

## Idaho Department of Lands

### Research for Rulemaking Docket 20-0302-2001

#### Trust Funds as Financial Assurance

Trust funds are used by several other state and federal agencies as well as some Canadian provinces. The initial amount is generally required to be equal to the estimated cost of reclamation for actions occurring over the next 12 months. Payment schedules are set up to have the trust amount keep pace as disturbance increases over the years. Trust funds are particularly useful for covering long term obligations such as post closure water treatment. A written agreement is typically used to govern the creation, operation, and oversight of the trust fund.

Following is a summary of some state and federal mining authorities and federal waste management authorities that allow the use of trust funds as financial assurance. Some states were included because their mining activity is similar to Idaho's. Other states were included due to guidance received on how to comply with Executive Order 2020-01. Some federal mining authorities are included because operators have been able to work within those guidelines in Idaho and other western states. Some federal waste management rules were also included at the request of some rulemaking participants. While waste management shares some similarities with some portions of the mining industry, waste management is a different industry with its own unique issues and drivers.

References on these authorities, and other references that mention trust funds for mining financial assurance, are listed after the summary. All of these materials can be found on IDL's rulemaking website.

#### **Alaska**

Alaska Department of Natural Resources does not appear to allow the use of trust funds for financial assurance.

#### **Arizona**

R11-2-806 allows the use of trust funds for financial assurance:

- A. An owner or operator may satisfy the requirements of this Article by establishing a trust fund that meets the requirements of the Act and this Chapter. The trust fund shall name the state of Arizona as the primary beneficiary. The trustee shall be an entity which has the authority to act as trustee and whose trust operations are regulated and examined by a federal or state agency.
- B. An owner or operator may satisfy the requirements of the trust fund by establishing a trust fund with a pay-in period that meets the requirements of the Act and this Chapter and by submitting an original signed duplicate of the trust agreement to the State Mine Inspector.
- C. A copy of the trust agreement shall be placed in the facility's operating record.
- D. The trust fund shall be initially funded in an amount at least equal to the costs estimated in the approved reclamation plan for reclamation of existing surface disturbances covered by the Act and any surface disturbances to occur in the 1st year of the trust fund.

E. Payments into the trust fund, other than the initial funding, shall be made annually, at a minimum, with subsequent payments made not later than 30 days after each annual anniversary of the date of the 1st payment by the owner or operator. Annual payments shall be in an amount adequate to pay all costs of reclamation for land to be disturbed in that annual period.

F. If the property owner or operator establishes a trust fund after having used 1 or more alternate mechanisms specified in this Article, the initial payment into the trust fund shall be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of this Section.

### **Montana**

A trust fund for Zortman-Landusky was established in Montana Code § 82-4-367. It must be invested according to Montana Code 17-6-2. Section 17-6-201(2)(a) only allows retirement funds to be invested in common stocks.

Montana Department of Environmental Quality does not appear to allow the use of trust funds for financial assurance.

### **Nevada**

NAC 519A.350 allows the use of a trust fund for financial assurance. 519A.350(2) has the specific requirements:

2. If the surety is a trust fund:

(a) The operator shall make periodic payments to the trust fund at least annually for the term of the exploration project or mining operation.

(b) The initial payment to the trust must be:

(1) For a new exploration project or mining operation, made before the land is affected.

(2) For an exploration project or mining operation which is active on October 1, 1990, made within 60 days after the operator receives a permit from the Division.

(c) The balance of the trust fund must be sufficient at all times to satisfy the requirements of NAC 519A.360.

### **New Mexico**

19.10.12.1203 allows the use of a trust fund for financial assurance. 19.10.12.1208.E has the specific requirements for the use of a trust:

(1) The director may approve the use of a trust to hold and manage funds for the purpose of implementing reclamation as prescribed in the closeout plan. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency and which has been approved by the director. The director must be notified of any change of trustee and any successor trustees must be approved by the director.

