

ILLINOIS POLLUTION CONTROL BOARD
August 3, 1995

RCRA SUBTITLE D UPDATE, DELAYED)
EFFECTIVE DATE OF USEPA) R95-13
FINANCIAL ASSURANCE REGULATIONS) (Identical in Substance Rules)
(4-7-95)) (Solid Waste--Landfill)

Adopted Rule. Final Order.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Pursuant to Sections 7.2 and 22.40(a) of the Environmental Protection Act (Act) [415 ILCS 5/7.2 & 22.40(a) (1992)], the Board amends the RCRA Subtitle D municipal solid waste landfill (RCRA Subtitle D) regulations. As discussed more fully below, the amendments delay the effective date of the financial assurance requirements until April 9, 1997.

Section 22.40(a) provides for quick adoption of regulations that are "identical in substance" to federal regulations adopted by U.S. EPA to implement Sections 4004 and 4010 of the Resource Conservation and Recovery Act of 1976 (RCRA, 42 U.S.C. §§ 6944 & 6949a) and that Title VII of the Act and Section 5 of the Administrative Procedure Act (APA) [5 ILCS 100/5-35 & 5-40 (1992)] shall not apply. Because this rulemaking is not subject to Section 5 of the APA, it is not subject to first notice or to second notice review by the Joint Committee on Administrative Rules (JCAR). The federal RCRA Subtitle D regulations are found at 40 CFR 258.

DISCUSSION

U.S. EPA amended its RCRA Subtitle D regulations on April 7, 1995. Those amendments delayed the effective date of the federal financial assurance requirements until April 9, 1997. The former effective date was April 9, 1995 (or October 9, 1995 for remote, very small landfills, as defined by 40 CFR 258.1(f)(1)). U.S. EPA amended the dates at 40 CFR 258.70(b) and 258.74(a)(5), (b)(1), (c)(1), and (d)(1). The stated purpose for the delay was to allow U.S. EPA additional time to perfect financial tests for local government and corporate self-assurance.

Accordingly, the Board has amended the financial assurance compliance deadlines to April 9, 1997. This required amendment of Sections 811.700(f) and (g), 811.706(c)(1), 811.711(a), 811.712(a), and 811.713(a), which are all locations where a compliance deadline appears in the regulations. We note, as is further explained in the discussion entitled "Financial Assurance and Impact of Deadline Extension", below on page 3, that the effective date for this amendment is January 1, 1996. In addition to the federally-derived amendments in this rulemaking, the Board has made a number of corrective and general

housekeeping amendments. All citations to the Code of Federal Regulations were updated in the open Sections. All the former references to the Illinois Compiled Statutes are removed in favor of citations to the Illinois Revised Statutes. We removed the explanatory Board Note at the end of Section 811.700 because it is no longer necessary. The Board removed the parenthetical explanation that the April 9, 1995 date is the effective date in Section 811.706(c)(1), consistent with the change in the federal regulations. We further added an explanation to the Board Note at the end of Section 811.706 that the amendments were prompted by the federal amendments to 40 CFR.74(a)(5), which does not correlate to this provision; there is no date recited in the cited 40 CFR 258.74(l). Additionally, the Board made a handful of additional minor conforming changes in punctuation and style.

PUBLIC COMMENTS

The Board proposed the instant amendments on May 4, 1995. We invited public comment on the amendments included in this docket. A Notice of Proposed Amendments appeared in the Illinois Register on May 19, 1995, at 19 Ill. Reg. 6756. The public comment period ended 45 days after that Notice appeared in the Register, i.e., on July 3, 1995. The Board received a single comment on the proposal:

PC 1 Browning-Ferris Industries (BFI), Midwest Region (June 16, 1995, by William R. Uffelman, Divisional Vice-President, Government Affairs)

PC 1 criticized the proposed amendments and suggested that the Board withdraw the amendments, so that all facilities that have not demonstrated financial assurance would immediately be required to do so. The Board has reviewed that comment, and for reasons that we explain, we decline to revise the proposed amendments based on the comment.

BFI states in summary in PC 1 as follows:

In postponing the Federal financial assurance deadline, the [U.S.] EPA did not suggest or envision extensions by states for the sole and exclusive benefit of facilities owned by political subdivisions--the effect of the proposed Illinois amendments. . . . If an extension of financial assurance requirements is adopted, it should apply to all facilities. We believe the proposed amendments should be withdrawn, and all solid waste landfills that have not demonstrated financial responsibility should be promptly required to do so. In addition, the [Board] should commit to the prompt adoption of the [U.S.] EPA-developed local government and corporate financial tests upon their

promulgation by the [U.S.] EPA.

