**Section 721.247 Liability Requirements**

a) Coverage for Sudden Accidental Occurrences. The owner or operator of one or more hazardous secondary material reclamation facilities or intermediate facilities that are subject to financial assurance requirements under Section 721.104(a)(24)(F)(vi) must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of its facilities. The owner or operator must maintain liability coverage in force for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in any of subsections (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(6).

1) An owner or operator may demonstrate the required liability coverage by having liability insurance that complies with this subsection (a)(1).

A) Each insurance policy must be amended by attachment of the Hazardous Secondary Material Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the Hazardous Secondary Material Facility Liability Endorsement must be identical to the wording specified by the Agency under Section 721.251. The wording of the Certificate of Liability Insurance must be identical to the wording specified by the Agency under Section 721.251. The owner or operator must submit a signed duplicate original of the Hazardous Secondary Material Facility Liability Endorsement or the Certificate of Liability Insurance to the Agency. If requested by the Agency, the owner or operator must provide a signed duplicate original of the insurance policy.

B) At a minimum, each insurance policy must be issued by an insurer that is licensed to transact the business of insurance, or that is eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

2) An owner or operator may comply with this Section by passing a financial test or using the guarantee for liability coverage that complies with subsections (f) and (g).

3) An owner or operator may comply with this Section by obtaining a letter of credit for liability coverage that complies with subsection (h).

4) An owner or operator may comply with this Section by obtaining a surety bond for liability coverage that complies with subsection (i).

5) An owner or operator may comply with this Section by obtaining a trust fund for liability coverage that complies with subsection (j).

6) An owner or operator may demonstrate the required liability coverage by using a combination of insurance under subsections (a)(2) through (a)(5), except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee if the financial statement of the owner or operator is consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated by the combination must total at least the minimum amounts required for the facility by this Section. If the owner or operator demonstrates the required coverage using a combination of financial assurances under this subsection (a)(6), the owner or operator must specify at least one assurance as "primary" coverage and all other assurance as "excess" coverage.

7) An owner or operator must notify the Agency in writing within 30 days whenever any of the following events has occurred:

A) A claim has resulted in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized by any of subsections (a)(1) through (a)(6);

B) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from operating a hazardous secondary material reclamation facility or intermediate facility is entered between the owner or operator and a third-party claimant for liability coverage established under any of subsections (a)(1) through (a)(6); or

C) A final court order that establishes a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence that arose from operating 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 any of subsections (a)(1) through (a)(6).

BOARD NOTE: Corresponding 40 CFR 261.147(a) recites that it applies to "a hazardous secondary material reclamation facility or intermediate facility with land-based units...or a group of such facilities". The Board has rendered this provision in the singular, intending that it include several facilities as a group if necessary. The Board does not intend to limit the applicability of this provision to multiple facilities. Note that the Agency can require complying with this provision by a facility to which it would not otherwise apply under subsection (d)(2), subject to the owner's or operator's right to appeal an Agency determination to the Board.

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 Section 720.110, that is used to manage hazardous secondary materials excluded under Section 721.104(a)(24) must demonstrate financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences that arise from operations of the facility or group of facilities. The owner or operator must maintain liability coverage for non-sudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. An owner or operator that must comply with this Section may combine the required per occurrence coverage levels for sudden and non-sudden accidental occurrences into a single per-occurrence level, and the owner or operator may combine the required annual aggregate coverage levels for sudden and non-sudden accidental occurrences into a single annual aggregate level. An owner or operator that combines coverage levels for sudden and non-sudden accidental occurrences must maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate. The owner or operator may demonstrate this liability coverage by any of the means in subsections (b)(1) through (b)(6):

1) An owner or operator may demonstrate the required liability coverage by having liability insurance that complies with this subsection (b)(1).