(2) The trust fund is also subject to the following conditions:

- (a) the initial payment into the trust must be made by the date established by the director;
- (b) the trust shall be funded in accordance with the terms of the permit;
- (c) investments of the trust shall be reviewed and approved by the director and may include fixed income investments such as U.S. treasury obligations, state issued securities, time deposits and other investments of similar risk as approved by the director;
- (d) income accrued on trust funds shall be retained in the trust, except as otherwise agreed by the director under the terms of an agreement governing the trust;
- (e) the trustee may be compensated under terms defined by the director, upon approval of the director;
- (f) the trust may be terminated by the permittee only if the permittee substitutes, with the approval of the director, alternate financial assurance as specified in this section or the permittee has completed reclamation in accordance with Subsection E of 19.10.12.1210 NMAC;
- (g) a copy of the trust agreement, as well as quarterly and annual reports of the trustee on the trust fund balance shall be provided to the director upon request;
- (h) any disbursement of funds from the trust shall be approved by the director in writing.

### **Oregon**

Oregon Department of Geology and Mineral Industries does not appear to allow the use of trust funds for financial assurance.

### **Pennsylvania**

Trust funds are authorized in PAC 86.156(a). Specific conditions are in PAC 86.158(f):

- (1) The amount of the trust fund or annuity shall be determined and set by the Department. The amount shall be that amount determined by the Department as necessary to meet the bonding requirements established by the Department for a permittee.
- (2) The trust fund or annuity shall be in a form and contain terms and conditions as required by the Department. At a minimum, trust fund or annuity shall provide that:
  - (i) The Department is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity.
  - (ii) Investment objectives of the trust fund or annuity shall be specified by the Department.
  - (iii) Termination of the trust fund or annuity may occur only as specified by the Department.
  - (iv) Release of money to the permittee from the annuity or trust fund may be made only upon written authorization of the Department.
- (3) A financial institution serving as a trustee or issuing an annuity shall be a State-chartered or National bank or other financial institution with trust powers or a trust company with offices located in this Commonwealth and whose activities are examined or regulated by a State or Federal agency.

An insurance company issuing an annuity shall be licensed or authorized to do business in this Commonwealth by the Insurance Commissioner or be designated by the Insurance Commissioner as an eligible surplus lines insurer.

(4) Trust funds and annuities, as described in this subsection, are established under government authority for the public purpose to guarantee that moneys are available for the Department to pay for treatment of postmining pollutional discharges or reclamation of the mine site or both. Trust funds and annuities constitute property of the Commonwealth and, as such, any earnings, profits and distributions shall have the same tax status accorded the Commonwealth.

Pennsylvania also requires all collateral bonds to be in the name of the permittee in PAC 86.158(g).

### **South Dakota**

South Dakota Department of Environment & Natural Resources does not appear to allow the use of trust funds for financial assurance.

### **Utah**

Utah Division of Oil, Gas and Mining does not appear to allow the use of trust funds for financial assurance.

### **Washington**

Washington Department of Natural Resources does not appear to allow the use of trust funds for financial assurance.

### **Wyoming**

Trusts are allowed as a type of collateral bond in Rule 020-0007, Chapter 6, Subsection 5.a.ii:

(ii) Negotiable bonds of the United States, a State or a municipality, endorsed to the order of the Department and placed in possession of the Department. Possession may be in the form of the cash value of the irrevocable trust for the full amount of the reclamation obligation and payable to the Department and federally insured. An operator may satisfy the requirements of this subsection by establishing an irrevocable trust that conforms to the requirements below and submitting an originally signed duplicate of the trust agreement to the Administrator for consideration.

(A) The wording of the irrevocable trust must be identical to the wording specified on the Wyoming Department of Environmental Quality Irrevocable Trust for Coal Reclamation Form and be signed by the operator or guarantor as principal, the financial institution as Trustee and be made payable to the Department;

(B) The Trustee must be a bank organized to do business in the United States that has the authority to act as a trustee and whose trust operations is regulated and examined by a Federal or State Agency;

(C) The irrevocable trust must be cash funded for the full amount of the reclamation obligation to be provided in the irrevocable trust before it may be approved to satisfy the requirements of financial assurance in lieu of a bond. For purposes of this subsection, "the full amount of the reclamation obligation to be provided" means the amount of coverage for reclamation required to be provided for

the permit, less the amount of financial assurance for reclamation obligation that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the operator or guarantor;

(D) Cancellation of an irrevocable trust shall follow the same procedures detailed in W.S. 35-11-419 for performance bonds; and

(E) Forfeiture proceeding for an irrevocable trust shall follow the same procedures detailed in W.S. 35-11-421 for performance bonds.

