

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:	)	
	)	
FINANCIAL ASSURANCE	)	R2010-009
INSTRUMENTS -- RENEWAL AND	)	
TERMS: AMENDMENTS TO 35 ILL.	)	(Rulemaking -- Land)
ADM. CODE 807 SUBPART F,	)	
810.104 AND 811 SUBPART G)	)	
	)	

**NOTICE OF FILING**

John Therriault, Acting Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, Illinois 60601  
(ELECTRONIC FILING)

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One Natural Resources Way  
Springfield, Illinois 62702-1271

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the TESTIMONY ON PROPOSED AMENDMENTS TO 35 ILL. ADM. CODE PART 807 SUBPART F, PART 810, AND PART 811 SUBPART G, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: Stephanie Flowers  
Stephanie Flowers  
Assistant Counsel  
Division of Legal Counsel

DATE: 4-21-10  
1021 North Grand Avenue East  
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TESTIMONY ON PROPOSED AMENDMENTS TO  
35 ILL. ADM. CODE 807 SUBPART F,  
810.104, AND 811 SUBPART G

My name is Brian S. White, Manager of the Compliance Unit in the Waste Reduction and Compliance Section of the Bureau of Land (“BOL”) at the Illinois Environmental Protection Agency (“Illinois EPA”). The Compliance Unit is generally responsible for compliance tracking activities in the Bureau of Land and for reviewing and evaluating compliance with the financial assurance requirements of the Environmental Protection Act and the Board adopted rules.

I graduated from Illinois State University in 1983 with a B.S. in Environmental Health. I also completed 44 hours of postgraduate work for a Master’s in Public Administration from University of Illinois Springfield. I worked jointly for the Menard and Cass County Health Departments from 1985 through 1987 as a Sanitarian and Environmental Health Director. In 1987, I started working for the Illinois Department of Public Health in the Asbestos Program. In 1988, I began working at the Illinois EPA in the Compliance Unit of the Bureau of Land and became the Compliance Unit Manager in January of 1991. In the fall of 2002, the financial assurance program was added to my responsibilities.

I hereby submit the following testimony in support of the Illinois EPA's proposed amendments to the financial assurance rules in 35 Ill. Adm. Code 807 ("Solid Waste"), Subpart F ("Financial Assurance for Closure and Post-Closure Care"); 35 Ill. Adm. Code 811 ("Standards for New Solid Waste Landfills"), Subpart G ("Financial Assurance"); and 35 Ill. Adm. Code 810 ("Solid Waste Disposal: General Provisions"), Section 810.104.

### **SUBSTANTIVE CHANGES**

The substantive amendments identified in this rulemaking provide a change in the existing law. The amendments result from the experience of the BOL's administration of the program for the past 25 plus years. The main amendments are to add evergreen or automatic renewal language to the letters of credit and bonds obtained by Illinois landfills as financial assurance for closure, post-closure care, and corrective action and to reduce the required term for bonds and letters of credit from four or five years to one year or more. These two amendments should result in an increase in the availability of these instruments as a financial assurance option for more landfills. The evergreen or automatic renewal language is also needed to protect against an expiration of coverage that would leave an abandoned landfill without funds for closure, post-closure care, and corrective action. Currently, if a bond or letter of credit is not renewed for another four or five year term by the expiration date, the regulations provide for an automatic extension of the financial assurance for one additional twelve month period but only if the Illinois EPA provides notice to the issuing institution within 30 days after expiration of the instrument. The evergreen or automatic renewal language will take the burden off the Illinois EPA to track the expiration dates of bonds and letters of credit. With the proposed amendments, the burden is on the financial institution to provide a notice to the Illinois EPA and the owner or

operator if it intends not to renew the bond or letter of credit. This is consistent with the other financial assurance programs of the Illinois EPA and with the financial assurance requirements in the Code of Federal Regulations (“CFR”) for similar programs.

