



## **GUIDELINE 18 - FINANCIAL ASSURANCE MECHANISMS FOR CLOSURE AND POST-CLOSURE FOR SOLID WASTE FACILITIES**

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### **I. Introduction**

The North Dakota Department of Environmental Quality (Department) has prepared this guidance document to assist facilities in meeting the financial assurance requirements of North Dakota Administrative Code (NDAC) Chapter 33.1-20-14 of the North Dakota Solid Waste Management Rules.

The purpose of financial assurance is to ensure that funds are available to cover the costs of closure and post-closure care if the owner or operator is unwilling or unable to do so. Therefore, it is important that the mechanisms demonstrating financial assurance are correctly prepared.

New or expanded facilities and/or units must demonstrate financial assurance prior to acceptance of solid waste.

Initial cost estimates must be in current dollars, and cost estimates must be adjusted annually for inflation. The inflation adjusted financial assurance documents for solid waste facilities must be received by the Department no later than August 31<sup>st</sup> of each year.

Should you have any questions regarding the preparation of your financial assurance documents feel free to contact the Department's Solid Waste Program. Additional information and resources can be found on the Department's website <https://deq.nd.gov/WM/>.

### **II. Mechanisms**

Each financial assurance mechanism must be approved by the Department. The following financial assurance mechanisms are acceptable, provided respective requirements of NDAC Section 33.1-20-14-07 are met. See the following sections below for additional information regarding each mechanism.

- Trust Fund
- Surety Bond
- Irrevocable Letter of Credit (LOC)
- Insurance Policy
- Financial Test and Corporate Guarantee

Owner of facilities may set up one mechanism or multiple mechanisms to demonstrate financial assurance for both closure and postclosure care of each facility. The amount of funds available through the mechanisms must be no less than the sum of funds that would be available if a single mechanism had been established and maintained for financial assurance of closure and of post closure care (NDAC Subsection 33.1-20-14-01(3)). Multiple mechanisms for closure and postclosure care are limited to trust funds, surety bonds, letters of credit, and insurance

(NDAC Subsection 33.1-20-14-03(3)).

### III. Trust Fund

After your facility has set up a trust fund in accordance with NDAC Subsection 33.1-20-14-07(1), a trust agreement **and** certification of acknowledgment must be submitted. A trust agreement for a trust fund as specified in NDAC Subsection 33.1-20-14-07(1) should be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted.

#### TRUST AGREEMENT

TRUST AGREEMENT, the "AGREEMENT" entered into as of [Effective date] by and between [Name of the Owner or Operator] a [Name of state] [Choose one: Corporation, Partnership, Association or Proprietorship], the "GRANTOR," and [Name of financial institution acting as TRUSTEE], [Insert "incorporated in the state of (State)" or "a national bank"], the "TRUSTEE".

Whereas, the North Dakota Department of Environmental Quality "DEPARTMENT" a regulatory agency of the state of North Dakota, has established certain regulations applicable to the GRANTOR requiring that an owner or operator of a solid waste management facility shall provide assurance that funds will be available when needed for closure or post-closure, or both, care of the facility,

Whereas, the GRANTOR has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

Whereas, the GRANTOR acting through its duly authorized officers has selected the TRUSTEE to be the trustee under this agreement and the TRUSTEE is willing to act as trustee,

Now, therefore, the GRANTOR and the TRUSTEE agree as follows:

#### **Section 1. Definitions.** As used in this AGREEMENT:

- (a) The term GRANTOR means the owner or operator who enters into this AGREEMENT and any successors or assigns of the GRANTOR.
- (b) The term TRUSTEE means the TRUSTEE who enters into this AGREEMENT and any successor TRUSTEE.

**Section 2. Identification of Facilities and Cost Estimate.** This agreement pertains to the facilities and cost estimates identified on attached *Schedule A*.

[On Schedule A, for each facility, list the permit number, name, and the current closure or postclosure, or both, cost estimates or portions thereof for which financial assurance is demonstrated by this AGREEMENT.]

**Section 3. Establishment of Fund.** The GRANTOR and the TRUSTEE hereby establish a trust fund, the FUND, for the benefit of the DEPARTMENT. The GRANTOR and the TRUSTEE intend that no third party have access to the FUND, except as herein provided. The FUND is established initially as consisting of the property which is acceptable to the TRUSTEE and

described in *Schedule B* attached hereto. Such property and any other property subsequently transferred to the TRUSTEE is referred to as the FUND, together with all earnings and profits thereon, less any payments or distributions made by the TRUSTEE pursuant to this AGREEMENT. The FUND must be held by the TRUSTEE, IN TRUST, as herein provided. The TRUSTEE is not responsible, nor may it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the GRANTOR any payments necessary to discharge any liabilities of the GRANTOR established by the DEPARTMENT.

**Section 4. Payment for Closure and Post-closure Care.** The TRUSTEE shall make payments from the FUND as the DEPARTMENT shall direct, in writing, to provide for the payment of the cost of closure, and/or post-closure care of the facilities covered by this AGREEMENT. The TRUSTEE shall reimburse the GRANTOR or other persons as specified by the DEPARTMENT from the FUND for closure and post-closure expenditures in such amounts as the DEPARTMENT shall direct in writing. In addition, the TRUSTEE shall refund to the GRANTOR such amounts as the DEPARTMENT specifies in writing. Upon refund such funds shall no longer constitute part of the FUND as defined herein.