The comment engages in a long discussion of Congressional and U.S. EPA intent, and it criticizes the existing financial assurance mechanisms in the Illinois rules, yet it does not focus directly on the proposed regulation to indicate the way in which the Board has deviated from the federal deadline extension so as to cause a disparate impact on privately-owned landfills. This comment essentially raises three issues that the Board must address:

1. Does Board adoption of the federal deadline extension cause a disparate impact on privately-owned landfills?
2. Can the Board avoid adoption of the federally-extended deadline?
3. What can the Board do to modify the present financial assurance mechanisms?

Financial Assurance and Impact of Deadline Extension

The original October 9, 1991 (56 Fed. Reg. 51029) federal Subtitle D rules provided that the financial assurance requirements were affective on April 9, 1994. They applied to all operating landfills, except that federal and state government-operated landfills were exempted. U.S. EPA delayed the effective date for financial assurance until April 9, 1995 on October 1, 1993 (58 Fed. Reg. 51547). In that delaying action, certain small landfills were allowed a later deadline for compliance of October 9, 1995. Again, on April 7, 1995 (60 Fed. Reg. 17652), U.S. EPA extended the deadline until April 5, 1997 for all operating landfills. These latest amendments are the subject of this proceeding.

Illinois' regulation of landfills predated the federal RCRA Subtitle D requirements. Those regulations included requirements for landfill financial assurance. Section 21.1 of the Act formerly exempted the state and its political subdivisions from the landfill financial assurance requirements.

In 1993, subsequent to the 1991 advent of the federal regulations, the General Assembly amended Section 21.1 so that units of local government were no longer exempted from the financial assurance requirements after the then-effective federal deadline for financial assurance. By a recent amendment, in P.A. 89-200, signed by Governor Edgar on July 21, 1995 and effective January 1, 1996, the General Assembly extended the compliance deadline to correspond with subsequent federal amendments. However, those amendments did not affect the regulatory status of landfills owned or operated by units of local government until the federal requirements become effective.

The extended federally-derived financial assurance deadline for municipally-owned and operated landfills has a disparate impact on privately-owned and operated landfills, but only because it delays the expiration of the disparity. Illinois law has required privately-owned and operated public landfills to maintain financial assurance since March 1, 1985. This was established by Section 21.1 of the Act and by the Board's Section 27 general landfill regulations. Section 21.1 exempted government-owned landfills from the financial assurance requirements. This is the source of the disparity.

With the advent and evolution of the federal regulations, Illinois landfill law and regulations have changed, so that Illinois facilities will be required to comply with the minimum federal financial assurance standards by the required effective dates. The federal regulations have never required financial assurance for any facilities because U.S. EPA has repeatedly extended the deadline for compliance. Until the federal financial assurance requirements become effective, all remains status quo ante in Illinois. That the federally-derived financial assurance requirements have not yet impacted landfills operated by units of local government continues the existence of the disparate impact.

Thus, there is an impact of the financial assurance requirements on privately-owned and operated landfills that does not yet exist for publicly-owned and operated units. However, this difference in impact did not arise through the Illinois landfill regulations. Rather, the General Assembly has determined that units of local government were exempted from the requirements until such a time as federal law requires that they become subject to those requirements. The extension of the deadline for financial assurance that is the subject of this proceeding conforms the Illinois rules to the federal rules. In so doing, it will allow the continuation of the disparate impact on privately-owned and operated landfills.

The Board's Authority to Amend the Deadline Requirements

Section 22.40 (a) requires the Board to amend the Illinois municipal solid waste landfill (MSWLF) regulations to assure that they remain no less stringent than the federal rules upon which they are based. The Board formerly incorporated the federal deadlines for financial assurance as U.S. EPA established and amended them, in R93-10, and with the advent of the April 7, 1995 action by U.S. EPA, the Board is again revisiting the effective date. Our intent in fulfilling our mandate is to assure three basic things. First, the Board wants to assure that the Illinois landfill regulations are no less stringent than and not inconsistent with the federal rules. Second, the Board must assure consistency with the provisions of the Act. Finally, we seek to assure that the MSWLF rules have no greater impact on

Illinois facilities than would the federal rules. In fact, the Board would exceed its statutory authority under Section 22.40 if we did not do so.

