

Idaho Department of Lands

Research for Rulemaking Docket 20-0302-2001

Corporate Guarantees and Self-Insurance as Financial Assurance

Corporate guarantees and self-insurance are essentially the same. They can leave an agency with nothing in the event of a bankruptcy, which is when most bond forfeitures occur. Financial criteria often must be met, and these criteria vary widely between agencies. A parent corporation is often allowed to provide the guarantee.

Following is a summary of some state and federal mining authorities and federal waste management authorities that allow the use of corporate guarantees 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 for comparison. 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 corporate guarantees 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 corporate guarantees for financial assurance.

Arizona

R11-2-809 allows for the use of self insurance with a corporate guarantee for financial assurance as follows:

- A. An owner or operator may use self insurance in combination with a guarantee only if, to meet the requirement of the financial test under this Article, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.
- B. An owner or operator, and/or guarantor, may satisfy the requirements of this Article upon successful completion of the financial test specified in this Section. Successful completion is determined by meeting the criteria of subsection (C) or (D) based on year-end financial statements for the latest completed fiscal year.
- C. The criteria of this subsection for successful completion of the financial test are:
 1. The owner or operator, and/or guarantor, shall have a tangible net worth of at least 10 times the costs estimated in the approved reclamation plan for reclamation.
 2. The owner or operator, and/or guarantor, shall have a tangible net worth of at least \$10 million.

3. The owner or operator, and/or guarantor, shall submit to the State Mine Inspector a letter signed by the chief financial officer showing compliance with this Section.

4. The owner or operator, and/or guarantor, shall either:

a. File financial statements annually with the U.S. Securities and Exchange Commission; or

b. Report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet shall have assigned the firm a financial-strength rating of 4A or 5A.

5. The firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

D. The criteria of this subsection for successful completion of the financial test are:

1. The owner or operator, and/or guarantor, shall meet the financial test requirements of R11-2-811.

2. The fiscal year-end financial statements of the owner or operator, and/or guarantor, shall be examined by an Independent Certified Public Accountant (ICPA) and included with the ICPA's report of the examination.

3. The firm's year-end financial statements cannot include an adverse opinion, a disclaimer of opinion, or a "going concern" qualification.

4. The owner or operator, and/or guarantor, shall submit to the State Mine Inspector a letter signed by the chief financial officer demonstrating compliance with this Section.

5. If the financial statements of the owner or operator, and/or guarantor, are not submitted annually to the U.S. Securities and Exchange Commission, the owner or operator, and/or guarantor, shall obtain a special report by an ICPA saying:

a. The ICPA has compared the data (which the letter from the chief financial officer specifies) as having been derived from the latest year-end financial statements of the owner or operator, and/or guarantor, with the amounts in the financial statements; and

b. No matters caused the ICPA to believe the specified data should be adjusted.

E. If an owner or operator using the test to provide financial assurance finds the requirements of the financial test are no longer met, based on the year-end financial statements, the owner or operator shall obtain alternate financial assurance that meets the requirements of the Act and this Chapter within 120 days after the end of the year for which financial statements have been prepared.

F. The State Mine Inspector may require reports of financial condition, at any time, from the owner or operator, and/or guarantor. If the State Mine Inspector makes a written finding, on the basis of the reports or other information, that the owner or operator, and/or guarantor, no longer meets the financial test requirements of subsection (C) or (D), the owner or operator shall obtain alternate financial assurance that meets the requirements of the Act and this Chapter within 120 days after notification of this written finding.

G. After the initial submission of the items specified in subsection (C) or (D), the owner or operator shall send updated information to the State Mine Inspector within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (C) or (D).

R11-2-811 allows for the use of Corporate guarantees for financial assurance:

An owner or operator may satisfy the requirements of this Section upon successful completion of a financial test specified in subsection (A) or (B). Successful completion is determined by meeting the criteria of subsection (C):

A. The owner or operator shall have:

1. 2 of the following 3 ratios: a ratio of total liabilities to net worth of less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; or a ratio of current assets to current liabilities greater than 1.5;
2. Net working capital and tangible net worth each at least 6 times the costs estimated in the approved reclamation plan for reclamation;
3. Tangible net worth of at least \$10 million; and
4. Assets located in the United States amounting to at least 90% of total assets or at least 6 times the costs estimated in the approved reclamation plan for reclamation.

B. The owner or operator shall have all of the following:

1. A current rating for the most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;
2. Tangible net worth at least 6 times the sum of the costs estimated in the approved reclamation plan for reclamation;
3. Tangible net worth of at least \$10 million; and
4. Assets located in the United States amounting to at least 90% of total assets or at least 6 times the costs estimated in the approved reclamation plan for reclamation.

C. To show successful completion of the corporate financial test, the owner or operator shall submit the following to the State Mine Inspector:

1. A letter signed by the owner's or operator's chief financial officer demonstrating compliance with this Section;
2. A copy of the ICPA's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and
3. A special report from the owner's or operator's ICPA to the owner or operator saying:
 - a. The ICPA has compared the data (which the letter from the chief financial officer specified) as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in the financial statements; and

b. No matters caused the ICPA to believe the specified data should be adjusted.

D. After the initial submission of items specified in subsection (C), the owner or operator shall send updated information to the State Mine Inspector within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (C).

E. If the owner or operator no longer meets the requirements of subsection (A) or (B), the owner or operator shall send notice of intent to establish alternative financial assurance to the State Mine Inspector. The notice shall be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternative financial assurance that meets the requirements of the Act and this Chapter within 120 days after the end of the fiscal year.

F. The State Mine Inspector may, based on reasonable belief that the owner or operator may no longer meet the requirements of subsection (A) or (B), require reports of financial condition by written request, at any time, from the owner or operator, in addition to those specified in subsection (C). If the State Mine Inspector makes a written finding, on the basis of the reports or other information, that the owner or operator no longer meets the requirements of subsection (A) or (B), the owner or operator shall provide alternate financial assurance that meets the requirements of the Act and this Chapter within 120 days after notification of this written finding.

G. The State Mine Inspector may disallow use of this test on the basis of qualifications in the opinion expressed by the ICPA in the report on examination of the owner's or operator's financial statements. An adverse opinion or a disclaimer of opinion will be cause for disallowance. The State Mine Inspector will evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance that meets the requirements of the Act and this Chapter within 120 days after notification of this disallowance.

