

**Minnesota Pollution Control Agency
Statement of Need and Reasonableness (SONAR)**

**Proposed Amendment to Rules Governing Financial Assurance
for Solid Waste Landfills
Minnesota Rules, Chapter 7035**



**Minnesota Pollution
Control Agency**

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Introduction and Background

The Minnesota Pollution Control Agency (Agency) is amending Minnesota Rules (Minn. R.), chapter 7035 governing solid waste. The Agency is revising existing rules to address two legislative directives, each requiring it to improve siting and financial assurance standards for landfills. The Agency split this into two separate rulemakings; this one addresses changes in financial assurance.

The Agency published a Request for Comments in July 2008 (and again in January 2010) and has worked with stakeholders since that time. The legislative directives were laid out in a May 2008 Omnibus Supplemental Budget bill, 2008 Minnesota Laws, as amended in May 2010 (pertinent language below, or search entire law at the following web link: www.revisor.mn.gov/data/revisor/law/2010/0/2010-361.pdf):

From Laws of Minnesota for 2010, **Chapter 361–S.F.No. 3275**

“Sec. 63. Minnesota Statutes 2008, section 116.07,

[...]

Subd. 4. Rules and standards.

[...]

(c) The rules for the disposal of solid waste shall [...]. The rules shall also include modifications to financial assurance requirements under subdivision 4h that ensure the state is protected from financial responsibility for future groundwater contamination. The modifications to the financial assurance rules specified in this paragraph must require that a solid waste disposal facility subject to them maintain financial assurance so long as the facility poses a potential environmental risk to human health, wildlife, or the environment, as determined by the agency following an empirical assessment. The financial assurance [...] modifications to the rules specified in this paragraph do not apply to:

(1) solid waste facilities initially permitted before January 1, 2011, including future contiguous expansions and noncontiguous expansions within 600 yards of a permitted boundary;

(2) solid waste disposal facilities that accept only construction and demolition debris and incidental nonrecyclable packaging, and facilities that accept only industrial waste that is limited to wood, concrete, porcelain fixtures, shingles, or window glass resulting from the manufacture of construction materials; and

(3) requirements for permit by rule solid waste disposal facilities.

(d) Until the rules are modified as provided in paragraph (c) to include site-specific criteria to prohibit areas from solid waste disposal due to groundwater contamination sensitivity, as required under this section, the agency shall not issue a permit for a new solid waste disposal facility, except for:

(1) the reissuance of a permit for a land disposal facility operating as of March 1, 2008;

(2) a permit to expand a land disposal facility operating as of March 1, 2008, beyond its permitted boundaries, including expansion on land that is not contiguous to, but is located within 600 yards of, the land disposal facility's permitted boundaries;

(3) a permit to modify the type of waste accepted at a land disposal

facility operating as of March 1, 2008:

(4) a permit to locate a disposal facility that accepts only construction debris as defined in section 115A.03, subdivision 7;

(5) a permit to locate a disposal facility that:

(i) accepts boiler ash from an electric energy power plant that has wet scrubbed units or has units that have been converted from wet scrubbed units to dry scrubbed units as those terms are defined in section 216B.68;

(ii) is on land that was owned on May 1, 2008, by the utility operating the electric energy power plant; and

(iii) is located within three miles of the existing ash disposal facility for the power plant; or

(6) a permit to locate a new solid waste disposal facility for ferrous metallic minerals regulated under Minnesota Rules, chapter 6130, or for nonferrous metallic minerals regulated under Minnesota Rules, chapter 6132. [...]."

From LAWS of MINNESOTA for 2010, **CHAPTER 361–S.F.No. 3275**

"Sec. 64. Minnesota Statutes 2008, section 116.07,

[...]

*Subd. 4h. **Financial responsibility rules.** (a) The agency shall adopt rules requiring the operator or owner of a solid waste disposal facility to submit to the agency proof of the operator's or owner's financial capability to provide reasonable and necessary response during the operating life of the facility and for 30 years after closure for a mixed municipal solid waste disposal facility or for a minimum of 20 years after closure, as determined by agency rules, for any other solid waste disposal facility, and to provide for the closure of the facility and postclosure care required under agency rules. Proof of financial responsibility is required of the operator or owner of a facility receiving an original permit or a permit for expansion after adoption of the rules. Within 180 days of the effective date of the rules or by July 1, 1987, whichever is later, proof of financial responsibility is required of an operator or owner of a facility with a remaining capacity of more than five years or 500,000 cubic yards that is in operation at the time the rules are adopted. Compliance with the rules and the requirements of paragraph (b) is a condition of obtaining or retaining a permit to operate the facility.*

(...)

(d) The commissioner shall consult with the commissioner of management and budget for guidance on the forms of financial assurance that are acceptable for private owners and public owners, and in carrying out a periodic review of the adequacy of financial assurance for solid waste disposal facilities. Financial assurance rules shall allow financial mechanisms to public owners of solid waste disposal facilities that are appropriate to their status as subdivisions of the state."

From LAWS of MINNESOTA for 2010, **CHAPTER 361–S.F.No. 3275**

*"Sec. 72. **SOLID WASTE FACILITY FINANCIAL ASSURANCE MECHANISMS: INPUT.***

Within six months after the effective date of this section, and before publishing the rules required for groundwater sensitivity and financial assurance in Minnesota Statutes, section 116.07, subdivision 4, the Pollution Control Agency shall consult with experts and interested persons on financial assurance adequacy for solid waste

facilities, including, but not limited to, staff from the Department of Natural Resources, Minnesota Management and Budget, local governments, private and public landfill operators, and environmental groups. The commissioner shall seek the input to determine the adequacy of existing financial assurance rules to address environmental risks, the length of time financial assurance is needed, based on the threat to human health and the environment, the reliability of financial assurance in covering risks from land disposal of waste in Minnesota and other states, and the role of private insurance."

Rule Development:

Pursuant to the above legislative directives, the Agency published advanced notice of its intent to amend these rules in the *State Register* in July 2008, and began working with stakeholders and interested parties. The 2008 legislative directive required the Agency to report progress on proposed rules to the Legislature in January 2010. The Legislature then clarified its directions and renewed the Agency's authority to make these rules in May 2010. The Agency republished an advanced notice of its intent to amend these rules in the *State Register* on January 3, 2011.

The Agency has registered input and developed lists of interested parties during this process. The Agency originally intended to develop one rule addressing both the siting and the financial assurance aspects of the legislative directive. The Agency later determined that, with different stakeholders and staff involved, and with a moratorium on most new landfills pending the Agency promulgating siting rules that address the legislative directive, it made sense to separate each topic into a separate rulemaking that could proceed on an independent schedule. The Agency anticipates general support for the Legislature's two directives to improve financial assurance standards for Minnesota landfills.

Alternative Format:

The Agency can make this document available in alternative formats such as large print, Braille, or cassette tape. To make a request, please contact Nathan Cooley at the Minnesota Pollution Control Agency, Municipal Division, 520 Lafayette Road North, St. Paul, MN 55155 (phone 651-757-2290). TTY users may call the Agency at 651-282-5332 or 800-657-3864. You may also fax a request to 651-297-8676, or send an e-mail to nathan.cooley@pca.state.mn.us.

Statutory Authority

The Agency has the necessary authority to adopt these proposed solid waste rules. Minn. Stat. § 116.07, subds. 2 and 4(b) provides the Agency general authority for solid waste standards. These general authorities were adopted and effective before January 1, 1996, and allow the Agency to amend existing solid waste rules.

In May 2008, and again in May 2010, the Legislature amended Minn. Stat. § 116.07, subds. 4(c) and 4h(d), providing the Agency with specific authority to set financial assurance standards for landfills. The focus of the legislation was certain types of new landfills that are initially permitted after January 1, 2011. Thus, Minnesota landfills in existence before that date will not be affected by the proposed rules.

Minn. Stat. § 14.125, part of the Administrative Procedures Act (APA), allows the Agency to subsequently amend these rules without additional legislative authorization; it also requires agencies to propose rules within 18-months of receiving specific legislative authorization. These specific rulemaking authorities require the Agency to propose rules no later than November 17, 2011.

General Need for these Amendments

Minn. Stat. chapter 14 requires the Agency to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Agency must set forth the reasons for its proposal, and the reasons must not be arbitrary and capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the Agency is a reasonable approach to addressing the expressed need.

The primary needs driving the Agency to propose these rules are the May 2008 and the May 2010 legislative directives described by the Minnesota Statute extracts shown in Section I (Introduction and Background). The legislative directives charge the Agency with making rules to improve financial assurance rules for certain landfills that receive initial permits after January 1, 2011. The Legislature believed there was a fundamental need to amend financial assurance rules for the regulated landfills in order to ensure that taxpayers are not saddled with costs to correct or mitigate failures in future landfill protective systems whether the landfills are operating at the time, or are closed. The Legislature and the Agency share common goals of protecting public health, the environment, taxpayers, and the economy.

General Reasonableness of these Amendments

Minn. Stat. ch. 14 requires the Agency to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the Agency must set forth the reasons for its proposal, and the reasons must not be arbitrary and capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists which requires administrative attention, and reasonableness means that the solution proposed by the Agency is a reasonable approach to addressing the expressed need. The Agency discusses the general reasonableness of the proposed rules in this section and provides a more detailed discussion in following sections.

The legislative directive required the Agency to work with a specified expert panel of stakeholders to propose rules that follow three stated concepts:

- (1) "Ensure" that the state of Minnesota (State) will not have to pay the costs of landfills that leak contamination into groundwater;
- (2) Limit the coverage of the new rule to certain types of newly permitted landfills only; and
- (3) The "end point" of financial assurance duties at these landfills is to be reached only after the Agency determines that no risk remains to the environment or to health. This differs from current practice, which has been to rely simply on compliance with a postclosure plan that is written by the landfill operator, in reference to a fixed post-closure time span in the landfill permit. The legislative directive is to change this practice, by placing a burden of proof on the landfill operator to show empirically that "no risk" remains at the closed landfill.

The Agency believes the proposed rules provide a reasonable approach to addressing the needs set out by the legislative directive.

The May 2008 legislative directive had the Agency work on developing appropriate rules, but not to finalize work before a progress report that was due by January 15, 2010. The Agency worked with stakeholders and formulated a preliminary rule approach that the Agency felt addressed the 2008

legislative directive. The Agency was also aware of varied and conflicting stakeholder positions and interpretations about legislative intent, so in its January 15th report, the Agency asked the Legislature to clarify its intent on several key issues.

As one example, the 2008 legislative directive was silent on whether the rules should apply to all, existing, expanded or only new landfills. The May 2010 legislative directive clarified that the rule should only apply to specified types of new landfills that receive an initial permit after January 1, 2011.

With the benefit of clarifications in the 2010 legislative directive, and in advance of convening the sector stakeholder group required by the legislation, the Agency revised its approach to these proposed rules, especially by limiting their scope. In addition to limiting the rules to the specified regulated landfills, the Agency determined that it should focus strictly on meeting the legislative directive in the rulemaking.

Normally, when the Agency opens a rule for revision, it takes advantage of that opportunity to do rule “housekeeping” to take care of fixing minor errors or inconsistencies, to make updates, or to improve organization or clarity of existing rules. In this case, the Agency found that in order to comply with the legislative directive in a timely manner, it needed to focus its efforts clearly on that goal. The Agency believes this is a reasonable approach because with many stakeholders, side-issues might make it hard to satisfy the legislative directive and APA deadlines in a timely manner.

Some participants in the legislatively-directed financial assurance stakeholder process, as well as others who attended the meetings or contacted the Agency, stated a need for updates beyond the legislative directive. In those discussions the Agency made a future commitment to stakeholders to continue working with them following this rulemaking to explore options in making such updates. This could include later rule amendments and new or reissued guidance documents and factsheets.

V. Detailed Analyses of Rule Provisions

The Agency has added detailed analyses of need and reasonableness of key rule provisions for this SONAR to extracts of the proposed rule language. The imbedded discussion immediately follows each substantive rule provision. The rule extract shows new rule language in an underlined format and any deleted rule language as stricken. The Agency imbeds its discussion following each substantive rule provision.

Imbedding the analyses within an extract of the proposed rule language clearly ties the rationale to the proposed change. An alternative would be to provide the discussion separate from the rule language and then to refer the reader to the pertinent rule using citations in the discussion. This is intended to help readers to identify and communicate about the specific language of interest. Finally, readers can use an electronic version of this document to quickly search for keywords of interest.

Disclaimer: The Revisor of Minnesota Statutes maintains the only official version of Minnesota Rules (published in printed book form). While the Agency has been diligent in verifying that rule language used in this SONAR is accurate, the Revisor has the only officially certified version. A certified version is published in the *State Register* as part of the public notice.

Background:

In May 2008, the Minnesota Legislature required the Agency to amend its financial assurance rules so as to ensure that the State (taxpayers) would not have to pay the costs of groundwater contamination from landfills. The Legislature further directed the Agency to report back to the Legislature by January 15, 2010, prior to amending the rules. In its January 2010 report to the Legislature, the Agency described stakeholder input and possible changes to its rules; it also set out several questions by the Agency and stakeholders seeking clarification of legislative intent. Following is a Universal Resource

Locator (URL) address linking to the May 2010 law which covers other issues but also contains the Legislature's clarified direction to the Agency (search on keywords such as "landfill" for example): www.revisor.mn.gov/data/revisor/law/2010/0/2010-361.pdf.

Again, the financial assurance rule changes directed by the Legislature, as amended in 2010, are to follow three core concepts:

- (1) "Ensure" that the state will not have to pay the costs of landfills that leak contamination into groundwater;
- (2) Limit the coverage of the new rule to certain types of newly permitted landfills only.
- (3) The "end point" of financial assurance duties at these new landfills is to come only after the Agency determines that no risk remains to the environment or to health. Current practice has been to rely on compliance with a postclosure plan written by the landfill operator, in reference to a time span in the landfill permit. The legislative directive places the "no risk" burden of proof on the landfill operator.

The Legislature also directed the Agency to undertake periodic consultation with the Commissioner of the Minnesota Management and Budget Agency as to financial assurance sufficiency, and stated that financial assurance rules should be appropriate to publicly-owned landfills.

In this rulemaking, the Agency adheres to the May 2010 legislative directive to ensure the soundness of financial assurance for regulated new landfills. These rules are worded so as not to apply to any landfills with existing permits, to renewals of permits for those landfills, or to expansions of those landfills. Also, pursuant to the 2010 directive, these rule changes apply neither to traditional demolition landfills, nor to demolition landfills that also accept limited, named materials from the manufacture of building materials. The Agency does not plan to make unrelated updates or corrections to its rules as part of this rulemaking.

The Legislature also directed the Agency to use input gathered from an expert panel with a wide range of financial-assurance expertise and from stakeholders to inform its rules. In June 2010, the Agency convened a group of financial experts in accordance with the sector participation described by the legislative directive. The Agency named the group the Adequacy of Landfill Financial Assurance panel ("ALFA Panel"). The Agency hosted six half-day ALFA panel public meetings and made these available by Webcast. In these meetings, ALFA members, Agency staff, invited presenters, and interested parties discussed issues identified in the legislative directive. The Agency facilitated the opportunity for ALFA panelists to provide information verbally and in writing to the Agency. Ten ALFA members submitted written "ALFA Panel Input" to inform questions that the Agency drew from the legislative directive.

Following the conclusion of ALFA meetings in October 2010, the members and interested parties had the opportunity on February 14, 2011, and March 1, 2011, to meet with Agency staff and discuss draft financial assurance rules concepts. At those meetings, Agency staff handed out this summary of ALFA members' written input:

Members who do not operate landfills:

- Most felt cash-funded trust funds, surety bonds, and standby letters of credit could meet the legislative "ensure" standard, if the Agency kept checking boilerplate language, and verifying that all conditions are met

- A minority felt only cash-funded trust funds can meet the test of “ensure.” There was some concern, for example, on what happens to uncollateralized letters of credit at an FDIC-insured bank that goes bankrupt. There were suggestions on how to evaluate sureties beyond their listing on Treasury Circular 570.
- Most felt that self-insurance (in particular, uncollateralized self-test) was the weakest of the current mechanisms, for these reasons:
 - Time lag between when financial problems occur inside a company, versus external detection and response by regulators
 - After a company’s financial distress is detected or acknowledged, the company is unlikely to have the ready source of cash required by the cost estimates, credit to draw on, or the ability to provide reliable substitute financial assurance
 - States find it increasingly difficult to monitor complex financial statements of companies to ascertain whether they can perform their obligations. This is even more complex when subsidiaries in other states and nations are involved. During the 2008 crisis, commercial rating agencies had problems also, in large part due to the increased complexity and lack of transparency of financial instruments and transactions
- Some participants believed that shortcomings of any mechanisms and any other non-standard approaches could be addressed through use of Minnesota Department of Natural Resources’ (MDNR) criteria-based approach to financial assurance evaluation at nonferrous mines

Members who operate landfills:

- Said all mechanisms in current rules were sufficiently safe and adequate, and more flexibility is desirable. Public landfill operators said since counties won’t go bankrupt, they should have extra flexibility
- Said the Agency should look for ways to reduce costs and cost estimates, and to declare a quicker end to postclosure care

The Agency also made available the full text of ALFA members’ responses as a table (see Attachment 2).

The following are extracts from the proposed new landfill financial assurance rules followed by the Agency’s rationale:

“7035.2525 SOLID WASTE MANAGEMENT FACILITIES GOVERNED.

[For text of subp 1, see M.R.]

*Subp. 2. **Exceptions.** Parts 7035.2525 to 7035.2915 do not apply to the following solid waste management facilities or persons, except as indicated:*

[For text of items A to E, see M.R.]

F. industrial solid waste land disposal facilities, except that those receiving an initial permit after January 1, 2011, must comply with parts 7035.2615 to 7035.2805;

[For text of items G to K, see M.R.]”

Current Minn. R. 7035.2525 carves out a broad exemption from the automatic applicability of certain technical and financial requirements for specified facility types. The breadth of that exemption varies by facility permit type. One of those types, referenced in subpart 2, item F, is the industrial landfill.

This section extends the applicability of requirements pertinent to financial assurance (Minn. R. 7035.2615 to Minn. R. 7035.2805) to newly permitted industrial landfills.

As to newly permitted industrial landfills, it is reasonable and necessary to limit the application of exemptions to future industrial landfills because the legislative directive explicitly requires newly permitted industrial landfills to post financial assurance. Leaving the exemption in place would run counter to the legislative directive.

Financial assurance is based upon accurate cost estimates. Therefore, in addition to providing that future new industrial landfills will be covered by the financial assurance mechanisms previously applied automatically to mixed-waste combustor ash landfills and mixed municipal solid waste landfills (which are set out in Minn. R. 7035.2665 to Minn. R. 7035.2805), it is also reasonable and necessary to have new industrial landfills subject to rule sections that set out the duties of closure, postclosure care and contingency action (Minn. R. 7035.2615 to Minn. R. 7035.2655). Fulfilling of these specific duties by the permittee are the reasons that financial assurance resources need to be maintained. The appropriate amount of financial assurance can only be determined by estimating the costs of these duties at a specific landfill, from closure through the date at which the Agency releases an operator from the necessity to provide financial assurance for the landfill.

In summary, because of the importance in the legislative directive of guaranteeing that funding will be available in the proper amount for the duration of the risk to health or the environment, making newly permitted industrial landfills subject to Minn. R. 7035.2615 to Minn. R. 7035.2655 is reasonable and necessary to ensure:

- 1) That appropriate cost estimates are made, and updated
- 2) That adequate financial assurance mechanisms are established and are appropriate to the cost estimates
- 3) That the initial mechanisms, or their replacements, remain in force until all postclosure care is completed and the Agency has concluded from an empirical assessment that all risks to the environment and health have ended and
- 4) That the funding mechanisms will be maintained in case the permittee changes

Amendments to 7035.2665 – Scope of financial requirements

“7035.2665 SCOPE.