Examination of the amendments indicates that the Board has provided all three assurances in this proceeding. The effective dates chosen derive directly from the federal dates, so they are equally as stringent and completely consistent. This satisfies the first point. Second, these amendments actually cause the regulatory effective date to become consistent with Section 21.1 of the Act because the General Assembly recently amended the statute. P.A. 89-200 amended Section 21.1(a.5), effective January 1, 1995, to replace the April 9, 1995 effective date with a reference to "the effective date established by U.S. EPA". Finally, the present amendments are wholly derived from the federal MSWLF regulations and are consistent with and no more stringent than those rules. The existing impact on privately-owned and operated facilities is not derived from the federal MSWLF regulations. Rather, the impact is from the pre-existing Section 27-derived landfill rules.

If the Board were to follow BFI's suggestion and withdraw the amendments, the MSWLF-derived segments of the Illinois landfill regulations would become more stringent than the federal part 258 rules. The Board is not free to ignore our mandate under Section 22.40(a) and produce this result. The only way the Board can make the Illinois landfill regulations more stringent than the federal rules would be by a Section 27 general rulemaking proceeding. It is the impact of the pre-existing Section 27 landfill regulations and the fact that the former federal effective date also imposes that burden on municipally-owned facilities of which BFI complains. That is beyond the scope of this proceeding.

Therefore, the Board is not free to withdraw the present amendments. Doing so would violate our mandate under Section 22.40 of the Act. Withdrawal would also result in an inconsistency between the statutory deadline for financial assurance, in Section 21.1(a.5), as amended, and the deadline in the landfill rules. Imposing the financial assurance requirements on publicly-owned and operated landfills prior to April 9, 1997 would make the Illinois rules more stringent than the federal MSWLF rules, a result that is only possible through a Section 27 general rulemaking,

The Board's Authority to Amend the Financial Assurance Mechanisms

The Board adopted the modern version of the Illinois landfill regulations on August 17, 1990, in R88-7. Those rules included financial assurance mechanisms and requirements. (See 35 Ill. Adm. Code 811.Subpart G.) As was correctly asserted by BFI, the Board used the established financial mechanisms of the

RCRA Subtitle C hazardous waste rules as a model for the landfill financial assurance provisions. That was a Section 27 general rulemaking proceeding.

Until U.S. EPA amends the federal financial assurance mechanisms, there is no basis for the Board to engage in identical-in-substance amendments to the Illinois rules. Whereas we can establish landfill regulations that are more stringent than the federal rules, we must undertake such an action under Section 27 of the Act, by general rulemaking, rather than by Section 22.40(a) identical-in-substance procedures. That is the only alternative for amending the Illinois regulations in the meantime. No person has filed a petition for the Board to commence such a proceeding. This is essentially the same result we drew in R93-10, on September 15, 1993, with regard to comments on the financial responsibility requirements in the context of an identical-in-substance proceeding.

In summary, the Board will not revise the amendments in response to PC 1. The BFI comments would have the Board ignore our statutory mandate and contemporaneous legislative activities to the same end. The comments raise further issues that are also not the proper subject of this proceeding. The proper setting for consideration of some of the issues raised by PC 1 is in the context of a Section 27 general rulemaking.

ORDER

The complete text of the proposed amendments follows:

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE G: WASTE DISPOSAL
 CHAPTER I: POLLUTION CONTROL BOARD
 SUBCHAPTER i: SOLID WASTE AND SPECIAL WASTE HAULING

PART 811
 STANDARDS FOR NEW SOLID WASTE LANDFILLS

SUBPART A: GENERAL STANDARDS FOR ALL LANDFILLS

Section	
811.101	Scope and Applicability
811.102	Location Standards
811.103	Surface Water Drainage
811.104	Survey Controls
811.105	Compaction
811.106	Daily Cover
811.107	Operating Standards
811.108	Salvaging
811.109	Boundary Control
811.110	Closure and Written Closure Plan
811.111	Postclosure Maintenance

SUBPART B: INERT WASTE LANDFILLS

Section	
811.201	Scope and Applicability
811.202	Determination of Contaminated Leachate
811.203	Design Period
811.204	Final Cover
811.205	Final Slope and Stabilization
811.206	Leachate Sampling
811.207	Load Checking