H. The owner or operator is no longer required to submit the items specified in subsection (C) when:

1. An owner or operator substitutes alternate financial assurance that meets the requirements of the Act and this Chapter; or
2. The State Mine Inspector releases the owner or operator's financial assurance under the Act and this Chapter.

I. An owner or operator may meet the requirements of this Section by obtaining a written guarantee. The guarantor shall be the direct or higher-tier parent corporation of the owner or operator, a group of legal entities which are controlled through stock ownership by a common parent corporation, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a substantial business relationship with the owner or operator. The guarantor shall meet the requirements for owners or operators in subsections (A) through (I) and shall comply with the terms of the guarantee. The certified copy of the guarantee shall accompany the items sent to the State Mine Inspector as specified in subsection (C). One of these items shall be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter shall describe the value received in consideration of the guarantee. If the guarantor is a firm with a substantial business relationship

with the owner or operator, this letter shall describe this substantial business relationship and the value received in consideration of the guarantee. The terms of the guarantee shall provide that:

1. If the owner or operator fails to perform the reclamation covered by the guarantee under the approved reclamation plan, the guarantor will do so or establish a trust fund as specified in the Act and this Chapter in the name of the owner or operator.
2. The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the State Mine Inspector. Cancellation may not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the State Mine Inspector, as evidenced by the return receipts.
3. If the owner or operator fails to provide alternate financial assurance that meets the requirements of the Act and this Chapter within 120 days after the owner or operator and the State Mine Inspector receive notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide the alternate financial assurance in the name of the owner or operator.

Missouri

The State of Missouri does allow corporate guarantees on a case by case basis.

Montana

No provision for corporate guarantees.

The State of Montana prepared a report in 2004, and it stated: "Corporate guarantees have proved to be risky because the fortunes of the companies and their corporate subsidiaries can change rapidly, as Montana learned in the Pegasus case." The 1998 Pegasus bankruptcy resulted in a \$46 million bond forfeiture at the Zortman-Landusky Mine. As of 2018, about \$77 million has been spent on reclamation and water management. Between reclamation costs and a long term trust fund for water treatment, almost \$50 million of public money has been obligated. \$32 million was state money.

https://leg.mt.gov/content/publications/environmental/2004mine_bonding.pdf

<https://www.greatfallstribune.com/story/news/2018/09/13/cleanup-costs-zortman-landusky-gold-mines-continue-mount-montana-bad-actor-superfund-acid/1292506002/>

Nevada

NAC 519A.350(7) allows the use of a corporate guarantee for financial assurance. Requirements include:

(a) Not more than 75 percent of the required surety may be satisfied by the corporate guarantee, which is subject to periodic review and approval by the Administrator of the Division. The remaining portion of the surety must be satisfied by a surety identified in this section.

(b) The audited financial statements of the corporation must indicate that the corporation has two of the following three ratios:

- (1) A ratio of total liabilities to stockholder's equity less than 2 to 1.

(2) A ratio of the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1 to 1.

(3) A ratio of current assets to current liabilities greater than 1.5 to 1.

(c) The net working capital and tangible net worth each must equal or exceed the amount established for reclamation pursuant to NAC 519A.360.

(d) The tangible net worth must be at least \$10,000,000.

(e) Ninety percent of the assets of the corporation must be:

(1) Located in the United States; or

(2) At least six times the amount established pursuant to NAC 519A.360.

New Mexico

The New Mexico Mining and Minerals Division does not appear to allow corporate guarantees for financial assurance.

Pennsylvania

Self bonding is authorized in PAC 86.156(a) for coal mining reclamation, but not for water treatment. Specific conditions are in PAC 86.159.

(a) The Department may accept a self-bond to cover all or part of the permittee's liabilities arising from coal mining activities. The Department will not accept a self-bond covering long-term indeterminate liabilities. These liabilities include, but are not limited to, obligations to treat discharges from mining activities which exist after completion of mining and reclamation activities as required by section 315 of The Clean Streams Law (35 P. S. § 691.315), § 87.102, 87.207, 88.92, 88.187, 88.507 and 89.52 or restoration of soil productivity of prime farmland as required by § 87.177—87.181, 88.129, 88.217, 88.330, 88.381, 88.493 and 90.161—90.165. The applicant for a self-bond shall demonstrate to the satisfaction of the Department a history of continuous efforts to achieve compliance with Federal and State environmental laws, that it meets financial eligibility criteria established in this section and enters into indemnity and security agreements required by this section. An applicant which is a subsidiary corporation may satisfy the requirements for eligibility to self bond by relying on its parent corporation. In this case, the parent corporation shall meet the eligibility and reporting requirements required by this section.

(b) The Department, in determining an applicant's eligibility to self-bond, will be satisfied by the applicant that it meets the following requirements:

(1) The applicant is incorporated in or authorized to do business in this Commonwealth. If a subsidiary corporation is a permittee or an applicant for a permit, the parent corporation of the subsidiary corporation is not required to be incorporated in or authorized to do business in this Commonwealth.

(2) The applicant has designated suitable agents in this Commonwealth to receive service of suits, claims, demands and other services of process.

(3) The applicant has a history of continuous business operation. This requirement may be deemed to be met if one of the following applies:

(i) The applicant's existence is the result of a reorganization, consolidation or merger involving a company with a history of continuous business operation.

(ii) The applicant is a majority-owned subsidiary of a corporation with a history of continuous business operation.

(4) The applicant, during the last 36 calendar months, has not defaulted in the payment of one or more of the following:

(i) Dividend or sinking fund installment, preferred stock or installment of indebtedness for borrowed money.

(ii) Payment of rentals under long-term leases.

(iii) A reclamation fee payment due under section 402 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. § 1232) for coal produced in this Commonwealth.

(5) The applicant, during the last 36 calendar months, has honored its obligations under other self-bonding programs established by another state or the Federal government.

(6) The applicant has not had commercial surety bonds cancelled for nonpayment of premiums or fraud or failure to comply with conditions established by the surety company as conditions of maintaining surety bonds in force and effect.

(c) The applicant, as part of the application for self-bonding, shall submit to the Department the following items:

(1) Financial statements for its most recent 3 fiscal years, prepared in accordance with generally accepted accounting principles, and in sufficient detail to determine if the applicant can meet the financial solvency tests contained in this section.