Parts 7035.2685 to 7035.2805 apply to owners and operators of:

A. mixed municipal solid waste land disposal facilities ~~and~~;

B. municipal solid waste combustor ash land disposal facilities; and

C. the following facilities that received an initial permit after January 1, 2011: an industrial waste land disposal facility and a demolition debris land disposal facility, except those solid waste land disposal facilities that accept only demolition and construction debris and incidental nonrecyclable packaging and certain industrial wastes limited to wood, concrete, porcelain fixtures, shingles, or window glass resulting from the manufacture of building materials.”

Current rules do not automatically require financial assurance for land disposal facilities other than those permitted specifically for disposal of mixed municipal solid waste and for municipal solid waste combustor ash. It is reasonable and necessary to extend the applicability of financial assurance

requirements to certain additional types of newly permitted landfills because the legislative directive explicitly requires these certain types of new landfills to post financial assurance. In addition to the landfills already subject to financial assurance requirements, the legislative directive adds industrial landfills and demolition landfills receiving typical industrial wastes under an industrial solid waste management plan.

Current Minn. R 7035.2665 does not explicitly apply financial assurance requirements to landfills other than those permitted for mixed municipal solid waste and mixed solid waste combustor ash. Instead the Agency must assess costs and risks at these other landfills on a case-by-case basis. Under its rule and statutory authority to use permit conditions to protect the environment and health, the Agency has required some landfills to carry financial assurance on a case-by-case basis. The legislative directive directs the Agency to broaden the list of landfills to be covered by financial assurance. Therefore it is reasonable and necessary to extend the automatic requirement for financial assurance to those other facility types, if newly permitted, because the legislative directive has declared that amended rules should require them to have financial assurance. Leaving the existing rule unchanged would run counter to the legislative directive.

“7035.2695 FINANCIAL ASSURANCES REQUIRED.

A. The owner or operator of a mixed municipal solid waste land disposal facility or a municipal solid waste combustor ash land disposal facility that received an initial permit prior to January 1, 2011, shall establish financial assurance for closure, postclosure care and corrective action at the facility by using one or more of the financial assurance mechanisms specified in parts 7035.2705 to 7035.2750.

B. For facilities that received an initial permit after January 1, 2011, the owner or operator of a mixed municipal solid waste land disposal facility, a municipal solid waste combustor ash land disposal facility, an industrial waste land disposal facility, or a demolition debris land disposal facility, except those solid waste land disposal facilities that accept only demolition and construction debris and incidental nonrecyclable packaging and certain industrial wastes limited to wood, concrete, porcelain fixtures, shingles, or window glass resulting from the manufacture of building materials, shall establish financial assurance for closure, postclosure care, and corrective action at the facility by using one or more of the standardized financial assurance mechanisms specified in parts 7035.2705 to 7035.2745, or alternatively may propose a nonstandardized financial assurance mechanism under part 7035.2751 for approval by the commissioner. These facilities must maintain financial assurance as long as the facility poses a potential environmental risk to human health, wildlife, or the environment, as determined by the agency following an empirical assessment conducted under part 7035.2655.”

This part sets out the requirement for financial assurance and lists where to find allowed mechanisms. The amendment changes the list of allowable mechanisms available to the specified types of newly permitted facilities, as compared to the mechanisms available to existing landfills. Current rules allow applicants to provide financial assurance in any of four mechanisms, one of which is Minn. R. 7035.2750, the “self insurance” mechanism. As to certain types of new landfills permitted after January 1, 2011, the proposed rule would remove self-insurance under Minn. R. 7035.2750 as an option, but would add a new performance-based option, the “nonstandardized” financial assurance mechanism, as new part Minn. R. 7035.2751. It is reasonable to add the nonstandardized option, in cases where the permittee can meet the criteria set forth, because the Administrative Procedures Act directs rulemaking to allow

for performance-based options when possible:

"Therefore, whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals." (Minn. Stat. 14.002)

While there are several types of uncollateralized self-insurance available to public and private entities under Minn. R. 7035.2750, they all rest on a promise from the landfill operator that it will be able to produce enough cash in the future to handle all landfill costs, even if the landfill revenue declines or ceases entirely. This is in contrast to the other three "standardized" mechanisms, which are based on a present-day source of cash that is placed into a dedicated trust fund or else a guarantee by a third party that is financially independent from the landfill. Information at the ALFA meetings indicated that sureties and banks issuing letters of credit have various means of protecting themselves, based on their knowledge of the industry and trade practices, since they will be called upon to pay large sums if the permittee does not fulfill its closure, postclosure, and contingency action duties.

Self-insurance involves no such third-party guarantee, and therefore no scrutiny by an independent guarantor. The landfill applicant does not have to set aside cash in a trust, nor does it have to obtain an irrevocable guarantee from an independent third party that has the wherewithal to pay the costs of closure, postclosure care, or contingency action in the event that the landfill operator cannot. Self-insurance is a formalized promise to pay out of future, unspecified revenues or borrowings. A public entity states that it can raise the money in the future because it will have enough revenue-raising power through taxation or bonding. A private entity states that it can provide enough money when necessary because the business is solvent now and therefore it will have sufficient resources in the future, whenever expenses come due.

Such uncollateralized and unsecured promises will be extinguished, or significantly reduced in worth, if the landfill operator goes into bankruptcy and liquidation. When an entity goes into bankruptcy (and these can include local governments) courts and trustees gather assets and distribute the liquidated proceeds among unsecured creditors according to their priority rankings. The bankruptcy process in considering the full range of creditors puts little or no weight on environmental protection, compared to the accounts receivable held by present day creditors. This problem is particularly acute when bankruptcy occurs soon after a landfill closes for business. Because the majority of landfills are more a storage mechanism than a treatment technology, many costs caused by leakage or fire may be delayed decades into the future, long after assets have been divided up.

Information at the ALFA meetings provided some examples from around the country where landfills were in financial distress and left without sufficient financial assurance, but where regulatory intervention produced some cash to handle some of the environmental problems. These typically involved continuing with landfill operations that restarted under a new operator who was required to set money aside from current revenues into a trust fund. This "workout" process may be sufficient to pay postclosure care expenses at landfills where the fiscal crisis occurs early in the revenue cycle, when it has years of airspace remaining, because much of the tipping fee revenue has yet to be received. However, it is not satisfactory for a landfill that has a fiscal collapse after it is full, at the end of its revenue life, and is experiencing costly problems with its engineered systems. This is the time at which self-insured landfills are most likely to declare that they are having financial problems, because costs are going up at the same time that revenues are about to end. There is a temptation at that point for the

landfill company to declare bankruptcy and to cease paying property taxes, at which point a county is supposed to take care of a huge liability with no assets. At that point, there is no source of cash other than by turning to government as the source of bailout funds, or to Superfund liability.

The temptation to declare bankruptcy and leave the problem to taxpayers has already proven to be a significant problem in the hardrock mining industry. In a document entitled *EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations* (2005), the General Accounting Office described the consequences of poor federal oversight of mining companies' financial assurance duties:

"In seeking to hold liable businesses responsible for their environmental cleanup obligations, the EPA faces significant challenges that often stem from the differing goals of environmental laws that hold polluting businesses liable for cleanup costs and other laws that, in some cases, allow businesses to limit or avoid responsibility for these liabilities. For example, businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries.... [The] EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to demonstrate their ability to pay for potential environmental cleanups — that is, to provide financial assurances. [The] EPA has cited competing priorities and lack of funds as reasons for not implementing this mandate, but its inaction has exposed the Superfund program and U.S. taxpayers to potentially enormous cleanup costs at gold, lead, and other mining sites and at other industrial operations, such as metal-plating businesses. Also, [the] EPA has done little to ensure that businesses comply with its existing financial assurance requirements in cleanup agreements and orders. Greater oversight and enforcement of financial assurances would better guarantee that cleanup funds will be available if needed."

The main problems with self-insurance highlighted in the ALFA meetings were (1) the inability of the state to keep up with rapid changes in the financial status of corporations, especially in the absence of current and accurate reporting by the corporations regarding their financial condition, and (2) the lack of an iron-clad guarantee from a third party with financial resources entirely separate from the waste operations. Reports from the General Accounting Office in 2002 and 2006 listed hundreds of publicly held major corporations that had to retract their financial statements because information in those statements was grossly incorrect and needed restatement. Despite hope that the Sarbanes-Oxley law would remedy this problem, financial literature is pointing to an "expectations gap" between what shareholders want by way of financial-statement accuracy and what auditors have been able, or willing, to verify. No structural solution to misleading financial statements has been found.

The Agency has concluded that to allow self insurance as a mechanism would not satisfy the legislative directive that financial assurance must "ensure" that the state does not pay the cost of groundwater contamination at the specified types of newly permitted landfills. This also was the opinion of a clear majority of ALFA members when queried by the Agency at the conclusion of the ALFA meetings. Most ALFA members questioned whether any state regulatory department had the ability to monitor corporate financial statements well enough for self insurance to meet the "ensure" standard of the legislative directive. Even if the state were to track such statements in an expert fashion, members were concerned about the time lag involved in such statements compared to the corporations' current status. Financial statements are retrospective and even under ideal circumstances do not enable states to predict a company's compliance given the trend to more restatements, reorganizations, and mergers. A

third complicating factor is that mergers may include moving corporate headquarters to a foreign location, where enforcement of financial assurance by a state attorney general is likely to be difficult. While it is common for privately-owned landfills to be owned by a company with a Minnesota address, this is a corporate subsidiary specifically set up to shield the parent corporation from liability. That subsidiary commonly owns a single landfill.

Most ALFA members that did not operate landfills expressed the opinion that cash-funded trust funds, surety bonds, and standby letters of credit were sufficiently strong to meet the “ensure” standard in the legislative directive, if certain caveats are kept in mind. Such members urged the Agency to continue checking that language of the instruments met the rule-required language exactly, and the financial institutions being relied upon were legitimate banks and sureties. Some stated a concern that sole reliance on a trust fund (which is allowed by current rule, and in the proposed rule) tends to underfund the landfill in the early stages and therefore a combination of a growing trust fund and a declining bond or letter of credit would be a stronger combination because the landfill would be protected at all stages. Some landfills follow this practice now.

A minority of non-landfill operators felt nothing but cash-funded trust funds could meet the test of “ensure.”

Landfill operators stated that Minnesota’s current rules were sufficient to meet the legislative directive’s “ensure” test.

The legislation directed the Agency to consider forms of financial assurance appropriate to local units of government. The great majority of current publicly-owned landfills, if of a type required to carry financial assurance, employ cash-funded trust funds. This money is raised from the Greater Minnesota Landfill Cleanup Fee (in the case of Mixed Municipal Solid Waste (MMSW) landfills) or, in the case of combustor ash landfills, from user fees charged at the waste combustor. Publicly owned landfills do have access to surety bonds and letters of credit, but have preferred to employ cash funded trust funds.

The Agency believes it is reasonable to satisfy the legislative directive as it relates to new publicly-owned landfills by leaving the trust fund mechanism in place, and adding an option to propose a nonstandardized financial assurance mechanism. This is reasonable because the preferred practice in waste disposal is “pay as you go.” In a pay as you go plan, landfill operators charge a fee to pay for financial assurance up front, and set that money aside to grow as the landfill fills. Because such trust funds may only be spent for landfill care as authorized by the Agency, this safeguards the funds so that they are available for landfill care when needed, even decades after closure. The owner may only obtain the balance plus interest after all postclosure care duties are complete according to the legislative directive (i.e., no remaining risk to the environment or to human health). This avoids an undesirable shifting of postclosure and contingency-action costs forward in time to people who never used the service.

Some companies that operate existing industrial landfills, mostly publicly regulated utilities, have used uncollateralized self-insurance when using the self-insurance option, and if allowed by the Agency. Later, if required to post collateral, they typically shift to letters of credit or surety bonds. Not all Minnesota landfill-operating companies have been able to meet the conditions for the self-test, but in such cases they have obtained other forms of financial assurance.

At some point the landfill will cease operations, the filled areas will be closed, and the postclosure care period begins. Prior to the legislative directive, state law and rules did not fully resolve how to determine when postclosure care duties are over. In Minn. Stat. 116.07, subd. 4h, the Agency was authorized to write rules in which the landfill operators' postclosure care duties extend "a minimum of 20 years" for non-Municipal Solid Waste (MSW) landfills, and "30 years" for MMSW landfills.

Current rules point to two documents to guide decisions as to when a landfill operator's postclosure duties are complete: one is the Agency's closure document issued under Minn. R. parts 7035.2625 and 7035.2635, which upon signing has a legal and binding effect throughout the entire postclosure care period. The other document is the postclosure care plan under part 7035.2645, drafted by the operator and approved by the Agency. Both documents may be amended during the postclosure care period.

The standard as to completion of landfill financial assurance duties, as set out in the legislative directive, is not found in current rule: *"The modifications to the financial assurance rules specified in this paragraph must require that a solid-waste disposal facility subject to them maintain financial assurance so long as the facility poses a potential environmental risk to human health, wildlife, or the environment, as determined by the agency following an empirical assessment."*

The Agency reads the legislative directive as a shift from the current approach used for municipal solid waste facilities, which is customarily regarded as a fixed period of approximately 30 years of postclosure care, which may terminate without regard to the reactivity and quantity of the waste remaining under the final cover.

Landfills are an evolving technology and the Agency believes that to satisfy the legislative directive's empirical test, it will need a wide range of information from the operator. This will include current emissions as well as the potential to emit in the future. The latter will depend on an assessment of the chemical and biological characteristics of the waste mass remaining, in combination with the predicted performance of the final cover over many years. Some solid waste professionals proclaim that if the waste mass has been reacted fully, the long-term fate of the cover is not important because the waste would be functionally equivalent to a hill of dirt and rock. The legislative directive would be fully satisfied in such a case.

Given the lack of information and consensus at this time as to which criteria would support an Agency finding of "potential environmental risk to human health, wildlife, or the environment," the Agency believes the most prudent course is to cite the legislative directive in its rules and work out the empirical criteria in the years to come, as more information comes forward as to the performance of the engineered, lined landfill.

This is reasonable because future landfills will have very long timeframes for permitting, operation, and postclosure care. A typical lined landfill takes five to ten years from initial proposal to begin operation; it accepts and buries waste for 30 to 50 years, and this is followed by decades of postclosure care. Therefore the earliest date for needing to do an empirical review of the endpoint of financial assurance at the affected landfills should fall sometime after 2070. Because the endpoint does affect the amount of funding needed, it is desirable for the Agency, in consultation with stakeholders, to issue guideline on how landfills should answer the empirical questions by 2020. This will be very early in the lifecycle of landfills to be permitted after January 2011.

It is reasonable and necessary to insert the language from the legislative directive into the rule as it

bears on future landfills, because the legislative directive places an empirical burden of proof on the landfill operator to prove to the Agency that no risks remain to health or the environment. The Agency will make this determination. After the Agency determines that the legislative directive is satisfied and no risk remains, the permittee will be released from responsibility by the closure order. Because the Agency will have determined that no risk remains to the environment or to health, it is reasonable to provide that maintenance of financial assurance funds will no longer be necessary and any remaining cash or instruments will be returned to the permittee.

"7035.2751 PROPOSALS FOR NONSTANDARDIZED FINANCIAL ASSURANCE MECHANISMS: FACILITIES INITIALLY PERMITTED AFTER JANUARY 1, 2011.

Subpart 1. Criteria for nonstandardized financial assurance mechanisms.

A. A nonstandardized financial assurance mechanism must meet the criteria in items B to E to be approved for use.

B. The mechanism must ensure that funds sufficient to cover the estimated costs of closure, postclosure care, and corrective action are available at all times.

C. The mechanism must be such that the funds will be available and immediately payable directly into the standby trust fund according to instructions from the commissioner. The standby trust fund must meet the requirements 3.1 in part 7035.2705 and an originally signed duplicate of the trust agreement must be submitted to the commissioner along with the mechanism.

D. The mechanism must be fully valid, binding, and enforceable under state and federal law.

E. The financial assurance mechanism must be drafted so that the financial assurance funds will not be assets in any bankruptcy proceeding filed by the permittee and will remain accessible by the commissioner throughout the bankruptcy reorganization or discharge.

Subp. 2. Evaluation; approval or disapproval.

A. All terms and conditions of a nonstandardized financial assurance mechanism must be approved by the commissioner. When the commissioner determines that the agency would benefit from an expert opinion on the adequacy of a proposed nonstandardized financial assurance mechanism, the commissioner shall retain an independent expert acceptable to the commissioner to evaluate the mechanism, at the owner's or operator's expense, to determine if the mechanism meets the criteria of subpart 1. The independent expert must have documented experience in the analysis of risk and the use of financial instruments used as guarantees such as bonds, letters of credit, and insurance. Prior to permit reissuance, the commissioner may require reevaluation of the nonstandardized financial assurance mechanism.

B. If a proposed nonstandardized financial assurance mechanism is disapproved by the commissioner, the operator or owner may submit an application for an alternative nonstandardized financial assurance mechanism or provide standard financial assurance under parts 7035.2705 to 7035.2745."

The Agency offered this mechanism after receiving comments from landfill operators during stakeholder meetings in the fall of 2010. They wanted flexibility if the Agency was going to reduce the number of allowable standard mechanisms for financial assurance to cash-funded trust funds and letters of credit. The Agency modeled this section on the Minnesota Department of Natural Resources' (MDNR) rule for financial assurance at nonferrous mines (Minn. R. 6132.1200); however, rather than relying solely on this mechanism (as does the MDNR), the Agency proposes adding this nonstandardized mechanism to three existing mechanisms using standard "boilerplate" language. The Agency believes these mechanisms would be capable of meeting the "ensure" standard of the legislative directive.

This section describing the nonstandardized mechanism sets out four criteria which, if all are satisfied, will constitute an acceptable, performance-based alternative to the three standard mechanisms. These criteria are modeled after those in the MDNR rule for financial assurance at nonferrous mines.

- (1) Adequacy: Because the commissioner may need to conduct closure, postclosure care or contingency actions (in the event the permittee is unwilling or unable), it is reasonable to require that assurance be large enough to cover the estimated costs at the time the need arises. The amount needed will depend on the status of the landfill: what work is complete and what work needs to be done.
- (2) Timeliness: It is also reasonable to require that the funds are available to the commissioner at the time they are needed, and would not necessitate burdensome procedural or legal remedies to acquire, or would not result in delays while the permittee seeks to sell off business units or other assets. Because it may be necessary for the commissioner to react quickly to provide the needed response action, it is reasonable to require that the financial assurance be sufficiently liquid to meet needs arising or anticipated at given stages of the landfill's postclosure care period or to implement a corrective action. Delays caused by waiting for the sale of assets, or for money to be raised from customers, combined with inflating costs, may jeopardize success.
- (3) Binding effect: The assurance must be binding under state or federal law, or it cannot be considered adequate.
- (4) Safe from bankruptcy: Since a primary risk of nonperformance by a landfill permittee is bankruptcy, it is reasonable to require that the Agency's claims to financial assurance funds be exempt from bankruptcy and must not be extinguishable in a bankruptcy proceeding.

As to review of a proposed mechanism by outside consultants with expertise in relevant financial markets, it is anticipated that some proposals for nonstandardized financial assurance mechanisms, as submitted by the applicant, may be beyond the ability of the commissioner to evaluate without the aid of experts in the fields of banking, suretyship, trusts, insurance, or any of several other highly specialized areas of finance where accurate, up to date knowledge is only available through actual, day in and day out, hands on, working experience.

It is vital to have this expertise be independent because the nonstandardized mechanisms are by nature flexible and the proposed rule does not contain the proven, time-tested boilerplate language that Minnesota and other states have found necessary to require, in order to enforce the collectability of standardized financial assurance mechanisms.

It is therefore reasonable for the commissioner to have the authority to seek out such expertise prior to approval. It is reasonable to require that this expertise be selected by the Agency, or else it would not be an independent opinion. Because access to such expertise will expedite decisions and protect the public, and because the permittee has the option of using one or more of the three standardized methods that do not trigger the need for hired expertise, it is not anticipated that the applicant will object to paying the market costs of such an evaluation.

Situations may arise where the commissioner upon review rejects a nonstandardized mechanism. In that case it is reasonable that the applicant have the opportunity to submit an alternative nonstandardized mechanism, which may need another independent expert review, or the applicant may turn to one or more of the three standardized methods available to landfills that are initially permitted after January 1, 2011. These will not need an expert review.