A) Each insurance policy must be amended by attachment of the Hazardous Secondary Material Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the Hazardous Secondary Material Facility Liability Endorsement must be identical to the wording specified by the Agency under Section 721.251. The wording of the Certificate of Liability Insurance must be identical to the wording specified by the Agency under Section 721.251. The owner or operator must submit a signed duplicate original of the Hazardous Secondary Material Facility Liability Endorsement or the Certificate of Liability Insurance to the Agency. If requested by the Agency, the owner or operator must provide a signed duplicate original of the insurance policy.

B) At a minimum, each insurance policy must be issued by an insurer that is licensed to transact the business of insurance, or that is eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

2) An owner or operator may comply with this Section by passing a financial test or by using the guarantee for liability coverage that complies with subsections (f) and (g).

3) An owner or operator may comply with this Section by obtaining a letter of credit for liability coverage that complies with subsection (h).

4) An owner or operator may comply with this Section by obtaining a surety bond for liability coverage that complies with subsection (i).

5) An owner or operator may comply with this Section by obtaining a trust fund for liability coverage that complies with subsection (j).

6) An owner or operator may demonstrate the required liability coverage by using a combination of insurance under subsections (b)(1) through (b)(5), except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee if the financial statement of the owner or operator is consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated by the combination must total to at least the minimum amounts required for the facility by this Section. If the owner or operator demonstrates the required coverage by using a combination of financial assurances under this subsection (b)(6), the owner or operator must specify at least one assurance as "primary" coverage and all other assurance as "excess" coverage.

7) An owner or operator must notify the Agency in writing within 30 days whenever any of the following events has occurred:

A) A claim has resulted in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized by any of subsections (b)(1) through (b)(6);

B) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from operating a hazardous secondary material treatment or storage facility is entered between the owner or operator and a third-party claimant for liability coverage established under any of subsections (b)(1) through (b)(6); or

C) A final court order that establishes a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence that arose from operating a hazardous secondary material treatment and/or storage facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under any of subsections (b)(1) through (b)(6).

BOARD NOTE: Corresponding 40 CFR 261.147(b) recites that it applies to "a hazardous secondary material reclamation facility or intermediate facility with land-based units...or a group of such facilities". The Board has rendered this provision in the singular, intending that it include several facilities as a group if necessary. The Board does not intend to limit the applicability of this provision to multiple facilities. Note that the Agency can require complying with this provision by a facility to which it would not otherwise apply under subsection (d)(2), subject to the owner's or operator's right to appeal an Agency determination to the Board.

c) Petition for Adjusted Standard. If an owner or operator can demonstrate that the level of financial responsibility required by subsection (a) or (b) is not consistent with the degree and duration of risk associated with treatment or storage at a facility, the owner or operator may petition the Board for an adjusted standard under Section 28.1 of the Act. The petition for an adjusted standard must be filed with the Board and submitted in writing to the Agency, as required by 35 Ill. Adm. Code 101 and Subpart D of 35 Ill. Adm. Code 104. If granted, the adjusted standard will take the form of an adjusted level of required liability coverage, this level to be based on the Board's assessment of the degree and duration of risk associated with owning or operating the facility or group of facilities. The owner or operator that requests an adjusted standard must provide the technical and engineering information that is necessary for the Board to determine that an alternative level of financial responsibility to that required by subsection (a) or (b) should apply.

BOARD NOTE: Corresponding 40 CFR 261.147(c) allows application for a "variance" for "the levels of financial responsibility" required for "the facility or group of facilities". The Board has rendered this provision in the singular, intending that it include a single petition pertaining to several facilities as a group. The Board does not intend to limit the applicability of this provision to multiple facilities in a single petition. The Board has chosen the adjusted standard procedure for variance from the level of financial responsibility required by subsection (a) or (b).

d) Adjustments by the Agency

1) If the Agency determines that the level of financial responsibility required by subsection (a) or (b) is not consistent with the degree and duration of risk associated with treatment or storage of hazardous secondary material at a facility, the Agency may adjust the level of financial responsibility required to comply with subsection (a) or (b) to the level that the Agency considers necessary to protect human health and the environment. The Agency must base this adjusted level on an assessment of the degree and duration of risk associated with owning or operating the facility.