### **Bureau of Land Management**

43 CFR 3809.552(c) allows BLM to require a trust fund or other funding mechanism to ensure the continuation of post closure water treatment or site maintenance.

“...The funding must be adequate to provide for construction, long term operation, maintenance, or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. BLM may identify the need for a trust fund or other funding mechanism during plan review or later.”

43 CFR 3809.555(e) describes the requirements for the contents of a trust that is an acceptable financial guarantee for BLM:

Either of the following instruments having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through BLM:

- (1) Negotiable United States Government, State and Municipal securities or bonds; or
- (2) Investment-grade rated securities having a Standard and Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service.

43 CFR 3809.556 has additional requirements:

(a) If you choose to use the instruments permitted under § 3809.555(e) in satisfaction of financial guarantee requirements, you must provide BLM, before you begin operations and by the end of each calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(b) You must review the market value of the account instruments by December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, you must, within 10 calendar days after its annual review or at any time upon the written request of BLM, provide additional instruments, as defined in § 3809.555(e), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. You must send a certified statement to BLM within 45 calendar days thereafter describing your actions to raise the market value of its account instruments to the required dollar amount of the financial

guarantee. You must include copies of any statements or reports furnished by the brokerage firm to you documenting such an increase.

(c) If your review under paragraph (b) of this section demonstrates that the total market value of trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, you may ask BLM to authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee. BLM will approve your request only if you are in compliance with the terms and conditions of your notice or approved plan of operations.

Section 6.3.4 of the BLM Surface Management Handbook has specific guidance on how trust funds should be set up and used by an operator. Some highlights include:

The operator's cost estimate for the activities covered by the trust must also cover all anticipated third party fees or other costs of maintaining the trust (6.3.4.3.1).

A present value determination is also needed (6.3.4.3.3).

A written Trust Fund Agreement is required (6.3.4.4), and is reviewed by BLM's legal counsel (6.3.4.4.3).

6.3.4.5 describes the acceptable financial instruments for trust funds:

Stock funds or stock index funds are acceptable equities, but not individual stocks.

Bond funds or bond index funds are acceptable.

Direct investment in the operator's company or a parent company or their assets through stocks or bonds is NOT allowed.

Real property, equipment, or other non-liquid assets are NOT allowed.

Stock market instruments may not exceed 70 percent of the asset mix.

Payments may be made over time according to a schedule in the Trust Fund Agreement, but the post closure costs must be fully funded by the time the post closure period occurs (6.3.4.6).

Trust fund must be reviewed at least annually, and cost estimates are reviewed at least every three years.

## **EPA – Landfills**

40 CFR 258.74 describes the allowable financial assurance mechanisms for closure, post-closure care, and corrective actions for operators of municipal solid waste landfills. Trust funds are described in paragraph 74(a):

(a) Trust Fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a trust fund which conforms to the requirements of this paragraph. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency. A copy of the trust agreement must be placed in the facility's operating record.

(2) Payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining life of the MSWLF unit, whichever is shorter, in the case of a trust fund for closure or post-closure care, or over one-half of the estimated length of the corrective action program in the case of corrective action for known releases. This period is referred to as the pay-in period.

(3) For a trust fund used to demonstrate financial assurance for closure and post-closure care, the first payment into the fund must be at least equal to the current cost estimate for closure or post-closure care, except as provided in paragraph (k) of this section, divided by the number of years in the pay-in period as defined in paragraph (a)(2) of this section. The amount of subsequent payments must be determined by the following formula:  $\text{Next Payment} = [\text{CE} \mp \text{CV}] / Y$  where CE is the current cost estimate for closure or post-closure care (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.

