

The Texas Commission on Environmental Quality (commission) adopts amendments to §§37.131, 37.141, 37.151, 37.251, 37.261, 37.301, 37.311, 37.321, 37.331, 37.341, 37.351, 37.361, 37.371, 37.381, 37.551, 37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661, 37.671, 37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.1001, 37.2001, 37.2003, 37.2011, 37.3001, 37.5011, 37.7021, 37.7041, 37.8061, 37.8071, and 37.9070.

Sections 37.361 and 37.825 are adopted *with changes* to the proposed text as published in the October 25, 2002 issue of the *Texas Register* (27 TexReg 9932). Sections 37.131, 37.141, 37.151, 37.251, 37.261, 37.301, 37.311, 37.321, 37.331, 37.341, 37.351, 37.371, 37.381, 37.551, 37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661, 37.671, 37.830, 37.835, 37.840, 37.845, 37.855, 37.1001, 37.2001, 37.2003, 37.2011, 37.3001, 37.5011, 37.7021, 37.7041, 37.8061, 37.8071, and 37.9070 are adopted *without changes* and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments to Chapter 37 are as a result of the quadrennial review of this chapter (Rule Log Number 2002-016-037-AD), which was adopted by the commission on October 10, 2002, and published in the October 25, 2002 issue of the *Texas Register* (27 TexReg 10056). The revisions correct typographical errors, clarify current requirements, change the commission's name, and incorporate exemptions for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities, scrap tire sites, and used oil recycling facilities.

Amendments to sections relating to inflation and changes in cost estimates are necessary to clarify long-standing, common sense financial practices, and allow the commission to fulfill its mission of requiring financial assurance, which is to require a permittee to pay for the closure and clean-up of its own facility and not burden the taxpayer, other generators, and industry with the cost. These amendments accomplish this mission by requiring that decreases to cost estimates or recalculation of cost estimates by a permittee must be approved by the executive director. Annual inflation adjustments must be made using an annual inflation factor. State and federal financial assurance regulations have conservative safeguards built in so that they are conservative by nature. Examples of these safeguards include requiring the cost estimate to be based on closure by an unrelated third-party, and clauses in financial assurance mechanisms which do not allow cancellation without the executive director's consent and/or the option to call on the mechanism and convert it to cash assets. Therefore, conservatism and common sense have dictated commission policy, which requires that after the executive director approves a cost estimate, his approval is also required to decrease the cost estimate or to recalculate costs in lieu of using an annual inflation factor. Additionally, amendments to these sections are justified and needed to clearly identify the relationship between cost estimates and financial assurance. The amendments require that an increase to cost estimates must result in an increase in financial assurance, and if a decrease in cost estimates is approved by the executive director, financial assurance may be decreased.

The rulemaking amends the applicability sections for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities; used oil recycling facilities; and scrap tire facilities. The amendments exempt state and federal facilities conducting these activities in the same manner the state and federal facilities are exempted from financial assurance requirements for underground storage tanks

(USTs), hazardous waste, and municipal solid waste. The primary reason for this amendment is that the required financial assurance mechanisms were not created with state and federal facilities in mind and these facilities cannot obtain financial assurance as required under this chapter. Therefore, the amendments provide for consistency among all program areas by exempting state and federal facilities from all financial assurance requirements in this chapter.

#### SECTION BY SECTION DISCUSSION

During the 77th Legislature, 2001, the agency underwent the sunset review process, culminating in the enactment of House Bill (HB) 2912, which among other things, extended the term of the agency to September 1, 2013, and changed its name to the Texas Commission on Environmental Quality. HB 2912, §18.01(a), states that: “Effective January 1, 2004: 1) the name of the Texas Natural Resource Conservation Commission is changed to the Texas Commission on Environmental Quality, and all the powers, duties, rights, and obligations of the Texas Natural Resource Conservation Commission are the powers, duties, rights and obligations of the Texas Commission on Environmental Quality;....”

Throughout the chapter, "TNRCC," "TNRCC's," or the "Texas Natural Resource Conservation Commission" is changed to either "TCEQ," "TCEQ's," or the "Texas Commission on Environmental Quality," as appropriate, to conform with the requirements of HB 2912.