**Section 5. Payments Comprising the FUND.** Payments made to the TRUSTEE for the FUND must consist of cash or securities acceptable to the TRUSTEE.

**Section 6. TRUSTEE Management.** The TRUSTEE shall invest and reinvest the principal and income of the FUND and keep the FUND invested as a single FUND without distinction between principal and income in accordance with general investment policies and guidelines which the GRANTOR may communicate in writing to the TRUSTEE from time to time, subject however to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the FUND, the TRUSTEE shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

- (a) Securities or other obligations of the GRANTOR or any other owner or operator of the facilities or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), may not be acquired or held unless they are securities or other obligations of a federal or state government;
- (b) The TRUSTEE is authorized to invest the FUND in time or demand deposits of the TRUSTEE, to the extent insured by an agency of the federal or state government; and
- (c) The TRUSTEE is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

**Section 7. Commingling and Investment.** The TRUSTEE is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the FUND to any common, commingled, or collective trust fund created by the TRUSTEE in which the FUND is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the TRUSTEE. The TRUSTEE may vote such shares in its discretion.

**Section 8. Express Powers of TRUSTEE.** Without, in any way, eliminating the powers and discretions conferred upon the TRUSTEE by the other provisions of this AGREEMENT or by law, the TRUSTEE is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the TRUSTEE is bound to see the application of the purchase money or to inquire into the validity or expediency of any such sale or disposition;
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To register any securities held in the FUND in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the TRUSTEE in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a federal reserve bank, but the books and records of the TRUSTEE shall at all times show that all such securities are part of the FUND;
- (d) To deposit any cash in the FUND in interest bearing accounts maintained or savings certificates issued by the TRUSTEE, in its separate capacity, or in any other banking institution affiliated with the TRUSTEE to the extent insured by an agency of the federal or state government; and
- (e) To compromise or otherwise adjust all claims in favor of or against the FUND.

**Section 9. Taxes and Expenses.** All taxes of any kind that may be assessed or levied against or in respect of the FUND and all brokerage commissions incurred by the FUND shall be paid from the FUND. All other expenses incurred by the TRUSTEE in connection with the administration of this TRUST, including fees for legal services rendered to the TRUSTEE, the compensation of the TRUSTEE to the extent not paid directly by the GRANTOR and all other proper charges and disbursements of the TRUSTEE, must be paid from the FUND.

**Section 10. Annual Valuation.** The TRUSTEE shall annually, at least thirty days prior to the anniversary date of establishment of the FUND, furnish to the GRANTOR and to the DEPARTMENT a statement confirming the value of the TRUST. Any securities in the FUND must be valued at market value as of no more than sixty days prior to the anniversary date of establishment of the FUND. The failure of the GRANTOR to object in writing to the TRUSTEE

within ninety days after the statement has been furnished to the GRANTOR and the DEPARTMENT, constitutes a conclusively binding assent by the GRANTOR barring the GRANTOR from asserting any claim or liability against the TRUSTEE with respect to matters disclosed in the statement.

**Section 11. Advice of Counsel.** The TRUSTEE may from time to time consult with counsel, who may be counsel to the GRANTOR, with respect to any question arising as to construction of this AGREEMENT or any action to be taken hereunder. The TRUSTEE shall be fully protected to the extent permitted by law in acting upon the advice of counsel.

**Section 12. TRUSTEE Compensation.** The TRUSTEE is entitled to reasonable compensation for its services as agreed upon in writing from time to time with the GRANTOR.

**Section 13. Successor TRUSTEE.** The TRUSTEE may resign or the GRANTOR may replace the TRUSTEE, but such resignation or replacement is not effective until the GRANTOR has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the TRUSTEE hereunder. Upon the successor trustee's acceptance of the appointment, the TRUSTEE shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the FUND. If for any reason, the GRANTOR cannot or does not act in the event of the resignation of the TRUSTEE, the TRUSTEE may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the TRUST in a writing sent to the GRANTOR, the DEPARTMENT, and the present TRUSTEE by certified mail ten days before such change becomes effective. Any expenses incurred by the TRUSTEE as a result of any of the acts contemplated by this section must be paid as provided in section 9.

**Section 14. Instructions to the TRUSTEE.** All orders, requests, and instructions by the GRANTOR to the TRUSTEE must be in writing, signed by such persons as are designated in the attached *Exhibit A*, or such other designees as the GRANTOR may designate by amendment to *Exhibit A*. The TRUSTEE shall be fully protected in acting without inquiry in accordance with the GRANTOR'S orders, requests, and instructions. All orders, requests, and instructions by the DEPARTMENT to the TRUSTEE must be in writing, signed by an authorized DEPARTMENT representative and the TRUSTEE shall act and be fully protected in acting in accordance with such orders, requests, and instructions. The TRUSTEE shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the GRANTOR or the DEPARTMENT hereunder has occurred. The TRUSTEE shall have no duty to act in the absence of such orders, requests, and instructions from the GRANTOR or the DEPARTMENT, or both, except as provided for herein.

