

NEBRASKA

DEPT. OF ENVIRONMENT AND ENERGY

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05-175N

Revised September, 2021

Guidance Document for the Corporate Financial Test

The corporate financial test allows corporations to assure the closure and/or post-closure costs associated with their solid waste management facilities. The Nebraska Department of Environment and Energy (NDEE) corporate financial test found in Title 132 – Integrated Solid Waste Management Regulations, Chapter 8, includes a financial component, a minimum tangible net worth requirement, and a domestic asset component. It also has recordkeeping and reporting requirements.

Financial Component

A firm must pass one of the following alternatives:

1. Alternative I - Bond rating requirement
 - A firm can satisfy the bond rating alternative if its senior unsubordinated bond rating is investment grade (Baa, A, Aa, or Aaa, as issued by Moody's, or BBB, A, AA, or AAA, as issued by Standard and Poor's).
2. Alternative II - Financial ratio requirement (1)
 - A ratio of total liabilities to net worth of less than 1.5 (leverage ratio).
3. Alternative III - Financial ratio requirement (2)
 - A ratio of the sum of net income plus depreciation, depletion, and amortization, minus \$10 million, to total liabilities of greater than 0.10 (profitability ratio).

Leverage ratios and profitability ratios give a good indication of a firm's financial health and help differentiate between viable and bankrupt firms.

Minimum Net Worth Requirement

Minimum size requirements - A firm must have a minimum tangible net worth greater than \$10 million plus the environmental obligations it seeks to assure. The owner/operator must include costs for all the activities assured by a financial test (i.e., closure, post-closure, and any other environmental obligations, including underground injection control (UIC); petroleum underground storage tank facilities; polychlorinated biphenyl (PCB) storage facilities; and hazardous waste treatment, storage, and disposal facilities (TSDF's)). This minimum tangible net worth requirement provides assurance that the cost of closure and/or post-closure does not force a firm into bankruptcy.

Tangible net worth is defined as the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties. If the firm's

environmental obligations are recognized in the audited financial statements as liabilities, a special report from the independent certified public accountant may be required. See item #4 under *Record keeping and Reporting Requirements*.

Domestic Asset Component

Any firm using the financial test must have assets in the United States at least equal to the costs that the firm seeks to assure. The domestic asset requirement is intended to ensure that funds will be available in the event of bankruptcy.

Recordkeeping and Reporting Requirements

The following items must be submitted to NDEE annually, with the exceptions that item #3 and/or # 4 may not need to be submitted in certain circumstances. See the exceptions noted below.

1. Chief financial officer (CFO) letter - A draft example of a CFO letter is included in this packet. The CFO letter should demonstrate that the firm has complied with the criteria of the test (i.e., the financial component and the domestic assets component) and must be submitted to NDEE annually.
2. Independent certified public accountant's opinion - A copy of the firm's audited financial statements for the latest completed fiscal year that has the accountant's opinion must be submitted to NDEE annually. An adverse opinion, disclaimer of opinion, or any qualification of opinion would automatically disqualify the owner/operator from using the corporate financial test, except some qualified opinions may be allowed if the matters which form the basis of the opinion are determined by NDEE to be insufficient to warrant disqualification.
3. Special report # 1 from the independent certified public accountant, if applicable. If the information used to calculate the financial ratios is different from data in the audited financial statements or data filed with the Securities and Exchange Commission (SEC) this special report should:
 - a. confirm that the data used in the CFO letter to pass the test were appropriately derived from the audited, year-end financial statements; and
 - b. be based upon an agreed upon procedure engagement in accordance with professional auditing standards. It should describe the procedures performed in comparing the data in the Chief Financial Officer's letter with the independently audited financial statements, the findings of that comparison, and the reason for any differences.

Exception: 1) A special report based on an agreed upon procedures engagement from the independent certified public accountant is not required if the following conditions are met:

- The firm uses Alternative I – Bond rating requirement; or
 - The firm uses financial test figures for Alternative II or Alternative III – Financial ratio requirement that are taken directly from the audited financial statements or SEC filings; and
4. Special report # 2 from the independent certified public accountant, if applicable. If the firm's environmental obligations including all closure, post-closure, or corrective action liabilities associated with solid waste facilities, petroleum underground storage facilities, UIC facilities, PCB storage facilities, or hazardous waste treatment storage and disposal facilities are recognized in the audited financial statements as liabilities, the special report should:
 - a. verify that all environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statement;

- b. describe how those obligations have been measured and reported;
- c. confirm that the firm has a tangible net worth of at least \$10 million plus any environmental obligations or guarantees that have not been recognized as liabilities in the annual financial statements.

