

**TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION**

Control 335 Department or Agency Environmental Management
Rule No. 335-6-13
Rule Title: Centralized Waste Treatment Facility Financial Assurance
Requirements

New Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? Yes

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? Yes

Is there another, less restrictive method of regulation available that could adequately protect the public? No

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? Yes

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? No

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? Yes

Does the proposed rule have an economic impact? Yes


If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Reference Service.

Signature of certifying officer Mindy Elliott

Date December 17, 2012

Date Filed 

APA-2
11/96

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
WATER DIVISION

NOTICE OF INTENDED ACTION

AGENCY NAME: Department of Environmental Management

RULE NO. & TITLE: 335-6-.13 Centralized Waste Treatment Facility Financial Assurance Requirements (New)

INTENDED ACTION: To adopt Chapter 335-6-.13 of the ADEM Administrative Code

SUBSTANCE OF PROPOSED ACTION:

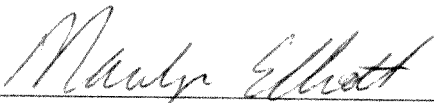
To adopt regulations as a final rule in accordance with Ala.Code 1975, §§ 22-25C-1 and §§ 22-25C-2.

TIME, PLACE, MANNER OF PRESENTING VIEWS:

Comments may be submitted in writing or orally at a public hearing to be held January 16, 2013, at 10:00 a.m. at the offices of the Alabama Department of Environmental Management, 1400 Coliseum Boulevard, Montgomery, Alabama, 36109, or by mail to P.O. Box 301463, Montgomery, AL 36130-1463.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: February 4, 2013 at 5:00 p.m.

CONTACT PERSON AT AGENCY: Daphne Smart, Branch Chief, Industrial and Municipal Branch, Water Division
(334) 270-5602.



Lance R. LeFleur
Director

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
WATER DIVISION - WATER QUALITY PROGRAM**

**CHAPTER 335-6-13
CENTRALIZED WASTE TREATMENT FACILITY
FINANCIAL ASSURANCE REQUIREMENTS**

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335-6-13-.01 Purpose. To require certain centralized waste treatment facilities to post a performance bond or other financial assurance in an amount sufficient to close the facility if the facility owner or operator ceases operation, abandons the facility, or fails to properly maintain the facility to ensure compliance with state environmental regulations.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXX, 2013.

335-6-13-.02 Applicability.

(1) The requirements of 335-6-13-.06 apply to owners or operators of centralized waste treatment facilities as defined by federal effluent guidelines set forth at 40 CFR Part 437, when applying for issuances or reissuances, or modifications of a permit for a facility that processes or treats industrial wastes, industrial wastewater, or used material. The following facilities are exempt from the requirements of this Chapter:

(a) waste treatment facilities which treat waste only from sources owned or operated by the owner of the waste treatment facilities or

(b) waste treatment facilities which treat waste pursuant to a contract at a waste treatment facility which also treat waste from sources owned or operated by the owner.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXX, 2013.

335-6-13-.03 Definitions. Wherever used in this rule, unless a different meaning clearly appears from the context or unless a different meaning is stated in a definition applicable to only a portion of this rule, the following shall mean:

(a) "Active life" means the period of operation beginning with the initial receipt of wastes, wastewater, or other used material and ending at completion of closure of the facility.

(b) "Annual" shall mean a calendar year.

(c) "Application" means forms and additional information that are required by rule 335-6-6 or 335-6-5 to be submitted when applying for an NPDES or SID Permit.

(d) "Centralized Waste Treatment Facility" also referred to as waste treatment facility means a facility as defined by federal effluent guidelines set forth at 40 CFR Part 437.

(e) "Certification" means a statement of professional opinion based upon knowledge and belief.

(f) "CFR" means Code of Federal Regulations.

(g) "Closure" for the purpose of this regulation only means removal and proper disposal, processing, or handling of industrial wastes, wastewaters, used materials, sludge, and any other materials, including but not limited to raw materials, byproducts, additives, and products.

(h) "Current closure cost estimate" as used in 335-6-13-.06 means the most recent of the estimates prepared in accordance with 335-6-13-.06.

(i) "Department" means the Alabama Department of Environmental Management as established by Code of Alabama 1975, § 22-22A-4.

(j) "Director" means the Director of the Alabama Department of Environmental Management, appointed pursuant to Code of Alabama 1975, § 22-22A-4, or his or her designee.

(k) "Discharge" means the addition, introduction, leaking, spilling, or emitting of any sewage, industrial wastes, pollutant or other wastes into waters of the state.

(l) "Engineer" means a person currently registered as a professional engineer with the State of Alabama Board of Registration for Professional Engineers and Land Surveyors.

(m) "Final closure" means the completion of closure of a facility.