**Section 15. Notice of Nonpayment.** The TRUSTEE shall notify the GRANTOR and the DEPARTMENT by certified mail within ten days following the expiration of the thirty-day period after the anniversary of the establishment of the TRUST if no payment is received from the GRANTOR during that period. After the pay-in period is completed, the TRUSTEE is not required to send a notice of nonpayment.

**Section 16. Amendment of AGREEMENT.** This AGREEMENT may be amended by an instrument in writing executed by the GRANTOR, the TRUSTEE, and the DEPARTMENT, or by the TRUSTEE and the DEPARTMENT, if the GRANTOR ceases to exist.

**Section 17. Irrevocability and Termination.** Subject to the right of the parties to amend this AGREEMENT as provided in section 16, this TRUST is irrevocable and continues until terminated at the written agreement of the GRANTOR, the TRUSTEE, and the DEPARTMENT, or by the TRUSTEE and the DEPARTMENT, if the GRANTOR ceases to exist. Upon termination of the TRUST, all remaining trust property, less final trust administration expenses, must be delivered to the GRANTOR.

**Section 18. Immunity and Indemnification.** The TRUSTEE may not incur personal liability of any nature in connection with any act or omission made in good faith in the administration of this TRUST or in carrying out any directions by the GRANTOR or the DEPARTMENT issued in accordance with this AGREEMENT. The TRUSTEE must be indemnified and saved harmless by the GRANTOR or from the TRUST, or both, from and against any personal liability to which the TRUSTEE may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the GRANTOR fails to provide such defense.

**Section 19. Choice of Law.** This AGREEMENT must be administered, construed, and enforced according to the laws of the state of North Dakota.

**Section 20. Interpretation.** As used in this AGREEMENT, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this AGREEMENT do not affect the interpretation or the legal efficacy of this AGREEMENT.

In Witness Whereof the parties have caused this AGREEMENT to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written: The parties below certify that the wording of this AGREEMENT meets the requirements specified in North Dakota Administrative Code (NDAC) Subsection 33.1-20-14-07(1) as such regulation was constituted on the date first above written.

[Signature of GRANTOR]  
[Title]  
[Attest:]  
[Title]

[Signature of TRUSTEE]  
[Title]  
[Attest:]  
[Title]

[Corporate Seal]

[Seal]

### CERTIFICATION OF ACKNOWLEDGMENT

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [Date], before me personally came [Name of owner or operator (grantor)] to me known, who, being by me duly sworn, did depose and say that [she/he] resides at [Address, City, State, Zip], that [she/he] is [Title of owner/operator] of [Name of business], the corporation described in and which executed the above instrument, that [she/he] knows the seal of said corporation, that the seal affixed to such instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that [she/he] signed [her/his] name thereto by like order.

Signature of notary public: \_\_\_\_\_

[Notary Seal]

### EXHIBIT A

The following persons, acting singly or collectively, shall have the right to issue instructions to the Trustee pursuant to Section 14 of the Agreement:

Original Trust Agreement date: [xx/xx/xxxx]

Exhibit Revision date: [xx/xx/xxxx]

[Utilize Department information identified below unless otherwise directed by the Department]

<u>Name</u>	<u>Title</u>	<u>Address</u>
[Department Authorized Staff]	Division Director, Division of Waste Management, North Dakota Department of Environmental Quality	4201 Normandy St. Bismarck, ND 58503-1324
[Other Authorized Facility Name]	[Title]	[Address]

[If more than one person has been designated by the GRANTOR to provide orders, requests, and instructions to the TRUSTEE, provide the name, title, and address for each person.]

### SCHEDULE A

On Schedule A, for each facility list the name, address, unit(s), and the current final closure, post-closure care cost estimates, or portions thereof, for which financial assurance is demonstrated by this agreement.

Original Trust Agreement date: [xx/xx/xxxx]

Schedule Revision date: [xx/xx/xxxx]

Name and address of Facility(ies):

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_  
Business Contact person: \_\_\_\_\_  
Contact phone: \_\_\_\_\_  
Permit number: \_\_\_\_\_

Closure cost estimate: \$ \_\_\_\_\_  
Post-closure cost estimate \$ \_\_\_\_\_  
Total cost estimates \$ \_\_\_\_\_

[If this Agreement demonstrates financial assurance for more than one facility, provide the name, address, and closure and/or postclosure estimated for each facility.]

## SCHEDULE B

On Schedule B, list the amount the trust is funded. If the trust is a standby trust, list the amount the trust would have in it, if it were funded. Select from **one or more** of the options below according to the type of financial assurance used. If none of the options pertain, contact the Department.

Original Trust Agreement date: [xx/xx/xxxx]

Schedule Revision date: [xx/xx/xxxx]

### **Option 1**

#### **SCHEDULE B-Fully Funded**

This trust fund is funded on [Date] in the amount of [Dollar amount spelled out] U.S. dollars (\$\_\_\_).

### **Option 2**

#### **SCHEDULE B-Surety Bond**

The corpus of this trust is now empty and when funded the amount will be [Dollar amount spelled out] U.S. dollars (\$\_\_\_) from [Name of surety bond company]. The surety bond number is \_\_\_\_.

### **Option 3**

#### **SCHEDULE B-Letter of Credit**

The corpus of this trust is now empty and when funded the amount will be [Dollar amount spelled out] U.S. dollars (\$\_\_\_) from [Name of financial institution]. The letter of credit number is \_\_\_\_.