Other administrative changes are adopted throughout the sections for consistency with other commission rules.

*Subchapter B - Financial Assurance Requirements for Closure*

Due to an administrative oversight, the title to Subchapter B, as it exists in current rule, is changed from "Financial Assurance Requirements for Closure" to "Financial Assurance Requirements for Closure, Post Closure, and Corrective Action."

Adopted §37.131, Annual Inflation Adjustments to Closure Cost Estimates, corresponds with existing language in the section and addresses a common question of the regulated community regarding whether a factor other than an annual factor can be used. The word "annual" is added to describe the federal data from which the annual inflation factor is derived in §37.131. The adopted language reads as follows: "...an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product...." Additionally, language that states the adjustment may be made by recalculating the maximum costs of closure, post closure, or corrective action, in current dollars, is deleted within the section to reflect the commission's interpretation and long-held practice of requiring annual inflation adjustments using an inflation factor, unless recalculated cost estimates in current dollars are approved by the executive director. The adopted text reads, "The adjustment must be made using an inflation factor...." A new paragraph is added at the end of the section to further clarify the requirements of the inflation adjustment.

Adopted §37.141, Increase in Current Cost Estimate, deletes the phrase "as a result of changes in the closure, post closure, or corrective action, plan or activities," to clarify that annual inflation adjustments to cost estimates addressed in §37.131 must result in an increase in the financial assurance mechanism. With the phrase deleted, any time the current cost estimate increases, the financial assurance mechanism must increase to equal the current cost estimate within 60 days. The adopted

language reads as follows: “Whenever the current cost estimate increases to an amount greater than the amount being provided in the financial assurance mechanism(s), the owner or operator must....” The last sentence of the section is deleted because the adopted amendments to §37.131 make this sentence redundant and unnecessary.

Adopted §37.151, Decrease in Current Cost Estimate, adds language to clarify the linkage between adjustments to cost estimates and adjustments to financial assurance. The current rule discusses obtaining the executive director’s approval for a decrease in financial assurance, but a decrease in the current cost estimate must precede this request. Therefore, the adopted additional language states that a written request to decrease the current cost estimate may be submitted to the executive director for approval, and only upon approval is it considered to be a revised current cost estimate. Consequently, it is the revised current cost estimate that may result in a written request to the executive director for approval of a reduction in financial assurance. The rulemaking adds new language to the end of the section to allow the owner or operator to simultaneously request approval of both a revised current cost estimate and a reduction in financial assurance. In order for §37.151 to be consistent with the adopted change to §37.141, the phrase “as a result of changes in the closure, post closure, or corrective action, plan or activities” is deleted. The adopted language reads as follows: “Whenever the revised current cost estimate decreases to an amount less than the amount being provided in the financial assurance mechanism(s), the owner or operator may....” In addition, the last sentence of the section is deleted because the adopted amendments to §37.131 make this sentence redundant and unnecessary.

*Subchapter C - Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action*

Adopted §37.261, Corporate Guarantee, adds the following language to the end of subsection (d) to decrease the annual filing burden on guarantors with a substantial business relationship if they can certify that there has been no change in their substantial business relationship with the business organization they are guaranteeing: “After the initial submission of these items to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship, the chief financial officer may submit a letter attesting that there has been no change.” This adopted amendment will also reduce the review time expended by staff by reducing the number of documents to review.

*Subchapter D - Wording of the Mechanisms for Closure, Post Closure, and Corrective Action*

Adopted §37.361, Corporate Guarantee, is adopted *with change* to delete redundant language in the figure for the corporate guarantee financial assurance mechanism because this language was incorrectly repeated in the originally adopted rule and inadvertently left in the proposal. The adopted language in the figure will read as follows: “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.”

*Subchapter F - Financial Assurance Mechanisms for Liability*

Adopted §37.551, Corporate Guarantee for Liability, adds a new subsection (e) to decrease the annual filing burden on guarantors with a substantial business relationship if they can certify that there has been no change in their substantial business relationship with the business organization they are

guaranteeing. As a result of adding the new subsection, subsequent subsections are relettered and a rule citation is corrected to accurately reflect the relettering.