(n) "Financial Assurance" means a financial arrangement by the owner or operator of a centralized waste treatment facility which guarantees the availability of funds which may be used for closure of the facility if determined necessary by the Department should the owner or operator cease operation, abandon the facility, or fail to properly maintain the facility to ensure compliance with state environmental regulations.

(o) "NPDES" or National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits for the discharge of pollutants into waters of the state.

(p) "Operator" means the person(s) having direct supervision over and responsibility for the daily operation of the centralized waste treatment facility.

(q) "Owner" means the person(s) who owns a facility or part of a facility.

(r) "Permit" means an issued NPDES or SID Permit.

(s) "SID Permit" or State Indirect Discharge Permit means a permit issued to an industrial user.

(t) "State" means the State of Alabama.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

335-6-13-.04 Other Closure Requirements. These rules and regulations do not supersede any other Departmental regulations regarding closure of any type of facility. Affected facilities shall comply with the conditions of these rules and any other applicable rules and regulations.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

335-6-13-.05 Financial Assurance Violations. Failure of the obligor of the bond or financial assurance to provide service satisfactory to the Department shall constitute a cause of action for recovery in a civil action at the instance of the Department.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

335-6-13-.06 Financial Assurance Criteria.

(1) Prior to the issuance or reissuance of a permit or prior to modification of an existing permit, the owner or operator of a facility subject to the requirements of this rule, shall post a performance bond or other financial assurance as described in this rule in an amount sufficient for closure of the facility.

(2) The owner or operator shall have a minimum of two detailed written estimates, in current dollars, of the cost of hiring a third party to perform closure of a facility prior to issuance or reissuance of a permit or modification of a permit. The owner or operator shall submit the closure cost estimates with the permit application and submit a copy of the estimates with the permit application.

(3) The owner or operator shall re-evaluate the closure cost estimate and the amount of financial assurance required if:

(a) Changes to the closure plan or facility conditions significantly increase the maximum cost of closure at any time during the active life of the facility. The owner or operator shall submit any updated cost estimates and documentation of the increase in required financial assurance at least 30 days prior to initiating changes at the facility which would significantly increase the maximum cost of closure at any time during the active life of the facility.

(b) Required by the Department to verify adequate funding to close a facility. This re-evaluation shall be due as required by the Department.

(4) The owner or operator shall establish financial assurance for closure of the facility in compliance with Division 6 rules. The owner or operator (or previous owner/operator) shall provide continuous coverage for closure until:

(a) released from financial assurance requirements by the Department.

(b) a new owner/operator establishes the financial assurance mechanism in accordance with this rule, if ownership/operation is transferred to another entity.

(5) The bond or other financial assurance may be declared forfeited if required by the Department when the owner or operator abandons the facility, ceases operation of the facility, or fails to properly maintain the facility to ensure compliance with state environmental regulations.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

335-6-13-.07 Allowable Mechanisms for Financial Assurance.

Allowable mechanisms used to demonstrate financial assurance under 335-6-13-.07 shall ensure that the funds necessary to meet the costs of closure will be available when they are needed. Owners and/or operators shall choose from the options specified in 335-6-13-.07 (1) through (6).

(1) Trust Fund.

(a) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements below. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency. A copy of the trust agreement shall be placed in the facility's record and a copy submitted to the Department.

(b) Payments into the trust fund shall be made annually by the owner or operator over the life of the permit or over the remaining expected life of the facility, whichever is shorter, in the case of a trust fund for closure. This period is referred to as the pay-in period.

(c) For a trust fund used to demonstrate financial assurance for closure, the first payment into the fund shall be at least equal to the current cost estimate for closure, except as provided in 335-6-13-.07(6) divided by the number of years in the pay-in period as defined in 335-6-13-.07(1)(b). The amount of subsequent payments shall be determined by the following formula:

$$\text{Next Payment} = [\text{CE} - \text{CV}] / \text{Y}$$

where CE is the current cost estimate for closure or post-closure care (updated for inflation or other changes), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(d) The initial payment into the trust fund shall be made before the initial start-up of operations for new facilities or before the reissuance or modification of a permit for existing facilities.

(e) If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in 335-6-13-.07, the initial payment into the trust fund shall be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of 335-6-13-.07(1).

(f) The owner or operator, or other person authorized to conduct closure activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if sufficient funds are remaining in the trust fund to cover the remaining costs of closure and if justification and documentation of the cost is placed in the facility's record, submitted to and approved by the Department. The owner or

operator shall place the documentation of the justification for reimbursement in the facility's record and notify the Department that reimbursement has been received.

(g) The trust fund may be terminated by the owner or operator only if the owner or operator substitutes alternate financial assurance as specified in 335-6-13-.07 or if he is no longer required to demonstrate financial responsibility in accordance with the requirements of 335-6-13-.08.

(2) Surety Bond Guaranteeing Payment or Performance.

