



Ohio Administrative Code

Rule 3745-51-147 Liability requirements - management of excluded hazardous secondary materials.

Effective: June 12, 2023

(A) Coverage for sudden accidental occurrences. An owner or operator of a hazardous secondary material reclamation facility or an intermediate facility subject to financial assurance requirements under paragraph (A)(24)(f)(vi) of rule 3745-51-04 of the Administrative Code, or a group of such facilities, shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount of at least one million dollars per occurrence with an annual aggregate of at least two million dollars, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraph (A)(1), (A)(2), (A)(3), (A)(4), (A)(5), or (A)(6) of this rule:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(a) Each insurance policy shall be amended by attachment of the "Hazardous Secondary Material Facility Liability Endorsement," or evidenced by a "Certificate of Liability Insurance." The wording of the endorsement shall be identical to the wording specified in paragraph (H) of rule 3745-51-151 of the Administrative Code. The wording of the certificate of insurance shall be identical to the wording specified in paragraph (I) of rule 3745-51-151 of the Administrative Code. The owner or operator shall submit a signed duplicate original of the endorsement or the certificate of insurance to the director, or directors if the facilities are located in more than one U.S. EPA region. If requested by a director, the owner or operator shall provide a signed duplicate original of the insurance policy.

(b) Each insurance policy shall be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this rule by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (F) and (G) of this rule.



(3) An owner or operator may meet the requirements of this rule by obtaining a letter of credit for liability coverage as specified in paragraph (H) of this rule.

(4) An owner or operator may meet the requirements of this rule by obtaining a surety bond for liability coverage as specified in paragraph (I) of this rule.

(5) An owner or operator may meet the requirements of this rule by obtaining a trust fund for liability coverage as specified in paragraph (J) of this rule.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated shall total at least the minimum amounts required by this rule. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the director in writing within thirty days whenever:

(a) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (A)(1) to (A)(6) of this rule; or

(b) A certification of valid claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material reclamation facility or intermediate facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (A)(1) to (A)(6) of this rule; or

(c) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material reclamation facility or intermediate facility is issued against the owner or operator or an



instrument that is providing financial assurance for liability coverage under paragraphs (A)(1) to (A)(6) of this rule.

(B) Coverage for non-sudden accidental occurrences. An owner or operator of a "hazardous secondary material" reclamation facility or "intermediate facility" with "land-based units," as defined in rule 3745-50-10 of the Administrative Code, which are used to manage hazardous secondary materials excluded under paragraph (A)(24) of rule 3745-51-04 of the Administrative Code or a group of such facilities, shall demonstrate financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for non-sudden accidental occurrences in the amount of at least three million dollars per occurrence with an annual aggregate of at least six million dollars, exclusive of legal defense costs. An owner or operator who shall meet the requirements of this rule may combine the required per-occurrence coverage levels for sudden and non-sudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and non-sudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and non-sudden accidental occurrences shall maintain liability coverage in the amount of at least four million dollars per occurrence and eight million dollars annual aggregate. This liability coverage may be demonstrated as specified in paragraph (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), or (B)(6) of this rule:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(a) Each insurance policy shall be amended by attachment of the "Hazardous Secondary Material Facility Liability Endorsement" or evidenced by a "Certificate of Liability Insurance." The wording of the endorsement shall be identical to the wording specified in paragraph (H) of rule 3745-51-151 of the Administrative Code. The wording of the certificate of insurance shall be identical to the wording specified in paragraph (I) of rule 3745-51-151 of the Administrative Code. The owner or operator shall submit a signed duplicate original of the endorsement or the certificate of insurance to the director, or directors if the facilities are located in more than one U.S. EPA region. If requested by a director, the owner or operator shall provide a signed duplicate original of the insurance policy.



(b) Each insurance policy shall be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this rule by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (F) and (G) of this rule.

(3) An owner or operator may meet the requirements of this rule by obtaining a letter of credit for liability coverage as specified in paragraph (H) of this rule.

(4) An owner or operator may meet the requirements of this rule by obtaining a surety bond for liability coverage as specified in paragraph (I) of this rule.

(5) An owner or operator may meet the requirements of this rule by obtaining a trust fund for liability coverage as specified in paragraph (J) of this rule.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated shall total at least the minimum amounts required by this rule. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the director in writing within thirty days whenever:

(a) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (B)(1) to (B)(6) of this rule; or

(b) A certification of valid claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material treatment



storage facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (B)(1) to (B)(6) of this rule; or

(c) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous secondary material treatment or storage facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (B)(1) to (B)(6) of this rule.