Exception: A Special Report from the certified public accountant regarding recognition of environmental obligations as liabilities is not required if one of the following conditions are met:

- If the firm can meet the minimum net worth requirement of \$10 million plus the environmental obligations it seeks to assure; or
- If the firm's environmental obligations for closure, post-closure or corrective actions of any of the facilities listed above are not recognized in the audited financial statements as liabilities.

The purpose of the two special reports is to ensure that the accountant has confirmed that the data in the CFO letter are appropriately presented.

The above three items must be submitted, unless there is an exception for item #3, within specific timeframes and must be updated annually. Initially these items must be submitted to NDEE and approved prior to initial receipt of waste or the financial assurance effective date, whichever is later. Each year they must be submitted within 90 days of the close of the firm's fiscal year. NDEE may allow up to an additional 45 days if the firm demonstrates the 90 days is insufficient time to acquire the audited financial statements. If a firm can no longer satisfy all of the financial test criteria it must notify NDEE and obtain an approved alternate financial assurance mechanism within 120 days of the close of the firm's fiscal year.

Corporate Guarantee

A firm may provide a corporate guarantee to another firm to meet the financial assurance requirements if it meets one of the following criteria:

- The firm is the parent corporation or principal shareholder of the solid waste management facility (corporate parent or grandparent); or
- the firm's parent company is also the parent company of the solid waste management facility (corporate sibling); or
- the firm has a "substantial business relationship" with the solid waste management facility (including subsidiaries of the solid waste management facility).

Under a guarantee, the guarantor promises to pay for or carry out closure and/or post-closure care on behalf of the owner or operator of the solid waste management facility. The written guarantee contract must be a legally valid, binding, and enforceable contract between the firms involved that has the following terms:

- A. If the owner/operator fails to perform closure and/or post-closure activities in accordance with the closure and/or post-closure plan the guarantor will either perform those activities or pay the costs of having them conducted by a third party (performance guarantee), or fund a trust to pay the costs of the activities (payment guarantee).
- B. The guarantor must demonstrate to NDEE compliance by passing the corporate financial test on an annual basis. In the case the guarantor fails the test, approved alternate financial assurance must

be provided to NDEE by the owner/operator within 90 days following the close of the guarantor's fiscal year. If the owner/operator fails to provide alternate financial assurance within the 90-day period, the guarantor would be required to provide approved alternate financial assurance within 120 days following the close of the guarantor's most recent fiscal year. NDEE may allow up to an additional 45 days if the firm demonstrates that 90 days is insufficient time to acquire the audited financial statements.

- C. The chief financial officer letter would be identical to that described for the corporate financial test unless the firm providing the guarantee is not a corporate parent, grandparent, or sibling. In that case, the chief financial officer letter must also address the "substantial business relationship" by describing the relationship and the consideration received from the owner/operator in exchange for the guarantee, which is necessary to ensure that the contract is valid and enforceable.
- D. The guarantor agrees to remain bound under the guarantee for so long as the owner/operator must comply with the applicable financial assurance requirements, except that the guarantor may cancel the guarantee by sending written notice by certified mail to NDEE and the owner/operator. Such cancellation cannot become effective earlier than 120 days after receipt of such notice by both NDEE and the owner/operator.
- E. If a guarantee is cancelled the owner/operator must within 90 days following receipt of the cancellation notice obtain an approved alternate financial assurance mechanism. If the owner/operator fails to provide approved alternate financial assurance within the 90-day period, the guarantor must provide alternate assurance within 120 days of the receipt of the cancellation notice by NDEE and the owner/operator.
- F. A performance guarantee may not be combined with other financial assurance mechanisms.

An originally signed certified copy of the guarantee and all of the financial test documentation must be submitted to NDEE within the timeframes outlined under the financial test guidance document.

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