2) In addition, if the Agency 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 Agency may require the owner or operator of the facility to comply with subsection (b).

3) An owner or operator must furnish to the Agency, within a reasonable time, any information that the Agency requests to aid its determination whether cause exists for these adjustments of level or type of coverage.

BOARD NOTE: The owner or operator may appeal any Agency determination made under this subsection (d) under Section 40 of the Act.

e) Release from the Financial Assurance Obligation for a Facility or a Unit at a Facility

1) After an owner or operator has removed all hazardous secondary material from a facility or a unit at a facility and decontaminated the facility or unit at the facility, the owner or operator may submit a written request that the Agency release it from the obligation of subsections (a) and (b) as they apply to the facility or to the unit. The owner or operator and a qualified Professional Engineer must submit with the request certifications stating that all hazardous secondary materials have been removed from the facility or from a unit at the facility, and that the facility or a unit has been decontaminated in compliance with the owner's or operator's Agency-approved Section 721.243(h) plan.

2) Within 60 days after receiving the complete request and certifications described in subsection (e)(1), the Agency must notify the owner or operator in writing of its determination on the request. The Agency must grant the request only if it determines that the owner or operator has removed all hazardous secondary materials from the facility or from the unit at the facility and that the owner or operator has decontaminated the facility or unit in compliance with its Agency-approved Section 721.243(h) plan.

3) After an affirmative finding by the Agency under subsection (e)(2), the owner or operator is no longer required to maintain liability coverage under Section 721.104(a)(24)(F)(vi) for that facility or unit at the facility that is indicated in the written notice issued by the Agency.

BOARD NOTE: The Board has broken the single sentence of corresponding 40 CFR 261.147(e) into five sentences in three subsections in this subsection (e) for enhanced clarity. The owner or operator may appeal any Agency determination made under this subsection (e) under Section 40 of the Act.

f) Financial Test for Liability Coverage

1) An owner or operator may comply with this Section by demonstrating that it passes one of the financial tests specified in this subsection (f)(1). To pass a financial test, the owner or operator must meet the criteria of either subsection (f)(1)(A) or (f)(1)(B):

A) Test 1. The owner or operator must have each of the following:

i) Net working capital and tangible net worth each at least six times the amount of liability coverage that the owner or operator needs to demonstrate by this test;

ii) Tangible net worth of at least $10 million; and

iii) Assets in the United States that amount to either at least 90 percent of the owner's or operator's total assets or at least six times the amount of liability coverage that it needs to demonstrate by this test.

B) Test 2. The owner or operator must have each of the following:

i) A current rating for its 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;

ii) Tangible net worth of at least $10 million;

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 at least 90 percent of the owner's or operator's total assets or at least six times the amount of liability coverage that it needs to demonstrate by this test.

2) Definition

"Amount of liability coverage", as used in subsection (f)(1), refers to the annual aggregate amounts for which coverage is required under subsections (a) and (b) and the annual aggregate amounts for which coverage is required under 35 Ill. Adm. Code 724.247(a) and (b) or 725.247(a) and (b).

3) To demonstrate that it meets the financial test in subsection (f)(1), the owner or operator must submit the following three items to the Agency:

A) A letter signed by the owner's or operator's chief financial officer and worded as specified by the Agency under Section 721.251. If an owner or operator is using the financial test to demonstrate both financial assurance, as specified by Section 721.243(e), and liability coverage, as specified by this Section, the owner or operator must submit the letter specified by the Agency under Section 721.251 for financial assurance to cover both forms of financial responsibility; no separate letter is required for liability coverage;

B) A copy of an independent certified public accountant's report on examining the owner's or operator's financial statements for the latest completed fiscal year; and