(C) Request for variance. If an owner or operator can demonstrate to the satisfaction of the director that the levels of financial responsibility required by paragraph (A) or (B) of this rule are not consistent with the degree and duration of risk associated with treatment or storage at the facility or group of facilities, the owner or operator may obtain a variance from the director. The request for a variance shall be submitted in writing to the director. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The director may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the director to determine a level of financial responsibility other than that required by paragraph (A) or (B) of this rule.

(D) Adjustments by the director. If the director determines that the levels of financial responsibility required by paragraph (A) or (B) of this rule are not consistent with the degree and duration of risk associated with treatment or storage at the facility or group of facilities, the director may adjust the level of financial responsibility required under paragraph (A) or (B) of this rule as may be necessary to protect human health and the environment. This adjusted level will be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the director determines that there is a significant risk to human health and the environment from non-sudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, pile, or land treatment facility, the director may require that an owner or operator of the facility comply with paragraph (B) of this rule. An owner or operator shall furnish to the director, within a reasonable time, any information which the director requests to determine whether cause exists for such adjustments of level or type of coverage.

(E) Period of coverage. Within sixty days after receiving certifications from the owner or operator



and a qualified professional engineer that all hazardous secondary materials have been removed from the facility or a unit at the facility and the facility or a unit has been decontaminated in accordance with the approved plan under paragraph (H) of rule 3745-51-143 of the Administrative Code, the director will notify the owner or operator in writing that the owner or operator is no longer required under paragraph (A)(24)(f)(vi) of rule 3745-51-04 of the Administrative Code to maintain liability coverage for that facility or a unit at the facility, unless the director has reason to believe that that all hazardous secondary materials have not been removed from the facility or unit at a facility or that the facility or unit has not been decontaminated in accordance with the approved plan.

(F) Financial test for liability coverage.

(1) An owner or operator may satisfy the requirements of this rule by demonstrating that the owner or operator passes a financial test as specified in this paragraph. To pass this test the owner or operator shall meet the criteria of paragraph (F)(1)(a) or (F)(1)(b) of this rule:

(a) The owner or operator shall have:

(i) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(ii) Tangible net worth of at least ten million dollars; and

(iii) Assets in the United States amounting to either:

(A) At least ninety per cent of the owner's total assets; or

(B) At least six times the amount of liability coverage to be demonstrated by this test.

(b) The owner or operator shall have:

(i) A current rating for the owner's 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



(ii) Tangible net worth of at least ten million dollars; and

(iii) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(iv) Assets in the United States amounting to either:

(A) At least ninety per cent of the owner's total assets; or

(B) At least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase "amount of liability coverage" as used in paragraph (F)(1) of this rule refers to the annual aggregate amounts for which coverage is required under paragraphs (A) and (B) of this rule and the annual aggregate amounts for which coverage is required under paragraphs (A) and (B) of rule 3745-55-47 of the Administrative Code and paragraphs (A) and (B) of rule 3745-66-47 of the Administrative Code.

(3) To demonstrate that the owner or operator meets this test, the owner or operator shall submit the following three items to the director:

(a) A letter signed by the owner's or operator's chief financial officer and worded as specified in paragraph (F) of rule 3745-51-151 of the Administrative Code. If an owner or operator is using the financial test to demonstrate both assurance as specified by paragraph (E) of rule 3745-51-143 of the Administrative Code, and liability coverage, the owner or operator shall submit the letter specified in paragraph (F) of rule 3745-51-151 of the Administrative Code to cover both forms of financial responsibility; a separate letter as specified in paragraph (E) of rule 3745-51-151 of the Administrative Code is not required.

(b) 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.

(c) 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.



(4) The owner or operator may obtain a one-time extension of the time allowed for submittal of the documents specified in paragraph (F)(3) of this rule if the fiscal year of the owner or operator ends during the ninety days prior to the first effective date of this rule and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than ninety days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer shall send, by the first effective date of this rule, a letter to the director of each U.S. EPA region in which the operator's facilities to be covered by the financial test are located. This letter from the chief financial officer shall:

(a) Request the extension;

(b) Certify that the chief financial officer has grounds to believe that the owner or operator meets the criteria of the financial test;

(c) Specify for each facility to be covered by the test the U.S. EPA identification number, name, address, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

(d) Specify the date ending the owner's or operator's last complete fiscal year before the first effective date of this rule;

(e) Specify the date, no later than ninety days after the end of such fiscal year, when the chief financial officer will submit the documents specified in paragraph (F)(3) of this rule; and

(f) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submittal of items specified in paragraph (F)(3) of this rule, the owner or operator shall send updated information to the director within ninety days after the close of each succeeding fiscal year. This information shall consist of all three items specified in paragraph (F)(3) of this rule.

