.

Other History:

EIB/SWMR-4, Solid Waste Management Regulations (filed 07/18/1994) was renumbered, reformatted, amended and replaced by 20 NMAC 9.1, Solid Waste Management Regulations, effective 11/30/1995.

That applicable portion of 20 NMAC 9.1, Subpart IX, Financial Assurance, (filed 10/27/1995) was **renumbered, reformatted and replaced** by 20.9.10 NMAC, Financial Assurance, effective 8/2/2007.