SUBPART C: PUTRESCIBLE AND CHEMICAL WASTE LANDFILLS

Section	
811.301	Scope and Applicability
811.302	Facility Location
811.303	Design Period
811.304	Foundation and Mass Stability Analysis
811.305	Foundation Construction
811.306	Liner Systems
811.307	Leachate Drainage System
811.308	Leachate Collection System
811.309	Leachate Treatment and Disposal System
811.310	Landfill Gas Monitoring
811.311	Landfill Gas Management System
811.312	Landfill Gas Processing and Disposal System
811.313	Intermediate Cover
811.314	Final Cover System
811.315	Hydrogeological Site Investigations
811.316	Plugging and Sealing of Drill Holes
811.317	Groundwater Impact Assessment
811.318	Design, Construction, and Operation of Groundwater Monitoring Systems
811.319	Groundwater Monitoring Programs
811.320	Groundwater Quality Standards
811.321	Waste Placement
811.322	Final Slope and Stabilization
811.323	Load Checking Program
811.324	Corrective Action Measures for MSWLF Units
811.325	Selection of remedy for MSWLF Units
811.326	Implementation of the corrective action program at MSWLF Units

SUBPART D: MANAGEMENT OF SPECIAL WASTES AT LANDFILLS

Section	
811.401	Scope and Applicability
811.402	Notice to Generators and Transporters
811.403	Special Waste Manifests
811.404	Identification Record
811.405	Recordkeeping Requirements
811.406	Procedures for Excluding Regulated Hazardous Wastes

SUBPART E: CONSTRUCTION QUALITY ASSURANCE PROGRAMS

Section

- 811.501 Scope and Applicability
- 811.502 Duties and Qualifications of Key Personnel
- 811.503 Inspection Activities
- 811.504 Sampling Requirements
- 811.505 Documentation
- 811.506 Foundations and Subbases
- 811.507 Compacted Earth Liners
- 811.508 Geomembranes
- 811.509 Leachate Collection Systems

SUBPART G: FINANCIAL ASSURANCE

Section

- 811.700 Scope, Applicability and Definitions
- 811.701 Upgrading Financial Assurance
- 811.702 Release of Financial Institution
- 811.703 Application of Proceeds and Appeals
- 811.704 Closure and Postclosure Care Cost Estimates
- 811.705 Revision of Cost Estimate
- 811.706 Mechanisms for Financial Assurance
- 811.707 Use of Multiple Financial Mechanisms
- 811.708 Use of a Financial Mechanism for Multiple Sites
- 811.709 Trust Fund for Unrelated Sites
- 811.710 Trust Fund
- 811.711 Surety Bond Guaranteeing Payment
- 811.712 Surety Bond Guaranteeing Performance
- 811.713 Letter of Credit
- 811.714 Closure Insurance
- 811.715 Self-Insurance for Non-commercial Sites

811.Appendix A Financial Assurance Forms

- Illustration A Trust Agreement
- Illustration B Certificate of Acknowledgment
- Illustration C Forfeiture Bond
- Illustration D Performance Bond
- Illustration E Irrevocable Standby Letter of Credit
- Illustration F Certificate of Insurance for Closure and/or Postclosure Care
- Illustration G Operator's Bond Without Surety
- Illustration H Operator's Bond With Parent Surety
- Illustration I Letter from Chief Financial Officer

811.Appendix B Section-by-Section Correlation Between the Requirements of the Federal MSWLF Regulations at 40 CFR 258 (1992) and the Requirements of Parts 810 through 814.

AUTHORITY: Implementing Sections 5, 21, 21.1, 22, 22.17 and 28.1 and authorized by Section 27 of the Environmental Protection Act (~~Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1005, 1021, 1021.1, 1022, 1022.17, 1028.1 and 1027~~) [415 ILCS 5/5, 21, 21.1, 22, 22.17, 28.1 & 27].

SOURCE: Adopted in R88-7 at 14 Ill. Reg. 15861, effective September 18, 1990; amended in R92-19 at 17 Ill. Reg. 12413, effective July 19, 1993; amended in R93-10 at 18 Ill. Reg. 1308, effective January 13, 1994; expedited correction at 18 Ill. Reg. 7504, effective July 19, 1993; amended in R90-26 at 18 Ill. Reg. 12481, effective August 1, 1994; amended in R95-xx at 19 Ill. Reg. _____, effective _____.

NOTE: Capitalization indicates statutory language.