(2) Financial statements for the completed quarters of the fiscal year in which application is made.

(3) A report, prepared by an independent certified public accountant in conformity with generally accepted accounting principles, containing the accountant's audit opinion or review opinion of the financial statements for the applicant's most recent 3 fiscal years.

(4) Certification that the applicant intends to maintain its existing corporate status for a period in excess of 5 years.

(5) Certification that forfeiture of the aggregate amount of the applicant's self-bonds approved and furnished for operations included under this section will not materially affect its ability to remain in business or endanger its cash flow to the extent it could not meet its current obligations.

(6) Other information regarding its financial solvency, continuous business operation and compliance with environmental laws as the Department may require.

(d) After initial submission of the information in the application for self-bonding, the applicant shall submit updated information as specified in subsections (b) and (c) within 90 days of the close of each of the applicant's fiscal years. The applicant shall meet the requirements of this section relating to eligibility to self-bond for each succeeding fiscal year. The Department may require reports of financial condition from the applicant and these reports shall be in addition to those specified in this subsection. Failure of the applicant to provide reports requested by the Department shall render the applicant ineligible to self-bond.

(e) If the applicant or the independent certified public accountant submits false information or representations in the application or reports required by this section, the application will be disallowed and render the applicant ineligible to self-bond. The applicant and the independent certified public accountant shall be subject to 18 Pa.C.S. § § 4903 and 4904 (relating to false swearing; and unsworn falsification to authorities).

(f) The applicant shall satisfy one of the following financial tests in paragraph (1), (2) or (3):

(1) The applicant satisfies the following requirements:

- (i) A current rating for its most recent bond issuance of either: AAA, AA or A as issued by Standard and Poor's Corporation; or Aaa, Aa or A as issued by Moody's Investor Services. The ratings may not have been assigned as a result of the bond issue being independently insured.
- (ii) Tangible net worth at least six times the total amount of outstanding and proposed self-bonds for coal mining activities in this Commonwealth.
- (iii) Assets in the United States amounting to at least 90% of total assets.

(2) The applicant satisfies the following requirements:

- (i) Tangible net worth of at least \$10 million.
- (ii) A ratio of total liabilities to net worth of 2.5 times or less and a ratio of current assets to current liabilities of 1.2 times or greater.
- (iii) Tangible net worth at least six times the total amount of outstanding and proposed self-bonds for coal mining activities in this Commonwealth.
- (iv) Assets in the United States amounting to at least 90% of total assets.

(3) The applicant satisfies the following requirements:

- (i) Possesses fixed assets in the United States of at least \$20 million.
- (ii) Has a ratio of total liabilities to net worth of 2.5 times or less and a ratio of current assets to current liabilities of 1.2 times or greater.
- (iii) Has tangible net worth at least six times the total amount of outstanding and proposed self-bonds for coal mining activities in this Commonwealth.
- (iv) Has assets in the United States amounting to at least 90% of total assets.

(g) An adverse opinion or a disclaimer of opinion expressed by the independent certified public accountant in its report on examination of the applicant's financial statements renders the applicant ineligible to self-bond. The Department may determine an applicant ineligible to self-bond on the basis of other qualifications in the opinion expressed by the independent certified public accountant in its report on the examination of the applicant's financial statements.

(h) The total value of outstanding plus proposed self-bonds for coal mining activities may not exceed 25% of the applicant's tangible net worth in the United States.

(i) The period of liability under an approved self-bond shall be determined in accordance with § 86.151 (relating to period of liability). The release of a self-bond shall be made under § § 86.170—86.172 (relating to scope; procedures for seeking release of bond; and criteria for release of bond). Liability under a self-bond is terminated upon the Department's approval of alternative bonding, as provided for in this subchapter, submitted by the applicant.

(j) As part of the application for self-bonding, the applicant shall submit to the Department a self-bond as defined in § 86.142 (relating to definitions). The self-bond shall be perfected under the applicable statutes of the Commonwealth and the United States at the time of execution. The security interests supporting the self-bond shall be in accordance with the following schedule:

(1) For tangible net worth from 6 to 6.99 times the total amount of outstanding and proposed self-bonds for coal mining activities in this Commonwealth, the security interest shall be in an amount equal to the amount of liability to be covered by the self-bond.

(2) For tangible net worth from 7 to 7.99 times the total amount of outstanding and proposed self-bonds for coal mining in this Commonwealth, the security interest shall be in an amount equal to 80% of the amount of liability to be covered by the self-bond.

(3) For tangible net worth from 8 to 8.99 times the total amount of outstanding and proposed self-bonds for coal mining in this Commonwealth, the security interest shall be in an amount equal to 60% of the amount of liability to be covered by the self-bond.

(4) For tangible net worth from 9 to 9.99 times the total amount of outstanding and proposed self-bonds for coal mining in this Commonwealth, the security interest shall be in an amount equal to 40% of the amount of liability to be covered by the self-bond.

(5) For tangible net worth equal to or in excess of 10 times the total amount of outstanding and proposed self-bonds for coal mining in this Commonwealth, the security interest shall be in an amount equal to 25% of the amount of liability to be covered by the self-bond.

(6) Notwithstanding a provision in this chapter to the contrary, the Department may require the applicant, either initially or during the period of liability under a self-bond, to provide additional security interests as the Department may, in its sole discretion, determine it necessary to assure the applicant's obligations under the self-bond are met. The determination that an applicant may be unwilling or unable to meet its obligations under the self-bond includes, but is not limited to, a review of individual factors such as the applicant demonstrating a pattern of delay, resistance to or avoidance of timely compliance with the conditions of the self-bond, the applicant's permit, or both, and Department orders relating thereto.

(k) The self-bond shall be in a form prepared and approved by the Department and may contain special conditions as the Department may require to assure the Commonwealth's interests are fully protected. The self-bond, in addition to another term or condition of forfeiture contained in a bond required by this subchapter, shall contain the following terms and conditions:

(1) The self-bond will be forfeited if either of the following occur:

(i) Ninety days after the Department is informed by or determines that the applicant is no longer eligible to self-bond and within the 90-day period the applicant fails to submit to the Department acceptable security as provided for in this subchapter to cover its self-bonded liability.