During discussion of the informal draft, stakeholders asked whether the nonstandardized mechanism should be regarded as an exception to the otherwise rigorous requirements of the three standardized methods, and would somehow allow firms to obtain financial assurance after being turned down by banks and sureties for lack of cash, collateral, or other indications of financial strength. The Agency does not regard this view as consistent with the 2008 and 2010 statutes, which directed the Agency to adopt rule amendments that would “ensure” the state does not pay for the costs of groundwater contamination from the landfills subject to the rules. The legislation called for more rigor in the financial assurance rules for new landfills, rather than less.

The four criteria set out in the nonstandardized mechanism should make it clear that the mechanism must provide real guarantees, and not mere assurances or paper promises. Strong guarantees typically involve liquid assets committed to this purpose, and/or irrevocable guarantees from independent and diversified third parties. Therefore applicants should not regard the nonstandardized mechanism as a loophole for landfill operators so marginal that no established institutions are willing to deal with them. A presenter at the ALFA meeting, representing surety company Evergreen National Indemnity, said sureties perform due-diligence checks to make sure that a potential client will not collapse after pocketing the bulk of a landfill’s revenue, and leave sureties liable for environmental cleanup.

Because of the historically strong track record of the three standard mechanisms, and because of the “boilerplate” language that is required of permittees and financial institutions in those rules worded so as to avoid legal disputes as to meaning, it is reasonable for the rules not to require an expert evaluation of the three standard mechanisms.

Because conditions may change in financial markets and this could affect the strength of the guarantees backing the nonstandardized mechanism, it is reasonable to provide the commissioner with the authority to require a subsequent expert analysis of the nonstandardized mechanism, if deemed necessary.

As of a law change in 2011, landfills permitted by the Agency will need to obtain renewed permits every ten years (previously, every five years). It is reasonable for the Agency to have the option of re-evaluating financial assurance at intervals, particularly where financial assurance is relying on nonstandardized instruments that are not based on time-tested boilerplate language. ALFA group members reminded the Agency that even a large, publicly-traded company’s financial status can change rapidly, citing the case of Safety-Kleen. (In that case, a series of embarrassing disclosures led to a restatement that changed a supposed profit of \$534 million to an actual loss of \$833 million. Shortly afterward, Safety-Kleen declared Chapter 11 bankruptcy.)

These two events drastically reduced the present value of financial assurance available for postclosure care and contingency action at Safety-Kleen’s hazardous waste landfill at Pinewood, South Carolina.

Hundreds of fraudulent corporate financial statements posted in 2000-2001 cost investors \$100 billion in share value (“The three Cs of fraudulent financial reporting,” *The Internal Auditor*, October 2002). Despite passage of the Sarbanes-Oxley disclosure law, the 2008 near-collapse of the global financial market was much more severe. Investor groups complain that the problem of fraudulent financial statements is as great as ever, according to this article from a financial auditing publication:

"The [Public Company Accounting Oversight Board]'s Investor Advisory Group made an impassioned plea to the board to investigate why auditors failed to flag even a single major corporate failure in the 2008 tailspin that plunged the global economy into recession. Monumental collapses at Bear Stearns, Lehman Brothers, AIG, Citigroup, Fannie Mae, Freddie Mac, Washington Mutual, and Countrywide Financial, for example, cost investors more than \$580 billion by the group's calculation, yet their bankruptcies, takeovers, and bailouts followed clean audit opinions. "It's still not clear how or why the audit process didn't work, says Barbara Roper, an investor advocate with the Consumer Federation of America. The Sarbanes-Oxley Act of 2002 was supposed to solve this problem, she says, but obviously it didn't. "[The PCAOB] needs to conduct a detailed, transparent, in-depth examination of the role of auditors in the financial crisis," she argues. 'That needs to look at what went wrong with the audits of major financial institutions, why the problems occurred, and what can or should be done about it.' ("Investors Push for Change to Auditors' Role," Compliance Week, May 2011)" (Emphasis added)

"7035.2755 USE OF MULTIPLE FINANCIAL ASSURANCE MECHANISMS.

An owner or operator may satisfy the requirements of part 7035.2695 by establishing more than one mechanism for financial assurance per facility. For facilities that received initial permits before January 1, 2011, these mechanisms are limited to trust funds, surety bonds guaranteeing payment into a trust fund, self-insurance, and letters of credit. For facilities that received initial permits after January 1, 2011, these mechanisms are limited to trust funds, surety bonds guaranteeing payment into a trust fund, letters of credit, and nonstandardized financial assurance mechanisms approved by the commissioner. The mechanisms must be established as specified in parts 7035.2705, 7035.2715, 7035.2720, 7035.2725, 7035.2745, ~~and~~ 7035.2750, and 7035.2751, except that it is the combination of mechanisms, rather than a single mechanism, which must provide financial assurance for an amount at least equal to the sum of the current cost estimates. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, the owner or operator may also use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The commissioner may use any or all of the mechanisms to provide for closure, postclosure care, or corrective action at the facility."

The current rule part allows a landfill permittee to choose from a combination of the four currently allowed mechanisms. The amendment adds language that also allows multiple mechanisms at new landfills, but the choice is drawn from the selection of mechanisms that will be available to new landfills (i.e., cash funded trust funds, surety bonds, standby letters of credit, and the nonstandardized financial assurance mechanism).

Continuing to allow multiple mechanisms is reasonable and necessary, and to be encouraged, because it spreads the risk of any one mechanism failing. Thus it serves the legislative directive, while also allowing flexibility as financial conditions change. The banking representative on the ALFA panel urged the use of multiple mechanisms to spread risk, and this was consistent with the opinion of ALFA members. A combination has been used, for example, at an existing industrial landfill in Minnesota that uses a surety bond at the early stages to cover unfunded costs while its trust fund is building; by the end of the landfill's life, financial assurance should rest all or mostly on the strength of the trust fund. Because some new landfills may also wish to use multiple mechanisms, it is reasonable and necessary to include

the nonstandardized financial assurance mechanism as an option when assembling the necessary financial assurance for new landfills.

A minority of ALFA members felt that rules should state a preference for the use of multiple mechanisms, or require multiple mechanisms. The Agency considered that suggestion but decided that landfill applicants should be allowed to choose among available mechanisms as long as all requirements and criteria are met. This is reasonable because financial conditions change over time and some flexibility is desirable.

Other subjects proposed for rule changes by stakeholders

Other subjects proposed by ALFA members are not in this rule, because the Agency sees them as applicable to the full range of landfills, current and future. As such they are beyond the scope of the rules required by the latest legislative directive, which provides that this rule not bear upon landfills of any type if initially permitted before January 2011. Further, there is a need to publish the proposed rule for public comment before November 16, 2011, which is the deadline set by APA in situations where the Legislature specifically directs a rule change. The Agency makes no comment about the merits of these suggestions other than to say they are worthy of further discussion.

The members' suggestions are contained in the ALFA member input table (see Attachment 2). Some of their suggestions include: Changing the calculation of the discount rate applying to trust funds, so that it varies less from year to year; adding other tests in addition to being listed on Treasury Circular 570 to verify the strength of sureties; and offering the non-standardized financial assurance mechanism available to landfills permitted before January 2011.

VI. Regulatory Analysis under Minn. Stat. § 14.131

Minn. Stat. § 14.131, entitled Statement of Need and Reasonableness, is supported by Minn. Stat. § 14.23, and Minn. R. 1400.2070, and requires the following considerations in the SONAR:

“By the date of the section 14.14, subdivision 1a, notice, the agency must prepare, review, and make available for public review a statement of the need for and reasonableness of the rule. The statement of need and reasonableness must be prepared under rules adopted by the chief administrative law judge and must include the following to the extent the agency, through reasonable effort, can ascertain this information:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

Also,

(8) The statement must describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.

(9) The statement must also describe the agency's efforts to provide additional notification under section 14.14, subdivision 1a, to persons or classes of persons who may be affected by the proposed rule or must explain why these efforts were not made.

(10) The agency must consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.

(11) The agency must send a copy of the statement of need and reasonableness to the Legislative reference Library when the notice of hearing is mailed under section 14.14, subdivision 1a."

The Agency addresses these considerations in order below:

1. Classes of Persons Affected.

The Agency is to describe the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

Who is affected?

These rules will regulate those parties applying for an initial permit after January 1, 2011, to operate one of the types of landfills described in Section I. While the proposed rules will change financial assurance mechanisms allowed for parties regulated by the new rules, these parties would have already been required to have financial assurance for operating a specified type of landfill under existing rules. The new rules should not increase or decrease the size of the currently small regulated community, which is landfill developers, owners and operators of specified types of landfills newly permitted after January 1, 2011.

Relatively few parties are likely to be affected by the proposed financial assurance rules, because applications for new landfill permits are infrequent. In the recent past, before the statutory landfill moratorium of 2008, taking into account all landfill types to be covered by this rule, the Agency has received an average of one to two initial permit applications per year. Recent experience in Minnesota and elsewhere indicates that the most profitable practice is for operators to expand their existing landfills under their existing permit, rather than build a new or "greenfield" landfill, where they would have to face greater attention from residents and, even if successful, would have to pay extra fees to the host community that are not currently paid by existing landfills. The legislative directive in Minn. Stat. § 116.07, subd. 4(d), explicitly exempts from these rules landfills that wish to expand under a permit issued prior to January 1, 2011, so the likelihood that operators will rely on existing capacity will be higher than ever.

The Agency relayed a stakeholder's concern in the January 15, 2010, report to the Legislature that applying the new rules to the smaller demolition type landfills would most likely prohibit their use. These small demolition landfills are most relied upon in Greater Minnesota where alternative landfills

are often not locally available. The May 2010 legislative directive stated that the proposed rules would not apply to such classic demolition landfills whether existing or newly permitted.

Who bears the cost of complying with these new rules?

The Agency believes that the cost of complying with proposed financial assurance rules should not change radically at new landfills compared to existing ones, because the operators of existing lined landfills are already under financial assurance obligations. Current rules and permits require using at least one of several financial assurance mechanisms. From 2000 to the present, six landfills have at some point used the self-insurance mechanism that the Agency proposes removing from the list of financial assurance options. In an ideal world, every permittee should have made arrangements to pay all required long-term costs associated with its landfill operation. In common practice, however, consensus of the expert panel was that some financial assurance mechanisms are less assuring than others if costs are deferred rather than guaranteed or set aside out of current revenues. The legislative directive requires that Agency rules "ensure" that sufficient money is available to pay the costs of groundwater contamination decades after the landfill has closed and the revenue stream has ended.

The Agency believes that the proposed rules do not substantively change the existing regulated community of landfill owners, add significant new requirements, or change the financial assurance obligations that otherwise would have been required for new landfills. Existing part 7035.2695 already requires owners or operators of MMSW and MSW ash landfills permitted prior to January 1, 2011, to provide financial assurance using mechanisms specified in parts 7035.2705 to 7035.2750. Proposed rules do not create additional responsibility for financial assurance, but elaborate on what is acceptable. The proposed rules amend 7035.2695 to provide that landfill types specified by the legislative directive that receive initial permits after January 1, 2011, must choose a financial assurance mechanism from a reduced list of optional known mechanisms in parts 7035.2705 to 7035.2745, or choose an alternative mechanism under 7035.2751. The Agency is likely to more closely scrutinize any financial assurance selected by the permittee of a new landfill in order to check it against the "ensure" standard formulated by the Legislature. If the permittee selects the alternative mechanism under 7035.2751, the Agency will seek professional evaluation initially and on permit renewal to assure that the financial assurance mechanism would prove adequate. Added costs to comply with the proposed rules will primarily be borne by the permittees of new landfills. Existing landfills are not covered by the rules.

Who benefits?

The proposed rules are primarily intended to safeguard the health, environment, and pocketbooks of Minnesota taxpayers by assuring that financial assurance mechanisms provide reliably accessible funds to remediate problems at a landfill during its operating life, to pay for closure work, and to pay expenses during the postclosure period.

The Agency administers a unique, taxpayer-supported program that was set up to address the unfunded problems left by older, state-permitted municipal solid waste landfills; before this program, such problems if handled at all had to be paid for with money raised under the highly litigious Superfund program. In 1994, the Minnesota Legislature passed legislation as an alternative to Superfund, creating the Closed Landfill Program (CLP). Under the CLP, the Agency became responsible in perpetuity for the long-term care of 112 state-permitted, municipal solid waste landfills throughout Minnesota, holding 60 million tons of waste dating back to 1948. Eligible landfills were those that closed by the statutory deadline and that met other conditions for qualification. The mission of the CLP is to manage the risk to public health and the environment that is associated with these landfills. This is accomplished by undertaking cleanup actions, long-term operation and maintenance, and the monitoring of area groundwater for contamination and landfill gas. The cumulative cost of that program has been \$340

million through FY 2010.

Some ALFA members pointed out that environmental and health threats that could be posed by modern lined landfills now in operation, or to be permitted, should differ significantly from those posed by the old closed landfills eligible for the CLP. Most of the older closed landfills covered by the CLP were unlined, or partially unlined, so leachate was free to flow out the bottom. Still, the Agency believes that concerns about the high and persistent costs of the CLP (which is still in operation and incurring expenses, after 17 years) helped drive the legislative directive that financial assurance must be sufficient to protect taxpayers from costs otherwise to be incurred by future landfills. Some costly problems encountered by the CLP project managers were not anticipated in 1994.

Other recent, related Agency landfill rules are designed to improve the siting of landfills; this should also reduce the likelihood and cost of failures. If a landfill liner fails (which can happen for several reasons, including a deeply buried fire), it can result in very costly contingency actions to investigate and remediate any contaminant release. Such events may also lead to higher than average postclosure care costs, in addition to the immediate expenses of contingency action.

In addition to the public and their environment, it is reasonable to believe that a permittee and its shareholders may also benefit from having more-reliable financial assurance as this should reduce the likelihood of its going bankrupt due to insufficient funds for landfill-related maintenance or clean-up costs.

2. Probable Costs to Agencies and Effect on State Revenues.

The Agency is to consider probable costs to itself or to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

What are the costs to the Agency?

The Agency anticipates that the additional cost to the Agency of implementing and enforcing the proposed rule changes will be minor.

The number of regulated parties affected by the proposed rules is small because the number of landfill operators is small and changes little over time. The Agency will spend some administrative effort developing guidance and communicating the changes to the regulated community.

The Agency will also spend some additional effort evaluating the adequacy of standard financial assurance mechanisms chosen by new permit applicants to assure financial adequacy. The Agency anticipates these reviews can be carried out with existing staff resources.

If an applicant chooses to pursue the "alternative financial assurance mechanism" allowed under part 7035.2751, the Agency would require the applicant to pay for the Agency to hire a financial assurance professional to review the adequacy of the proposed mechanism(s) to assure financial protection. The applicant would need to base pursuit of this alternative financial assurance mechanism on a risk-cost/benefit analysis. There is risk to the applicant that, in choosing an alternative mechanism with little or no proven track record, that non-standard mechanism might not prove strong enough to meet the "ensure" standard.

What are the costs to other agencies?

The Agency does not anticipate that the rule changes will cause additional costs to be incurred by any other state or federal agency. Again, the proposed financial assurance rules do not impose new financial assurance liability. They reduce by one the number of standard financial assurance mechanisms, and allow the possibility of proposing an alternative mechanism subject to rigorous review. It is possible that counties may incur costs for review of a nonstandardized financial mechanism.

What is the effect on State revenue?

The Agency believes that these amendments are revenue neutral (e.g., no positive or negative impact on State revenues).

3. Consideration of Less Costly Methods to Achieve Purpose of the Rules.

The Agency is to consider whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The primary need for these proposed rules is to address the legislative directive that financial assurance mechanisms should ensure that Minnesotans are protected from financial burdens if an operating or closed landfill required remediation. The Legislature also directed the Agency to seek advice from a panel of experts to determine which financial assurance mechanisms are sufficiently reliable. The Agency believes that the panel provided a solid consensus on most of the questions posed by the Legislature, though not always a unanimous opinion.

While the Agency's primary responsibility was to assure that emergent costs at landfills are not passed on to the public, the Agency listened to ALFA panel and stakeholder input regarding the costs associated with various financial assurance mechanisms. The rules do not require that specific mechanisms be used at specified times, but there was consensus that it would be wise to employ a progression of mechanisms over the life of the landfill.

The panel and the Agency found a consensus to support amending the existing financial assurance rules to eliminate one of the available standard mechanisms. The self-insurance mechanism lacked the support found for the other mechanisms; this concern was heightened due to the recent worldwide economic downturn.

In an effort to allow flexibility for possible future solutions that might not avail themselves today, the Agency proposed an alternative, nonstandardized mechanism. This mechanism is not predefined. It is based on similar language in a rule from the Minnesota Department of Natural Resources. The proposed rule requires the proponent to pay the Agency to hire independent financial expertise to determine the proposal's initial adequacy to provide financial assurance, and authorizes the Agency to recheck this adequacy at some interval (most likely, at permit renewal).

Amending financial assurance rules to improve their reliability reduces options for some permittees. The Agency believes that the permittee's liability for potential emergent costs has not changed, and that any increased cost or reduced options for permittees is about more accurately accounting for existing liability. Consistently applying the best financial assurance mechanisms should ultimately make compliance more transparent and even-handed for regulated parties.

4. Description of Alternatives Considered for Achieving the Purpose of the Rules.

The Agency is to describe any alternative methods seriously considered for achieving the purpose of the proposed rule and the reasons why they were rejected in favor of the proposed rule.

Since the primary need for these proposed rules is to address the legislative directive that financial assurance mechanisms protect Minnesotans from any emergent costs associated with landfills, the Agency's ability to provide alternative methods to those in these proposed amendments is limited.

The Agency did explore the availability of an environmental insurance type of pool as an alternative to the current standard financial assurance mechanisms. The Agency repeatedly contacted the Minnesota Chamber of Commerce, Minnesota insurers, and the American Insurance Association but could not find an insurance company or broker willing to present information to ALFA or Agency staff on this topic. Since it is possible that such an insurance product may exist either now or in the future, the Agency

believes a future landfill operator could assemble such a package and apply to meet the criteria listed under the alternative mechanisms provision.

The Agency met with the financial assurance panel and stakeholders, sought their input, and proposed rules intended to meet their reasonable needs, to comply with the legislative directive, and to protect Minnesota taxpayers.

5. Probable Costs of Complying with the Proposed Rules.

The Agency is to evaluate the probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

The Agency notes at the outset that the Legislature through statutes passed in 2008 and again in 2010 directed this rulemaking. The Legislature's stated purpose was to ensure that taxpayers would not pick up costs for the cleanup of landfills to be built in the future; rather, landfills would set aside assets to cover those costs. The Agency believes that identifiable categories of affected parties, permittees of the new landfills regulated by these proposed rules, will not realize increased costs if they continue to use the three standard financial assurance methods at future landfills that are allowed at existing landfills by current rule. These standard mechanisms are the cash-funded trust fund, surety bonds, and the standby letter of credit. These proposed rules help assure that the true cost of providing financial assurance at future landfills will be adequately funded. In cases where the cost would not have been adequately funded before the rules took effect, that externalized cost would now be internalized. The Agency notes that one group of future landfill owners, those who elect to use the non-standardized financial assurance mechanism, may incur the costs of expert evaluation. The Agency estimates that this cost per evaluation could be \$5,000 to \$10,000.

The Legislature clarified its intent to reduce financial risks to the public from operating and closing a landfill. As directed, the Agency sought counsel and proposed rules that it believes would increase the reliability of available financial assurance mechanisms.

The costs of financial assurance can be favorably managed by choosing the combinations of mechanisms most appropriate for the phase of the landfill's operation or closure. For example, while a new landfill would have lower cost estimates for closure (since there is relatively little waste initially), it also would have had little time to generate cash from tipping fees to adequately fund a cash trust fund. Initially, it may make sense to rely more heavily on a surety bond, then gradually shifting to a cash-funded trust fund as fees are collected. The collection of financial assurance funds from today's waste generators is, in general, the best way to pay for the future costs at a landfill being used by those generators. To do otherwise is to expect future taxpayers to pay for today's lack of diligence.