The one-year term and evergreen or automatic renewal language was derived from language that exists in the other financial assurance programs at Parts 704, 724, 725, and 848 and the language at Parts 724 and 725 is derived from the federal language at 40 CFR, Parts 264 and 265, Subpart H. The language is also consistent with the allowable language for bonds and letters of credit in 40 CFR §258.74; specifically, 40 CFR, Part 258 is the “Criteria for Municipal Solid Waste Landfills” and §258.74 are the allowable financial assurance mechanisms. The changes correspond to the generally accepted practices at the Federal and State levels for regulated sites subject to financial assurance. Therefore, the amendments will provide consistent language throughout the various financial assurance programs of the BOL and will be consistent with federal financial assurance language as well.

The substantive changes relating to evergreen renewal language and the one-year term limit are as follows:

At Sections 807.662(e)(1)(B) [Surety Bonds Guaranteeing Payment], 807.663(e)(1)(B) [Surety Bonds Guaranteeing Performance], 811.711(e)(1)(B) [Surety Bonds Guaranteeing Payment], and 811.712(e)(1)(B) [Surety Bonds Guaranteeing Performance], the financial assurance mechanism will need to guarantee that in addition to providing closure and post-closure care and corrective action, the owner or operator will provide alternative financial assurance if the current financial assurance is not renewed.

At Sections 807.662(e)(2)(E) [Surety Bonds Guaranteeing Payment], 807.663(e)(2)(E) [Surety Bonds Guaranteeing Performance], 807.664(e)(2)(E) [Letter of Credit], 811.711(e)(2)(F)

[Surety Bonds Guaranteeing Payment], 811.712(e)(2)(F) [Surety Bonds Guaranteeing Performance], and 811.713(e)(2)(F) [Letter of Credit] and the corresponding Illustrations, the Illinois EPA will be required to collect on the financial assurance mechanism if a financial assurance alternative is not provided and approved by the Agency prior to the expiration of the current financial assurance.

At Sections 807.662(g)(1), 807.663(g)(1), 807.664(g)(1), 811.711(g)(1), 811.712(g)(1), and 811.713(g)(1), the term of the financial assurance mechanism must be at least one year. At this time the term of the bond or the letter of credit is four years for landfills subject to the requirements of Part 807 and five years for landfills subject to the requirements of Part 811.

At Sections 807.662(g)(2), 807.663(g)(2), 807.664(g)(2), 811.711(g)(2), 811.712(g)(2), and 811.713(g)(2) and the corresponding Illustrations, the financial assurance mechanism for bonds and letters of credit will be automatically renewed or extended for a period of at least one year unless the financial institution or surety notifies the owner or the operator and the Illinois EPA at least 120 days prior to the current expiration date that it does not intend to renew.

The other substantive amendments that request a change in existing law are to help provide accuracy and efficiency in running the financial assurance program at the Illinois EPA. Besides the letters of credit and bonds, two of the other financial assurance options have errors that require amendments. First, the trust agreement option currently requires funding over a certain amount of years but does not require that the cost estimate be updated thereafter and so this amendment is proposed at Sections 811.710(c), 807.661(c) and Illustration A Section 2 of Parts 807 and 811. Also, the trust agreement requires that the Illinois EPA director must okay minor changes to the trust agreement. This has created an efficiency problem within the Illinois EPA as the Director's office is getting what amounts to data entry requests and must re-route the

paperwork to the financial assurance department in the BOL. The changes at Illustration A Section 16-18 of Parts 807 and 811 allowing the Illinois EPA Director the ability to appoint a designee will allow the paperwork to be sent directly to the financial assurance department in the BOL. Second, the self-insurance option under Part 811 currently does not require the unit of local government to provide an alternative financial assurance to the Illinois EPA when the unit of local government fails the required financial test. This error is remedied with the amendment at Section 811.716(c)(5). Again, this language is needed to protect against a shortage of funds for closure and post-closure care.

Lastly, the amendments to Sections 807.662(b), 807.663(b), and 807.665(b) clarify that insurance or bonds provided by an excess or surplus lines insurer approved by another state will be allowed for Part 807 permits as well. Although there has been no change in law the Illinois EPA's interpretation of this statutory language in the past has erroneously limited it to only Part 811 permits.