(ii) Within 90 days of the issuance of an order to abate conditions at a site covered by a self-bond which constitutes either an actual or potential risk of harm to the environment, the applicant fails to, except as provided for in § 86.211 (relating to enforcement—general), comply with the order or fails to submit to the Department acceptable security as provided for in this subchapter in an amount equal to the self-bonded liability.

(2) Liability under the self-bond shall be conditioned on:

(i) The applicant faithfully performing the following requirements:

(A) The Surface Mining Conservation and Reclamation Act (52 P. S. § § 1396.1— 1396.19b).

(B) The Clean Streams Law (35 P. S. § § 691.1—691.1001).

(C) The Air Pollution Control Act (35 P. S. § § 4001—4015).

(D) The Coal Refuse Disposal Control Act (52 P. S. § § 30.51—30.66).

(E) The Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003).

(F) The Dam Safety and Encroachments Act (32 P. S. § § 693.1—693.27).

(G) The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § § 1406.1 — 1406.21).

(H) Regulations adopted by the EQB under the acts set forth in clauses (A)—(G).

(ii) The applicant immediately notifying the Department of a significant change in the management control or organization of the applicant.

(iii) The applicant immediately notifying the Department of a material adverse change to the financial condition of the applicant, that may affect eligibility to self-bond or diminish the value of the security interests pledged to secure the self-bond.

(iv) The applicant, during the period of the self-bond, applying for or consenting to the appointment of a receiver, conservator, trustee or liquidator of itself or its property, admitting in writing its inability to pay its debts as the debts mature or making a general assignment for the benefit of its creditors.

(v) During the period of the self-bond, a creditor of the applicant attaching or executing a judgment against the applicant so that the Department would have reasonable belief the prospect of the applicant having sufficient assets to cover the full amount of the self-bond or to be able to perform under the self-bond is impaired.

(3) The self-bond shall become immediately due and payable upon default of one or more of the terms and conditions or the dissolution of a party to the self-bond. The self-bond shall provide for confession of judgment and confession of execution upon default of one or more of the terms and conditions or dissolution.

(l) The self-bond shall be executed by:

(1) The applicant, except as provided in paragraphs (2) and (3).

(2) If the applicant is a subsidiary corporation, the applicant's parent corporation shall be a party to the self-bond which shall establish the applicant and its parent corporation as coindemnitors under the self-bond. Corporations applying for a self-bond, and parent and nonparent corporations guaranteeing an applicant's self-bond, shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of the authorization shall be submitted to the Department along with an affidavit certifying that the agreement is valid under all applicable Federal and State laws. In addition, the corporate guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the guarantee agreement. The parent corporation may cancel its obligations under the self-bond upon 120 days written notice to the Department, but the cancellation will not be effective until the self-bond is replaced with an alternate form of bonding authorized by this subchapter and approved by the Department.

(3) If the applicant is a partnership, joint venture or syndicate, each person with a beneficial interest in the same shall be a party to the self-bond and shall be established as a coindemnitor under the self-bond.

(m) Each indemnitor under the self-bond shall be jointly and severally liable.

(n) Only security interests acceptable to the Department shall be used to secure the self-bond and include, but are not limited to, account security agreements, mortgages, industrial plant mortgages, pledges of stock and personal property liens. In accepting security interests, the Department will exercise the degree of judgment, skill, diligence and care under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with these matters, would use in the conduct of an enterprise of like character and with like aims. If the applicant is unable or fails to provide security interests acceptable to the Department, the applicant shall be ineligible to self-bond. The Department may accept a security interest in an applicant's parent corporation's assets.

(o) During the period of the self-bond and until released in writing by the Department, the parties to the self-bond who are indemnitors may not take action which would adversely affect the Commonwealth's rights, title or interest in the security interests pledged to secure the self-bond. The parties who are indemnitors shall immediately notify the Department of a sale, merger, acquisition, reorganization, consolidation or other action which may so affect the pledged security interests. The self-bond shall

contain provisions so that if the parties who are indemnitors take action which adversely affects the pledged security interests, the action shall constitute an event of default.

(p) In addition to the indemnification and security required in subsection (j), the Department may require a third-party guarantee of an applicant's self-bond. Third-party guarantors shall enter into a guaranty and suretyship agreement with the Department whereby the third-party guarantor guarantees and becomes surety for the performance of the parties who are indemnitors under the self-bond required by subsection (j).

(1) The guaranty and suretyship agreement shall be perfected under the applicable statutes of the Commonwealth and the United States at the time of execution with security interests so that the Commonwealth's interests as indemnitee are fully protected.

(2) Only security interests approved by the Department shall be used to satisfy the requirements of this subsection. The security instruments include, but are not limited to, surety mortgages, industrial plant mortgage and security agreements and security liens on personal property.

(q) When the Department determines that an event of default or forfeiture under the self bond has occurred, the determination shall also constitute a determination of the applicant's inability to self-bond.

(r) The Department will upon request of the applicant, maintain the confidentiality of the applicant's financial information and the terms and conditions of the security interests unless the same are otherwise disclosed to governmental agencies or the public.

(s) Applications for a self-bond and each annual update of a self-bond shall be accompanied by a nonrefundable check in the amount of \$900 made payable to the "Commonwealth of Pennsylvania."

(t) Remedies provided or authorized by laws for violation of statutes, including the acts, this chapter, the terms and conditions of the permits and orders of the Department, are expressly preserved. Nothing in this subchapter may be construed as an exclusive remedy. No action taken under this subchapter waives or impairs another remedy provided by law.

South Dakota

The South Dakota Department of Environment and Natural Resources appears to allow corporate guarantees, but no further guidance is published. See Title 45, Chapter 6B, Mined Land Reclamation, § 45-6B-22:

45-6B-22. Surety bond--Surety other than bond--Considerations by board. In determining whether the surety of an operator shall be guaranteed by a corporate surety bond and in determining the form of surety to be provided by the operator if other than a bond, the Board of Minerals and Environment shall consider, with respect to the operator, such factors as the operator's financial status, assets within the state, past performance on contractual agreements, and facilities available to carry out the planned work. The operator shall supply evidence of financial responsibility for all surety other than a bond.

Utah

The Utah Division of Oil, Gas and Mining allows a written self-bonding agreement under Title 40, Chapter 8, Utah Mined Land Reclamation Act § 40-8-14.3:

(3)

(a) If the operator proposes reclamation surety in the form of a written contractual agreement, the board shall approve the form of surety.