C) If the chief financial officer's letter prepared under subsection (f)(3)(A) includes financial data that shows that the owner or operator satisfies the test in subsection (f)(1)(A) (Test 1), and either the data in the chief financial officer's letter are different from the data in the audited financial statements required by subsection (f)(3)(B), or the data are different from any other audited financial statement or data filed with the federal Securities and Exchange Commission, then the owner or operator must submit a special report from its independent certified public accountant. The special report must be based on an agreed-upon procedures engagement, in compliance with professional auditing standards. The report must describe the procedures used to compare the data in the chief financial officer's letter (prepared under subsection (f)(3)(A)), the findings of the comparison, and the reasons for any difference.

4) This subsection (f)(4) corresponds with 40 CFR 261.147(f)(3)(iv), a provision relating to extending the deadline for filing the financial documents required by 40 CFR 261.147(f)(3) until as late as 90 days after the effective date of the federal rule. Thus, the latest date for filing the documents was March 29, 2009, which is now past. See 40 CFR 261.147(f)(3) and 73 Fed. Reg. 64668 (Oct. 30, 2008). This statement maintains structural consistency with the corresponding federal provision.

5) After initially submitting items specified in subsection (f)(3), the owner or operator must send updated information to the Agency within 90 days after the close of each succeeding fiscal year. This information must comprise all three items specified in subsection (f)(3).

6) If the owner or operator no longer complies with of subsection (f)(1), it must obtain insurance (subsection (a)(1)), a letter of credit (subsection (h)), a surety bond (subsection (i)), a trust fund (subsection (j)), or a guarantee (subsection (g)) for the entire amount of required liability coverage required by this Section. Evidence of liability coverage must be submitted to the Agency 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 test requirements.

7) The Agency must disallow use of the financial tests in this subsection (f) on the basis of qualifications in the opinion expressed by the independent certified public accountant in the accountant's report on examining the owner's or operator's financial statements (see subsection (f)(3)(B)) if the Agency determines that those qualifications significantly, adversely affect the owner's or operator's ability to provide its own financial assurance by this mechanism. An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Agency must evaluate all other kinds of qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage that complies with this Section within 30 days after receiving notice Agency disallowance under this subsection (f)(7).

g) Corporate Guarantee for Liability Coverage

1) Subject to the limitations of subsection (g)(2), an owner or operator may comply with this Section by obtaining a written guarantee ("guarantee"). The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a sister 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 applicable to an owner or operator in subsections (f)(1) through (f)(6). The wording of the guarantee must be identical to the wording specified by the Agency under Section 721.251. A certified copy of the guarantee must accompany the items sent to the Agency that are required by subsection (f)(3). 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, this 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.

A) The guarantor must pay full satisfaction, up to the limits of coverage, whenever either of the following events has occurred with regard to liability for bodily injury or property damage to third parties caused by sudden or non-sudden accidental occurrences (or both) that arose from operating facilities covered by the corporate guarantee:

i) The owner or operator has failed to meet a judgment based on a determination of liability; or

ii) The owner or operator has failed to pay an amount agreed to in settlement of claims arising from or alleged to arise from the injury or damage.

B) This subsection (g)(1)(B) is derived from 40 CFR 261.147(g)(1)(ii), which USEPA has marked as "reserved". This statement maintains structural consistency with the corresponding federal regulations.

BOARD NOTE: Any determination by the Agency under this subsection (g)(1)(B) is subject to Section 40 of the Act . This subsection (g)(1)(B) is derived from 40 CFR 264.141(h) and 265.141(h) (2017).

2) Limitations on Guarantee and Documentation Required

A) If both the guarantor and the owner or operator are incorporated in the United States, a guarantee may be used to comply with this Section only if the Attorneys General or Insurance Commissioners of each of the following states have submitted a written statement to the Agency that a guarantee executed as described in this Section is a legally valid and enforceable obligation in that state:

i) The state in which the guarantor is incorporated (if other than the State of Illinois); and

ii) The State of Illinois (as the state in which the facility covered by the guarantee is located).