### **Option 4**

#### **Schedule B-Payment into Trust**

This trust is funded on the [Day] day of [Month], [Year], in the amount of [Dollar amount spelled out] U.S. dollars (\$\_\_\_\_\_).

This amount represents the first payment into the trust as provided in NDAC Subdivision 33.1-20-14-07(1)(c).

The second installment in the amount of [Dollar amount spelled out] U.S. dollars (\$\_\_\_\_\_) will be deposited into the trust on or before [Date].

The third and final installation in the amount of [Dollar amount spelled out] U.S. dollars (\$\_\_\_\_\_) will be deposited into the trust on or before [Date].

## **IV. Surety Bond**

A. **Guarantee Bond.** If you are using a surety bond guaranteeing payment into a trust fund as specified in NDAC Subsection 33.1-20-14-07(2) it must be worded as follows, except that the

instructions in brackets are to be replaced with the relevant information and the brackets deleted. In addition, you must establish a standby trust fund and the trust agreement must be submitted to the Department with the surety bond. Wording for the trust agreement in this document should be used.

### FINANCIAL GUARANTEE BOND

Date bond executed: \_\_\_\_\_

Effective date: \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Principal: **[Legal name and business address of owner or operator]**

Type of organization: **[Choose one: "individual", "joint venture," "partnership" or "corporation"]**

State of incorporation: \_\_\_\_\_

Surety(ies): **[Name(s) and business address(es)]**

Permit number, name, address, and closure or post-closure, or both, amount for each facility guaranteed by this bond: \_\_\_\_\_

**[List each facility separately]**

Closure cost estimate: \$ \_\_\_\_\_

Post-closure cost estimate: \$ \_\_\_\_\_

Total penal sum of bond: \$ \_\_\_\_\_

Know all persons by these presents that we the PRINCIPAL and SURETY(IES) hereto are firmly bound to the North Dakota Department of Environmental Quality (hereinafter called the DEPARTMENT) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assignors jointly and severally: provided that where the SURETY(IES) are corporations acting as cosureties, we, the SURETIES, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each SURETY binds itself, jointly and severally with the PRINCIPAL, for the payment of such sum only as is set forth opposite the name of such SURETY, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said PRINCIPAL is required under North Dakota Century Code Chapter 23.1-08-09 to have a permit in order to own or operate each solid waste management facility identified above, and

Whereas said PRINCIPAL is required to provide financial assurance for closure or closure and post-closure care as required by North Dakota Administrative Code (NDAC) Article 33.1-20 or as a condition of the permit, and

Whereas said PRINCIPAL shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the PRINCIPAL shall faithfully,

before the beginning of final closure of each facility identified above, fund the standby trust fund in the amounts identified above for the facility,

Or, if the PRINCIPAL shall fund the standby trust fund in such amounts within fifteen days after an order to begin closure is issued by the DEPARTMENT or a state or other court of competent jurisdiction,

Or, if the PRINCIPAL shall provide alternate financial assurance as specified in NDAC Chapter 33.1-20-14, as applicable, and obtain the DEPARTMENT'S written approval of such assurance within ninety days after the date of notice of cancellation is received by both the PRINCIPAL and the DEPARTMENT from the SURETY(IES), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The SURETY(IES) shall become liable on this bond obligation only when the PRINCIPAL has failed to fulfill the conditions described above. Upon notification by the DEPARTMENT that the PRINCIPAL has failed to perform as guaranteed by this bond, the SURETY(IES) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the DEPARTMENT.

The liability of the SURETY(IES) shall not be discharged by any payment or any succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the SURETY(IES) hereunder exceed the amount of said penal sum.

The SURETY(IES) may cancel the bond by sending notice of cancellation by certified mail to the PRINCIPAL and to the DEPARTMENT, provided, however, that cancellation shall not occur during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by both the PRINCIPAL and the DEPARTMENT as evidenced by the return receipts.

The PRINCIPAL may terminate this bond by sending written notice to the SURETY(IES) provided, however, that no such notice shall become effective until the SURETY(IES) receive(s) written authorization for termination of the bond by the DEPARTMENT.

**\*\*The following paragraph is an optional rider that may be included but is not required.**

*The PRINCIPAL and SURETY(IES) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure or post-closure, or both, amount, provided that the penal sum does not increase by more than twenty percent in any one year, and no decrease in the penal sum takes place without the written permission of the DEPARTMENT.*

In witness whereof, the PRINCIPAL and SURETY(IES) have executed this financial guarantee bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the PRINCIPAL and SURETY(IES) and that the wording of this surety bond meets the requirements specified in NDAC Subsection 33.1-20-14-07(2) as such rule was constituted on the date this bond was executed.

PRINCIPAL  
[Signature(s)]

CORPORATE SURETY(IES)  
[Name and address]

[Name(s)]  
[Title(s)]  
[Corporate seal]

State of Incorporation: \_\_\_\_\_  
Liability limit: \$ \_\_\_\_\_

[Signature(s)]  
[Name(s) and Title(s)]  
[Corporate seal]

Bond premium: \$ \_\_\_\_\_

[For every cosurety, provide signature(s), corporate seal, and other information in the same manner as for surety above.]