(b) In making this decision, the board shall consider:

(i) the operator's: (A) financial status; (B) assets within the state; (C) past performance in complying with contractual agreements; and (D) facilities available to carry out the planned work;

(ii) the magnitude, type, and costs of approved reclamation activities planned for the land affected; and

(iii) the nature, extent, and duration of operations under the approved notice.

Wyoming

Self-bonding is allowed for financial assurance under Rule 020-0007, Chapter 6, Section 4. The application for self-bonding is submitted at the same time an operator applies for a license to mine. Existing operations with more than a five year life of mine may also apply. A parent company may also submit a guarantee if they meet the same financial criteria. Foreign parent companies have additional requirements. An indemnity agreement is required for all self bonds, as is an annual report that confirms compliance with the financial criteria with the full report from the credit reporting agency.

These rules were revised in 2019. When the rules were in draft form, it was reported that Peabody would not even qualify for a corporate guarantee under the proposed rules.

https://trib.com/business/energy/despite-coal-pushback-rules-limiting-self-bonding-advance-in-wyoming/article_f2cf1b49-4514-5d54-99a7-51de05f442ab.html

020-0007.6

Section 4. Self-bonds.

(a) Application to Self-bond.

(i) Initial application to self-bond shall be made at the time the operator makes written application to the Administrator for a license to mine. An operator conducting an existing operation with greater than a five (5)-year life of mine remaining may submit an application to self-bond to the Administrator. The application shall be on forms furnished by the Administrator and shall contain:

(A) Identification of operator:

(I) For corporations, name, address, telephone number, state of incorporation, principal place of business and name, title and authority of person signing application, and statement of authority to do business in the State of Wyoming, or

(II) For all other forms of business enterprises, name, address and telephone number and statement of how the enterprise is organized, law of the State under which it is formed, place of business, and relationship and authority of the person signing the application.

(B) Amount of bond proposed to be under a self-bond in accordance with W.S. § 35-11-417(c)(i). The proposed self-bond maximum amount shall not exceed seventy-five percent (75%) of the required bond amount.

(C) Type of operation and anticipated dates performance is to be commenced and completed.

(D) Brief chronological history of business operations conducted within the last five years which would illustrate a continuous operation for five years immediately preceding the time of application. The Administrator may allow a joint venture or syndicate with less than five years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least five years immediately preceding the time of application.

(E) Information in sufficient detail to show good-faith performance of past mining and reclamation obligations. The compliance information in the permit and/or annual reports may be referenced to satisfy part of this requirement.

(F) Financial information in sufficient detail to show that the operator and ultimate parent entity:

(I) Have a rating for all bond issuance actions and long term credit rating within the current year of "Aa3" or higher as issued by Moody's Investor Service, "AA-" or higher as issued by Standard and Poor's Corporation or "AA-" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of seventy-five percent (75%) of the approved reclamation cost estimate in the most recent Director's bond letter.

(II) Have a rating for all bond issuance actions and long term credit rating within the current year of "A2" or higher as issued by Moody's Investor Service, "A" or higher as issued by Standard and Poor's Corporation or "A" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of seventy percent (70%) of the approved reclamation cost estimate in the most recent Director's bond letter unless the requirements of subsection (I) are met above.

(III) Have a rating for all bond issuance actions and long term credit rating within the current year of "Baa2" or higher as issued by Moody's Investor Service, "BBB" or higher as issued by Standard and Poor's Corporation or "BBB" or higher as issued by Fitch Ratings. The operator is eligible for a maximum of fifty percent (50%) of the approved reclamation cost estimate in the most recent Director's bond letter unless the requirements of subsection (II) are met above.

(IV) In the event of a split rating, the Director has the discretion to determine which rating would be accepted and applied to (I), (II) or (III) of this subsection.

(G) A statement identifying by name, address and telephone number:

(I) A registered office which may be, but need not be, the same as the operator's place of business;

(II) A registered agent, which agent must be either an individual resident in this State, whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office. The registered agent so appointed by the operator shall be an agent to such operator upon whom any process, notice or demand required or permitted by law to be served upon the operator may be served;

(III) If the operator fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot be reasonably found at the registered office, then the Director shall be an agent for such operator upon whom any process, notice or demand may be served. In the event of any such process, the Director shall immediately cause one copy of such process, notice or demand to be forwarded by registered mail, to the operator at his principle place of business. The Director shall keep a record of all processes, notices, or demands served upon him under this paragraph, and shall record therein the time of such service and his action with reference thereto;

(IV) Should the operator change the registered office or registered agent, or both, a statement indicating such change shall be filed immediately with the Land Quality Division; and

(V) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon an operator in any other manner now or hereafter permitted by law.

(H) The Administrator may accept a written guarantee for an operator's self-bond from an ultimate parent entity guarantor if the guarantor satisfies the financial criteria of this Chapter as if it were the operator. The terms of the ultimate parent entity guarantee shall provide for the following:

(I) If the operator fails to complete the reclamation plan the ultimate parent entity guarantor shall do so or the ultimate parent entity guarantor shall be liable under the indemnity agreement to provide funds to the State sufficient to complete the reclamation, but not to exceed the actual reclamation costs; and

(II) The ultimate parent entity guarantee shall remain in force unless the ultimate parent entity guarantor sends notice of cancellation by certified mail to the operator and to the Administrator at least one hundred and twenty (120) days in advance of the cancellation date, and the Administrator accepts the cancellation. The cancellation shall be accepted by the Administrator if the operator obtains suitable replacement bond before the cancellation date, if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed, or if the lands have been released under W.S. §§ 35-11-417(e) and 423.

(I) If the Administrator accepts a foreign ultimate parent entity guarantee the Administrator shall require:

(I) A legal opinion from a firm recognized to do business in the country of the firm's international headquarters concerning the collectability of the self-bond under the laws of

that foreign country. The firm shall be selected by the Administrator from a list provided by the applicant. The applicant shall be responsible for the cost of the opinion;

(II) A separate bonding instrument to cover the estimated cost of recovering the reclamation bond in the foreign country. This separate bond shall be highly liquid such as cash, letters of credit, certificates of deposit or government securities and be redeemable within 90 days of forfeiture. The Administrator may also require additional information that is deemed necessary to support the self-bond;

(J) For a noncoal operator, the obligation shall not exceed 50 percent of the operator's tangible net worth in the United States. For the Administrator to accept an ultimate parent entity guarantee, the total amount of the ultimate parent entity guarantor's outstanding self-bonds shall not exceed fifty percent (50%) of the ultimate parent entity guarantor's tangible net worth in the United States.