SUBPART G: FINANCIAL ASSURANCE

Section 811.700 Scope, Applicability and Definitions

- a) This Subpart provides procedures by which the owner or operator of a permitted waste disposal facility provides financial assurance satisfying the requirements of Section 21.1(a) of the Act.
- b) Financial assurance may be provided, as specified in Section 811.706, by a trust agreement, a bond guaranteeing payment, a bond guaranteeing payment or performance, a letter of credit, insurance or self-insurance. The owner or operator shall provide financial assurance to the Agency before the receipt of the waste.
- c) Except as provided in subsection (f), this Subpart does not apply to the State of Illinois, its agencies and institutions, or to any unit of local government; provided, however, that any other persons who conduct such a waste disposal operation on a site that is owned or operated by such a governmental entity shall provide financial assurance for closure and postclosure care of the site.
- d) The owner or operator is not required to provide financial assurance pursuant to this Subpart if the owner or operator demonstrates:
 - 1) That closure and postclosure care plans filed pursuant to 35 Ill. Adm. Code 724 or 725 will result in closure and postclosure care of the site in accordance with the requirements of this Part; and
 - 2) That the owner or operator has provided financial assurance adequate to provide for such closure and postclosure care pursuant to 35 Ill. Adm. Code 724 or 725.

- e) Definition: "Assumed closure date" means the date during the next permit term on which the costs of premature final closure of the facility, in accordance with the standards of this Part, will be greatest.
- f) On or after April 9, 1995⁷, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at a MSWLF unit that requires a permit under subsection (d) of section 21.1 of the Act, unless that person complies with the financial assurance requirements of this Part.
- g) The standards adopted in this subpart that are identical in substance to the federal Subtitle D regulations that are individually indicated as applicable to MSWL units shall not apply to such units until April 9, 1995⁷.

BOARD NOTE: Subsection (f) clarifies the applicability of the financial assurance requirements to local governments, since the Subtitle D regulations exempt only federal and state governments from financial assurance requirements. (See 40 CFR 258.70 (19924), as amended at 60 Fed. Reg. 17652 (Apr. 7, 1995)). P.A. 89-200, signed by the Governor on July 21, 1995 and effective January 1, 1996, amended the deadline for financial assurance for MSWLFs from April 9, 1995 to April 9, 1997.

~~BOARD NOTE: The compliance dates specified in subsections (f) and (g) reflect the revised dates proposed by the USEPA in the Federal Register Notification published on July 28, 1993 (see 58 FR 40568). The Board notes that the revised dates are included in the regulations in order to be identical in substance with the federal Subtitle D program. The Board recognizes that the proposed revisions are not yet final. However, the Board anticipates that the USEPA's proposal will become effective before the end of the post-adoption comment period of the instant rulemaking. Thus, if there are any changes in the final version of the federal rules, the Board will make corresponding changes in the instant regulations.~~

(Source: Amended at 19 Ill. Reg. _____, effective _____
_____)

Section 811.706 Mechanisms for Financial Assurance

- a) The owner or operator of a waste disposal site may utilize any of the mechanisms listed in subsections (a)(1) through (a)(6) to provide financial assurance

for closure and postclosure care, and for corrective action at a MSWLF unit. An owner or operator of a MSWLF unit shall also meet the requirements of subsections (b), (c), and (d). The mechanisms are as follows:

- 1) A trust Fund (see Section 811.710);
 - 2) A surety Bond Guaranteeing Payment (see Section 811.711);
 - 3) A surety Bond Guaranteeing Performance (see Section 811.712);
 - 4) A letter of Credit (see Section 811.713);
 - 5) Closure Insurance (see Section 811.714); or
 - 6) Self-insurance (see Section 811.715).
- b) The owner or operator of a MSWLF unit shall ensure that the language of the mechanisms listed in subsection (a), when used for providing financial assurance for closure, postclosure, and corrective action, satisfies the following:
- 1) The amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action; and
 - 2) The funds will be available in a timely fashion when needed.
- c) The owner or operator of a MSWLF unit shall provide financial assurance utilizing one or more of the mechanisms listed in subsection (a) within the following dates:
- 1) By April 9, 1994~~7~~ (~~the effective date of these requirements~~) or prior to the initial receipt of solid waste, whichever is later, in the case of closure and post-closure care; or
 - 2) No later than 120 days after the remedy has been selected in accordance with the requirements of Section 811.325, in the case of corrective action.
- d) The owner or operator shall provide continuous coverage until the owner or operator is released from the financial assurance requirements pursuant to 35 Ill. Adm. Code 813.403(b) or Section 811.326.

~~Board Note.~~ BOARD NOTE: Subsections (b) and (c) are derived from 40 CFR 258.74(l) (19924). Amendments prompted by amendments to 40 CFR 258.74(a)(5) (1994), as amended at 60 Fed. Reg. 17652 (Apr. 7, 1995). P.A. 89-200, signed by the Governor on July 21, 1995 and effective January 1, 1996, amended the deadline for financial assurance for MSWLFs from April 9, 1995 to April 9, 1997.