## **REVISIONS**

The proposed revisions to Parts 807 and 811 do not change the substantive intent of the law but are a reworking of the language of the regulations that makes the intent of the law clearer or more accurate. Administration of the financial assurance programs for over 25 years has identified certain language that has been problematic or misunderstood. The following is a list of the revisions:

Several definitions were revised to more accurately describe the terms including "assumed closure date" at Section 811.700(e) and "pay-in period" at Section 811.710(d)(1)(B). The proposed definition of assumed closure date was changed by BOL Permit Section to state

more clearly that it is when closure is most expensive. The pay-in period was changed to clarify that a pay-in period is only available during the initial permit term.

Section 811.704(g) was removed because the cost estimate for closure and post closure is not reduced by any present value calculation since no interest accrues in any financial assurance mechanism except a trust and at Section 811.718 a clarification was made that the availability of discounting is limited to trust mechanisms because no interest accrues in mechanisms other than a trust.

Other revisions were to add language to clarify intent such as at Sections 811.711(f)(2), 811.712(f)(2), 811.713(f)(2), 811.714(d)(2), 807.662(f)(2), 807.663(f)(2), 807.664(f)(2) and 807.665(d)(2) where the language was replaced to specify that a reduction of the cost estimate must be approved in writing. This language is found at 35 Ill. Adm. Code 724.243(b)(7), 725.243(b), 725.243(c), 704.215, 704.216, and 704.217 and the change to Parts 807 and 811 provide consistency throughout the financial assurance regulations of the BOL. And at Sections 811.711(h)(2), 811.712(h)(2), 811.713(h)(2), 807.662(h)(2), 807.663(h)(2), and 807.664(h)(2) where the language was added to clarify refunds are conditional. Also, at Illustrations C, D, and H where the language "failed to so provide closure and post-closure care or corrective action" was stricken and the language "failed to fulfill one or more of the conditions described above" was inserted to more accurately state when a surety shall pay the penal sum. This language was taken from 35 Ill. Adm. Code 724.251 incorporating language from 40 CFR 264.151. And finally at Illustrations C and D of Parts 807 and 811 where the language "in accordance with . . ." was added to reference when IEPA will send written authorization for termination of the bond.

And some revisions of the language were to provide better reading flow such as at Sections 811.711(e)(1), 811.712(e)(1), 807.662(e)(1), and 807.663(e)(1) where the sentence was

divided into two requirements and in 811.711(e)(1)(A) where the corrective action language was revised. And at Sections 811.712(e)(3) and 807.663(e)(3) where the last sentence of (e)(1)(A) was moved to (e)(3) for better reading flow. Also, at Section 811.715(h) and 807.666(h) where the sentence was also divided into two requirements. In the new (h)(1) the language “gross revenue and financial tests” was replaced with “the requirements of this Section” to also reference the requirements of subsections (f) and (g). At the new (h)(2) the language “on a form specified in Appendix A, Illustration H” was added to direct the reader to the correct form in Appendix A. The language “in accordance with subsections (d), (e), (f), and (g)” was added to give authority for language used in Illustration H. Finally, at Sections 811.711(g)(3), 811.712(g)(3), 811.713(g)(2), 807.662(g)(3), 807.663(g)(3) and 807.664(g)(3) where the language was divided into two parts repeating the language of Sections 807.604 and 811.702. This language is from 35 Ill. Adm. Code 724.243(c)(9) with a minor adjustment in that “written authorization for termination of the bond” is language from the illustrations. This language is also found at 35 Ill. Adm. Code 725.243(b), 725.243(c), 704.215, 704.216, and 704.217 and therefore the amendments at Parts 807 and 811 will provide consistent language throughout the various financial assurance programs of the BOL.

### **REITERATIONS**

The Illinois EPA inserted a certification at Illustrations A, C, D, E, F, and H of Parts 807 and 811 to require that the wording of each instrument is identical to the Illinois EPA forms. This amendment is made to promote efficiency in that the financial assurance department does not have to review each form submitted for changes made in the language. The language for this certification was taken from 35 Ill. Adm. Code 724.251 incorporating language from 40



CFR 264.151. Therefore, the amendments will provide consistent language throughout the various financial assurance programs of the BOL and will be consistent with federal financial assurance language as well.