(b) Approval or Denial of Operator's Self-bond Application.

(i) The Administrator, within 60 days of operator's submission of all materials necessary to base a decision on the application shall:

(A) Approve or reject such application and declare in writing his reasons for such action to the operator or his registered agent. The decision shall be based on all the information submitted and shall be sufficient to meet the demonstrations required by W.S. § 35-11-417(d); and

(B) If a rejection is based on inadequate information or failure of the operator to supply all necessary material, the Administrator shall allow the operator 30 days to remedy the deficiencies. Such corrections must be made to the satisfaction of the Administrator. The Administrator shall have an additional 60 days to approve or reject the corrected application.

(ii) An indemnity agreement shall be submitted subject to the following requirements:

(A) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the ultimate parent entity guarantor, and shall bind each jointly and severally;

(B) Corporations applying for a self-bond or parent corporations guaranteeing a subsidiary's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind the corporation. A copy of such authorization shall be provided to the Administrator;

(C) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest directly or indirectly, in the operator; and

(D) The indemnity agreement shall provide that the persons or parties bound shall pay all litigation costs incurred by the State in any successful effort to enforce the agreement against the operator.

(c) Self-Bond Renewal.

(i) Information for the self-bond renewal under the self-bonding program which shall accompany the annual report shall include:

(A) Amount of bond required, which shall be determined in accordance with W.S. § 35-11-417(c)(ii) and the amount which is proposed to be under a self-bond; and

(B) Financial information in sufficient detail to show that the guarantor still meets the information in Section 4(a)(i)(F), and the limitations in Section 4(a)(i)(I) and (J). The guarantor shall submit the full report from the credit reporting agency or agencies supporting its rating for the current year. Additional information may be requested by the Director when a split rating occurs.

(ii) Any valid initial self-bond may carry the right of successive renewal as long as the above listed information is submitted and demonstrates that the guarantor remains qualified under W.S. § 35-11-417(d) and there is a minimum five (5)-year life of mine remaining.

(iii) Renewal of self-bonds approved prior to the effective date of these rules shall require the bond and credit ratings described in Section 4(a)(i)(F) and shall meet the limitations in Section 4(a)(i)(I) and (J). Operators with self-bonds approved prior to the effective date of these rules shall submit a new application to self-bond within eighteen (18) months of the effective date of these rules.

(d) Self-bond Substitution.

(i) The Administrator may require the operator to substitute a good and sufficient bond instrument if the Administrator determines in writing that the self-bond of the operator fails to provide the protection consistent with the objectives and purposes of this Act. The Administrator shall require full or partial substitution if the financial information submitted or requested under Section 4(c)(i)(B) indicates that the operator and/or the ultimate parent entity no longer qualifies under the self-bonding program. Substitution of an alternate bond shall be made within 90 days. The operator may also request substitution. This request is contingent upon the operator meeting all the requirements of the bond provisions (W.S. §§ 35-11-417 through 424) of the Act. If these requirements are met, the Administrator shall accept substitution.

(ii) If the operator fails within 90 days to make a substitution for the revoked self-bond the Administrator shall suspend or revoke the license of the operator to conduct operations upon the land described in the permit until such substitution is made.

(iii) All methods of substitution shall be made in accordance with the bonding provisions (W.S. §§ 35-11-417 through 418) of the Act. The Administrator shall require substitution of a good and sufficient bond.

(e) Reporting requirements.

(i) If a devaluation in the credit rating occurs, the Administrator shall be notified within thirty (30) days of the change and a copy of the rating report shall be provided to the Administrator.

(ii) A statement listing any notices issued by the Securities and Exchange Commission or proceedings against the operator or ultimate parent entity initiated by any party alleging a failure to comply with any public disclosure or reporting requirements under the securities laws of the United States. Such statement shall include a summary of each such allegation, including the date, the requirement alleged to be violated, the party making the allegation, and the disposition or current status thereof. The Administrator shall be notified within thirty (30) days of the filing.

Bureau of Land Management

BLM does not accept any new corporate guarantees. Those that were in place prior to January 20, 2001 may be used to cover portions of an operation that existed on that same date:

https://www.blm.gov/sites/blm.gov/files/uploads/NV_3809%20Reclamation%20Bonding%20Guidelines.pdf

Office of Surface Mining Reclamation and Enforcement (OSMRE)

Self-insurance is allowed for coal mines under the federal Surface Mining Control and Reclamation Act (SMCRA). 30 CFR 800 contains the requirements for self bonding. As stated on the Office of Surface Mining's (OSMRE) websites, self bonding is a:

“(legally binding corporate promises without separate surety or collateral, available only to permittees who meet certain financial tests). State regulatory programs vary somewhat in terms of which financial instruments are acceptable. A few states also have exercised their discretion to exclude the self-bond option.

To remain qualified, self-bonded permittees must maintain a tangible net worth of at least \$10 million, possess fixed assets in the U.S. of at least \$20 million, and either meet certain financial ratios or have an "A" or higher bond rating.”

<https://www.osmre.gov/resources/bonds/BondsOverview.shtm>.

OSMRE provided further analysis and policy guidance. In 2016, three of the largest coal mines in the United States filed for bankruptcy. They held about \$2 billion in self-bonds, and the ability of the agencies to ensure reclamation is uncertain. Additional bankruptcy filings are expected in this mining sector. As a result, Colorado has stopped accepting new self-bonds, and Virginia is proposing to eliminate them. OSMRE recommends the following:

- Inquiry into a mining company's financial health, both present and future. This extends to parent companies, guarantors, or other related entities.
- Require a company to switch to surety or collateral bonds if their financial status degrades.

<https://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf>

The Government Accounting Office (GAO) recommended eliminating self-bonding in 2018:

“Self-bonding presents a risk to the government because it is difficult to (1) ascertain the financial health of an operator, (2) determine whether the operator qualifies for self-bonding, and (3) obtain a replacement for existing self-bonds when an operator no longer qualifies. In addition, some stakeholders said that the risk from self-bonding is greater now than when the practice was first authorized under the Surface Mining Control and Reclamation Act (SMCRA).”