(6) If the owner or operator no longer meets the requirements of paragraph (F)(1) of this rule, the



owner or operator shall obtain insurance, a letter of credit, a surety bond, a trust fund, or a guarantee for the entire amount of required liability coverage as specified in this rule. Evidence of liability coverage shall be submitted to the director within ninety 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 test requirements.

(7) The director 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)(b) of this rule]. An adverse opinion or a disclaimer of opinion will be cause for disallowance. The director will evaluate other qualifications on an individual basis. The owner or operator shall provide evidence of insurance for the entire amount of required liability coverage as specified in this rule within thirty days after notification of disallowance.

(G) Guarantee for liability coverage.

(1) Subject to paragraph (G)(2) of this rule, an owner or operator may meet the requirements of this rule by obtaining a written guarantee, hereinafter referred to as "guarantee." The guarantor shall 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 shall meet the requirements for owners or operators in paragraphs (F)(1) to (F)(6) of this rule. The wording of the guarantee shall be identical to the wording specified in paragraph (G)(2) of rule 3745-51-151 of the Administrative Code. A certified copy of the guarantee shall accompany the items sent to the director as specified in paragraph (F)(3) of this rule. 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, this 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.

(a) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or non-sudden accidental occurrences



(or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(b) [Reserved.]

(2)

(a) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this rule only if the "Attorneys General" or "Insurance Commissioners" of:

(i) The state in which the guarantor is incorporated; and

(ii) Each state in which a facility covered by the guarantee is located have submitted a written statement to Ohio EPA that a guarantee executed as described in this rule and in paragraph (G)(2) of rule 3745-55-51 of the Administrative Code is a legally valid and enforceable obligation in that state.

(b) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this rule only if:

(i) The non-U.S. corporation has identified a registered agent for service of process in each state in which a facility covered by the guarantee is located and in the state in which the non-U.S. corporation has its principal place of business; and if

(ii) The attorney general or insurance commissioner of each state in which a facility covered by the guarantee is located and the state in which the guarantor corporation has its principal place of business, has submitted a written statement to Ohio EPA that a guarantee executed as described in this rule and paragraph (H)(2) of rule 3745-51-151 of the Administrative Code is a legally valid and enforceable obligation in that state.

(H) Letter of credit for liability coverage.

(1) An owner or operator may satisfy the requirements of this rule by obtaining an irrevocable



standby letter of credit that conforms to the requirements of this paragraph and submitting a copy of the letter of credit to the director.

(2) The financial institution issuing the letter of credit shall be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(3) The wording of the letter of credit shall be identical to the wording specified in paragraph (J) of rule 3745-51-151 of the Administrative Code.

(4) An owner or operator who uses a letter of credit to satisfy the requirements of this rule may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund shall 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.

(5) The wording of the standby trust fund shall be identical to the wording specified in paragraph (M) of rule 3745-51-151 of the Administrative Code.

(I) Surety bond for liability coverage.

(1) An owner or operator may satisfy the requirements of this rule by obtaining a surety bond that conforms to the requirements of this paragraph and submitting a copy of the bond to the director.

(2) The surety company issuing the bond shall be among those listed as acceptable sureties on federal bonds in the most recent "Circular 570" of the U.S. department of the treasury.

(3) The wording of the surety bond shall be identical to the wording specified in paragraph (K) of rule 3745-51-151 of the Administrative Code.

(4) A surety bond may be used to satisfy the requirements of this rule only if the attorneys general or insurance commissioners of:



- (a) The state in which the surety is incorporated; and
- (b) Each state in which a facility covered by the surety bond is located have submitted a written statement to Ohio EPA that a surety bond executed as described in this rule and in paragraph (K) of rule 3745-51-151 of the Administrative Code is a legally valid and enforceable obligation in that state.
- (J) Trust fund for liability coverage.
- (1) An owner or operator may satisfy the requirements of this rule by establishing a trust fund that conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the director.
- (2) The trustee shall 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.
- (3) The trust fund for liability coverage shall be funded for the full amount of the liability coverage to be provided by the trust fund before the trust fund may be relied upon to satisfy the requirements of this rule. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the trust fund, shall either add sufficient funds to the trust fund to cause the value of the trust fund to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this rule to cover the difference. For purposes of this paragraph, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden or non-sudden occurrences required to be provided by the owner or operator by this rule, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.
- (4) The wording of the trust fund shall be identical to the wording specified in paragraph (L) of rule 3745-51-151 of the Administrative Code.



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[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules, and federal statutory provisions referenced in this rule, see rule 3745-50-11 of the Administrative Code titled "Incorporated by reference."]