6. Probable Consequences of Not Adopting the Proposed Rules.

The Agency must consider the probable consequences of not adopting the proposed rules, including those consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

Landfill permittees:

Individuals, businesses or units of government may own or operate a landfill. The proposed rules are intended to ensure that the financial assurance mechanisms selected by a permittee adequately protect Minnesota citizens from future costs associated with running a landfill, closing a landfill, or maintaining a closed landfill. The consequence to permittees of not adopting these rules is that they would have continued access to the existing financial assurance mechanisms allowed in Minnesota rules. Existing financial assurance mechanisms may work in most instances, but would not be as assuring of adequate

financial assurance in the event of unanticipated costs or fiscal stress.

The public:

While the risk of any currently-allowed financial assurance mechanism failing cannot be proven with extensive statistics from within state borders, the consequence of a failure is potentially significant. The ALFA advisory panel helped the Agency evaluate these mechanisms by relative risk. The proposed rules eliminate one mechanism that the Agency and advisory panel determined to be the least reliable.

The current worldwide economic downturn demonstrates that the possibility of financial failure for businesses, uninsured financial institutions, and even local governments is within the realm of possibility. If the proposed rules were not adopted, the public would not be as well protected when selecting financial assurance mechanisms that would do a better job of ensuring prompt and reliable funding. The Agency believes that not adopting these rules may increase the taxpayers' financial risk by allowing the use of weaker financial assurance mechanisms (the self-insurance provisions) that would not provide as dependable a source of funds. One of the most significant concerns is whether a state has the practical ability to collect on self-insurance provisions when parent corporations are based outside of the state or outside of the U.S. entirely. At best, the added legal costs of distant collection lawsuits, and delay in recovery due to trial and appeals, would be problematic if the goal is to protect the environment and public health.

Because current economics and politics favor the use of existing landfills rather than building new ones, there will be relatively few landfills newly permitted for the foreseeable future; likely there will be less than one (1) or two (2) applicants per year. Also, today's landfills are sited, designed and constructed to meet engineering standards that have been developed over the last 30 years. The Agency believes that financial assurance mechanisms will need to be in force at a given new landfill for a period of approximately 60-80 years. During that time, more will be learned about their adequacy in protecting the taxpayers from having to pay cleanup costs.

The Agency:

The Agency and its advisory panel reached consensus that the existing mechanisms are not equal in the risks they pose. The consensus was that, in order to meet the Legislature's stringent standard of "ensuring" adequate financial assurance, the Agency should eliminate one mechanism due to its comparative weakness: a lack of reliance on either cash in a trust fund or a financially viable third party as guarantor. One possible consequence of not adopting the proposed rule is that the Legislature could decide the Agency failed to respond to specific 2008 and 2010 directives to strengthen landfill financial assurance and make the directed change by law.

The Agency believes that whether or not the Legislature were to step in and impose new statutes in lieu of the proposed rules, the consequences of not adopting these rules are likely to be minor. The regulated community must still comply with existing financial assurance rules. However, if there is a failure of the existing financial assurance mechanisms to perform, there is a potentially significant risk to future Minnesota taxpayers, who would have to cover cleanup costs by raising taxes, as they did in supporting the Closed Landfill Program.

7. Assessment of Differences between the Proposed Rule and Related Federal and Relevant State Regulations.

The Agency must assess any differences between the proposed rule and existing federal regulations, and provide specific analyses of the need for and reasonableness of each difference. The 2011 Minnesota Session Laws Chapter 4 also requires a specific analysis of the need and reasonableness for each difference from federal and neighboring state solid waste standards.

Related federal financial assurance regulations are found at Title 40 Code of Federal Regulations Part 258 (40 CFR 258). § 258.74 applies to new, existing, and expanded Municipal Solid Waste Landfill (MSWLF) units.

The Agency's proposed rules are different in scope from United States Environmental Protection Agency (EPA) regulations in two regards: they would apply only to certain types of newly permitted landfills, and the types of landfills are broader than the MSW landfills covered by the EPA's regulations.

The EPA's regulations setting out financial assurance at non-hazardous, municipal solid waste landfills are contained in 40 Code of Federal Regulations Part 258, Subparts F and G. These set out acceptable forms of financial assurance and the costs to be covered. The EPA allows states with approved Subtitle D solid waste programs such as Minnesota to be more protective than the federal regulations, but not less.

The EPA regulations list the following mechanisms as acceptable for financial assurance at MMSW landfills: trust funds, surety bonds, irrevocable standby letters of credit, corporate financial test or guarantee, local government financial test or guarantee, and insurance (but only for the costs of closure and postclosure care. The EPA does not accept insurance to cover the costs of corrective action).

The proposed rule would allow the first three mechanisms listed by EPA, and without the need for additional evaluation. Under 40 CFR §258.74(i), the EPA also allows an alternative, unspecified form of financial assurance proposed by a landfill, if approved by the state. The proposed rules would allow for this in the form of the unconventional financial assurance mechanism. Therefore, the proposed rules would allow a total of four mechanisms for the establishment of financial assurance at the specified types of newly permitted landfills.

Among the list of states for comparison here, those that allow a range of financial assurance mechanisms very similar to the federal regulations are Ohio, Iowa, North Dakota, Wisconsin, Indiana, and Michigan. (Note: Michigan is in the process of reviewing its rules.) Some of these allow cash deposits in a form other than a trust fund, if held in specified instruments such as certificates of deposit.

Some states allow an abbreviated list of allowable mechanisms, as do Minnesota's current rules: Illinois allows trust funds, surety bonds, insurance to cover the costs of closure and postclosure care, self insurance for noncommercial landfills, and standby letters of credit. South Dakota allows cash, trust funds, surety bonds, letters of credit, and insurance.

In 40 CFR §258.74(i), the EPA also allows an alternative, unspecified form of financial assurance proposed by a landfill, if approved by the state. North Dakota and Wisconsin rules have this provision, in addition to the specified mechanisms.

In 40 CFR §258.74(j), the EPA allows states to assume the financial responsibility for MMSW landfill closure, postclosure care, and corrective action. None of the states in the list for comparison offer this provision to operating landfills.

Regarding an endpoint for financial assurance requirements, the EPA in 40 CFR §258.61 requires that financial assurance at MMSW landfills be sufficient to cover costs for 30 years following closure. This is not a fixed figure because EPA regulations also provide that state agencies may shorten the standard period, or may extend it to protect human health and the environment.

Preceding the 2008 and 2010 legislative directives, Minn. Stat. §116.07, subd. 4h required that Agency rules specify a minimum of 20 years of financial assurance at non-MMSW landfills, and 30 years of financial assurance at MMSW landfills. South Dakota rules set a fixed period of 30 years as an endpoint for financial assurance responsibilities.

States with rule language setting out a “minimum of 30 years” rather than a fixed period of 30 years are Ohio, Michigan, Illinois, Iowa, Indiana, and North Dakota. Indiana sets out a non-exclusive list of criteria on which the state may judge whether duties should continue past 30 years. Michigan rules set up a perpetual care fund.

Wisconsin rules require financial assurance to cover a minimum of 40 years of postclosure care at MMSW landfills.

Need for the rules:

In laws passed in 2008 and 2010 the Minnesota Legislature directed the Agency to adopt rules to prevent state taxpayers having to pay the cost of contamination from landfills newly permitted after January 1, 2011. By directing the rule changes, the 2008 and 2010 laws created the need for the rule amendments. It is reasonable for the Agency to meet that need by consulting with stakeholders following the law’s passage, by restricting future landfills to the use of mechanisms that can ensure the state will not have to correct environmental degradation from the specified landfills, and by allowing the option of performance-based financial assurance if taxpayers are protected.

8. Consideration of Performance-based Rules (Minn. Stat. § 14.002).

The Agency must describe how, in developing the rules, it considered and implemented the legislative policy supporting performance-based regulatory systems.

Minn. Stat. § 14.002, titled State Regulatory Policy, reads as follows:

“The legislature recognizes the important and sensitive role for administrative rules in implementing policies and programs created by the legislature. However, the legislature finds that some regulatory rules and programs have become overly prescriptive and inflexible, thereby increasing costs to the state, local governments, and the regulated community and decreasing the effectiveness of the regulatory program. Therefore, whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

The legislative directives prescribed certain rule content in Minn. Stat. § 116.07, subd. 4:

Subd. 4. Rules and standards.

[...]

(c) The rules for the disposal of solid waste shall [...] include modifications to financial assurance requirements under subdivision 4h that ensure the state is protected from financial responsibility for future groundwater contamination. The modifications to the financial assurance rules specified in this paragraph must require that a solid waste disposal facility subject to them maintain financial assurance so long as the facility poses a potential environmental risk to human health, wildlife, or the environment, as determined by the agency following an empirical assessment. [...]

From LAWS of MINNESOTA for 2010, **CHAPTER 361–S.F.No. 3275**

Sec. 64. Minnesota Statutes 2008, section 116.07, subdivision 4h, is amended to read:

*Subd. 4h. **Financial responsibility rules.** (a) The agency shall adopt rules requiring the operator or owner of a solid waste disposal facility to submit to the agency proof of the operator's or owner's financial capability to provide reasonable and necessary response during the operating life of the facility and for 30 years after closure for a mixed municipal solid waste disposal facility or for a minimum of 20 years after closure, as determined by agency rules, for any other solid waste disposal facility, and to provide for the closure of the facility and postclosure care required under agency rules. Proof of*

financial responsibility is required of the operator or owner of a facility receiving an original permit or a permit for expansion after adoption of the rules. Within 180 days of the effective date of the rules or by July 1, 1987, whichever is later, proof of financial responsibility is required of an operator or owner of a facility with a remaining capacity of more than five years or 500,000 cubic yards that is in operation at the time the rules are adopted. Compliance with the rules and the requirements of paragraph (b) is a condition of obtaining or retaining a permit to operate the facility.

(...)

(d) The commissioner shall consult with the commissioner of management and budget for guidance on the forms of financial assurance that are acceptable for private owners and public owners, and in carrying out a periodic review of the adequacy of financial assurance for solid waste disposal facilities. Financial assurance rules shall allow financial mechanisms to public owners of solid waste disposal facilities that are appropriate to their status as subdivisions of the state.

From LAWS of MINNESOTA for 2010, **CHAPTER 361–S.F.No. 3275**

Sec. 72. **SOLID WASTE FACILITY FINANCIAL ASSURANCE**

MECHANISMS: INPUT.

Within six months after the effective date of this section, and before publishing the rules required for groundwater sensitivity and financial assurance in Minnesota Statutes, section 116.07, subdivision 4, the Pollution Control Agency shall consult with experts and interested persons on financial assurance adequacy for solid waste facilities, including, but not limited to, staff from the Department of Natural Resources, Minnesota Management and Budget, local governments, private and public landfill operators, and environmental groups. The commissioner shall seek the input to determine the adequacy of existing financial assurance rules to address environmental risks, the length of time financial assurance is needed, based on the threat to human health and the environment, the reliability of financial assurance in covering risks from land disposal of waste in Minnesota and other states, and the role of private insurance.

The proposed rule (new part 7035.2751 *Proposals for Nonstandardized Financial Assurance Mechanisms; Facilities Initially Permitted after January 1, 2011*), allows permit applicants to propose a performance-based alternative to several standard financial assurance mechanisms, subject to the Agency's acceptance of independent viability verification. The Agency anticipates a greater burden to demonstrate financial assurance adequacy using the alternative mechanism than more simply meeting the basic thresholds of this provision.

9. Additional Notice Plan.

The Agency must describe efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule, or explain why these efforts were not made (Minn. Stat. § 14.14, subd. 1a).

The Agency believes that the proposed rules do not change the regulated universe of those interested in building new landfills, which under current rules were already subject to Minnesota financial assurance requirements more stringent than Federal requirements. The Agency has worked closely with representatives from the potentially regulated community, their associations and other interested parties (stakeholders) since July 2008 in discussing the Legislative directive on landfill rules and how proposed rule changes could address that directive. The Agency has hosted or attended numerous stakeholder meetings to gather input as it developed draft rule language. It has communicated widely during the rule development process through Webcasts, meetings and emails.

The Agency has held or attended numerous stakeholder meetings and has sent or posted many communications related to these proposed rules beginning in July 2008. From June 2010 through March 2011, the Agency hosted and Webcast the following public input meetings to develop financial-assurance rules:

- Adequacy of Landfill Financial Assurance (ALFA) Meeting #1: June 17, 2010
- ALFA Meeting #2: July 15, 2010
- ALFA Meeting #3: August 3, 2010
- ALFA Meeting #4: August 31, 2010
- ALFA Meeting #5: September 21, 2010
- ALFA Meeting #6: October 19, 2010
- Meeting to review initial draft of FA rules: February 14, 2011
- Meeting to review initial draft of FA rules: March 1, 2011

Subsequently, during the 2011 Minnesota Legislative Session, the Agency worked closely with key stakeholder representatives.

With a high level of stakeholder awareness and interest in workable rules, the Agency believes that the standard notice processes required by Minn. Stat. § 14.22, would be adequate. Still, the Agency has provided additional notice as shown below.

The Agency's Notice Plan includes giving standard notices required by statute as follows:

1. Publishing notice of its intent to adopt these proposed rules in the *State Register* in accordance with Minn. Stat. § 14.22;
2. Mailing notices to parties who have registered with the Agency for the purpose of receiving notice of rulemaking proceedings as required by Minn. Stat. § 14.14, subdivision 1a;
3. Providing notice to the Legislature per Minn. Stat. § 14.116;
4. Notifying and seeking approval to proceed from the Governor's Office;
5. The Agency published a Request for Comments (an advanced notice of possible rules to seek advice) in the *State Register* in July 2008 and again in January 2011; and
6. The Agency has developed an interested party mailing list and will notify interested parties when notices are made available.

The Agency's Additional Notice Plan will be submitted to the Office of Administrative Hearings intending to obtain optional approval as allowed under Minn. R. 1400.2060. The following is an outline of the Agency's intended additional notice plan:

1. The Agency plans to send emails to interested parties and stakeholders for whom it has a current email address informing them where to find official notices.
2. The Agency plans to provide links to *State Register* notices via email.
3. The Agency plans to post advice about the proposed rules on the Agency's website at (www.pca.state.mn.us). This includes information about the Agency contact person.
4. The Agency published an updated (2nd) Request for Comments (an advanced notice of possible rules to seek advice) in the *State Register* in January 2011, originally published in July 2008.

The Agency plans to provide a standard comment period of 30 days for the proposed rules.

10. Fiscal Impact.

The Agency must consult with the commissioner of the Department of Finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government (Minn. Stat. § 14.131). The Agency's Executive Budget Officer initiates this consultation with the Department of Finance.

In accordance with the interim process established by the Department of Finance on June 21, 2004, the Agency will provide Finance with a copy of the proposed rule and SONAR at the same time as it sends these to the Governor's Office. This timing allows the fiscal impacts and fiscal benefits of a proposed rule to be reviewed by the Department of Finance concurrent with the Governor's Office review (up to 21 days).

The documents include: the Governor's Office Proposed Rule and SONAR Form, proposed rules and SONAR. The Department of Finance response will become part of the rulemaking record.

The Agency believes that few local governments (e.g., counties) will see any fiscal impact from the proposed rules. This is because so few regulated new landfills of the covered types are likely to be built in Minnesota and only a fraction of these are likely to be county owned or operated. Most existing publicly-owned landfills have relied on cash-funded trust funds for their financial assurance rather than the other three mechanisms allowed by current rules. The proposed rules are not likely to change this preference. However, they would allow the use of a new nonstandardized mechanism if it can meet the reliability performance criteria. Existing landfills must continue to comply with the current financial assurance rules. Also, if a landfill were sited in a county, the county might realize long-term fiscal benefits from the proposed rules either directly or indirectly, by having financial assurance costs in the form of cash collected from current users of the landfill; this avoids placing unfunded costs on future county taxpayers who never used the landfill. Still, county stakeholders sought additional flexibility in allowed financial assurance mechanisms. The Agency believes that the nonstandardized mechanism can meet this desired flexibility.

11. Copy to Legislative Reference Library.

The Agency must send a copy of the SONAR to the Legislative Reference Library when the notice of hearing is mailed under Minn. Stat. § 14.14, subd. 1a.

The Agency plans to submit all required documentation.

VII. Other Considerations

Other Minnesota Statutes contain requirements in addition to those required SONAR considerations in Minn. Stat. § 14.131. Also, the Agency provides a comparison of its proposed financial assurance mechanisms with related state and federal mechanisms:

1. Minn. Stat. § 14.111 Farming Operations
2. Minn. Stat. § 14.116 Notice to Legislature
3. Minn. Stat. § 116.07 Pollution Control Agency; exercise of powers (business considerations)
4. Minn. Stat. § 174.05 Pollution Control Agency; Rules and Standards (notifying the commissioner of the Minnesota Department of Transportation)
5. Minn. Stat. § 14.127 Legislative Approval Required, subd. 1, Cost thresholds
6. Minn. Stat. § 116.07, subd. 2(f), analysis of differences between the proposed rule and similar federal and bordering and Environmental Protection Agency (EPA) Region-5 state standards.
7. Comparison of Federal and State Financial Assurance Mechanisms

The Agency addresses these below in order:

1. Minnesota Statute § 14.111 Farming Operations:

“Before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule change to the commissioner of agriculture, no later than 30 days prior to publication of the proposed rule in the State Register.

A rule may not be invalidated for failure to comply with this section if an agency has made a good faith effort to comply.”

The Agency believes that its proposed rules do not affect farming operations and that it is not required to notify the commissioner of the Department of Agriculture under Minn. Stat. § 14.111.

Either of these possibilities exists under existing rules and would remain possible under the proposed rule. The total acreage of farmland used for landfills in Minnesota would remain miniscule and would not be changed by the proposed rule. It is also conceivable that a closed landfill might someday be returned to some type of farming practice (e.g., hay production).

2. Minnesota Statute § 14.116 Notice to Legislature:

“When an agency mails notice of intent to adopt rules under section 14.14 or 14.22, the agency must send a copy of the same notice and a copy of the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules.

In addition, if the mailing of the notice is within two years of the effective date of the law granting the agency authority to adopt the proposed rules, the agency shall make reasonable efforts to send a copy of the notice and the statement to all sitting legislators who were chief house and senate authors of the bill granting the rulemaking authority. If the bill was amended to include this rulemaking authority, the agency shall make reasonable efforts to send the notice and the statement to the chief house and

senate authors of the amendment granting rulemaking authority, rather than to the chief authors of the bill.”

The Agency plans to send copies of the notice, the proposed rule, and the SONAR to the chairs and ranking minority party members of the Senate Environment and Natural Resources Committee. The Agency will also copy the chairs and ranking minority members of the House Environment, Energy and Natural Resources Policy and Finance Committee.

Since mailing of this notice is within two (2) years of the effective date of the law granting the Agency authority to adopt the proposed rules, the Agency shall make reasonable efforts to send a copy of the notice and the statement to all sitting legislators who were chief house and senate authors of the bill granting the rulemaking authority. Since the bill was amended to include this rulemaking authority, the Agency will make reasonable efforts to send the notice and the statement to the chief sitting house and senate authors of the amendment granting rulemaking authority, as well as to the chief authors of the bill.

3. Minnesota Statute § 116.07 Pollution Control Agency; Exercise of Powers (Business Considerations)

Minn. Stat. § 116.07, subd. 6 (and identical language in Minn. Stat. § 115.43, subd. 1), state the following regarding the consideration of economic impacts:

“In exercising all its powers the pollution control agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.”

The Agency worked with a variety of stakeholders while developing the proposed rules. This included a coalition organized by the Minnesota Chamber of Commerce representing private, business and public owners and operators of landfills, a legislatively-directed ALFA work group, and a coalition of environmental groups. The Agency has duly considered possible economic impacts from various options leading to the negotiated proposed rules. The Agency believes the scope of these rules will not make future landfills economically unfeasible, given that rules and state permits already require financial assurance to be in place for the types of landfills (both existing and future) addressed by the proposed rules. The legislative directives provided that the rules should not apply to landfills with existing permits or to their expansion.