“GAO also previously reviewed federal financial assurance requirements for various energy and mineral extraction sectors and found that coal mining is the only one where self-bonding was allowed.” <https://www.gao.gov/products/GAO-18-305>

The federal rules outlining the requirements for self bonds and corporate guarantees are found here:
https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=713cb1a3e9b624b58129941f6ee032cb&rgn=div5&view=text&node=30:3.0.1.10.44&idno=30#se30.3.800_116

40 CFR 800.23

(a) Definitions. For the purposes of this section only:

Current assets means cash or other assets or resources which are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

Current liabilities means obligations which are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

Fixed assets means plants and equipment, but does not include land or coal in place.

Liabilities means obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

Net worth means total assets minus total liabilities and is equivalent to owners' equity.

Parent corporation means a corporation which owns or controls the applicant.

Tangible net worth means net worth minus intangibles such as goodwill and rights to patents or royalties.

(b) The regulatory authority may accept a self-bond from an applicant for a permit if all of the following conditions are met by the applicant or its parent corporation guarantor:

(1) The applicant designates a suitable agent to receive service of process in the State where the proposed surface coal mining operation is to be conducted.

(2) The applicant has been in continuous operation as a business entity for a period of not less than 5 years. Continuous operation shall mean that business was conducted over a period of 5 years immediately preceding the time of application.

(i) The regulatory authority may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the time of application.

(ii) When calculating the period of continuous operation, the regulatory authority may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations.

(3) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:

(i) The applicant has a current rating for its most recent bond issuance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(ii) The applicant has a tangible net worth of at least \$10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iii) The applicant's fixed assets in the United States total at least \$20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(4) The applicant submits;

(i) Financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) Unaudited financial statements for completed quarters in the current fiscal year; and

(iii) Additional unaudited information as requested by the regulatory authority.

(c)(1) The regulatory authority may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor, if the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section as if it were the applicant. Such a written guarantee shall be referred to as a "corporate guarantee." The terms of the corporate guarantee shall provide for the following:

(i) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the regulatory authority sufficient to complete the reclamation plan, but not to exceed the bond amount.

(ii) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the regulatory authority at least 90 days in advance of the cancellation date, and the regulatory authority accepts the cancellation.

(iii) The cancellation may be accepted by the regulatory authority if the applicant obtains suitable replacement bond before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(2) The regulatory authority may accept a written guarantee for an applicant's self-bond from any corporate guarantor, whenever the applicant meets the conditions of paragraphs (b)(1), (b)(2) and (b)(4) of this section, and the guarantor meets the conditions of paragraphs (b)(1) through (b)(4) of this section. Such a written guarantee shall be referred to as a "non-parent corporate guarantee." The terms of this guarantee shall provide for compliance with the conditions of paragraphs (c)(1)(i) through (c)(1)(iii) of this section. The regulatory authority may require the applicant to submit any information specified in paragraph (b)(3) of this section in order to determine the financial capabilities of the applicant.

(d) For the regulatory authority to accept an applicant's self-bond, the total amount of the outstanding and proposed selfbonds of the applicant for surface coal mining and reclamation operations shall not

exceed 25 percent of the applicant's tangible net worth in the United States. For the regulatory authority to accept a corporate guarantee, the total amount of the parent corporation guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed 25 percent of the guarantor's tangible net worth in the United States. For the regulatory authority to accept a non-parent corporate guarantee, the total amount of the non-parent corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the guarantor's tangible net worth in the United States.

(e) If the regulatory authority accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(1) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the parent corporation guarantor, and shall bind each jointly and severally.

(2) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be provided to the regulatory authority along with an affidavit certifying that such an agreement is valid under all applicable Federal and State laws. In addition, the guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.

(3) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.

(4) Pursuant to §800.50, the applicant, parent or non-parent corporate guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the regulatory authority an amount necessary to complete the approved reclamation plan, not to exceed the bond amount. If permitted under State law, the indemnity agreement when under forfeiture shall operate as a judgment against those parties liable under the indemnity agreement.

(f) A regulatory authority may require self-bonded applicants, parent and non-parent corporate guarantors to submit an update of the information required under paragraphs (b)(3) and (b)(4) of this section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.

(g) If at any time during the period when a self-bond is posted, the financial conditions of the applicant, parent or nonparent corporate guarantor change so that the criteria of paragraphs (b)(3) and (d) of this section are not satisfied, the permittee shall notify the regulatory authority immediately and shall within 90 days post an alternate form of bond in the same amount as the self-bond. Should the permittee fail to post an adequate substitute bond, the provisions of §800.16(e) shall apply

Environmental Protection Agency

EPA does allow corporate guarantees under their RCRA and CERCLA programs. In 2017 the EPA's Office of Inspector General recommended eliminating the use of all corporate self-insurance instruments. The agency is unable to validate a company's self-insurance which threatens the effectiveness of these programs.

https://www.epa.gov/sites/production/files/2017-12/documents/epaig_20171222-18-p-0059_glance.pdf

40 CFR 258-74 allows for corporate guarantees under RCRA Subtitle D (Municipal Solid Waste Landfills). 40 CFR 258-74(e) describes a Corporate Financial Test or self-bond, and 40 CFR 258-74(g) describes a corporate guarantee:

(e) *Corporate financial test.* An owner or operator that satisfies the requirements of this paragraph (e) may demonstrate financial assurance up to the amount specified in this paragraph (e):

(1) *Financial component.*

(i) The owner or operator must satisfy 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; or

(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.

(ii) The tangible net worth of the owner or operator must be greater than:

(A) The sum of the current closure, post-closure care, corrective action cost estimates and any other environmental obligations, including guarantees, covered by a financial test plus \$10 million except as provided in paragraph (e)(1)(ii)(B) of this section.

(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, 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, and subject to the approval of the State Director.

(iii) The owner or operator must have assets located in the United States amounting to at least the sum of current closure, post-closure care, corrective action cost estimates and any other environmental obligations covered by a financial test as described in paragraph (e)(3) of this section.