Also the requirement of 807.621(b) and 811.704(b) for when a cost estimate increases is repeated at Sections 811.711(f)(3), 811.712(f)(3), 811.713(f)(3), 811.714(d)(3), 807.662(f)(3), 807.663(f)(3), 807.664(f)(3) and 807.665(d)(3). The language is from 35 Ill. Adm. Code 724.243(b)(7) and is consistent with language throughout the various financial assurance programs of the BOL including 35 Ill. Adm. Code 725.243(b), 725.243(c), 704.215, 704.216, and 704.217.

#### **UPDATES**

Several updates were made to Parts 807 and 811 including changes to citations, current editions, Agency names or titles, and changes of language based upon administrative rules or guidelines. The updates are as follows:

Statutory language is italicized throughout as required by the Illinois Administrative Code Style Manual Section 1-14(a)(2).

At Sections 811.700(b), 811.706(a), 811.713(e), 807.600(b), 807.640, and 807.664(e), the term “may” is replaced with “shall” to indicate obligation rather than discretion as required by the Illinois Administrative Code Style Manual Section 1-21(f).

At Sections 811.710(b)(1), 807.661(b)(1), 811.713(b)(1), 807.664(b)(1), and Illustrations A and E of Parts 807 and 811, “Illinois Commissioner of Banks and Trust Companies” is replaced with “Department of Financial and Professional Regulation” per the change of name in Executive Order 2004-6 and 15 ILCS 520/0.01 et seq. as amended by Public Act 89-508

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At Section 807.661(b)(2) and Illustration A of Part 807 "Foreign Corporations as Fiduciaries Act" is replaced with "Corporate Fiduciary Act" as in Part 811 due to repeal of the former.

At Sections 811.710(b)(1) and (b)(2), Illustration A and E of Part 811, and Illustration E of Part 807, the outdated citation reference is stricken.

At Sections 811.711(b), 807.662(b), 811.712(b), 811.714(b), 811.714(c), 807.663(b), 807.665(b), 807.665(c) and Illustrations C, D, and F of Parts 807 and 811 "Department of Insurance" is replaced with "Department of Financial and Professional Regulation" per the change of name in Executive Order 2004-6.

At Sections 811.713(b)(2), 807.664(b)(2), Illustration A Sections 6(b) and 8(d) of Part 807, and Illustration E of Part 807 the phrase "or the Federal Savings and Loan Insurance Corporation" is stricken per merger of FSLIC and FDIC in 12 U.S.C.A. 1811 et seq. as amended by Public Law 101-73.

At Sections 811.714(c) and 807.665(c) added citation reference.

At Section 807.666(a) the definition of "Generally Accepted Accounting Principles" is updated by adding current edition, publisher name and address to meet requirement of 5 ILCS 100/5-75.

For Illustration E in Parts 807 and 811, add current Illinois EPA postal address and correct governing authority paragraph to parallel 35 Ill. Adm. Code 724.251 incorporating 40 CFR 264.151 Letter of Credit language.

For Illustrations C, D, and H in Parts 807 and 811 insert current reference to the Illinois Environmental Protection Act.

In addition, there is only one amendment to Part 810 which is an update of the accounting and auditing standards incorporated by reference at Section 810.104(a)(2).

### **CORRECTIONS**

Opening Parts 807 and Part 811 to amendments has also provided the Illinois EPA an opportunity to correct the many errors found in the original rulemaking.

At Sections 807.666, 811.715 and the table of contents, the second element in the hyphenated compound of the title is capitalized (i.e., Non-commercial was changed to Non-Commercial).

At Table of Contents 811.Appendix A, Illustration G & H added language (i.e., "Owner's or") so illustrations are consistent with body of rules.

At Section 811.700(f) language replaced to correct the Illinois Environmental Protection Act reference under which an MSWLF unit is required to obtain a permit.

At Section 811.703(c) replaced language to provide reference to correct section of the Act.

At Section 811.704(k)(3) language replaced to correct the reference copied from 40 CFR 258.73(a)(2).