(Source: Amended at 19 Ill. Reg. _____, effective _____)

Section 811.711 Surety Bond Guaranteeing Payment

- a) An owner or operator may satisfy the requirements of this Subpart by obtaining a surety bond which conforms to the requirements of this Section and submitting the bond to the Agency. A surety bond obtained by an owner or operator of a MSWLF unit must be effective before the initial receipt of waste or before April 9, 1994 (the effective date of the financial assurance requirements under RCRA Subtitle D regulations), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the remedy has been selected in accordance with the requirements of Section 811.325.
- b) The surety company issuing the bond shall be licensed by the Illinois Department of Insurance pursuant to the Illinois Insurance Code (~~Ill. Rev. Stat. 1991, ch. 73, pars. 613 et seq. [215 ILCS 5/1 et seq.]~~) and approved by the U.S. Department of the Treasury as an acceptable surety.

BOARD NOTE: The U.S. Department of the Treasury lists acceptable sureties in its Circular 570.

- c) The surety bond must be on the forms specified in Appendix A, Illustration C, D, or H.
- d) Any payments made under the bond will be placed in the landfill closure and postclosure fund within the State Treasury.
- e) Conditions:
 - 1) The bond must guarantee that the owner or operator will provide closure and postclosure care in accordance with the approved closure and postclosure care plans. If the facility is a MSWLF unit, then the corrective action bond must guarantee that the owner or operator will

implement corrective action in accordance with Section 811.326.

- 2) The surety will become liable on the bond obligation when, during the term of the bond, the owner or operator fails to perform as guaranteed by the bond. The owner or operator fails to perform when the owner or operator:
 - A) Abandons the site;
 - B) Is adjudicated bankrupt;
 - C) Fails to initiate closure of the site or postclosure care or corrective action when ordered to do so by the Board pursuant to Title VII of the Act, or when ordered to do so by a court of competent jurisdiction;
 - D) Notifies the Agency that it has initiated closure or corrective action, or initiates closure or corrective action, but fails to close the site or provide postclosure care or corrective action in accordance with the closure and postclosure care or corrective action plans; or
 - E) For a corrective action bond, fails to implement corrective action at a MSWLF unit in accordance with Section 811.326
- f) Penal sum:
 - 1) The penal sum of the bond must be in an amount at least equal to the current cost estimate.
 - 2) The Agency shall approve a reduction in the penal sum whenever the current cost estimate decreases.
- g) Term:
 - 1) The bond must be issued for a term of at least five years and must not be cancelable during that term.
 - 2) If the owner or operator fails to provide substitute financial assurance prior to expiration of a bond, the term of the bond must be automatically extended for one twelve-month period starting with the date of expiration of the bond. During such extension the bond will cease to serve as financial assurance satisfying the requirements

of this Part, and will not excuse the owner or operator from the duty to provide substitute financial assurance.

- 3) The Agency shall release the surety if, after the surety becomes liable on the bond, the owner or operator or another person provides financial assurance for closure and postclosure care of the site or corrective action at a MSWLF unit, unless the Agency determines that the closure or postclosure care plan, corrective action program at a MSWLF unit, or the amount of substituted financial assurance is inadequate to provide closure and postclosure care or implement corrective action in compliance with this Part.

h) Cure of default and refunds:

- 1) The Agency shall release the surety if, after the surety becomes liable on the bond, the owner or operator or another person provides financial assurance for closure and postclosure care of the site or corrective action at a MSWLF unit, unless the Agency determines that the closure or postclosure care plan, corrective action at a MSWLF unit or the amount of substituted financial assurance is inadequate to provide closure and postclosure care or implement corrective action in compliance with this Part.
- 2) After closure and postclosure care have been completed in accordance with the plans and requirements of this Part or after the completion of corrective action at a MSWLF unit in accordance Section 811.326, the Agency shall refund any unspent money which was paid into the "Landfill Closure and Postclosure Fund" by the surety.

~~Board Note.~~ BOARD NOTE: MSWLF corrective Aaction language at subsection (a) is derived from 40 CFR 258.74(b)(1) (19924), as amended at 60 Fed. Reg. 17652 (Apr. 7, 1995). P.A. 89-200, signed by the Governor on July 21, 1995 and effective January 1, 1996, amended the deadline for financial assurance for MSWLFs from April 9, 1995 to April 9, 1997. The other clarifying changes reflect the inclusion of financial assurance requirements for implementing corrective action at MSWLF units under this Section.