4. Minnesota Statute § 174.05 Pollution Control Agency; Rules and Standards (Notifying the Commissioner of the Minnesota Department of Transportation)

Minn. Stat. § 174.05, titled Pollution Control Agency; Rules and Standards, provides the following requirements regarding notifying the Commissioner of Transportation:

*“Subdivision 1. **Notification by Pollution Control Agency.** The commissioner of the Pollution Control Agency shall inform the commissioner of transportation of all activities of the Pollution Control Agency which relate to the adoption, revision, or repeal of any standard or rule concerning transportation established pursuant to section 116.07. Upon notification the commissioner shall participate in those activities. Participation may include, but is not limited to, access to all pertinent information collected or*

compiled by the Pollution Control Agency and transmittal to the commissioner of the Pollution Control Agency of information and expert opinions concerning the ability of affected modes of transportation to accomplish the desired objectives and the impact that alternative methods of attaining those objectives would have on present or planned transportation systems in the state.

*Subd. 2. **Commissioner to submit review of proposed rules.** Prior to public hearings on any rule concerning transportation proposed by the Pollution Control Agency, the commissioner of transportation shall submit a written review of those rules, including an analysis of their impact upon the state's transportation system, and may propose alternative rules or standards. This report shall be made part of the record of the hearing and shall be made available to any person prior to the hearing.*

*Subd. 3. **Report by Pollution Control Agency.** Upon the adoption, revision or repeal of a rule concerning transportation, the commissioner of the Pollution Control Agency shall publish a written report of the manner in which the adopted rule reflects consideration of the factors specified in section 116.07, subdivision 6, and the specific issues raised in the commissioner of transportation's report."*

The Agency believes that the proposed rules present no special concern regarding Minnesota's transportation systems. Therefore, the Agency believes there is no obligation to provide special notice of the proposed rules to the Commissioner of Transportation under Minn. Stat. § 174.05.

5. Minnesota Statute § 14.127 Legislative Approval Required, Subdivision 1, Cost Thresholds

Minn. Stat. § 14.127, titled Legislative Approval Required, subd. 1, Cost thresholds, provides the following requirement:

"Subdivision 1. Cost thresholds. An agency must determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees. For purposes of this section, "business" means a business entity organized for profit or as a nonprofit, and includes an individual, partnership, corporation, joint venture, association, or cooperative".

Subd. 2. Agency determination. An agency must make the determination required by subdivision 1 before the close of the hearing record, or before the agency submits the record to the administrative law judge if there is no hearing. The administrative law judge must review and approve or disapprove the agency determination under this section.

Subd. 3. Legislative approval required. If the agency determines that the cost exceeds the threshold in subdivision 1, or if the administrative law judge disapproves the agency's determination that the cost does not exceed the threshold in subdivision 1, any business that has less than 50 full-time employees or any statutory or home rule charter city that has less than ten full-time employees may file a written statement with the agency claiming a temporary exemption from the rules. Upon filing of such a statement with the agency, the rules do not apply to that business or that city until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval.

Subd. 4. Exceptions.

(a) Subdivision 3 does not apply if the administrative law judge approves an agency's determination that the legislature has appropriated money to sufficiently fund the expected cost of the rule upon the business or city proposed to be regulated by the rule.

(b) Subdivision 3 does not apply if the administrative law judge approves an agency's determination that the rule has been proposed pursuant to a specific federal statutory or regulatory mandate.

(c) This section does not apply if the rule is adopted under section 14.388 or under another law specifying that the rulemaking procedures of this chapter do not apply.

(d) This section does not apply to a rule adopted by the Public Utilities Commission.

(e) Subdivision 3 does not apply if the governor waives application of subdivision 3. The governor may issue a waiver at any time, either before or after the rule would take effect, but for the requirement of legislative approval. As soon as possible after issuing a waiver under this paragraph, the governor must send notice of the waiver to the speaker of the house and the president of the senate and must publish notice of this determination in the State Register.

Subd. 5. Severability.

If an administrative law judge determines that part of a proposed rule exceeds the threshold specified in subdivision 1, but that a severable portion of a proposed rule does not exceed the threshold in subdivision 1, the administrative law judge may provide that the severable portion of the rule that does not exceed the threshold may take effect without legislative approval.

The proposed rules do not require anyone to construct a landfill or to close an existing one. The rules only require adherence to improved financial-assurance standards for those who wish to apply to construct a new landfill of the specified types. The types of landfills covered by the proposed rule are typically run as a for-profit venture (whether privately owned or as a public enterprise fund).

The Agency believes that the cost of complying with the proposed rule in the first year is not likely to exceed the statutory \$25,000 cost threshold for any one business with less than 50 full-time employees or for any one statutory or home rule charter city with fewer than ten full-time employees. While several landfills are owned and operated by counties, there are no statutory or home rule charter cities that own or operate the types of landfills regulated by these proposed rules, or that are expected to build new ones. A large business is most likely to propose a landfill regulated by these proposed rules.

The proposed rule represents an incremental change to existing rules for an existing regulated community. Under existing Minnesota Rules, the regulated community already had a narrower list of financial assurance mechanisms than are allowed by federal regulation, and existing landfills are not affected in any event since the proposed rules cover only specified types of newly-permitted ones. The Agency believes that most increased financial assurance costs that would be incurred by a new landfill are incremental in nature and that these increased costs are unlikely to exceed \$25,000 in the first year for any business with less than 50 full-time employees.

6. March 3, 2011 Statutory SONAR Requirements:

The 2011 Minnesota Session Laws Chapter 4 requires that for proposed rules adopting solid waste standards, the SONAR must include an assessment of any differences between the proposed rule and existing federal standards adopted under the Resource Conservation and Recovery Act, United States Code, title 42, section 6921(b)(1); similar standards in states bordering Minnesota; and similar standards in states within the EPA Region 5; and a specific analysis of the need for and reasonableness of each difference.

As described above in section VI. Regulatory Analysis under Minn. Stat. § 14.131, item 7. Assessment of Differences between the Proposed Rule and Related Federal and Relevant State Regulations (see page 27), the EPA's regulations governing non-hazardous, municipal solid waste landfills are contained in 40 Code of Federal Regulations Part 258, Subparts F and G. These set out acceptable forms of financial assurance and the costs to be covered. The EPA allows states with approved Subtitle D solid waste programs such as Minnesota to be more protective than the federal regulations, but not less.

VIII. List of Authors, Witnesses and Attachments

The following Agency staff participated in the development of this rulemaking and SONAR:

- a. Nathan Cooley, Rule Coordinator, Municipal Division, Land Policy Unit
- b. Jim Chiles, Policy Coordinator, Municipal Division, Land Policy Unit
- c. Dan Vleck, Professional Engineer, Municipal Division, Solid Waste Permitting
- d. Johnna Benke, Financial Assurance Coordinator, Municipal Division, Land Policy Unit
- e. David Richfield, Manager, Municipal Division, Stormwater Program
- f. Jim Brist, Supervisor, Municipal Division, Land Policy Unit
- g. Paula Connell, Supervisor, Municipal Division, Solid Waste Permitting

In support of the need for and reasonableness of the proposed rules, the Agency anticipates that it will enter the following exhibits into the hearing record:

IX. Attachments:

- 1 - Certified Copy of Rule Language
- 2. - ALFA Report

X. CONCLUSION

Based on the discussion in this document, the proposed rules are both needed and reasonable.

9/8/11
Date

Mitelli E Seamon for
Paul Aasen
Commissioner

ATTACHMENT 1—Certified Copy of Rule Language

ATTACHMENT 2—ALFA Report

1.1 **Pollution Control Agency**

1.2 **Proposed Permanent Rules Relating to Financial Assurance at Certain Types of**
1.3 **New Landfills**

1.4 **7035.2525 SOLID WASTE MANAGEMENT FACILITIES GOVERNED.**

1.5 [For text of subp 1, see M.R.]

1.6 Subp. 2. **Exceptions.** Parts 7035.2525 to 7035.2915 do not apply to the following
1.7 solid waste management facilities or persons, except as indicated:

1.8 [For text of items A to E, see M.R.]

1.9 F. industrial solid waste land disposal facilities, except that those receiving an
1.10 initial permit after January 1, 2011, must comply with parts 7035.2615 to 7035.2805;

1.11 [For text of items G to K, see M.R.]

1.12 **7035.2665 SCOPE.**

1.13 Parts 7035.2685 to 7035.2805 apply to owners and operators of:

1.14 A. mixed municipal solid waste land disposal facilities and;

1.15 B. municipal solid waste combustor ash land disposal facilities; and

1.16 C. the following facilities that received an initial permit after January 1, 2011: an
1.17 industrial waste land disposal facility and a demolition debris land disposal facility, except
1.18 those solid waste land disposal facilities that accept only demolition and construction
1.19 debris and incidental nonrecyclable packaging and certain industrial wastes limited
1.20 to wood, concrete, porcelain fixtures, shingles, or window glass resulting from the
1.21 manufacture of building materials.

1.22 **7035.2695 FINANCIAL ASSURANCES REQUIRED.**

1.23 A. The owner or operator of a mixed municipal solid waste land disposal
1.24 facility or a municipal solid waste combustor ash land disposal facility that received an
1.25 initial permit prior to January 1, 2011, shall establish financial assurance for closure,

2.1 postclosure care and corrective action at the facility by using one or more of the financial
2.2 assurance mechanisms specified in parts 7035.2705 to 7035.2750.

2.3 B. For facilities that received an initial permit after January 1, 2011, the owner
2.4 or operator of a mixed municipal solid waste land disposal facility, a municipal solid
2.5 waste combustor ash land disposal facility, an industrial waste land disposal facility,
2.6 or a demolition debris land disposal facility, except those solid waste land disposal
2.7 facilities that accept only demolition and construction debris and incidental nonrecyclable
2.8 packaging and certain industrial wastes limited to wood, concrete, porcelain fixtures,
2.9 shingles, or window glass resulting from the manufacture of building materials, shall
2.10 establish financial assurance for closure, postclosure care, and corrective action at the
2.11 facility by using one or more of the standardized financial assurance mechanisms specified
2.12 in parts 7035.2705 to 7035.2745, or alternatively may propose a nonstandardized financial
2.13 assurance mechanism under part 7035.2751 for approval by the commissioner. These
2.14 facilities must maintain financial assurance as long as the facility poses a potential
2.15 environmental risk to human health, wildlife, or the environment, as determined by the
2.16 agency following an empirical assessment conducted under part 7035.2655.

2.17 **7035.2751 PROPOSALS FOR NONSTANDARDIZED FINANCIAL ASSURANCE**
2.18 **MECHANISMS; FACILITIES INITIALLY PERMITTED AFTER JANUARY 1,**
2.19 **2011.**

2.20 **Subpart 1. Criteria for nonstandardized financial assurance mechanisms.**

2.21 A. A nonstandardized financial assurance mechanism must meet the criteria in
2.22 items B to E to be approved for use.

2.23 B. The mechanism must ensure that funds sufficient to cover the estimated costs
2.24 of closure, postclosure care, and corrective action are available at all times.

2.25 C. The mechanism must be such that the funds will be available and
2.26 immediately payable directly into the standby trust fund according to instructions from

3.1 the commissioner. The standby trust fund must meet the requirements in part 7035.2705
3.2 and an originally signed duplicate of the trust agreement must be submitted to the
3.3 commissioner along with the mechanism.

3.4 D. The mechanism must be fully valid, binding, and enforceable under state
3.5 and federal law.

3.6 E. The financial assurance mechanism must be drafted so that the financial
3.7 assurance funds will not be assets in any bankruptcy proceeding filed by the permittee and
3.8 will remain accessible by the commissioner throughout the bankruptcy reorganization or
3.9 discharge.

3.10 Subp. 2. **Evaluation; approval or disapproval.**

3.11 A. All terms and conditions of a nonstandardized financial assurance
3.12 mechanism must be approved by the commissioner. When the commissioner determines
3.13 that the agency would benefit from an expert opinion on the adequacy of a proposed
3.14 nonstandardized financial assurance mechanism, the commissioner shall retain an
3.15 independent expert acceptable to the commissioner to evaluate the mechanism, at the
3.16 owner's or operator's expense, to determine if the mechanism meets the criteria of subpart
3.17 1. The independent expert must have documented experience in the analysis of risk and
3.18 the use of financial instruments used as guarantees such as bonds, letters of credit, and
3.19 insurance. Prior to permit reissuance, the commissioner may require reevaluation of the
3.20 nonstandardized financial assurance mechanism.

3.21 B. If a proposed nonstandardized financial assurance mechanism is disapproved
3.22 by the commissioner, the operator or owner may submit an application for an alternative
3.23 nonstandardized financial assurance mechanism or provide standard financial assurance
3.24 under parts 7035.2705 to 7035.2745.

3.25 **7035.2755 USE OF MULTIPLE FINANCIAL ASSURANCE MECHANISMS.**

4.1 An owner or operator may satisfy the requirements of part 7035.2695 by establishing
4.2 more than one mechanism for financial assurance per facility. For facilities that received
4.3 initial permits before January 1, 2011, these mechanisms are limited to trust funds, surety
4.4 bonds guaranteeing payment into a trust fund, self-insurance, and letters of credit. For
4.5 facilities that received initial permits after January 1, 2011, these mechanisms are limited
4.6 to trust funds, surety bonds guaranteeing payment into a trust fund, letters of credit, and
4.7 nonstandardized financial assurance mechanisms approved by the commissioner. The
4.8 mechanisms must be established as specified in parts 7035.2705, 7035.2715, 7035.2720,
4.9 7035.2725, 7035.2745, ~~and~~ 7035.2750, and 7035.2751, except that it is the combination of
4.10 mechanisms, rather than a single mechanism, which must provide financial assurance for
4.11 an amount at least equal to the sum of the current cost estimates. If an owner or operator
4.12 uses a trust fund in combination with a surety bond or a letter of credit, the owner or
4.13 operator may also use the trust fund as the standby trust fund for the other mechanisms.
4.14 A single standby trust fund may be established for two or more mechanisms. The
4.15 commissioner may use any or all of the mechanisms to provide for closure, postclosure
4.16 care, or corrective action at the facility.

Adequacy of Landfill Financial Assurance (ALFA) Panel

– Collated Input from Panel Members –

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12-15-2010

Questions 1 & 2: Adequacy of Current FA Rules and Reliability of Mechanisms

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>Manny Castillo, Xcel</p>	<p><i>The current instruments provide flexibility to operators in meeting F.A. obligations.</i></p> <p><i>A couple of suggested modifications are that the F.A. rules apply to industrial Landfills, and that self-test reporting be modified to a quarterly basis (10Q) for those landfills that are not Public Utilities Commission regulated utilities.</i></p>	<p><i>Current Rules implemented by authority or by negotiated permit have provided for facilities to have F.A. as part of their operating requirements. During the ALFA presentations it was discussed that there have been no failures of F.A. instruments.</i></p> <p><i>The self-test should be maintained as a valid option. The reasons are that it</i></p>		<p><i>Recent history shows no history of instruments failure (per presentation by financial institutions and the MPCA). According to the Surety Bond presenter, their goal is to make the operator financially responsible for the facility (strict underwriting). A Surety Bond provides an independent review of the company’s ability to pay. The coupling of siting and liner and capping</i></p>	<p><i>Match the instrument to (1) Location (2) type of facility (waste), (3) Owner-Operator history, and Financial Institution.</i></p> <p><i>Using this formula should yield reliable mechanisms. Note new facilities are to be sited in more “environmentally protective” locations. This should also be taken into account in designing, and applying F.A.</i></p>

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance "ensure" that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of "ensure" standard	2C. Other input on reliability
Manny Castillo, Xcel	<i>There should be no permit creep. It should be clear in the rules that the applicability is only to new landfills, and cannot be added to existing landfill operations.</i>	<i>provides a picture of financial health of an operating company. The requirement that the Chief Financial Officer of the company sign the document provides additional assurance that this is a verified true financial picture. Another reason for the validity of this financial report are the Sarbanes-Oxley requirements placed on companies and their financial officers.</i>		<i>requirements will over the long term decrease leachate generation if the facility is properly designed, constructed, and operated. The four existing instruments can be reliable if the instrument holder is a sound company. As presented at the meetings even cash can be vulnerable in certain circumstances.</i>	<i>instruments.</i>
Manny Castillo, Xcel		<i>In Xcel Energy's situation the MPCA has already reviewed the matter and concluded in "Program Management Decision Memo", effective December 5, 2003; "Where a lined coal-ash monofill is operated by a publicly regulated utility, and where the Public Utilities Commission regulates that utility in such a way as to allow the operator to pass along a rise in its landfill costs, such monofills shall continue, at the minimum to obtain uncollateralized instruments for their financial assurance."</i> <i>Since 2003 Xcel Energy has</i>			

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
		<i>effectively used the Financial Self-Test for its Sherco 3 and King coal ash landfills. To reiterate the self-test option should be maintained in the new rules.</i>			
<p>Jennifer Engstrom</p> <p>Jennifer Engstrom, DNR</p> <p>Jennifer Engstrom, DNR</p>	<i>Based on experience since the rules were put into place, there is room for improvement in the current rules.</i>		<i>As was done for the Non-ferrous Metallic Mineral Mineland Reclamation rules (Ch. 6132), criteria were established that once met, would define the mechanism of financial assurance permitted. The four criteria are that 1) the source of funds are sufficient to cover the costs, 2) the funds will be available and payable to the commissioner when needed, 3) the funds are not dischargeable through bankruptcy, and 4) all terms and conditions of the financial assurance are approved by the commissioner. If the MPCA is concerned about the capacity (time, funds, or expertise) to review the financial assurance packages, there is also a provision in the non-ferrous rules to have the cost of that evaluation paid for by the proposer. These also seem to be in line with the</i>	<i>If the rules focused on the criteria for acceptable financial assurance and did not provide the text of those mechanisms in rule, they could be flexible to changing times. It would also be that over time, the language could be applied at various facilities more readily. For example, if a proposer requested the language used at the most recently permitted facilities, and that language were provided, it could be readily adopted if the proposer agreed. It could also be the case that minor changes would be suggested, requiring an abbreviated review. Over time, the flexibility of being able to accept a variety of mechanisms and adjust the language as issues arose would be beneficial to the state and ultimately to the proposers.</i>	

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>Jennifer Engstrom, DNR</p> <p>Jennifer Engstrom, DNR</p> <p>Jennifer Engstrom, DNR</p>			<p><i>recent trend of “user pays.” In this case, the user could be viewed as the company operating the landfill or the actual users of the landfill itself. It doesn’t seem a bad idea for everyone involved to understand more of the costs (both financial and to the environment) of disposal in landfills.</i></p> <p><i>Various mechanisms described above (trust funds, letters of credit, surety bonds) can be written such that the above listed criteria would be met and thus they would be acceptable mechanisms.</i></p> <p><i>The corporate self-test or corporate guaranty is not typically written to meet the above criteria. If language were added such that the criteria would be met, a corporate guaranty could be an acceptable form. Other possible options for strengthening the corporate guaranty would be to have the MPCA control the third party evaluation of the self-test rather than the company providing one to the MPCA.</i></p>	<p><i>It may also be advantageous to the state and to proposers to be allowed the ability to have several financial assurance mechanisms for one facility. It goes to the principal of diversifying assets. If one market seems to be affected by some economic adjustment, the other may not be affected at the same time.</i></p> <p><i>An additional aspect that would help protect the state would be the ability for the MPCA to hire a third party contractor to actually perform any work needed on site that the financial assurance was planned to cover. That is, if the financial assurance money is needed to cover the cost of the work and that the state must arrange for it to be done, that the MPCA would not actually be on site doing the work, but that a contractor would be hired. Third party rates are thus important so that the amount determined is adequate.</i></p>	