(a) An owner or operator may demonstrate financial assurance for closure by obtaining a payment or performance surety bond which conforms to the requirements of 335-6-13-.07(2). The bond shall be effective before the initial start up of operations for new facilities or before the reissuance or modification of a permit for existing facilities. The owner or operator shall place a copy of the bond in the facility record and submit a copy of the bond to the Department for approval. The surety company issuing the bond shall, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the U.S. Department of the Treasury.

(b) The penal sum of the bond shall be in an amount at least equal to the current closure cost estimate, except as provided in 335-6-13-.07(6).

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(d) The owner or operator shall establish a standby trust fund. The standby trust fund shall meet the requirements of 335-6-13-.07(1) except the requirements for initial payment and subsequent annual payments specified in 335-6-13-.07(1) b through e.

(e) Payments made under the terms of the bond will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Department. Payments from the trust fund shall be approved by the Department.

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner and operator and to the Department 120 days in advance of cancellation. If the surety cancels the bond, the owner or operator shall obtain alternate financial assurance as specified in 335-6-13-.07 within 90 days of the notice of cancellation.

(g) The owner or operator may cancel the bond only if alternate financial assurance is substituted as specified in 335-6-13-.07 or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with 335-6-13-.08.

(3) Letter of Credit.

(a) An owner or operator may satisfy the requirements of 335-6-13-.07 by obtaining an irrevocable standby letter of credit which conforms to the requirements of 335-6-13-.07(1). The letter of credit shall be effective before the initial start-up of operations for new facilities or before the reissuance or modification of a permit for existing facilities. The owner or operator shall place a copy of the letter of credit in the facility's record and submit a copy of the letter of credit to the Department for approval. The issuing institution 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.

(b) A letter from the owner or operator referring to the letter of credit by number, issuing institution, and date shall be included with the letter of credit in the facility record and a copy shall be submitted to the Department. The letter shall provide the name and address of the facility, name and address of the owner/operator, and the amount of funds assured.

(c) The letter of credit shall be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for closure except as provided in 335-6-13-.07(6). The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution has cancelled the letter of credit by sending notice of cancellation by certified mail to the owner and operator and to the Department 120 days in advance of cancellation. If the letter of credit is cancelled by the issuing institution, the owner or operator shall obtain alternate financial assurance within 90 days of the notice of cancellation.

(d) The owner or operator may cancel the letter of credit only if alternate financial assurance is substituted as specified in 335-6-13-.07 or if the owner or operator is released from the financial assurance requirements in accordance with 335-6-13-.08.

(4) Insurance.

(a) An owner or operator may demonstrate financial assurance for closure by obtaining insurance which conforms to the requirements of 335-6-13-.07. The insurance shall be effective before the initial start-up of operations for new facilities or before the reissuance or modification of a permit for existing facilities. At a minimum, the insurer shall be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States. The owner or operator shall place a copy of the insurance policy in the facility's record and submit a copy of the insurance policy to the Department for approval.

(b) The closure insurance policy shall guarantee that funds will be available for closure of the facility when final closure occurs. The policy shall also guarantee that once closure begins, the insurer will be responsible for the paying out of funds to the owner or operator or other person authorized to

conduct closure up to an amount equal to the face amount of the policy upon the direction of the Department.

(c) The insurance policy shall be issued for a face amount at least equal to the current cost estimate for closure except as provided in 335-6-13-.07(6). The term face amount means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(d) An owner or operator, or other person authorized to conduct closure may receive reimbursements for closure. Requests for reimbursement will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure and if justification and documentation of the cost is placed in the facility's record and approved by the Department. The owner or operator shall place the documentation of the justification for reimbursement in the facility's record and notify the Department that reimbursement has been received.

(e) The insurance policy shall contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided that such consent is not unreasonably refused.

(f) The insurance policy shall provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the owner and operator and to the Department 120 days in advance of cancellation. If the insurer cancels the policy, the owner or operator shall obtain alternate financial assurance as specified in 335-6-13-.07 within 90 days of the notice of cancellation.

(g) The owner or operator may cancel the insurance policy only if alternate financial assurance is substituted as specified in 335-6-13-.07 or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with the requirements of 335-6-13-.08.

(5) State-Approved Mechanism. An owner or operator may satisfy the requirements of 335-6-13-.07 by obtaining other mechanisms that meet the criteria specified in 335-6-13-.07, and that are approved by the Department.

(6) Use of Multiple Mechanisms. An owner or operator may demonstrate financial assurance for closure as required by 335-6-13-.06(4) and (5), by establishing more than one financial mechanism per facility. The mechanisms must be as specified in 335-6-13-.07(1) to (5), except that financial assurance for an amount at least equal to the current cost estimate for closure may be provided by a combination of mechanisms, rather than a single mechanism.