**B. Performance Bond.** If you are using a surety bond guaranteeing performance of closure or post-closure care as specified in NDAC Subsection 33.1-20-14-07(2) it must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted. In addition, you must establish a standby trust fund and the trust agreement must be submitted to the Department with the surety bond. Wording for the trust agreement in this document should be used.

### PERFORMANCE BOND

Date bond executed: \_\_\_\_\_

Effective Date: \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

PRINCIPAL: [Legal name and business address of owner or operator]

Type of organization: [Choose one: "Individual," "joint venture," "partnership," or "corporation"]

State of Incorporation: \_\_\_\_\_

SURETY(IES): [Name(s) and business address(es)]

Permit number, name, address and closure or post-closure, or both, amount(s) for each facility guaranteed by this bond: \_\_\_\_\_

[List each facility separately]

Closure cost estimate: \$ \_\_\_\_\_

Post-closure cost estimate: \$ \_\_\_\_\_

Total penal sum of bond: \$ \_\_\_\_\_

Know all persons by these presents, that we the PRINCIPAL and SURETY(IES) hereto are firmly bound to the North Dakota Department of Environmental Quality (hereinafter called the DEPARTMENT), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally: Provided that, where the SURETY(IES) are corporations acting as cosureties, we the SURETIES bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us and for all other purposes each SURETY binds itself jointly and severally with the PRINCIPAL for the payment of such sum only as is set forth opposite the name of each SURETY, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said PRINCIPAL is required under North Dakota Century Code Chapter 23.1-08-09 to have a permit to own or operate each solid waste management facility identified above, and

Whereas said PRINCIPAL is required to provide financial assurance for closure, or closure and post-closure care as required by North Dakota Administrative Code (NDAC) Article 33.1-20 or as a condition of the permit, and

Whereas said PRINCIPAL shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, Therefore, the conditions of this obligation are that if the PRINCIPAL shall faithfully perform closure, when required to do so, of each facility for which this bond guarantees closure, in accordance with the closure plan and other requirements of the permit as such plan and permit may be amended pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended.

And if the PRINCIPAL shall faithfully perform post-closure care of each facility for which this bond guarantees post-closure care, in accordance with the post-closure plan and other requirements of the permit as such plan and permit may be amended pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

Or, if the PRINCIPAL shall provide alternate financial assurance as specified in NDAC Chapter 33.1-20-14 and obtain the DEPARTMENT'S written approval of such assurance within ninety days after the date notice of cancellation is received by both the PRINCIPAL and the DEPARTMENT from the SURETY(IES) then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The SURETY(IES) shall become liable on this bond obligation only when the PRINCIPAL has failed to fulfill the conditions described above.

Upon notification by the DEPARTMENT that the PRINCIPAL has been found in violation of the closure requirements of NDAC Article 33.1-20 for a facility for which this bond guarantees performance of closure, the SURETY(IES) shall either perform closure in accordance with the closure plan and other permit requirements or place the closure amount guaranteed for the facility into the standby trust fund as directed by the DEPARTMENT.

Upon notification by the DEPARTMENT that the PRINCIPAL has been found in violation of the post-closure requirements of NDAC Article 33.1-20 for a facility for which this bond guarantees performance of post-closure care, the SURETY(IES) shall either perform post-closure care in accordance with the post-closure plan and other permit requirements or place the post-closure amount guaranteed for the facility into a standby trust fund as directed by the DEPARTMENT.

Upon notification by the DEPARTMENT that the PRINCIPAL has failed to provide alternate financial assurance as specified in NDAC Chapter 33.1-20-14 and obtain written approval of such assurance from the DEPARTMENT during the ninety days following receipt by both the PRINCIPAL and the DEPARTMENT of a notice of cancellation of the bond, the SURETY(IES) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the DEPARTMENT.

The SURETY(IES) hereby waive(s) notification of amendments to closure plans, permits, applicable laws, statutes, rules, and regulations and agree(s) that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the SURETY(IES) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the SURETY(IES) hereunder exceed the amount of said penal sum.

The SURETY(IES) may cancel the bond by sending the notice of cancellation by certified mail to the PRINCIPAL and to the DEPARTMENT, provided, however, that cancellation shall not occur during the one hundred twenty days beginning on the date of receipt of the notice of cancellation by both the PRINCIPAL and the DEPARTMENT as evidenced by the return receipts.

The PRINCIPAL may terminate this bond by sending written notice to the SURETY(IES) provided, however, that no such notice shall become effective until the SURETY(IES) receive(s) written authorization for termination of the bond by the DEPARTMENT.

**\*\*The following paragraph is an optional rider that may be included but is not required.**

*PRINCIPAL and SURETY(IES) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure or post-closure, or both, amount, provided that the penal sum does not increase by more than twenty percent in any one year, and no decrease in the penal sum takes place without the written permission of the DEPARTMENT.*

In Witness Whereof, the PRINCIPAL and SURETY(IES) have executed this performance bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the PRINCIPAL and the SURETY(IES) and that the wording of this surety bond meets the requirements in NDAC Subsection 33.1-20-14-07(2) as such rule was constituted on the date this bond was executed.

PRINCIPAL  
[Signature(s)]  
[Name(s)]  
[Title(s)]  
[Corporate Seal]

CORPORATE SURETY(IES)  
[Name and Address]  
State of Incorporation: \_\_\_\_\_  
Liability Limit: \$ \_\_\_\_\_  
[Signature(s)]  
[Name(s) and Title(s)]  
[Corporate Seal]  
Bond premium: \$ \_\_\_\_\_

[For every cosurety, provide signature(s), corporate seal, and other information in the same manner as for surety above].