(4) For a trust fund used to demonstrate financial assurance for corrective action, the first payment into the trust fund must be at least equal to one-half of the current cost estimate for corrective action, except as provided in paragraph (k) of this section, divided by the number of years in the corrective action pay-in period as defined in paragraph (a)(2) of this section. The amount of subsequent payments must be determined by the following formula:  $\text{Next Payment} = [\text{RB} \mp \text{CV}] / Y$  where RB is the most recent estimate of the required trust fund balance for corrective action (i.e., the total costs that will be incurred during the second half of the corrective action period), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(5) The initial payment into the trust fund must be made before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997, or October 9, 1997 for MSWLF units meeting the conditions of §258.1(f)(1)), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §258.58.

(6) If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in this section, the initial payment into the trust fund must be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of this paragraph and paragraph (a) of this section, as applicable.

(7) The owner or operator, or other person authorized to conduct closure, post-closure care, or corrective action activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if sufficient funds are remaining in the trust fund to cover the remaining costs of closure, post-closure care, or corrective action, and if justification and documentation of the cost is placed in the operating record. The owner or operator must notify the State Director that the documentation of the justification for reimbursement has been placed in the operating record and that reimbursement has been received.

(8) The trust fund may be terminated by the owner or operator only if the owner or operator substitutes alternate financial assurance as specified in this section or if he is no longer required to demonstrate financial responsibility in accordance with the requirements of §§258.71(b), 258.72(b), or 258.73(b).

40 CFR 264.143 describes the allowable financial assurance mechanisms for owners and operators of hazardous waste treatment, storage, and disposal facilities. Trust funds are described in paragraph 143(a):

(a) Closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a closure trust fund which conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator. An owner or operator of a new facility must submit the originally signed duplicate of the trust agreement to the Regional Administrator at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) The wording of the trust agreement must be identical to the wording specified in §264.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see §264.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current closure cost estimate covered by the agreement.

(3) Payments into the trust fund must be made annually by the owner or operator over the term of the initial RCRA permit or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund must be made as follows:

(i) For a new facility, the first payment must be made before the initial receipt of hazardous waste for treatment, storage, or disposal. A receipt from the trustee for this payment must be submitted by the owner or operator to the Regional Administrator before this initial receipt of hazardous waste. The first payment must be at least equal to the current closure cost estimate, except as provided in §264.143(g), divided by the number of years in the pay-in period. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:  $\text{Next payment} = (CE - CV)/Y$  where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(ii) If an owner or operator establishes a trust fund as specified in §265.143(a) of this chapter, and the value of that trust fund is less than the current closure cost estimate when a permit is awarded for the facility, the amount of the current closure cost estimate still to be paid into the trust fund must be paid in over the pay-in period as defined in paragraph (a)(3) of this section. Payments must continue to be made no later than 30 days after each anniversary date of the first payment made pursuant to part 265 of this chapter. The amount of each payment must be determined by this formula:  $\text{Next payment} = (CE - CV)/Y$  where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he must

maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (a)(3) of this section.

(5) If the owner or operator establishes a closure trust fund after having used one or more alternate mechanisms specified in this section or in §265.143 of this chapter, his first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to specifications of this paragraph and §265.143(a) of this chapter, as applicable.

(6) After the pay-in period is completed, whenever the current closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the Regional Administrator for release of the amount in excess of the current closure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the Regional Administrator for release of the amount in excess of the current closure cost estimate covered by the trust fund.

(9) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a) (7) or (8) of this section, the Regional Administrator will instruct the trustee to release to the owner or operator such funds as the Regional Administrator specifies in writing.

(10) After beginning partial or final closure, an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Regional Administrator. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for partial or final closure activities, the Regional Administrator will instruct the trustee to make reimbursements in those amounts as the Regional Administrator specifies in writing, if the Regional Administrator determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Regional Administrator has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, in accordance with §264.143(i) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Regional Administrator does not instruct the trustee to make such reimbursements, he will provide the owner or operator with a detailed written statement of reasons.

(11) The Regional Administrator will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with §264.143(i).

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