(7) The language of the mechanisms listed in 335-6-13-.07(1) to (5), must ensure that the instruments satisfy the following criteria:

(a) The financial assurance mechanisms must ensure that the amount of funds assured is sufficient to cover the costs of closure.

(b) The financial assurance mechanisms must ensure that funds will be available in a timely fashion if needed.

(c) The financial assurance mechanisms must be obtained by the owner or operator by the required dates as indicated in these requirements until the owner or operator is released from the financial assurance requirements under 335-6-13-.08.

(d) The financial assurance mechanisms must be legally valid, binding, and enforceable under state and federal law.

(8) Discounting. The Department may allow discounting of closure cost estimates in 335-6-13-.06 (2) and (3) up to the rate of return for essentially risk free investments, net of inflation, under the following conditions:

(a) The Department determines that cost estimates are complete and accurate and the owner or operator has submitted a statement from an engineer so stating;

(b) The Department finds the facility in significant compliance with applicable and appropriate permit conditions; and

(c) Discounted cost estimates must be adjusted annually to reflect inflation and years of remaining life.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

335-6-13-.08 Release from Financial Assurance Requirements by the Department. Upon the submission of a certification by the owner or operator and a determination by the Department that the facility has been properly closed, the facility shall be released from the financial assurance requirements of this chapter. This certification must be submitted to the Director, by registered mail, signed by the owner or operator and by a qualified Professional Engineer. Documentation supporting the Professional Engineer's certification must be furnished to the Director upon request.

Author: Chris Sasser; Daphne Smart

Statutory Authority: Code of Alabama 1975, §§ 22-25C-1 and §§ 22-25C-2.

History: XXXXXXXX, 2013.

**ECONOMIC IMPACT STATEMENT
FOR APA RULE
(Section 41-22-23(f))**

Control No. **335** Department or Agency **Environmental Management**

Rule No: **335-6-13**

Rule Title: **Centralized Waste Treatment Facility Financial Assurance Requirements**

New Amend Repeal Adopt by Reference

This rule has no economic impact.

This rule has an economic impact, as explained below:

1. NEED/EXPECTED BENEFIT OF RULE:

To assure that financial resources will be available in the future to properly close certain centralized waste treatment facilities if the owner or operator ceases proper operation of the facility, abandons the facility, or fails to properly maintain the facility in compliance with state environmental regulations.

2. COSTS/BENEFITS OF RULE AND WHY RULE IS THE MOST EFFECTIVE, EFFICIENT, AND FEASIBLE MEANS FOR ALLOCATING RESOURCES AND ACHIEVING THE STATED PURPOSE:

The costs associated with the proposed rules will be specific to the site of the facility, but the proposed rules will benefit the public by serving to protect public health and the environment in the area of a facility from the potential risks associated with the improper operation, closure, or abandonment of the facility.

3. EFFECT OF THIS RULE ON COMPETITION:

Minimal effects on competition are anticipated inasmuch as all covered facilities will be subject to the same requirements when a permit is issued, reissued, or modified.

4. EFFECT OF THIS RULE ON COST-OF-LIVING AND DOING BUSINESS IN THE GEOGRAPHICAL AREA WHERE THE RULE IS TO BE IMPLEMENTED:

The effect of this rule will be site specific to each facility. Its effect on the geographical area cannot be estimated with specificity, but is expected to be minimal, if at all.

5. EFFECT OF THIS RULE ON EMPLOYMENT IN THE GEOGRAPHICAL AREA WHERE THE RULE IS TO BE IMPLEMENTED: See above.

6. SOURCE OF REVENUE TO BE USED FOR IMPLEMENTING AND ENFORCING THIS RULE:

Sources already dedicated and provided to Department.

7. THE SHORT-TERM/LONG-TERM ECONOMIC IMPACT OF THIS RULE ON AFFECTED PERSONS, INCLUDING ANALYSIS OF PERSONS WHO WILL BEAR THE COSTS AND THOSE WHO WILL BENEFIT FROM THE RULE: See #4.

8. UNCERTAINTIES ASSOCIATED WITH THE ESTIMATED BENEFITS AND BURDENS OF THE RULE, INCLUDING QUALITATIVE/QUANTITATIVE BENEFITS AND BURDEN COMPARISON:

The costs imposed on each facility will depend on the costs estimates for closure for each facility.

9. THE EFFECT OF THIS RULE ON THE ENVIRONMENT AND PUBLIC HEALTH:

The rule is designed to protect public health and the environment in the area of a facility from the potential risks associated with the improper operation, closure, or abandonment of the facility.

10. DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE RULE IS NOT IMPLEMENTED:

Without assurance that financial resources will be available in the future to properly close certain centralized waste treatment facilities if the owner or operator ceases proper operation of the facility, abandons the facility, or fails to properly maintain the facility in compliance with state environmental regulations, the public and the environment could be exposed to the potential risks associated with the improper operation and/or abandonment of a facility.