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BILL ANALYSIS



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Senate Bill 404 (as enacted)
Sponsor: Senator Jack Brandenburg
Senate Committee: Finance
House Committee: Natural Resources

PUBLIC ACT 250 of 2013

Date Completed: 2-24-15

CONTENT

The bill amended Part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act to revise financial assurance requirements for a disposal area. Specifically, the bill does the following:

- Allows a landfill owner or operator to establish a required perpetual care fund as a perpetual care fund bond.
- Eliminates a requirement that a landfill owner or operator pay an amount equal to the required financial assurance over the term of the disposal area license.
- Exempts a perpetual care fund bond from a provision allowing the Department of Environmental Quality (DEQ) to use a bond posted to fulfill financial assurance requirements if the owner or operator fails to comply with Part 115 requirements to correct a violation.
- Includes a perpetual care fund bond among the instruments on which the DEQ may draw if the owner or operator does not extend the bond's effective date before it expires or establish alternative financial assurance.
- Requires increases to a landfill's perpetual care fund to be made within 30 days after the end of the State fiscal year, rather than semiannually.
- Eliminates a provision allowing the interest and earnings of a perpetual care fund to be used to pay the solid waste management program administration fee or a surcharge assessed on each cubic yard of waste disposed of in a landfill.
- Allows a trust or escrow account established as a perpetual care fund to be replaced with a perpetual care fund bond, and requires the DEQ Director to authorize the fund's custodian to disburse the money in the trust or escrow account to the landfill owner.
- Requires a landfill owner or operator who uses a perpetual care fund bond also to establish a standby trust for the deposit of all payments made under the terms of the bond.
- Exempts a standby trust from required increases to a perpetual care fund and annual accounting valuations until the trust is funded pursuant to the bill's requirements.

The bill also repealed Section 11524, which allowed person to request a reduction in the total amount of financial assurance required for a landfill; required the DEQ to release the required financial assurance if its amount was exceeded by the amount in the perpetual care fund; and authorized the DEQ to require an increase in the amount of required financial assurance if money was disbursed from the perpetual care fund before a landfill's closure.

The bill took effect on December 26, 2013.

The bill defines "perpetual care fund bond" as a surety bond, an irrevocable letter of credit, or a combination of these instruments in favor of and on a form approved by the DEQ by which a perpetual care fund is established.

Financial Assurance: Disposal Area

Section 11523 in Part 115 requires a person to obtain a license from the DEQ in order to conduct, manage, maintain, or operate a disposal area. ("Disposal area" means one or more of the following at a location as defined by the boundary identified in its construction permit or engineering plans approved by the DEQ: a solid waste transfer facility, incinerator, sanitary landfill, processing plant, or other solid waste handling or disposal facility used in the disposal of solid waste.) The DEQ may not issue a license to operate a disposal area unless the applicant has filed, as part of the application, evidence of financial assurance (i.e., mechanisms used to demonstrate that the funds necessary to meet the cost of closure, postclosure maintenance and monitoring, and corrective action will be available whenever they are needed).

For a Type III landfill or a preexisting unit at a Type II landfill, financial assurance must be in the form of a bond in an amount equal to \$20,000 per acre of licensed landfill within the solid waste boundary; however, the amount of the bond may not be less than \$20,000 or more than \$1.0 million. Each bond must provide assurance for the maintenance of the finished landfill site for a period of 30 years after the landfill or any approved portion is completed. Additionally, a perpetual care fund (described below) must be maintained. (A Type II landfill is a municipal landfill that can accept virtually any nonhazardous solid waste for disposal. A Type III landfill can be a construction and demolition landfill or a special use landfill for a particular waste.)

Financial assurance for a Type II landfill that is an existing unit or a new unit must be in an amount equal to the cost of hiring a third party to conduct closure, postclosure maintenance and monitoring, and, if necessary, corrective action (such as the investigation, cleanup, treatment, or monitoring of constituents released into the environment from a disposal area). The application must demonstrate financial assurance in accordance with Section 11523a. (Under that section, an applicant for a Type II landfill license must submit evidence that the applicant has financial assurance for any existing unit or new unit in an amount equal to or greater than the sum of standard closure and postclosure cost estimates, and any corrective action cost estimate.)

Financial assurance established for a solid waste transfer facility, incinerator, processing plant, other solid waste handling or disposal facility, or a combination of these must be in the form of a bond in an amount equal to 0.25% of the facility's construction cost, but not less than \$4,000, and must be continued in effect for two years after the disposal area is closed.

A landfill owner or operator may post a cash bond with the DEQ instead of other bonding mechanisms to fulfill the remaining financial assurance requirements in Section 11523.

Previously, a minimum amount equal to the remaining financial assurance requirement divided by the term of the operating license had to be paid to the DEQ before the landfill's licensure. Subsequent payments had to be made annually in an amount equal to the remaining financial assurance requirement divided by the number of years remaining until the operating license expired, until the required amount was attained. The bill deleted these provisions.

The DEQ may use a required bond for the closure and postclosure monitoring and maintenance of a disposal area if the owner or operator fails to comply with the related requirements of Part 115 and the rules promulgated under it to the extent necessary to correct the violations. At least seven days before using the bond, the Department must issue a notice of violation or other order alleging the violation and provide an opportunity for a hearing. Under the bill, these provisions do not apply to a perpetual care fund bond.