(2) *Recordkeeping and reporting requirements.*

(i) The owner or operator must place the following items into the facility's operating record:

(A) A letter signed by the owner's or operator's chief financial officer that:

(1) 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 under this part 258, cost estimates required for UIC facilities under 40 CFR part 144, if applicable, cost estimates required for petroleum underground storage tank facilities under 40 CFR part 280, if applicable, cost estimates required for PCB storage facilities under 40 CFR part 761, if applicable, and cost estimates required

for hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265, if applicable; and

(2) Provides evidence demonstrating that the firm meets the conditions of either paragraph (e)(1)(i)(A) or (e)(1)(i)(B) or (e)(1)(i)(C) of this section and paragraphs (e)(1)(ii) and (e)(1)(iii) 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 will be cause for disallowance, with the potential exception for qualified opinions provided in the next sentence. The Director of an approved State may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Director deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the Director of an approved State does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this section.

(C) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that owner or operator satisfies paragraph (e)(1)(i)(B) or (e)(1)(i)(C) of this section that are different from data in the audited financial statements referred to in paragraph (e)(2)(i)(B) of this section or any other audited financial statement or data filed with the SEC, 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.

(D) If the chief financial officer's letter provides a demonstration that the firm has assured for environmental obligations as provided in paragraph (e)(1)(ii)(B) of this section, 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.

(ii) An owner or operator must place the items specified in paragraph (e)(2)(i) of this section in the operating record and notify the State Director that these items have been placed in the operating record 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.

(iii) After the initial placement of items specified in paragraph (e)(2)(i) of this section in the operating record, the owner or operator must annually update the information and place updated information in the operating record within 90 days following the close of the owner or operator's fiscal year. The Director of a State may provide up to an additional 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. The updated information must consist of all items specified in paragraph (e)(2)(i) of this section.

(iv) The owner or operator is no longer required to submit the items specified in this paragraph (e)(2) or comply with the requirements of this paragraph (e) when:

(A) He substitutes alternate financial assurance as specified in this section that is not subject to these recordkeeping and reporting requirements; or

(B) He is released from the requirements of this section in accordance with § 258.71(b), § 258.72(b), or § 258.73(b).

(v) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 120 days following the close of the owner or operator's fiscal year, obtain alternative financial assurance that meets the requirements of this section, place the required submissions for that assurance in the operating record, and notify the State Director that the owner or operator no longer meets the criteria of the financial test and that alternate assurance has been obtained.

(vi) The Director of an approved State may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in paragraph (e)(2) of this section.

If the Director of an approved State finds that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance that meets the requirements of this section.

(3) Calculation of costs to be assured.

When calculating the current cost estimates for closure, post-closure care, corrective action, or the sum of the combination of such costs to be covered, and any other environmental obligations assured by a financial test referred to in this paragraph (e), the owner or operator must 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 it assures them through a 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.

(g) *Corporate Guarantee.*

(1) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a “substantial business relationship” with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraph (e) of this section and must comply with the terms of the guarantee. A certified copy of the guarantee must be placed in the facility’s operating record along with copies of the letter from the guarantor’s chief financial officer and accountants’ opinions. If the guarantor’s parent corporation is also the parent corporation of the owner or operator, the letter from the guarantor’s chief financial officer must describe the value received in consideration of the guarantee. If the guarantor is a firm with a “substantial business relationship” with the owner or operator, this letter must describe this “substantial business relationship” and the value received in consideration of the guarantee.

(2) The guarantee must be effective and all required submissions placed in the operating record 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 in the case of corrective action no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.

(3) The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform closure, post-closure care, and/ or corrective action of a facility covered by the guarantee, the guarantor will:

(A) Perform, or pay a third party to perform, closure, post-closure care, and/or corrective action as required (performance guarantee); or

(B) Establish a fully funded trust fund as specified in paragraph (a) of this section in the name of the owner or operator (payment guarantee).

(ii) The guarantee will remain in force for as long as the owner or operator must comply with the applicable financial assurance requirements of this Subpart unless the guarantor sends prior notice of cancellation by certified mail to the owner or operator and to the State Director. Cancellation may 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 State Director, as evidenced by the return receipts.

(iii) If notice of cancellation is given, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the State Director. 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 of the cancellation notice, obtain alternative

assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

(4) If a corporate guarantor no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 90 days, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within the next 30 days.

(5) The owner or operator is no longer required to meet the requirements of this paragraph (g) when:

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

(ii) The owner or operator is released from the requirements of this section in accordance with §258.71(b), § 258.72(b), or § 258.73(b).

40 CFR 264-143(f) does allow for corporate guarantees under RCRA Subtitle C (Hazardous Waste Facilities):

(f) Financial test and corporate guarantee for closure.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of either paragraph (f)(1)(i) or (ii) of this section:

(i) The owner or operator must have:

(A) Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least \$10 million; and

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least \$10 million; and

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and postclosure cost estimates and the current plugging and abandonment cost estimates.

(2) The phrase “current closure and post-closure cost estimates” as used in paragraph (f)(1) of this section refers to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner’s or operator’s chief financial officer (§264.151(f)). The phrase “current plugging and abandonment cost estimates” as used in paragraph (f)(1) of this section refers to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner’s or operator’s chief financial officer (§144.70(f) of this title).

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the Regional Administrator:

(i) A letter signed by the owner’s or operator’s chief financial officer and worded as specified in §264.151(f); and

(ii) A copy of the independent certified public accountant’s report on examination of the owner’s or operator’s financial statements for the latest completed fiscal year; and

(iii) A special report from the owner’s or operator’s independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, yearend financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) An owner or operator of a new facility must submit the items specified in paragraph (f)(3) of this section to the Regional Administrator at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal.

(5) After the initial submission of items specified in paragraph (f)(3) of this section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must send notice to the Regional Administrator of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Regional Administrator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (f)(1) of this section, require reports of

financial condition at any time from the owner or operator in addition to those specified in paragraph (f)(3) of this section. If the Regional Administrator finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) The Regional Administrator may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (f)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Regional Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) The owner or operator is no longer required to submit the items specified in paragraph (f)(3) of this section 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).

(10) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (8) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in §264.151(h). The certified copy of the guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee must provide that:

- (i) If the owner or operator fails to perform final closure of a facility covered by the corporate guarantee in accordance with the closure plan and other permit requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in §264.143(a) in the name of the owner or operator.
- (ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Regional Administrator. Cancellation may 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 Regional Administrator, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternative financial assurance in the name of the owner or operator.

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