**V. Letter of Credit**

If you use a letter of credit as specified in NDAC Subsection 33.1-20-14-07(3) it must be worded as follows except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted.

As per NDAC Subdivision 33.1-20-14-07(3)(b), a letter from the owner or operator, referring to the letter of credit by number, issuing institution, and date and including the name and address

of the solid waste management unit or facility and the amount of funds assured, must be provided with the letter of credit to the department.

### IRREVOCABLE STANDBY LETTER OF CREDIT

Division Director  
North Dakota Dept of Environmental Quality  
Division of Waste Management – Solid Waste Program  
4201 Normandy St.  
Bismarck, ND 58503-1324

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit Number \_\_\_\_\_ in your favor, at the request and for the account of [Owner/operator name and address] up to the aggregate amount of [Dollar amount written out] U.S. dollars \$\_\_\_\_\_, available upon presentation of

- (1) Your sight draft bearing reference to this letter of credit no. \_\_\_\_\_, and
- (2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of North Dakota Century Code Chapter 23.1-08".

This letter of credit is effective as of [Date] and shall expire on [Date at least one year later], but such expiration date shall be automatically extended for a period of [At least one year date after expiration] on [Date] and on each successive expiration date, unless, at least one hundred twenty days before the current expiration date, we notify both you and [Owner or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for one hundred twenty days after the date of receipt by both you and [Owner or operator's name], as shown on the signed return receipts.

When this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [Owner or operator's name] in accordance with your instructions.

We certify that the wording of this letter of credit is meets the requirements specified in North Dakota Administrative Code Subsection 33.1-20-14-07(3) as such rule was constituted on the date shown immediately below.

[Signature(s) of Official(s) of issuing institution]

[Title(s)]

[Date]

This credit is subject to [Insert "the most recent edition of the "Uniform Customs and Practice for Documentary Credits", published by the International Chamber of Commerce", OR "the Uniform Commercial Code"]].

**VI. Insurance**

If you use a certificate of insurance as specified in NDAC Subsection 33.1-20-14-07(4) it should be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted.

**CERTIFICATE OF INSURANCE FOR CLOSURE OR POST-CLOSURE CARE**

Name and address of insurer (hereinafter called the "INSURER"): \_\_\_\_\_

Name and address of Insured (hereinafter called the "INSURED"): \_\_\_\_\_

Facilities covered: [List each facility separately]

Facility Permit Number: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Closure cost estimate: \$ \_\_\_\_\_

Post-closure cost estimate: \$ \_\_\_\_\_

Policy face amount: \$ \_\_\_\_\_

Policy Number: \_\_\_\_\_

Effective Date: \_\_\_\_\_

The INSURER hereby certifies that it has issued to the INSURED the policy of insurance identified above to provide financial assurance for [Insert "closure" or "closure and post-closure care" or "post-closure care"] for the facilities identified above. The INSURER further warrants that such policy conforms in all respects with the requirements of North Dakota Administrative Code (NDAC) Subsection 33.1-20-14-07(4), as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such rules is hereby amended to eliminate such inconsistency.

When requested by the North Dakota Department of Environmental Quality (DEPARTMENT) the INSURER agrees to furnish to the DEPARTMENT a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate meets the requirements specified in NDAC Subsection 33.1-20-14-07(4) as such rule was constituted on the date shown immediately below.

\_\_\_\_\_  
Authorized signature for INSURER

[Name of person signing]

[Title of person signing]

Signature of witness or notary: \_\_\_\_\_

[Date]

**VII. Financial Test and Corporate Guarantee**

**A. Financial Test.** To demonstrate the financial test, you should use a letter from the chief financial officer. It should be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted. Don't forget to send in the Accountant's Opinion on your firm's financial statement and the Special Report from the Independent CPA with the Letter from Chief Financial Officer\*\*.

**\*\* If your company/corporation does not have a Chief Financial Officer then the highest official dealing with financial operations should sign the letter and his/her title should be inserted into the letter in place of "Chief Financial Officer".**

***If the owner/operator is a government entity (i.e., a City or County), replace "firm" with the appropriate entity designation and edit accordingly where necessary.***

**LETTER FROM CHIEF FINANCIAL OFFICER**

Division Director  
North Dakota Dept of Environmental Quality  
Division of Waste Management – Solid Waste Program  
4201 Normandy St.  
Bismarck, ND 58503-1324

I am the chief financial officer of **[Insert name and address of firm]**. This letter is in support of this firm's use of the financial test to demonstrate financial assurance for closure and/or post-closure costs, as specified in North Dakota Administrative Code (NDAC) Sections 33.1-20-14-02 through 33.1-20-14-07.