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>Paul Hanson, Dept of Commerce</p> <p>Paul Hanson, Dept of Commerce</p> <p>Paul Hanson, Dept of Commerce</p>	<p><i>The need for financial assurance arises as a result of two components. A failure of the landfill (including postclosure) and a failure of the landfill operator to remedy that failure. The state should not rely upon financial assurance as it may minimize the sense that oversight and monitoring are critical. As a consequence the state needs to have sufficient resources to monitor the landfills under consideration throughout their lifetimes. Landfills need to be operated in a safe, efficient and financially sound manner. A necessary component of that includes monitoring the financial health of the landfill operators. In addition to financial assurance discussed below this ought to include the monitoring of their existing insurance coverages for risks that may arise that may have adverse impacts on their financial soundness if not protected by appropriate insurance. Further, testimony was provided that discussed the legal</i></p>	<p><i>Testimony appeared to establish a preference ranking of financial assurance as follows</i></p> <ul style="list-style-type: none"> <i>Trust funds</i> <i>Letters of credit</i> <i>Surety bonds</i> <i>Self-test</i> 	<p><i>Testimony was provided where trust funds, letters of credit and surety bonds all performed within expectations. There did not appear to be unknown problems with their adequacy. However, all of these require staff and resources to diligently monitor, control and if necessary act to ensure the applicability and solidity of the financial assurance. MPCA and the state need to have landfills and landfills require an entity to exist to establish, operate and close them. Based upon the financial circumstances of those entities, as well as the availability within the financial marketplace for financial assurance products, MPCA needs to have as many options available to it to adequately protect the state while ensuring that landfills provide a reasonable business opportunity for the entities that operate them. As a strategy MPCA might require a lesser amount of financial assurance for the mechanisms preferred by</i></p>	<p><i>The self-test is another matter. The Self-test is in essence the submission of financial data that MPCA needs to be gathering for the ongoing financial monitoring of landfill operators. Financial assurance is the mechanism in place for the failure of that monitoring and the business entity being monitored . The financial collapse of a business entity may come suddenly and in some instances the collapse may occur as a result of the financial manipulation of the officers of the business entity. Testimony was provided regarding the collapse of several businesses. It was noted that the financial rating organizations had in some instances only a short time before the collapse been rating the entity very favorably. While the MPCA may gather significant financial intelligence from its ongoing field inspections of landfills and discussions with both the landfill operator and their competitors the potential for</i></p>	

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
Paul Hanson, Dept of Commerce	<i>management of risk by the separation of liability into separate corporate entities. Additional testimony was provide that stated that surety companies manage that risk by requiring the cross-collateralization between the various corporate entities as a means to allow them to attach corporate assets that would otherwise be inaccessible. MPCA should consider that strategy as well as financial assurance in seeking to protect the state.</i>		<i>MPCA. For example Trust funds \$10, letter of credit \$12 and surety bond \$15, for whatever amounts and arrangement of preferences desired by MPCA.</i>	<i>financial failure still exists. As mentioned many business failures have been preceded by the financial manipulation of company officers. However, in instances of governmental units that have the ability to tax or otherwise assess costs to their residents this mechanism may be more appropriate.</i>	
Joe Howe, MMB Joe Howe, MMB	<i>When I read the word adequacy, I am interpreting it as how much or what percentage of the estimated closing costs should be placed in the financial assurance mechanism. I feel the percentage in the financial assurance mechanism should be 100% of the estimated costs after closure.</i>	<i>I would just ensure that the current rules address the percentage of financial assurance that is necessary.</i>	<i>In my opinion, the only mechanism that is not sufficiently reliable is the corporate self-test. The other mechanisms seem to meet the threshold of preventing risk. The self-test is something that I feel is very close to an “honor system”, and in light of current economic events, we have been exposed to many recent examples of businesses taking liberties with its financial statements. Any misleading information in a financial statement would cause the self-test to become risky. Another big concern is</i>	<i>If the self-test is taken out of the equation; there shouldn't be a need for MPCA to strengthen the reliability of these mechanisms, unless, for instance, a surety bond is issued by an affiliated corporation. That would be something MPCA could disallow. Also, if private insurance is used, the record of the issuer should be scrutinized thoroughly.</i>	<i>I came onto this panel skeptical of instruments such as surety bonds and letters of credit. After reviewing the presentations given by our experts, I feel the risk involved with these mechanisms is quite minor. I feel this especially due to the fact that landfill operators seem to be very stable, and landfill operations have a long history of being environmentally responsible.</i>

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
			<i>whether a corporation would set up a financial assurance mechanism using one of its subsidiaries, and try to back out of the agreement later on.</i>		
Terry Johnson, WMI Terry Johnson, WMI Terry Johnson, WMI	<i>Examination of the facts presented to the Panel concerning Minnesota Landfill FA performance since the existing SW rules were promulgated, revealed no significant failures. In fact, contingency funds have never been accessed in this period. Experts that testified on the various FA mechanisms showed information that indicated the mechanisms allowed in MN have served their purpose in other states. The totality of the information presented and discussed in this panel process strongly suggests that the current rules are adequate and function as designed. When we couple these observations with the fact that future facilities will undergo more rigorous siting and permitting the case becomes even stronger that the existing FA rules are functioning as intended and adequate going forward. Nonetheless, the work done by the Panel and MPCA</i>	<i>The FA rules should apply to Industrial Landfills and large demolitions landfills as well.</i>	<i>A key point made repeatedly by many of the outside experts as well as panelists was the need for flexibility and use of multiple mechanisms. The point was made that this in and of itself improves the reliability of the system as a whole. It is also necessary to accommodate unforeseen changes in the financial markets and to maintain competitive rates. For these reasons, and considering the fact that no significant problem was identified with any of the mechanisms presently in use, all of these forms of FA should continue to be viable options. An additional reason I feel the existing process is working, that it is protective of human health and the environment including groundwater, and surface waters, and that it satisfies the legislative intent lies in the fact that the MN FA requirements require us to calculate contingency action cost estimates and provide FA for</i>	<i>As discussed above, I believe the information presented indicates that the existing mechanisms are protective and meet the legislative directive. However, there are some relatively simple changes that could strengthen the reliability of these existing mechanisms:</i> <ol style="list-style-type: none"> <i>1. Require Treasury listing on Circular 570 which will eliminate captives.</i> <i>2. Require an AM best rating.</i> <i>3. For LOCs some language change that addresses non renewal should be added that requires the permittee to obtain alternate FA within 90 days.</i> <i>4. Perhaps some provisions should be included to define when the State may call a FA instrument so that this process is formalized clear.</i> <i>5. We also support that the discount rate be tied to more long term interest rate trends such as the 10 year treasury rate. This smoothes annual cost estimate changes due solely to interest rate</i> 	<i>We also learned appropriately that our first line of defense (i.e., pre FA) is the financial health of the organization whether it is public or private. In this regard, 6 large publicly traded companies with rigorous financial reporting requirements are more reliable than smaller private entities because the information to evaluate their strength is readily available and regularly audited. Government or public entities also have a high degree of reliability due to their ability to tax and bond. Their may be mechanisms that are more appropriate for large publicly traded companies and government entities that would not be appropriate for small private companies. As long as reliability is maintained, we feel that MN needs to maintain a fair system that does not provide an advantage to one entity over another.</i>

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>Terry Johnson, WMI</p> <p>Terry Johnson, WMI</p> <p>Terry Johnson,</p>	<p><i>did reveal some areas where the existing FA rules could be improved and these are addressed in item II.B below.</i></p>		<p><i>these potential scenarios. This is unique to Minnesota, exceeds the requirement of the federal program and inherently ties our program to the risk posed by the facility. For instance, if the landfill site is located in a more sensitive area or an area with receptors in close proximity, the contingency action response with respect to groundwater considers these factors. Sites that would require a more extensive groundwater response 5 would have higher contingency action costs than a site with no receptors and little environmental risk. With regard to reliability of specific mechanisms, the only two that appeared less than optimal in the discussions were instruments issued by captive companies and corporate self-tests which are uncollateralized. As we also learned the MN FA rules do not allow uncollateralized corporate self-tests or captive sureties. If this is not the case this is an area where the existing rules could be improved, as suggested below. Early on in the process there</i></p>	<p><i>fluctuations that can be difficult to manage.</i></p>	

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>WMI</p> <p>Terry Johnson, WMI</p> <p>Terry Johnson, WMI</p>			<p><i>was some discussion that trust accounts were the most reliable form of FA. The information presented to the panel and various discussions shed some light on this subject. Specifically, we learned that these instruments are only as solid as the financial institution holding them, we also learned that if they reside with a public or political entity they can and have been depleted for other purposes (i.e., MLCAT fund) and we learned that they remove operating capital from the enterprise which impacts the cost of the goods and services that the entity provides (e.g., waste rates, electricity rates, etc.). It was also clear that they cannot be a sole FA mechanism because of the impact of annual swings in cost estimates for a cash instrument. For these reasons, any new rule should reflect the fact that they are equivalent to the other mechanisms but not superior.</i></p>		
<p>Mike Lynn, Dakota County</p>	<p><i>The financial assurance rules generally protect the public from financial risk. The exceptions I note later in my response. Individual MPCA</i></p>	<p><i>The MPCA should also draft rule language and direct personnel, as necessary, to affect the following:</i></p>	<p>(1) Trust Funds; and</p> <p>(2) Letter of Credit; with some mechanism that ensures if there is a</p>	<p>(1) Name the parent corporation on the permit or in the financial assurance documents</p>	

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>Mike Lynn, Dakota County</p> <p>Mike Lynn, Dakota County</p> <p>Mike Lynn, Dakota County</p>	<p><i>staff is given wide discretion under the rules to serve the public interest, but together have not been given the incentive or the direction to work in an optimal manner.</i></p> <p><i>Given the importance of this topic to the MPCA and the legislature, and because of the fiscal pressures facing the MPCA and other agencies at this time, the review and the approval of cost estimates should be re-emphasized in the MPCA solid waste work plans.</i></p> <p><i>I will provide a few specific suggestions for the MPCA’s consideration to ensure adequate cost estimates. Some of what I mention might work in a rule amendment, some may not.</i></p> <p><i>Upon submittal of the annual reports and amended cost estimates to the MPCA, I would recommend that as a group the solid waste engineers review the cost estimates for closure, post-closure, and contingency action, and certify in a report</i></p>	<p><i>(1) Continually update cost estimates and evaluate, with the advent of leachate re-circulation at some MSW landfills, whether cost estimates associated with the increased probability of adverse events due to a more saturated landfill outweigh a reduction in cost estimates due to the benefit of leachate re-circulation; and</i></p> <p><i>(2) Include in closure costs and mandate outreach by the MPCA to local units of government, in order to include their approved end use plans in the state’s approved financial assurance plans, especially so as to maximize the productive use of the land, and hence enhance its tax-paying status in the future when the landfill is closed; and</i></p>	<p><i>bankruptcy, structured or not, the liability sticks with “good asset” part of the overall entity</i></p>		

	1A. adequacy of the current financial assurance rules	1B. Other input on adequacy to address risks at future landfills	2A. What forms of financial assurance “ensure” that the state is protected from cleanup costs?	2B. Methods to strengthen the reliability of mechanisms falling short of “ensure” standard	2C. Other input on reliability
<p>County</p> <p>Mike Lynn, Dakota County</p> <p>Mike Lynn, Dakota County</p>	<p><i>that they are similar in methodologies as between all like facilities and events. From my previous work experience at the MPCA, this will require during the relevant review period, a full-time policy coordinator/supervisor who can independently review assumptions and calculations, and who has the authority to judge work performance and is familiar with the relevant technical and policy considerations, This work effort will correct for a situation in the past where a “demolition” landfill took months to extinguish a landfill fire despite their best efforts, but their existing cost estimate for a contingency action assumed the event would be over in a week or less. This landfill’s experience should be reflected in cost estimates for all facilities, who likewise accept combustible waste. The MPCA should vigilantly flag such oversights, make the appropriate comparisons, and approve conservative cost estimates to avoid the reporting of estimates that are inadequate to cover actual</i></p>	<p><i>(3) Cross-train a full-time MPCA engineer or technical permitting staff to assist solid waste permitting personnel in the application of the financial assurance rules in consideration of these comments and other policy considerations, ensure conservative and uniform cost estimates between the various facilities, verify through independent means relevant parameters such as “maximum open area” for closure costs, work with existing resources such as the financial assurance coordinator and the attorney general, and prepare reports for the legislature.</i></p>			

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Mike Lynn, Dakota County	<p>costs.</p> <p><i>As a group effort, the MPCA staff ought to also systematically inventory, by rule, the occurrence or non-occurrence of significant contingency action events affecting financial assurance cost, so it can begin assigning probabilities to certain adverse events, and compare “actual” total contingency action estimates to estimates employing the use of randomly generated probabilities. The MPCA ought to seek and analyze data from Minnesota and other states.</i></p>				
Shawn McFarlane, Bremer Bank	<p><i>They are in need of some changes, but the majority of the rules are acceptable. In particular, the 4 mechanisms of financial assurance (FA) have some adequacy problems:</i></p> <p><i>Self-test: Relying on companies to test themselves does not adequately ensure against potential problems. To qualify for self-test treatment, a firm must have an investment-grade credit rating</i></p>	<i>None; the response in IA is very detailed.</i>	<p><i>In order to be adequate (discussed in Roman numeral I), a FA mechanism must be reliable, so much of the comments from I above apply here.</i></p> <p><i>The only FA mechanism that is sufficiently reliable on its own is a trust fund, for reasons detailed in the response to IA. Self-tests are not reliable in almost any situation. Surety bonds and letters of credit</i></p>	<i>Eliminate the self-test mechanism, require at least some dollars in a trust fund, and tighten the time windows relative to obtaining new surety or LOC FA, should the first provider’s contract be voided in some way.</i>	<i>None, already covered above.</i>
Shawn McFarlane,					

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<p>Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>from a nationally recognized statistical ratings organization (NRSRO), but the regulatory use of these ratings is undergoing a major overhaul at the Federal level. Furthermore, the 2008 credit crisis has greatly increased investor skepticism about the accuracy of these ratings. Until 2007, when additional NRSROs were added to the SEC’s list, the three major ratings agencies (Standard & Poor’s, Moody’s and Fitch) were paid by the companies they rated. Being paid by the firms you are being asked to critically and accurately rates is a situation that is likely to result in ratings that are inflated, inaccurate, and slow to change to financial or operational deterioration. Indeed, we saw this occur during the recent credit crisis. Investment grade firms that can currently use the self-test should have little difficulty securing access to one of the other three FA mechanisms.</i></p> <p><i>Letters of credit: obtaining credit in a market-based procedure is a good signal of</i></p>		<p><i>have a decent level of reliability, but should not be the sold source of FA, for reasons described in 1A. One possible implementation could be to limit surety bonds or letters of credit to be a minority of the dollars required for FA, and to make a trust fund the plurality. So an operator could have 34% trust fund, 33% surety and 33% LOC, or 51% trust fund, 49% surety, etc.</i></p>		

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>a firm’s ability and willingness to live up to its FA obligations. Further, a letter of credit is a good means of obtaining access to cash for landfill cleanup or other contingencies. Banks are required to hold capital against losses on LOCs, both those in use and those that are unused. There are some technical questions about the time windows relating to obtaining a new letter of credit, should an existing one be canceled. Further advance notice about LOC cancelation and signing of a new one should be written into the rules. In addition, the recent banking crisis highlights that LOC provider banks can rapidly enter financial distress. Relying solely on a LOC for FA is misguided, as the failure of a bank and a landfill operator could expose MPCA and taxpayers to risk. In particular, most landfill operators are subject to the cyclicalities of the business cycle, and if they become financially stretched, that is likely to occur at the same time that banks become</i></p>				

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>financially stretched. The irrevocability of a LOC is a good feature, but it obviously doesn't protect against a bank failure; an irrevocable promise of credit from an insolvent bank is not irrevocable, because the insolvent bank's unused obligations are frequently canceled. (Outstanding loans remain in effect, and deposits covered by FDIC insurance remain.) A DIVERSITY of FA mechanisms is an excellent way to reduce this risk.</i></p> <p><i>Surety bonds: this method appears to be a relatively low-cost alternative, but the surety bond providers noted that they underwrite their policies with an assumption of no losses. When no losses are assumed, virtually no capital is placed behind a surety bond. Contrast this with a property insurance policy, where the underwriting insurance company MUST set aside a reserve for losses, based on actuarial science. This is an acceptable approach for projects in which the provider has a strong financial</i></p>				

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>incentive to complete the project, such as completing a highway in order to get paid. However, it is problematic for landfill FA, because no operator PLANS on having a problem. In particular, for closed landfills, there is no additional profit to be obtained from the site, so the financial incentives are skewed, but the surety bond still has no capital behind it. It is important to note that landfill operators that want to remain active in the industry have an incentive for “repeat business” and will avoid reputational risk that could arise from a problem at a closed landfill, providing them with an incentive for proper management of site both in the open and closed landfill part of the lifecycle. However, one of the goals of FA is to provide financial resources if an operator is UNABLE to live up to obligations – UNABLE to pursue repeat business or to care about reputational risk.</i></p> <p><i>Trust funds: this method requires the contribution of cash or securities, and while it</i></p>				

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>is more capital intensive than the other methods, it also provides several additional levels of safety. The trust fund must be managed by a fiduciary, who has a legal duty to diversify the portfolio against credit risk, interest rate risk and other risks. The fiduciary purchases debt obligations of other entities (usually government bonds issued by federal or local political subdivisions or government agencies) that have no direct relationship with the operation of the landfill, providing built-in diversification. Further, because the portfolio’s securities are marketable and not dependent on the landfill operator’s creditworthiness, they can easily be used to pay for landfill cleanup or other contingencies. Trust funds also provide the greatest level of transparency for MPCA, especially compared to the self-test. The creditworthiness of a single surety bond provider or a single bank LOC may be strong, but it is very unlikely to be as strong as a federal government debt</i></p>				

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>security, and certainly not as diverse a source of FA.</i></p> <p><i>Some panel members claimed that trust funds take capital out of private enterprise, where it could be put to better use. This is incorrect for two reasons:</i></p> <p><i>(1) The securities bought by a trust fund and held in its portfolio are assets, and are also liabilities of another going concern. A trust fund that holds U.S. Treasury securities has exchanged dollars for Treasury’s promise to repay. Treasury then spends those dollars on government expenditures, which is as much a part of the economy as private enterprise. Another example: a trust fund that holds Federal Home Loan Bank bonds has exchanged dollars for FHLB’s promise to repay. FHLB then uses those dollars to provide loans or advances to private-sector banks, which are also part of the economy. Last example: a trust fund that holds top-rated commercial paper (such as from General Electric) has</i></p>				

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>	<p><i>exchanged dollars for GE’s promise to repay. GE then uses those dollars for some kind of project: building jet engines, manufacturing light bulbs, paying a dividend, etc., all of which are part of the economy.</i></p> <p><i>(1) if the funds were “left” in the private enterprise operating the landfill, then the FA would be dependent on the creditworthiness of the landfill operator. This is the exact risk that MPCA is seeking to protect against: FA’s goal is provide financial support when the operator is unable to provide it. The rate of return on a trust fund portfolio of high-grade government securities may be less than the rate of return on a private company, but that is by design: the FA trust is supposed to be lower-risk than a landfill provider’s standalone credit risk.</i></p>				
Jessica Schaum, Conservation MN	<i>As described, the process seems adequate for requiring some level of funding up front for possible future costs based on the type of landfill and</i>	<i>Although more difficult to put into practice, somehow corresponding FA amounts to the citing rules could be explored. If there is a higher</i>	<i>Letters of credit – maybe the most reliable source of financial assurance for landfills in Minnesota, as PCA staff can track the status of each LOC</i>	<i>If there is language to enable the state to recover money quicker in any mechanism it should be updated.</i>	