(Source: Amended at 19 Ill. Reg. _____, effective _____)

Section 811.712 Surety Bond Guaranteeing Performance

- a) An owner or operator may satisfy the requirements of this Subpart by obtaining a surety bond which conforms to the requirements of this Section and submitting the bond to the Agency. A surety bond obtained by an owner or operator of a MSWLF unit must be effective before the initial receipt of waste or before April 9, 1994⁷ (the effective date of the financial assurance requirements under RCRA Subtitle D regulations), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the remedy has been selected in accordance with the requirements of Section 811.325.
- b) The surety company issuing the bond shall be licensed by the Illinois Department of Insurance pursuant to the Illinois Insurance Code (~~Ill. Rev. Stat. 1991, ch. 73, pars. 613 et seq.~~ [215 ILCS 5/1 et seq.]) and approved by the U.S. Department of the Treasury as an acceptable surety.

BOARD NOTE: The U.S. Department of the Treasury lists acceptable sureties in its Circular 570.

- c) The surety bond must be on the forms as specified in Appendix A, Illustration C, D, or H.
- d) Any payments made under the bond will be placed in the landfill closure and postclosure fund within the State Treasury.
- e) Conditions:
- 1) The bond must guarantee that the owner or operator will provide closure and postclosure care in accordance with the closure and postclosure care plans in the permit. If the facility is a MSWLF unit, then a corrective action bond must guarantee that the owner or operator will implement corrective action in accordance with Section 811.326. The surety shall have the option of providing closure and postclosure care or carrying out corrective action, or of paying the penal sum.
 - 2) The surety will become liable on the bond obligation when, during the term of the bond, the owner or operator fails to perform as guaranteed by the bond. The owner or operator fails to perform when the owner or operator:

- A) Abandons the site;
 - B) Is adjudicated bankrupt;
 - C) Fails to initiate closure of the site or postclosure care or corrective action when ordered to do so by the Board pursuant to Title VII of the Act, or when ordered to do so by a court of competent jurisdiction; or
 - D) Notifies the Agency that it has initiated closure or corrective action, or initiates closure or corrective action, but fails to close the site or provide postclosure care or corrective action in accordance with the closure and postclosure care or corrective action plans.
 - E) For a corrective action bond, fails to implement corrective action at a MSWLF unit in accordance with Section 811.326
- f) Penal sum:
- 1) The penal sum of the bond must be in an amount at least equal to the current cost estimate.
 - 2) The Agency shall approve a reduction in the penal sum whenever the current cost estimate decreases.
- g) Term:
- 1) The bond must be issued for a term of at least five years and must not be cancelable during that term.
 - 2) If the owner or operator fails to provide substitute financial assurance prior to expiration of a bond, the term of the bond must be automatically extended for one twelve-month period starting with the date of expiration of the bond. During such extension, the bond will cease to serve as financial assurance satisfying the requirements of this Part, and will not excuse the owner or operator from the duty to provide substitute financial assurance.
- h) Cure of default and refunds:
- 1) The Agency shall release the surety if, after the surety becomes liable on the bond, the owner or operator or another person provides financial

assurance for closure and postclosure care of the site or corrective action at a MSWLF unit, unless the Agency determines that the closure or postclosure care plan, corrective action at a MSWLF unit, or the amount of substituted financial assurance is inadequate to provide closure and postclosure care or implement corrective action at a MSWLF unit in compliance with this Part.

- 2) After closure and postclosure care have been completed in accordance with the closure and postclosure care plans and the requirements of this Part or after the completion of corrective action at a MSWLF unit in accordance with Section 811.326, the Agency shall refund any unspent money which was paid into the "Landfill Closure and Postclosure Fund" by the surety.
- i) The surety will not be liable for deficiencies in the performance of closure by the owner or operator after the Agency releases the owner or operator from the requirements of this Subpart.

~~Board Note.~~ BOARD NOTE: MSWLF corrective action language at subsection (a) is derived from 40 CFR 258.74 (b)(1) (19924), as amended at 60 Fed. Reg. 17652 (Apr. 7, 1995). P.A. 89-200, signed by the Governor on July 21, 1995 and effective January 1, 1996, amended the deadline for financial assurance for MSWLFs from April 9, 1995 to April 9, 1997. The other clarifying changes reflect the inclusion of financial assurance requirements for implementing corrective action at MSWLF units under this Section.