**Instructions:** *Fill out the following paragraphs regarding facilities and associated cost estimates. If your firm has no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its permit number, name, address, and current closure and/or post-closure cost estimates. Identify each cost estimate as to whether it is for closure or post-closure care. If an owner/entity has multiple permits, they should all be included in one financial test.*

1. This firm is the owner or operator of the following facilities for which financial assurance for closure and/or post-closure care is demonstrated through the financial test specified in NDAC Sections 33.1-20-14-02 through 33.1-20-14-07. The current closure and/or post-closure cost estimates covered by the test are shown for each facility:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_  
Permit No.: \_\_\_\_\_

Closure cost estimate: \$ \_\_\_\_\_  
Post-closure cost estimate: \$ \_\_\_\_\_  
Total cost estimate: \$ \_\_\_\_\_

2. This firm guarantees, through the guarantee specified in NDAC Sections 33.1-20-14-02

through 33.1-20-14-07, the closure and/or post-closure care of the following facilities owned or operated by the guaranteed party. The current cost estimates for the closure and/or post-closure care so guaranteed are shown for each facility:

Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 City, State, Zip: \_\_\_\_\_  
 Permit No.: \_\_\_\_\_

Closure cost estimate: \$ \_\_\_\_\_  
 Post-closure cost estimate: \$ \_\_\_\_\_  
 Total cost estimate: \$ \_\_\_\_\_

The firm identified above is **Insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator and receiving the following value in consideration of this guarantee; or (3) engaged in the following substantial business relationship with the owner or operator and receiving the following value in consideration of this guarantee.** *[Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter].*

This firm **Choose one: "is required" or "is not required"** to file a form 10K with the Securities and Exchange Commission for the latest fiscal year.

The fiscal year of this firm ends on **Insert month, day**. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended **Insert date**.

**(Comment: the figures for the following items must be contained in the audited financial statements from the most recently completed fiscal year.)**

**Instructions: Choose only one of the following alternatives.**

**Alternative I**

1. Sum of current closure and post-closure cost estimate(s) *(total of all cost estimates shown above)*..... \$ \_\_\_\_\_
- \*2. Total liabilities *(if any portion of the closure or post-closure cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4)*..... \$ \_\_\_\_\_
- \*3. Tangible net worth *(if any portion of the closure and post-closure cost estimates is included in "total liabilities" on your firm's/entity's financial statements, you may add the amount of that portion to this line)* ..... \$ \_\_\_\_\_
- \*4. Net worth *(if any portion of the closure and post-closure cost estimates is included in "total liabilities" on your firm's/entity's financial statements, you may add the amount of that portion to this line)* ..... \$ \_\_\_\_\_
- \*5. Current assets..... \$ \_\_\_\_\_

- \*6. Current liabilities ..... \$ \_\_\_\_\_
  - \*7. Net working capital (*line 5 minus line 6*)..... \$ \_\_\_\_\_
  - \*8. The sum of net income plus depreciation, depletion,  
and amortization..... \$ \_\_\_\_\_
  - \*9. Total assets in the United States..... \$ \_\_\_\_\_
- |  | YES   | NO    |
|--|-------|-------|
| 10. Is line 5 divided by line 6 greater than 1.5?..... | _____ | _____ |
| 11. Is line 7 at least 4 times line 1?.....            | _____ | _____ |
| 12. Is line 3 at least 4 times line 1?.....            | _____ | _____ |
| 13. Is line 3 at least \$2 million? .....              | _____ |       |
| 14. Is line 9 at least 4 times line 1?.....            | _____ | _____ |

**Alternative II**

- 1. Sum of current closure and post-closure cost estimate(s) (*total of all cost estimates shown above*)..... \$ \_\_\_\_\_
- 2. Current bond rating of most recent issuance of this firm and name of rating service .....
- 3. Date of issuance of bond.....
- 4. Date of maturity of bond .....
- \*5. Total liabilities (*if any portion of the closure or post-closure cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 6 and 7*)..... \$ \_\_\_\_\_
- \*6. Tangible net worth (*if any portion of the closure and post-closure cost estimates is included in "total liabilities" on your firm's financial statements, you may add the amount of that portion to this line*) ..... \$ \_\_\_\_\_
- \*7. Net worth (*if any portion of the closure and post-closure cost estimates is included in "total liabilities" on your firm's/entity's financial statements, you may add the amount of that portion to this line*) ..... \$ \_\_\_\_\_
- \*8. Current assets..... \$ \_\_\_\_\_
- \*9. Current liabilities..... \$ \_\_\_\_\_

- \*10. Net working capital (line 8 minus line 9)..... \$ \_\_\_\_\_
  - \*11. The sum of net income plus depreciation, depletion,  
and amortization..... \$ \_\_\_\_\_
  - \*12. Total assets in the United States..... \$ \_\_\_\_\_
- |  | YES   | NO    |
|--|-------|-------|
| 13. Is line 10 at least 4 times line 1?..... | _____ | _____ |
| 14. Is line 6 at least 4 times line 1?.....  | _____ | _____ |
| 15. Is line 6 at least \$2 million?.....     | _____ | _____ |
| 16. Is line 12 at least 4 times line 1?..... | _____ | _____ |

I hereby certify that the wording of this letter is meets the requirements specified in NDAC Subsection 33.1-20-14-07(5) as such regulations were constituted on the date shown immediately below.

[Signature]  
[Name]  
[Title]  
[Date]

**B. Corporate Guarantee.** If you are using a corporate guarantee, as specified in NDAC Subsection 33.1-20-14-07(5), it must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted. You will also need to submit the Letter from Chief Financial Officer to prove that you meet the requirements of NDAC Subdivisions 33.1-20-14-07(5)(a) through (e) NDAC. If an owner/entity has multiple permits, they should all be included in one corporate guarantee (financial test).