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<p>Jessica Schaum, Conservation MN</p> <p>Jessica Schaum, Conservation MN</p> <p>Jessica Schaum,</p>	<p><i>allowed financial assurance mechanisms. There are options for landfill owners and operators to choose from to make up their required financial assurance, and I see that as a benefit. The new rules make it more difficult to determine what the level of funding should be based on ‘no risk.’ We heard from landfill operators that the contingency action cost estimates could be more conservative, but again the new rules dictate somewhat of a higher standard.</i></p>	<p><i>inherent risk of problems based on citing conditions, then perhaps an extra layer of financial assurance should be needed. If companies or local governments aren’t willing to put up additional dollars, the PCA could deter citing here in the first place. Points to the importance of taking a site-specific look at each proposed landfill.</i></p>	<p><i>and make sure they remain current, cover the necessary amount, and seem generally easy to obtain for companies in good credit standing. The bank is obligated to pay if there is a failure or the owner disappears. Also are reliable for new landfills because the easiest way to pay for future costs is as trucks are coming through the gates.</i></p> <p><i>County dedicated trust funds – reliable because these funds are set aside as the landfill is operating and are established by resolution of LGU. In public settings this money is in a separate fund and is difficult to ‘raid’ unless it serves the designated purpose, and the PCA has the ability to draw on the account should the operator fail to perform (but highly unlikely counties/cities will go out of business or dissolve). Hence, a very reliable method.</i></p> <p><i>Cash funded trust funds – cash is reliable and should be allowed as an option. Trust funds for private entities are held at a financial institution</i></p>	<p><i>Some sort of risk analysis package/checklist, although I realize the PCA isn’t in the credit analysis business. We heard that in the mining realm, the Agency can hire experts to do this work and pass the costs onto the mining companies, so that those fees pay for the credit history and background analysis. Could the PCA follow a similar method in cases where landfill operators wanted to use the self test? Maybe this sort of analysis should be required for any new landfill and their associated FA mechanism(s), to know more about the financial strength of the company or municipality.</i></p> <p><i>If self test is allowed, I think our discussion around a larger, more comprehensive series of financial tests is needed to determine financial strength.</i></p>	

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<p>Conservation MN</p> <p>Jessica Schaum, Conservation MN</p> <p>Jessica Schaum, Conservation MN</p>			<p><i>and the PCA is able to draw on them if need be.</i></p> <p><i>Surety bonds – the PCA felt that getting payment from surety bonds promptly and at full value is challenging, while the surety companies explained that their business operates on the model that they expect no loss. Unclear how keeping these as a source of FA helps the PCA to ensure “no risk”, given possible complications with timing of claims and litigation matters. Not as reliable as trust funds and letters of credit.</i></p> <p><i>I have concerns with the self test being adequate and am hesitant to accept them as financial assurance given one company’s short term cash flow and long term volatility in the market. The self test should never be used to cover 100% of a site’s financial assurance, and if partially used, should allow with significant collateral of some type (as currently allowed).</i></p>		
Denny Siems,	<i>I feel that the current FA rules</i>	<i>The Agency needs to relook</i>	<i>I have to admit that when we</i>	<i>Letters of credit should be</i>	

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Olmsted Co.	<i>are adequate to address all foreseeable environmental risks related to closure and postclosure care. Any new landfills sited in the future will be sited in better hydrogeologic areas because of the new FASIT rules. These new landfills will be utilizing composite liners and new technologies such as leachate recirculation which will only make them safer and therefore there will be less environmental risk.</i>	<i>at how costs are calculated for contingency actions. It is not very likely that new facilities will have liner failures, groundwater contamination, large landfill fires, slope failures, etc. They certainly should not be funded at a 60% likelihood of happening. There may only be an actual 10-20% chance of these types of catastrophic incidents happening. There are many fewer landfills today and they are being operated and managed in a much more competent fashion than they were 20-30 years ago. The most likely things that may happen during the postclosure period would be pump failures, blower problems, flare failures, and erosion of the final covers. So I feel that the contingency action funds are way over funded. The Agency needs to develop a guidance that establishes the true concerns and likelihood of occurrence so that these calculations are more realistic and consistent for all landfills.</i>	<i>started this process I felt the only good form of FA was cash trust funds. It was my opinion that these trust funds should be funded over the operational life of the site. After hearing all of the presentations I now feel that letters of credit and surety bonds can be useful and are reasonably safe. The point was brought up and seems appropriate that having multiple mechanisms available and in fact utilizing multiple mechanisms at one time may be safer than relying solely on one type of mechanism. Having said that, I still feel that cash trust funds are the safest form of FA. I do not think that the corporate self-test is very reliable at all and it should not be allowed. The one exception might be to allow the self-test for utilities as they have the ability to raise rates.</i>	<i>improved by including language regarding non-renewal by the bank. Language should require the owner of a facility to obtain alternative FA and written approval by the Agency of the alternative within 120 days or the Agency can draw on the letter of credit.</i>	
Denny Siems, Olmsted Co.	<i>Composite liners have been in use for twenty years now and there have been no known examples of failure to date. There is also a very good chance that by the time the liners would fail that the waste will be degraded to the point where any release to the groundwater will be insignificant.</i>				
Denny Siems, Olmsted Co.	<i>The Agency likes to put forth the landfills in the Closed Landfill Program (CLP) as examples of future risk, but, they are an inappropriate for making a comparison to future facilities. The old landfills were unlined, they accepted</i>	<i>The agency also needs to look at the requirement for</i>	<i>The next question that needs to be addressed related to trust funds is how fast they need to be fully funded. I feel that there is a difference between how the public and private sectors should fund their trusts because there is a</i>		

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<p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p>	<p><i>industrial wastes that turned out to be hazardous, HHW, batteries, appliances and many other things that are not in the landfill waste stream today. All new landfills will have composite liners, industrial solid waste plans, waste screening programs, mercury reduction programs, HHW and VSQG programs so it is safe to say that the risks related to these new sites will be much lower than the risks of the facilities in the CLP.</i></p>	<p><i>third party estimates for post closure care & contingency action costs when it comes to funding for county landfills. All counties have mowers, equipment and staff in their highway departments to mow and make erosion repairs and dealing with more minor contingency actions during the post closure care period. Everyone knows counties are not going away so third party estimates are not needed for public facilities.</i></p> <p><i>When the Agency sets the inflation and discount rates for trust funds on an annual basis the payments are very volatile, big ups and downs in the monthly payments, which makes budgeting difficult. I would recommend using a 5 or 10 year rolling average to help level out these payments.</i></p>	<p><i>definite difference on how they each operate. Private sector facilities trusts should probably be required to be fully funded in 10 years and should be required to obtain letters of credit or surety bonds to back up the fund until fully funded as they could declare bankruptcy at any time. Public sector facilities, counties, should be able to fund their trusts over the design life of the site as they most likely will not ever declare bankruptcy as they have bonding and taxing authority to raise additional money if needed.</i></p> <p><i>Another very important factor is that counties operate their solid waste facilities as enterprise funds. An example was the Crow Wing County presentation. When operating an enterprise fund, money is set aside as a portion of tipping fees in a reserve fund for future cell development and closures along with equipment purchases. These reserve funds are adjusted each year when our 5-year capital improvement programs are updated. As another</i></p>		

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<p>Scott Strand, MCEA</p> <p>Scott Strand, MCEA</p> <p>Scott Strand,</p>	<p><i>remaining FA funds mandatory, do not sufficiently protect either the environment or taxpayers’ wallets.</i></p> <p><i>The current rules’ reliance on surety bonds and letters of credit as preferred FA mechanisms is also misguided. Insurers and banks can always refuse to pay on demand, and force MPCA to sue to collect, with all the attendant costs and delays. Bankruptcy courts using their broad injunctive authority under 11 U.S.C. § 105 and cases like Met-Coil can direct the payment of assets like bonds and L/C’s into settlement pools that can be available to any environmental claimant, private or public. The result is that there is no guarantee that those funds would be available to the MPCA to deal with landfill costs; MPCA may have to share with other creditors in the bankruptcy proceeding.</i></p>	<p><i>foreseeable closure, corrective action, and post-closure maintenance costs, including any long-term (or perpetual) water treatment costs, at the level necessary if the MPCA were to contract out to the do the work.</i></p> <p><i>3) Contrary to what sometimes seems to be the conventional wisdom, surety bonds, letters of credit, and private insurance policies are not immune from the reach of bankruptcy courts, and none of them offer the MPCA the immediate access to funds that might be required to address environmental problems at a landfill.</i></p> <p><i>4) The draft rules MPCA proposed in 2009 were a major step forward, and there should be no backsliding with the new draft rules.</i></p>	<p><i>and the environment from a sudden closure or bankruptcy, but, more important, it can help get the incentives right. When landfills close, as planned or unexpectedly, and revenue ceases, current law creates a strong incentive for operators to avoid as many of the closure and post-closure costs as possible. Indeed, private operators have a fiduciary obligation to their shareholders to minimize those costs, just as government operators do to their constituents. With substantial FA in place, however, completing closure and post-closure responsibilities becomes a source of revenue, because operators who meet their environmental responsibilities efficiently get their FA money back, which should be considerably more than what it cost them to do the work. No other FA mechanism is as effective in aligning landfill operators’ financial objectives with the public’s environmental and taxpayer cost avoiding objectives. In economic terms, adequate FA internalizes negative external costs, which is a key objective of all of our</i></p>		<p><i>insolvent overnight.</i></p> <p><i>3. Bankruptcy courts can reach beyond what are traditionally thought of as assets of a bankrupt estate in the interest of treating all creditors fairly.</i></p>

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<p>MCEA</p> <p>Scott Strand, MCEA</p> <p>Scott Strand, MCEA</p>			<p>environmental laws.</p> <p><i>Determining the correct amount to require is of course a significant challenge. We encourage MPCA to consider requiring two trust funds—one for predictable, shorter-term closure costs and likely corrective actions costs during operations, and one for longer-term, less predictable water quality treatment costs that can arise long after closure. Often, financial assurance covers the former and ignores the latter, and having a separate fund at the outset may reduce the risk that the longer-term issues are kicked down the road. We also encourage MPCA to insist on a discount rate low enough to be risk-free. Historically, 2% has been a rule of thumb, although recent experience may justify even lower discount rates. Once the fund is created, the amount should be reviewed at least annually, to make sure the cost estimates and discount rates still reflect reality.</i></p> <p><i>Of course, landfill operators will resist tying up their capital in trust funds. Given the likely</i></p>		

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<p>Scott Strand, MCEA</p> <p>Scott Strand, MCEA</p> <p>Scott Strand, MCEA</p>			<p><i>collateral demands of banks and insurers for third-party guarantee arrangements today, the cost difference between cash in a trust fund, and letters of credit and surety bonds may not be that great. There may be also ways to reduce the burden. One trust fund mechanism that appears to make sense, at least today, is a “468B Settlement Trust,” which allows a grantor to deduct the initial deposit and allows the fund to grow tax-free, provided that the grantor surrenders all claims on the funds and meets other conditions. Required amounts can also be lower in the opening stages of a new landfill, with new deposits required as the landfill expands.</i></p> <p><i>Letters of credit, surety bonds, and private insurance are all much more vulnerable. These are all essentially webs of contracts, and any bank, surety, or insurer can defend against a claim by contending that the contract is invalid or unenforceable for any number of reasons, the most likely being fraud in the inducement. Obviously, only large, stable,</i></p>		

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<p>Scott Strand, MCEA</p> <p>Scott Strand, MCEA</p>			<p><i>and reliable institutions should be eligible, and language can and should be added to the various contracts to reduce the risk somewhat. It is very difficult, however, to guarantee prompt payment, particularly if the demand is for a large amount. Because L/C's typically do not include any conditions for payment other than a demand, they may be more reliable than bonds or insurance policies. For the same reasons, however, the collateral a bank may require to secure a demand L/C may tie up as much capital as a simple trust fund arrangement. Obviously, the more reliable any FA mechanism is for the MPCA, the less likely it is to be available, and the more likely it is that fees and collateral requirements will be high.</i></p>		

Questions 3 & 4: Relevant Time Period, and Evaluating Insurance as FA

	3A. Factors relevant to determining end to FA duties	3B. Other input on the time period for risks from LFs	4A. Private insurance – adequacy of information, recommendations to MPCA	4B. Other input on the subject of private insurance
Manny Castillo, Xcel	<i>Similar to reliability of financial assurance location, type of facility, owner-operator, and current landfill condition at closure should be taken into consideration. Unless there is proof that a closed landfill has the potential to adversely impact the groundwater system, the terms of 30 and 20 years should be maintained for each respective facility class</i>		<i>There needs to be more information on this type of F.A. Instrument. Need to look at how the instrument would function, and the long term financial performance of the institution</i>	
Jennifer Engstrom, DNR	<i>A site specific monitoring plan with trigger levels and locations should be established. Site monitoring data that had been collected over the operating life should be evaluated to predict if future impacts by the facility on the environment would be significant. If there is that potential then the financial assurance should be maintained until such case is no longer predicted. As an incentive to the financial assurance holder, the amount could be evaluated periodically and decreased as</i>	<i>If the intent of the Legislature was not to have the state as a whole someday become responsible for remediation of groundwater contamination (or potentially other environmental impacts) from a landfill, then another source must be maintained until it is deemed that the risk is at least low. A comparison could be made between the predicted impacts of the facility at inception and with the data collected during operation. It could be borne out that the facility is well understood</i>	<i>Unfortunately, the details of an individual insurance package can vary greatly. It is not possible to determine without knowing that exact wording, if private insurance would provide the security for which the state is looking. If, as mentioned above, a set of criteria were applied to the insurance package language, it could be determined if the funds would be available if needed. A note of caution is that even the insurance company itself could fail, as evidenced by recent economic events.</i>	

	3A. Factors relevant to determining end to FA duties	3B. Other input on the time period for risks from LFs	4A. Private insurance – adequacy of information, recommendations to MPCA	4B. Other input on the subject of private insurance
<p>Jennifer Engstrom, DNR</p> <p>Jennifer Engstrom, DNR</p> <p>Jennifer Engstrom, DNR</p>	<p><i>various risks diminish.</i></p>	<p><i>and behaves in an expected manner. This would confirm the risk level at a given facility which could be taken into account when periodically evaluating financial assurance, and in determining the duration that it must be maintained.</i></p> <p><i>There was work done by the EPA into investigating the predictions for the drainage from coal combustion wastes (EPA. Characterization of coal combustion residues from electric utilities – leaching and characterization data. Dec 2009. EPA-600/R-09/151). This seems like it would provide some insight into future water quality impact predictions on the coal combustion waste or other ash storage facilities.</i></p> <p><i>One of the topics raised that could have bearing on determining risk, is the electronic leak detection test. It is apparently a relatively cost effective way to evaluate the expected performance of a liner (if conducted properly). The test is conducted after the liner is built but before it is used. It could provide an indication of construction quality. It may also be to the state's advantage if that procedure were conducted at the request of the agency and not directly by the landfill owner to have an independent third party evaluation.</i></p>		

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Jennifer Engstrom, DNR		<i>Additionally, the metallic mining rules have a provision for site specific research. This is research that is planned and carried out to evaluate conditions at a given site and provide for a site specific variance. I believe the water quality standards in the NPDES process have a similar provision. This could be used to inform the predictions for future behavior and allow for specific determination of risk at a site and thus aid in the determination of the duration and level of financial assurance.</i>		
Paul Hanson, Dept of Commerce				
Joe Howe, MMB	<i>It appears the current MPCA rules that focus on whether the operator has satisfied the post-closure plan is a good factor to use regarding returning the fund balance in a financial assurance instrument. I would probably defer to more of an expert on these matters in this answer</i>		<i>Private insurance would be an adequate form of financial assurance. There are a couple of details that will need to be looked over thoroughly before allowing private insurance. One is the language in the agreement with the landfill operator. Another is the record of the institution that is issuing the insurance. I am assuming there are some industry standards that can be used to determine the quality of the insurance, such as a rating from a rating agency.</i>	
Terry Johnson, WMI	<i>No information was presented in the process, nor are we aware of any information that suggests that a period of 30 years is inadequate for modern landfills. Rather Minnesota's FA program in total exceeds the Federal program. Thus, we believe that the current legislative directive is satisfied</i>		<i>The presentation and discussion on private insurance was not as in depth as that for sureties and LOC but some good information was presented on ways to strengthen and regulate this potential mechanism. If these and perhaps other guidelines were followed and sufficiently addressed in rule this mechanism would be acceptable. We know that it has been</i>	

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Terry Johnson, WMI	<p><i>by existing rule language on this matter. We do, however, see some merit to developing a framework for determining the end point for PCC and FA. Since the existing panel process did not delve deeply into this subject we strongly recommend that this subject be further developed in a stakeholder process to formulate guidance. However, we do offer some preliminary thoughts on this subject for consideration.</i></p>		<p><i>used elsewhere so clearly regulatory frameworks exist for its</i></p>	
Terry Johnson, WMI	<p><i>Landfills have environmental protection infrastructure as well as monitoring programs by media. These systems allow both direct and indirect means of evaluating the effectiveness of this infrastructure. So it would seem logical to base discharge decisions on the environmental performance of the facility with respect to groundwater, surface water, landfill gas and leachate. Discharge decisions would also depend upon the site-specific setting and factors such as proximity to and 7</i></p> <p><i>sensitivity of receptors. A goal of the above type of system would be to provide incentives for appropriate long-term operational decisions that result in reduced threat to human health and the environment. We would be pleased to participate in this process.</i></p>			
Mike Lynn, Dakota				

	3A. Factors relevant to determining end to FA duties	3B. Other input on the time period for risks from LFs	4A. Private insurance – adequacy of information, recommendations to MPCA	4B. Other input on the subject of private insurance
County				
Shawn McFarlane, Bremer Bank	<i>Scientific factors, such as the time period at which leachate from a closed landfill meets secondary drinking water standards. Financial factors, such as the longest term to maturity of securities that would be available to buy in a FA trust portfolio: 30 years. While the financial markets have a handful of oddball bonds like perpetual, 50- and 100-year bonds, the vast majority of bond issuance is 30 years or shorter in term. It seems impractical to demand 50, 70 or more years on post-closure liabilities when they would be funded in a trust fund that could only buy 30-year assets. This would be an asset-liability mismatch. In particular, applying discount rates to the liability would be difficult. If someone insisted on 60 years of liability, and was planning on funding it with a 30-year bond today, and then buying another 30-year bond 30 years from now, how would they quantify the discount rate and the earnings? Who knows what the 30-year bond yield will be in 30 years, let alone in 30 weeks?</i>		<i>At present, my understanding of what the panel heard about private insurance, separate from surety bonds, was that post-closure FA policies were not being written by the marketplace. Only more direct environmental liability policies were being written. If this is true and remains true, then private landfill or environmental insurance for this particular need remains an interesting concept without a practical implementation.</i>	
Shawn McFarlane, Bremer Bank				
Jessica Schaum, Conservation MN	<i>If it is up to the operator to create a postclosure plan and the PCA has the ability to approve, then every single item in the plan should be met before any financial assurance funds</i>	<i>The PCA should be able to call for risk reduction standards in creating and maintaining the landfill, and then making sure that the operator's postclosure plan is fulfilled. We</i>	<i>Do not accept private insurance as a reliable form of financial assurance at new landfills. It doesn't appear that many private companies are in the business of offering landfills policies to protect against contingency action and</i>	

	3A. Factors relevant to determining end to FA duties	3B. Other input on the time period for risks from LFs	4A. Private insurance – adequacy of information, recommendations to MPCA	4B. Other input on the subject of private insurance
<p>Jessica Schaum, Conservation MN</p> <p>Jessica Schaum, Conservation MN</p>	<p><i>are returned. In addition to those listed above, a site specific, holistic look at the following could be used to determine when/if to return all FA funds.</i></p> <p><i>History of owner/operator/landfill performance, previous landfill emergencies or known problems and how they relate to the postclosure plan</i></p> <p><i>Leachate generation rates and water standards (metals, known contaminants, endocrine disruptors)</i></p> <p><i>Leachate recirculation</i></p> <p><i>Landfill flares</i></p> <p><i>Groundwater factors- distance to water table, soil type, history of flow</i></p> <p><i>Site geology</i></p> <p><i>Type of waste</i></p> <p><i>Quality of liner construction</i></p> <p><i>Quality of cover</i></p> <p><i>Stormwater structures</i></p> <p><i>Size of cells and construction type</i></p> <p><i>Adjoining land uses, water features</i></p> <p><i>Was there a plan for end use – revenue generator? Gas extraction? Ski hill?</i></p> <p><i>Perpetual care costs of mowing, testing, and contingency actions handed over to CLP or some other agreement is set up for perpetual care</i></p>	<p><i>should be able to design and operate landfills to reduce future threats, and correlate that to future financial assurance estimates. Better care, planning, and good maintenance behavior could be rewarded in the form of lower financial assurance requirements.</i></p>	<p><i>closure costs. In addition, the premiums may be higher to operators when compared to a more standard letter or credit or trust fund payments. If the PCA is open to considering, the insurance policies would be written to ensure the operator/owner do the work they need to, and provide language so the state could make a claim in a quick period of time if there were a problem.</i></p>	
<p>Denny Siems, Olmsted Co.</p>	<p><i>I agree with the legislative directive that someone needs to be responsible for landfills to make sure</i></p>	<p><i>Now the real elephant in the room; Perpetual Care (PC) or as the ITRC study calls it Custodial Care (CC).</i></p>	<p><i>I don't feel that insurance is a good alternative for FA. First of all the costs probably would be quite high and only a few of the facilities</i></p>	<p><i>Do not allow landfills to use insurance to fund f/a!!!__</i></p>