At Section 811.710(g)(2) added mistakenly omitted language "to release" so that paragraph parallels 807.661(f)(2).

At Sections 811.711(b), 811.712(b), 811.714(b) and 811.711(g)(3) the duplicate passage is stricken.

At Sections 811.711(c) and 811.712(c) language is stricken to only reference the proper illustration.

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At Sections 811.711(d), 807.662(d), 811.711(h)(2), 811.712(h)(2), 811.713(h)(2), 811.712(d), 811.713(d), 807.663(d), 807.664(d), and Illustrations C, D, E and H of Parts 807 and 811 Landfill Closure and Post-Closure Fund is capitalized and hyphenated properly according to the fund name at 21.1(c) of the Illinois Environmental Protection Act and 30 ILCS 105/5.382.

At Sections 811.711(e)(2)(C), 811.712(e)(2)(C), and 811.713(e)(2)(C) "Title VII" is stricken and replaced with "Title VIII" to accurately reference the enforcement section of the Illinois Environmental Protection Act.

At Sections 811.714(a), 807.665(a) and Illustration F of Parts 807 and 811, added language specifying that a certificate of insurance (Illustration F) must be submitted to the Agency in addition to an insurance policy.

At Sections 811.714(c) and 807.665(c) substitute language "filed with" because no approval is given by the Insurance Division.

At Section 811.715(e)(1)(A)(iv), a duplicate word is stricken and " 's " is added for correct grammar.

At Sections 811.715(h)(1), 807.666(h)(1) and Illustrations A and E of Parts 807 and 811, the word "which" is replaced with "that" as a grammar correction.

At Section 811.716 (c)(1)(A)(iii) "(f)(4)" is replaced with "(d)" to correct the reference copied from 40 CFR 258.74(f)(3)(A)(3).

For Illustration A, Section 10 in Part 811, insert "be" for correct grammar.

For Illustration A, Section 14 in Parts 807 and 811, correct phrase "Director or his/her designee(s)".

For Illustration A, Section 18 in Part 811, correct "is" to "if".

For Illustration A, Section 17 in Parts 807 and 811, insert "Director".

For Illustrations C and D insert comma for proper punctuation.

For Illustrations C, D, and H in Parts 807 and 811 the word "and" was replaced with "or" because the Illinois EPA can call in the bond even if only closure is not provided in accordance with 811.711(e)(2)(C) and 807.662(e)(2)(C).

For Illustrations C, D, and H in Parts 807 and 811, changed "Agency" to "IEPA" for consistency with opening paragraph.

For Illustrations C, D and H in Part 811 reformat signature lines to correct order as in Part 807 Illustrations.

For Illustration D in Part 807, capitalize the word "Agency"

For Illustration D in Part 807 and 811 replace "Forfeiture" with "Performance" to reference accurate title.

For Illustration E in Part 807 and 811 capitalize "Your".


For Illustration F in Part 807 capitalize the word "Code".

For Illustration F in Part 811 add language from 811.714(b) allowing for an excess or surplus lines insurer approved by the insurance department of one or more states.

For Illustrations F and G in Part 811, add "corrective action" language because mechanism can be used as a corrective action financial assurance mechanism.

For Illustrations G and H in Part 811, add "Owner's or" in front of each instance of "Operator" to allow form to be consistent with body of rules.

Add language to Illustration H in Parts 807 and 811 to parallel language from Illustrations C and D.

By:   
Brian S. White 4/21/2010

**CERTIFICATE OF SERVICE**

I, STEPHANIE FLOWERS, an attorney, do certify that I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the TESTIMONY ON PROPOSED AMENDMENTS TO 35 ILL. ADM. CODE 807 SUBPART F, 810.104, AND 811 SUBPART G and will cause the same to be served upon the following persons, by placing a true and correct copy in an envelope addressed to:

John Therriault, Acting Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
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Environmental Bureau North  
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Mitchell Cohen, General Counsel  
Illinois Dept. of Natural Resources  
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and mailing it by First Class Mail from Springfield, Illinois on April 22, 2010 with sufficient postage affixed.

  
STEPHANIE FLOWERS

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