**CORPORATE GUARANTEE FOR CLOSURE OR POST-CLOSURE CARE**

Guarantee made this [Date] by [Name of guaranteeing entity], a business corporation organized under the laws of the state of [Insert name of state], herein referred to as guarantor. This guarantee is made on behalf of the [Name of owner or Operator] of [Business address], which is [Insert one of the following: “our subsidiary”; “a subsidiary of [name and address of common parent corporation], of which guarantor is a subsidiary”; or “an entity with which guarantor has a substantial business relationship”] to the Department.

**Recitals**

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in North Dakota Administrative Code (NDAC) Subsection 33.1-20-14-07(5).
2. [Name of Owner or Operator] owns or operates the following solid waste management facility(ies) covered by this guarantee:

[Identify each permit separately with the following information:]

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
City, State, Zip: \_\_\_\_\_  
Permit No.: \_\_\_\_\_

Closure cost estimate: \$ \_\_\_\_\_  
Post-closure cost estimate: \$ \_\_\_\_\_  
Total cost estimate: \$ \_\_\_\_\_

3. "Closure plans" and "post-closure plans" as used below refer to the plans maintained as required by NDAC Sections 33.1-20-04.1-05, 33.1-20-04.1-09, and 33.1-20-14-02 for the closure and post-closure care of facilities as identified above.

4. For value received from [Name of Owner or Operator], guarantor guarantees to the Department that in the event that [Name of Owner or Operator] fails to perform [Insert one of the following choices: "closure", "post-closure care", or "closure and post-closure care"] of the above facility(ies) in accordance with the closure or post-closure plans and other permit or interim status requirements when required to do so, the guarantor shall do so or establish a trust fund as specified in NDAC Chapter 33.1-20-14, as applicable, in the name of [Name of Owner or Operator] in the amount of the current closure and/or post-closure cost estimates as specified in NDAC Sections 33.1-20-14-02 through 33.1-20-14-07.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within ninety days, by certified mail, notice to the Department and to [owner or operator] that he intends to provide alternate financial assurance as specified in NDAC Sections 33.1-20-14-02 through 33.1-20-14-07, as applicable, in the name of [Name of Owner or Operator]. Within one hundred twenty days after the end of such fiscal year, the guarantor shall establish such financial assurance unless [Name of Owner or Operator] has done so.

6. The guarantor agrees to notify the Department by certified mail, of a voluntary or involuntary proceeding under title 11 (Bankruptcy), United States Code, naming guarantor as debtor, within ten days after commencement of the proceeding.

7. Guarantor agrees that within thirty days after being notified by the Department of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor of closure or post-closure care, he shall establish alternate financial assurance as specified in NDAC Sections 33.1-20-14-02 through 33.1-20-14-07, as applicable, in the name of [Name of Owner or Operator] unless [Name of Owner or Operator] has done so.

8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure or post-closure plan, amendment or modification of the permit, the extension or reduction of the time of performance of closure and/or post-closure, or any other modification or alteration of an obligation of the owner or operator.

9. Guarantor agrees to remain bound under this guarantee for as long as [Name of Owner or

**Operator** must comply with the applicable financial assurance requirements of NDAC Sections 33.1-20-14-02 through 33.1-20-14-07 for the above-listed facilities, except as provided in paragraph 10 of this agreement.

10. **Instructions:** *Insert the following paragraph only if the guarantor is (a) a direct or higher-tier corporate parent, or (b) a firm whose parent corporation is also the parent corporation of the owner or operator otherwise ignore it.*

Guarantor may terminate this guarantee by sending notice by certified mail to the Department and to **[Name of Owner or Operator]**, provided that this guarantee may not be terminated unless and until **[Name of Owner or Operator]** obtains, and the Department approve(s), alternate closure and/or post-closure care coverage complying with NDAC Subsection 33.1-20-14-03(3).

**Instructions:** *Insert the following paragraph only if the guarantor is a firm qualifying as a guarantor due to its "substantial business relationship" with its owner or operator otherwise ignore it.*

Guarantor may terminate this guarantee one hundred twenty days following the receipt of notification, through certified mail, by the Department and by **[Name of Owner or Operator]**.

11. Guarantor agrees that if **[Name of Owner or Operator]** fails to provide alternate financial assurance as specified in NDAC Subsection 33.1-20-14-03(3), as applicable, and obtain written approval of such assurance from the Department within ninety days after a notice of cancellation by the guarantor is received by the Department from guarantor, guarantor shall provide such alternate financial assurance in the name of **[Name of Owner or Operator]**.

12. Guarantor expressly waives notice of acceptance of this guarantee by the Department or by **[Name of Owner or Operator]**. Guarantor also expressly waives notice of amendments or modifications of the closure and/or post-closure plan and of amendments or modifications of the facility permit(s).

I hereby certify that the wording of this guarantee meets the requirements specified in NDAC Subsection 33.1-20-14-07(5) as such regulations were constituted on the date first above written.

Effective date:

**[Name of guarantor]**

**[Authorized signature for guarantor]**

**[Name of person signing]**

**[Title of person signing]**

Signature of witness of notary: \_\_\_\_\_

**[Notary Seal]**