(Source: Amended at 19 Ill. Reg. _____, effective _____)

Section 811.713 Letter of Credit

- a) An owner or operator may satisfy the requirements of this Subpart by obtaining an irrevocable standby letter of credit which conforms to the requirements of this Section and submitting the letter to the Agency. A letter of credit obtained by an owner or operator of a MSWLF unit must be effective before the initial receipt of waste or before April 9, 1994⁷ (the effective date of the financial assurance requirements under RCRA Subtitle D regulations), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the remedy has been selected in accordance with the requirements of Section 811.325.

- b) The issuing institution shall be an entity which has the authority to issue letters of credit and:
- 1) Whose letter-of-credit operations are regulated by the Illinois Commissioner of Banks and Trust Companies pursuant to the Illinois Banking Act ~~(Ill. Rev. Stat. 1991, ch. 17, pars. 301 et seq. [205 ILCS 5/1 et seq.]~~}; or,
 - 2) Whose deposits are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.
- c) Forms:
- 1) The letter of credit must be on the forms specified in Appendix A, Illustration E.
 - 2) The letter of credit must be accompanied by a letter from the owner or operator, referring to the letter of credit by number, the name and address of the issuing institution, and the effective date of the letter, and providing the following information: the name and address of the site and the amount of funds assured for closure and postclosure care of the site, or for corrective action at a MSWLF unit by the letter of credit.
- d) Any amounts drawn by the Agency pursuant to the letter of credit will be deposited in the landfill closure and postclosure fund within the State Treasury.
- e) Conditions on which the Agency may draw on the letter of credit:
- 1) The Agency shall draw on the letter of credit if the owner or operator fails to perform closure or postclosure care in accordance with the closure and postclosure care plans, or fails to implement corrective action at a MSWLF unit in accordance with Section 811.326.
 - 2) The Agency shall draw on the letter of credit when the owner or operator:
 - A) Abandons the site;
 - B) Is adjudicated bankrupt;
 - C) Fails to initiate closure of the site or postclosure care or corrective action when

ordered to do so by the Board pursuant to Title VII of the Act, or when ordered to do so by a court of competent jurisdiction; or

D) Notifies the Agency that it has initiated closure or corrective action, or initiates closure or corrective action, but fails to Provide closure and postclosure care or corrective action in accordance with the closure and postclosure care or corrective action plans.

E) For a corrective action bond, fails to implement corrective action at a MSWLF unit in accordance with Section 811.326

f) Amount:

- 1) The letter of credit must be issued in an amount at least equal to the current cost estimate.
- 2) The Agency shall approve a reduction in the amount whenever the current cost estimate decreases.

g) Term:

- 1) The letter of credit must be issued for a term of at least five years and must be irrevocable during that term.
- 2) If the owner or operator fails to substitute alternative financial assurance prior to expiration of a letter of credit, the term of the letter of credit must be automatically extended for one twelve-month period starting with the date of expiration. During such extension, the letter of credit will cease to serve as financial assurance satisfying the requirements of this Part, and will not excuse the owner or operator from the duty to provide substitute financial assurance.

h) Cure of default and refunds:

- 1) The Agency shall release the financial institution if, after the Agency is allowed to draw on the letter of credit, the owner or operator or another person provides financial assurance for closure and postclosure care of the site or corrective action at a MSWLF unit, unless the Agency determines that a plan or the amount of substituted financial assurance is inadequate to

provide closure and postclosure care, or implement corrective action at a MSWLF unit, as required by this Part.

- 2) After closure and postclosure care have been completed in accordance with the closure and postclosure care plans and the requirements of this Part or after the completion of corrective action at a MSWLF unit in accordance with Section 811.326, the Agency shall refund any unspent money which was paid into the "Landfill Closure and Postclosure Fund" by the financial institution.

~~Board Note.~~ BOARD NOTE: MSWLF corrective action language at subsection (a) is derived from 40 CFR 258.74 (c) (1) (19924), as amended at 60 Fed. Reg. 17652 (Apr. 7, 1995). P.A. 89-200, signed by the Governor on July 21, 1995 and effective January 1, 1996, amended the deadline for financial assurance for MSWLFs from April 9, 1995 to April 9, 1997. The other clarifying changes reflect the inclusion of financial assurance requirements for implementing corrective action at MSWLF units under this Section.

(Source: Amended at 19 Ill. Reg. _____, effective _____)

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above opinion and order was adopted on the 3rd day of August, 1995, by a vote of 4-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board