B) If either the guarantor or the owner or operator is incorporated outside the United States, a guarantee may be used to comply with this Section only if both of the following has occurred:

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

ii) The Attorney General or Insurance Commissioner of the State of Illinois (as the 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 (if other than the State of Illinois) has submitted a written statement to the Agency that a guarantee executed as described in this Section is a legally valid and enforceable obligation in that state.

C) The facility owner or operator and the guarantor must provide the Agency with all documents that are necessary and adequate to support an Agency determination that the required substantial business relationship exists adequate to support the guarantee.

BOARD NOTE: The Board added documentation to this subsection (g)(2)(C) to ensure that the owner and operator ensures all information necessary for an Agency determination is submitted to the Agency. The information required would include copies of any contracts and other documents that establish the nature, extent, and duration of the business relationship; any statements of competent legal opinion, signed by an attorney duly licensed to practice law in each of the jurisdictions referred to in the applicable of subsection (g)(2)(A) or (g)(2)(B), that would support a conclusion that the business relationship is adequate consideration to support the guarantee in the pertinent jurisdiction; a copy of the documents required by subsection (g)(2)(A)(ii) or (g)(2)(B)(ii); documents that identify the registered agent, as required by subsection (g)(2)(B)(i); and any other documents requested by the Agency that are reasonably necessary to make a determination that a substantial business relationship exists, as defined in subsection (g)(1)(A).

h) Letter of Credit for Liability Coverage

1) An owner or operator may comply with this Section by obtaining an irrevocable standby letter of credit that complies with this subsection (h) and submitting a copy of the letter of credit to the Agency.

2) The financial institution issuing the letter of credit must 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 must be identical to the wording specified by the Agency under Section 721.251.

4) An owner or operator that uses a letter of credit to comply with this Section may also establish a standby trust fund. Under the terms of this letter of credit, all amounts paid under a draft by the trustee of the standby trust fund must be deposited by the issuing institution into the standby trust fund complying with instructions from the trustee. The trustee of the standby trust fund must 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.

5) The wording of the standby trust fund must be identical to the wording specified by the Agency under Section 721.251.

i) Surety Bond for Liability Coverage

1) An owner or operator may comply with this Section by obtaining a surety bond that complies with this subsection (i) and submitting a copy of the bond to the Agency.

2) The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

BOARD NOTE: The U.S. Department of the Treasury updates Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies", on an annual basis under 31 CFR 223.16. Circular 570 is available on the Internet at the following website: http://www.fiscal.treasury.gov/surety-bonds/circular-570.html.

3) The wording of the surety bond must be identical to the wording specified by the Agency under Section 721.251.

4) A surety bond may be used to comply with this Section only if the Attorneys General or Insurance Commissioners of the following states have submitted a written statement to the Agency that a surety bond executed as described in this Section is a legally valid and enforceable obligation in that state:

A) The state in which the surety is incorporated; and

B) The State of Illinois (as the state in which the facility covered by the surety bond is located).

j) Trust Fund for Liability Coverage

1) An owner or operator may comply with this Section by establishing a trust fund that complies with this subsection (j) and submitting an originally signed duplicate of the trust agreement to the Agency.

2) The trustee must 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.

3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to comply with this Section. 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 that the owner or operator must provide, the owner or operator must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or the owner or operator must obtain other financial assurance that complies with this Section to cover the difference. If the owner or operator must either add sufficient funds or obtain other financial assurance, it must do so before the anniversary date of the establishment of the trust fund. For this subsection, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden or non-sudden occurrences that the owner or operator must provide under this Section, less the amount of financial assurance for liability coverage that the owner or operator has provided by other financial assurance mechanisms to demonstrate financial assurance.

4) The wording of the trust fund must be identical to the wording specified by the Agency under Section 721.251.

(Source: Amended at 48 Ill. Reg. 16813, effective November 7, 2024)