Section 11523 provides that under the terms of a surety bond, letter of credit, or insurance policy, the issuing institution must notify the DEQ and the owner or operator at least 120 days before the bond expires or is cancelled. If the owner or operator does not extend the bond's effective date

or establish alternative financial assurance within 90 days after receiving the notice, the DEQ may draw on the bond. The bill extended these provisions to a perpetual care fund bond. Additionally, in the case of a perpetual care fund bond, the bill requires the issuing institution to deposit the proceeds into the standby trust or escrow account unless the DEQ agrees to the expiration or cancellation of the bond.

Under the bill, if an owner or operator of a disposal area fulfills the financial assurance requirements by obtaining a bond, including a perpetual care fund bond, and the surety company, insurer, trustee, bank, or financial or other institution that issued or holds the bond becomes the subject of a bankruptcy action or has its authority to issue or hold the bond or to act as an escrow agent or trustee suspended or revoked, within 60 days after receiving notice of that event, the owner or operator must establish alternative financial assurance.

Perpetual Care Fund

Section 11525 requires a landfill owner or operator to establish and maintain a perpetual care fund for a period of 30 years after final closure of the landfill. The fund may be established as a trust or an escrow account, and may be used to demonstrate financial assurance for Type II landfills under Sections 11523 and 11523a. Under the bill, a perpetual care fund also may be established as a perpetual care fund bond.

Except as otherwise provided, a landfill owner or operator must increase the amount of his or her perpetual care fund by 75 cents for each ton or portion of a ton or 25 cents for each cubic yard or portion of a cubic year of solid waste that is disposed of in the landfill. The deposits must be made until the fund reaches the prescribed maximum required amount. The bill eliminated a requirement that the deposits be made at least semiannually. Instead, the bill requires that increases to the amount of a fund be calculated based on solid waste disposed of in the landfill as of the end of the State fiscal year and be made within 30 days after the end of each State fiscal year.

Until the perpetual care fund reaches the maximum required amount, the fund's custodian (a bank or other financial institution) must credit to the fund any of its interest and earnings. (The bill defines, "custodian" as the trustee or escrow agent either of a perpetual care fund that is established as a trust escrow account, or of a standby trust or escrow account for a perpetual care fund bond. Previously, the term meant the trustee or escrow agent of a perpetual care fund.)

The bill refers to a perpetual care fund trust or escrow account, rather than a perpetual care fund, in provisions regarding the fund's operation, the credit and distribution of fund interest and earnings, and an annual accounting to the DEQ.

The bill deleted a provision that allowed the custodian, upon the owner's or operator's direction, to use the interest and earnings to pay the solid waste management program administration fee or the surcharge required by Section 11525a for the landfill. (Section 11525a requires a landfill owner or operator to pay a surcharge of 12 cents for each cubic yard or portion of a cubic yard of solid waste or municipal solid waste incinerator ash that is disposed of in the landfill before October 1, 2015. The owner or operator must collect the surcharge from any person who generated the solid waste or who arranged for its delivery to the solid waste hauler or transfer facility. The surcharge must be forwarded to the State Treasurer for deposit in the Solid Waste Staff Account of the Solid Waste Management Fund.)

Under the bill, a perpetual care fund established as a trust or escrow account may be replaced with a perpetual care fund that is established as a perpetual care fund bond that complies with all applicable requirements. Upon the replacement, the DEQ Director must authorize the custodian to disburse the money in the trust or escrow account to the landfill owner unless a contract between the owner and operator specifies otherwise.

The bill requires a landfill owner or operator who uses a perpetual care fund bond to satisfy the requirements of Section 11525 also to establish a standby trust or escrow account. The custodian must deposit all payments made under the terms of the bond directly into the standby trust or

escrow account in accordance with the DEQ Director's instructions. The standby trust or escrow account must meet the requirements of Section 11525 for a trust or account established as a perpetual care fund, except that until the standby trust or escrow account is funded pursuant to these requirements, the required 75-cent or 25-cent payments into the trust or account and the annual accounting valuations are not required.

Termination of Financial Assurance

Section 11525b requires the owner or operator of a disposal area to provide continuous financial assurance coverage until released from the requirement to do so by the DEQ. A landfill owner or operator who has completed postclosure maintenance and monitoring of the landfill in accordance with Part 115, rules promulgated under it, and an approved postclosure plan may request that the required financial assurance be terminated. A person requesting termination must submit to the DEQ a statement that the landfill has been monitored and maintained as required for the prescribed 30-year postclosure period, and certify that the landfill is not subject to corrective action. Within 60 days of receiving the statement, the DEQ must perform a consistency review of it and disapprove or approve the statement.

If the statement is approved, the DEQ must notify the custodian of the perpetual care fund that money from the fund will be disbursed as provided in Section 11525(10). (Under that section, upon the DEQ's approval of a request to terminate financial assurance for a landfill, the custodian must disburse any money in the perpetual care fund to the owner, unless a contract between the owner and the operator provides otherwise.)

Under the bill, the requirement to notify the custodian of the disbursement of fund money applies if the fund is established as a trust or escrow account.

MCL 324.11504 et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill has no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.