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<p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p> <p>Denny Siems,</p>	<p><i>that they do not pose a threat to the environment. The question in my mind is when does this responsibility end for the owner of a landfill and when does this responsibility transfer to society as a whole? When someone decides to get into the business of owning and operating a landfill they need to know that there will be an endpoint to their obligation. They have to base their business plan for the life of the facility and a known endpoint of the postclosure care and contingency action responsibilities. It is impossible to plan for these issues in perpetuity. If a prospective landfill owner can see no end to their responsibilities or is required to fund for perpetual care (PC) they will most likely decide it is a poor business to get into and society may find that no one is willing to provide this needed service. Landfills are needed because no matter how much waste reduction is accomplished, how much waste is recycled, how much resource recovery is utilized, some remaining waste will need to be placed in a landfill.</i></p> <p><i>As a general statement I believe the current rule provides a good baseline for when the obligations could end. The law says that the financial obligation for an MMSW</i></p>	<p><i>As mentioned earlier the owner/operator of a landfill for business planning purposes needs to know when their obligations will end. The current rule says 30 years but I feel a new rule should allow for an earlier exit form FA obligations if the waste mass is stabilized. At that point in time I feel it should become a societal obligation. At the majority of the sites the PC or CC costs will be quite low. The costs will be for mowing and cap maintenance and maybe some reduced amount of groundwater monitoring.</i></p> <p><i>How will PC or CC costs be paid for and who will do the work? I feel we already have in place the vehicles to do these two things. First, the funding should come from the Solid Waste Management Tax (SWMT). All businesses and residents pay this tax so that would make it a uniform way for society to contribute money for this need. The amount of money that would be needed each year would be miniscule. As an example for new sites coming on line after 1-1-11, let's assume they have an operating life of 40 years and a full 30 year PCC period for a total time frame of 70 years before entering the PC or CC stage. The amount of money needed each year over 70 years to create the PC or CC fund would be very small, say 1 one-hundredth of 1% of the</i></p>	<p><i>would use them, perhaps only suspect sites that could not obtain another type of mechanism. I think that the Agency would also find it very hard and litigious to get the money out of an insurance company. And finally the real elephant in to room on insurance; how reliable are they? Insurance companies typically try to off load any risk they have by buying insurance from another company which buys insurance from another company, etc. creating all kinds of counter party risk. Any one of the insurance companies in the chain becomes insolvent and they could all fall like dominos and the Agency could find out at the worst possible time that a landfill utilizing insurance for FA actually has none.</i></p>	

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<p>Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p>	<p><i>landfill is 30 years and a non MMSW landfill is 20 years. The current law does allow for these obligations to continue on beyond 30 or 20 years by commissioner discretion if the landfill was a poorly run site that has continuing problems. It should be pointed out that there is currently no real evidence that the 30 year post closure care period for FA is inadequate. The main problems with the law as it now stands are; there is no way to determine when the site no longer is a treat to the environment and it is not possible to end the obligations earlier than 30 years for a very well run facility that has utilized technologies such as enhanced liners to protect the ground water or leachate recirculation to stabilize the waste mass. Landfill owners that have been proactive in their business plans and utilized these technologies need to be rewarded for their extra expense and stewardship toward the environment by allowing them to be released from their obligations at an earlier point in time if the waste mass has been stabilized.</i></p> <p><i>So how do we decide when a landfill has met its obligation? The main issues are leachate quantity & quality, gas generation rates and the presence or absence of ground</i></p>	<p><i>SWMT. In 2007 \$55,000,000 was collected via the SWMT. The key to this concept though would be to create a PC or CC fund that was absolutely inaccessible by the governor or the legislature.</i></p> <p><i>After the landfill was closed and the 30 year PCC has been completed the appropriate amount of money for the work needed in the PC or CC period would be removed from this fund and given to the Closed Landfill Program (CLP). The CLP already takes care of over 100 landfills so adding a small number of additional sites should not be a problem.</i></p> <p><i>In 1998, the last time the Agency looked at PC for the 26 open MSW landfills, there are currently only 21 open MSW landfills, I offered up the following funding solution; \$1 per person in every household and \$1 per employee for every business per year to be paid on their state income tax form into a PC fund. This tax would continue until the Agency felt the fund was adequate for PC. I understand that this funding of current facilities PC is outside the current legislative directive but the funding concept could still be used for landfills opened after 1-1-11 say at a rate of \$1 per household and \$10 per business per year until adequately funded. Taxing our citizens at this rate would be</i></p>		

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<p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p>	<p>water contamination. The Interstate Technology & Regulatory Alternative Landfill Technologies Team (ITRC) did a study and wrote a paper called "Evaluating, Optimizing, or Ending Post-Closure Care at MSW Landfills Based on Site-Specific Data Evaluations". This was a very informative paper and takes us a good way down the road to answering our question. They stated that it is possible to determine when Post Closure Care (PCC) could end and a Custodial Care (CC) period could begin based on a data evaluation of leachate, landfill gas, groundwater, and the final cap. The ITRC definition of the CC period is similar to what the MPCA has always called Perpetual Care (PC). I will discuss the need for CC or PC below in part B.</p> <p>I feel that it may be impossible to write a rule that is adequate at delineating when the PCC period can end along with the FA obligations for a landfill within the time constraints of the current rule writing period. The Agency needs to put together a forum or stakeholder group to take the ITRC study and develop it to the point where we can come up with correct data points and benchmark numbers that need to be met for the four areas outlined in the ITRC study. Therefore, I</p>	<p>basically unnoticeable. But again, the fund would need to be structured so the governor and the legislature could never access it.</p> <p>Some members of the panel stated that the costs of PC or CC should be shouldered by the landfills themselves but I cannot agree with that idea. That idea does not work from a business sense. It also would not be very equitable among the different landfills and could possibly cause problems for the environment. If you are a private landfill or a landfill only based system it may make sense to put the whole burden for PC or CC on the landfill. But if you are a public facility that is operating an integrated solid waste system that is actively utilizing all the components of the waste hierarchy such as waste reduction programs, recycling, yard waste composting, and HHW & VSQG programs it would be very unfair. An integrated solid waste system is much more expensive to operate than just a landfill. Putting the additional cost of PC or CC on these systems could cause the elimination of some of these programs causing degradation to the environment.</p>		

	3A.Factors relevant to determining end to FA duties	3B. Other input on the time period for risks from LFs	4A. Private insurance – adequacy of information, recommendations to MPCA	4B. Other input on the subject of private insurance
Denny Siems, Olmsted Co.	<i>recommend that the Agency write the new FASIT rule to address the groundwater and karst issues with only minor changes to FA with the caveat that the Agency will form a stakeholder group that will set the parameters for when PCC and FA obligations end and CC or PC begin. The Agency after receiving stakeholder input on these issues will then write language that will be added to the rule as an addendum within 18 months.</i>			
Scott Strand, MCEA	<i>Landfill operators should remain on permits, including financial assurance, until there is no reasonable possibility that the facility will threaten water quality or any other environmental standards. That can be a very long time. We certainly anticipate there will be situations where an operator of a closed landfill will choose to relinquish its claim to its FA to the government, or even pay more, in order to “walk away” from its environmental responsibilities. That should not be prohibited, in our view, but it certainly should not be mandatory, and there should be no arbitrary time limits.</i>		<i>Kris Hulsebus’s overview covered this issue well. Assuming that private insurance products are even available to cover these kinds of costs (a big assumption), insurance poses the same risks as surety bonds. Insurers can cancel policies, can refuse payment, can force agencies like MPCA to sue to collect, and will try to negotiate settlements in their own favor.</i>	
Scott Strand, MCEA	<i>A risk assessment scoring protocol like the one outlined in the California report could be a useful tool for evaluating whether the MPCA would or could consider a landfill</i>			

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	<i>takeover and transfer of FA funds over to the government. The risk of uncertainty must in all cases rest with operators, not with the taxpayers.</i>			

Questions 5 & 6: FA for Publicly Owned Landfills, and Other Comments

	5A. forms of FA appropriate for publicly owned landfills	5B. Other input on financial assurance for publicly owned landfills	6. Other comments to MPCA
Manny Castillo, Xcel			<i>Given the complexity of the rulemaking process and the legislative mandate it is recommend that he MPCA stay on task.</i>
Jennifer Engstrom, DNR			
Paul Hanson, Dept of Commerce			
Joe Howe, MMB Joe Howe, MMB	<i>It appears the majority of publicly owned facilities go with the trust fund option for financial assurance. This is an extremely safe option. Also, I am of the opinion that a local unit of government that operates a landfill is not going to go bankrupt; therefore, it would always have the ability to pay for clean-up costs associated with the landfill that is located within its county. The chances of a landfill that is owned by a local unit of government being neglected seems to be so minute that it couldn't even be calculated.</i>		<i>Sitting in on this panel has been quite an interesting experience. I came onto this panel extremely skeptical of some of the instruments used for financial assurance. I was also leery of landfills and the environmental threats they cause. I leave this panel with a whole new view. I would advocate the use of any of the financial assurance mechanisms discussed (except for the self-test). These can be of high quality, keeping in mind the agreement is well written (with teeth) and the agreement is performed using reputable organizations.</i> <i>My concerns about landfill risk also appear to have been blown out of proportion a little. After hearing the testimony from all of the experts, it seems that in the last twenty years, environmental risks associated with landfills have been reduced dramatically. My assumption is that risk will be further mitigated in the years ahead. The key here is that we do not</i>

	5A. forms of FA appropriate for publicly owned landfills	5B. Other input on financial assurance for publicly owned landfills	6. Other comments to MPCA
Joe Howe, MMB			<i>take a step back in our enforcement of environmental policy while the landfills are built and operated. Keeping strict environmental laws on the books regarding landfill operations is key when determining the type and amount of financial assurance that is necessary.</i>
Terry Johnson, WMI Terry Johnson, WMI Terry Johnson, WMI	<i>We support that all existing and any new FA mechanisms should be available to public entities as well as private entities. There may be other mechanisms that from a solvency or reliability perspective could be perfectly viable for a publicly owned landfill. We heard two specific proposals on this subject from Crow Wing County. The first was use of enterprise funds as a FA mechanism by restricting access. We agree that this may be a viable option but have not evaluated the legality or the reliability of the access restriction mechanisms. Dedicated government funds in MN have a poor record of access restrictions so this would need to be evaluated carefully. The second recommendation was to allow local governments to use a self-test or self-insure. We do not see a problem with this as long as it is directly comparable to the test available for private industry which in our understanding requires collateral. It is important to note that in this process we learned that several mechanisms not typically used by Publically Owned</i>	<i>We believe that a significant inequity presently exists with regard to funding FA at public and privately owned Mixed Municipal Solid Waste Landfills (MMSWLF). For instance, most Counties with MSW landfill facilities are able to use the fees (\$6.67/ton) collected as part of the Greater MN LF Abatement Fee to fund their FA accounts. Since these fees are for the same explicit purpose regardless of whether or not they are collected at a public or privately owned landfill, it would seem logical that private landfill operators, which collect the same fees, should be allowed to use these fees for the same purposes. The ability of all owners and operators of MMSWLF's to use these fees for FA purposes would provide a more equitable system than presently exists.</i>	

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Terry Johnson, WMI	<i>Landfills are available to them such as surety bonds. We feel that if any new instruments are under review, consideration should be given to maintaining an equitable system since public entities, large publicly traded corporations and small private operators all compete to some degree in the marketplace.</i>		
Mike Lynn, Dakota County			
Shawn McFarlane, Bremer Bank	<i>The same mechanisms described in IA above: trust fund, surety bond and letter of credit, with multiple mechanisms required if not 100% trust fund. I can find no compelling reason for different policies for a county or other public entity compare to a private operator.</i>		<i>Technical suggestions on the rate estimating table spreadsheet (filename: 2009 Rate est table.xls)</i>
Shawn McFarlane, Bremer Bank			<i>The spreadsheet calculates an inflation-adjusted cost for postclosure care using the previous 12 months' inflation rate, presumably the Consumer Price Index (CPI). These figures are listed in cells C13-C32. Next, the cost is discounted by a discount rate factor. In the versions I have seen, 0.50% is used, presumably the Federal Reserve discount rate or similar short-term interest rate. As of fall 2010, the present year's cost is inflated by 1.48%, then discounted by 0.50%.</i>
Shawn McFarlane, Bremer Bank			<i>Suggestions for improving this spreadsheet: Use a longer-term interest rate for the discount factor.</i> <i>Benefit #1 from this suggestions: It reduces the year-to-year volatility of contribution requirements by. See the attached spreadsheet, showing the volatility of the Fed Funds rate compared to the 5-year and 10-year Treasury rate. The Fed Funds rate is very cyclical with the</i>

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>			<p><i>business cycle, so using it as the discount factor means you are discounting the liabilities the most (getting the lowest present value) at the peak of the business cycle, precisely when the business risks to the operator are highest because the economy will be slowing down. Similarly, the discount factor is lowest coming out of a recession, so firms and public entities are required to make larger contributions precisely when demand for landfill services is likely to be lowest in the business cycle and financial stress levels are beginning to improve.</i></p> <p><i>Benefit #2: FA during landfill operation and after closure has a long-term horizon, yet the overnight interest rate is used to discount it. This creates a mismatch between assets (the FA trust fund or other mechanism) and the liabilities (possible and expected postclosure costs). For simplicity, a single rate such as the 5- or 10-year Treasury yield could be used. However, this would ignore the difference in time horizon on a landfill that was closed 29 years ago versus one that is still accepting waste today. Should BOTH those landfills be discounted at the same rate? While more complex, a fairer and more reasonable solution would be to use different discount rates based on the life of the closed landfill. The Federal Reserve Bank of St. Louis maintains a daily time series of constant-maturity Treasury securities from 90 days to 30 years, so the data is easily obtained by MPCA via the research.stlouisfed.org Website.</i></p> <p><i>MPCA could also consider using different discount factors for different FA mechanisms.</i></p>

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<p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p> <p>Shawn McFarlane, Bremer Bank</p>			<p><i>For instance, since surety bonds and LOCs do not earn any interest for the FA trust, but instead have premium or inactivity costs associated with them, they should face a relatively low discount rate factor. Contrast this with a FA trust fund, which can purchase securities to earn higher rates of interest. These securities could also attempt to match the duration of the post-closure liabilities.</i></p> <p><i>Note that the NOMINAL yield earned on fixed-rate government securities already INCLUDES the market's expectation of future inflation, as well as the "real yield" on government securities. This was first codified by economist Irving Fisher in 1926 (the Fisher equation), so it is well-established in the economic literature. So if the discount factor were used on trust funds, which invest in assets that are already pricing in the market's best guess on future interest rates, then it would make sense to use a longer-term interest rate as the discount factor, to avoid "double-counting" an inflation adjustment. As an example, the amount would be inflated by the CPI, then discounted by the 10-year Treasury yield, which includes the market's expectations of inflation in it. Another alternative would be to use the "real yield" on Treasury Inflation-Protected Securities (TIPS), which are bonds whose principle increases with the CPI, but that also pay a yield in nominal terms.</i></p> <p><i>The use of a higher figure for a discount rate would encourage the use of the safest FA mechanism, the trust fund, because the assets in the fund could earn that discount rate as a</i></p>

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Shawn McFarlane, Bremer Bank			<p><i>yield (or higher), and it would also reduce the required FA contribution, but only by an amount that was reasonable and determined by market conditions (bond yields).</i></p> <p><i>Shawn McFarlane, CFA</i></p> <p><i>Please note that I am writing for myself, and these opinions are not necessarily those of Bremer Trust, Bremer Bank, or Bremer Financial Corporation.</i></p>
Jessica Schaum, Conservation MN Jessica Schaum, Conservation MN Jessica Schaum, Conservation MN	<p><i>The current mechanisms allowed seem adequate and sufficient. Private insurance or other mechanisms may not even be available for municipalities or utilities.</i></p>		<p><i>Any form of financial assurance at landfills is going to cost the landfill operator money. The trick is to accurately estimate those costs and then attempt to balance out those costs with the risks associated with building, maintaining, and closing landfills so that no undue burden is placed on the landfill owners, local governments, or taxpayers.</i></p> <p><i>We are only testing for known contaminants at this time – many of which we didn't know about 30 years ago. Just something to keep in mind, we may be finding chemicals or compounds mixing and leaching out of landfills that we can not fathom at this time. Could be significant costs and devastating results involved.</i></p> <p><i>Idealistic final comment – if it is more expensive to landfill things to the consumer, perhaps their habits can change. Can we raise the cost of hauling away trash based on amount created or weight? If taxpayers do not want to pay more for creating trash, perhaps it could be done a different way. Some of the burden of creating, maintaining, and closing landfills could be</i></p>

	5A. forms of FA appropriate for publicly owned landfills	5B. Other input on financial assurance for publicly owned landfills	6. Other comments to MPCA
Jessica Schaum, Conservation MN			<p><i>shared with the companies creating the trash. Why shouldn't they have more responsibility for their wastes? Something like an extended producer responsibility approach – the Agency could establish rules and programs for waste that companies would have to pay into for their share of what is headed to the landfills. Companies would then figure out how to repackage their items so it saves them money and saves space in the landfill.</i></p>
<p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p> <p>Denny Siems, Olmsted Co.</p>	<p><i>It makes sense that public facilities should have access to all different types of FA mechanisms. But consideration should also be given to the idea that public facilities that operate as an enterprise fund and have large capital reserves be allowed to use reserves to bridge the gap in FA funding if they have to close their landfills early.</i></p>		<p><i>I hope that a new rule can be successfully written that addresses closure, post closure care (PCC) and perpetual care (PC) or custodial care (CC) costs and funding for all new landfills after 1-1-11. But there will still be a very, very large void that has been discussed for many years without any resolution, namely PC or CC for all of the currently operating landfills in the state. There are approximately 104 demolition landfills, 21 MSW landfills and 19 industrial landfills operating in the state. These facilities should be and are responsible for the closure and PCC at their sites. But what about PC or CC for them? Hopefully we can answer the PC or CC issue for new landfills during this FASIT rule process and that will lay the foundation for establishing a fund for all the active sites in the state.</i></p> <p><i>Thank You for allowing me to participate on this panel and hopefully my comments and ideas throughout the process have been useful.</i></p>
Scott Strand, MCEA	<p>We do not believe the issues are radically different for public landfills. Municipalities can go bankrupt just like</p>		<p>The legislature should at some point consider the establishment of a separate fund, paid for by a per-ton assessment, to cover landfill</p>

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Scott Strand, MCEA	private companies can, and third-party guarantee arrangements pose the same risks no matter who owns the landfill. There may be ways public funds can be dedicated that provide the same level of protection as a private trust fund, and the California study explored some of those options.		cleanup and remediation costs if financial assurance is unavailable or insufficient. Such a fund could reduce the risk that existing landfills will impose costs on taxpayers, most likely after the facilities close and the operator is no longer around or is judgment-proof. We hope these comments and the presentation we submitted are helpful. Please contact us if you would like to discuss any of these issues further. We look forward to the rulemaking process.