*Subchapter G - Wording of the Mechanisms for Liability*

Adopted §37.651, Financial Test for Liability, deletes an asterisk within the figure for the financial test for liability coverage that was inadvertently placed in the originally adopted rule.

*Subchapter I - Financial Assurance for Petroleum Underground Storage Tank Systems*

Adopted §37.825, Financial Test of Self-Insurance, adds language to the figure for USTs that was inadvertently left out of the originally adopted rule. The adopted language is necessary to clarify whether a dollar amount must be inserted in the form or whether a question must be answered "yes" or "no." The figure contained in 37.825(d) is adopted *with change* to correct formatting errors and remove underlines that were inadvertently included during this proposal. Grammatical corrections were also made in §37.825(b)(1) - (5).

Adopted §37.855, Standby Trust Fund, adds language to the figure contained in subsection (b) under Section 13 for USTs that was inadvertently left out of the originally adopted rule. The adopted language is necessary to identify for the trustee, who may provide written instructions to the trustee on behalf of the commission.

For Subchapters K, L, and M, federal and state regulations currently provide for exemptions to state and federal entities from financial assurance for USTs, hazardous waste, and municipal solid waste.

Chapter 37 identifies these exemptions in the applicability section of the applicable subchapters related to these programs. Language is added in §§37.1001, 37.2001, and 37.3001 to incorporate these exemptions.

*Subchapter K - Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, and Reuse Facilities*

Adopted §37.1001, Applicability, adds language to incorporate exemptions for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities in order to demonstrate consistency with other subchapters of this chapter.

*Subchapter L - Financial Assurance for Used Oil Recycling*

Adopted §37.2001, Applicability, adds language to incorporate exemptions for used oil recycling facilities in order to demonstrate consistency with other subchapters of this chapter.

General financial assurance requirements and mechanisms throughout Chapter 37 refer to "closure" while 30 TAC Chapter 324 (which is referenced within §37.2003, Definitions) refers to requiring financial assurance for "soil remediation." In order to clarify that "soil remediation" as used in Chapter 324 has the same meaning as "closure" as used in §37.2003, the amendment adds the following language, "except the term 'closure' for purposes of this subchapter includes the term 'soil remediation' as used in Chapter 324 of this title." This will simplify paperwork for the oil recycling industry since it will be able to use the standard mechanism without change to reflect industry-specific terminology.

Adopted §37.2011, Financial Assurance Requirements for Used Oil Handlers, deletes language which requires the oil recycling industry to modify the standard mechanism language; therefore, simplifying paperwork for the oil recycling industry since the affected industry will be able to use the standard mechanism without having to change it to reflect industry-specific terminology. The amendment mirrors the amendment in §37.2003.

*Subchapter M - Financial Assurance Requirements for Scrap Tire Sites*

Adopted §37.3001, Applicability, adds language to incorporate exemptions for scrap tire storage sites in order to demonstrate consistency with other subchapters of this chapter.

*Subchapter O - Financial Assurance for Public Drinking Water Systems and Utilities*

Adopted §37.5011, Financial Assurance for a Public Water System or Retail Public Utility, deletes language in subsection (a) that requires a reference in a financial assurance mechanism to the appropriate statutory reference to public drinking water or utility regulation because this language is unnecessary and causes confusion.

*Subchapter Q - Financial Assurance for Underground Injection Control Wells*

Adopted §37.7021, Financial Assurance Requirements for Plugging and Abandonment, deletes subsection (d) because this language is no longer applicable, as a result of the adopted amendments to §37.131. Due to the deletion of subsection (d), the subsequent subsection is relettered.

Adopted §37.7041, Financial Assurance Requirements for Liability, replaces the word "may" with "shall" in subsection (a) for clarification and consistency with program rules for underground injection control. This modification is consistent with technical requirements in accordance with §331.142(b), which require liability coverage. The permissive language used in the originally adopted rule was inadvertent and not intended to be at odds with the technical standards for hazardous waste injection wells.

*Subchapter U - Financial Assurance for Medical Waste Transporters*

Adopted §37.9070, Financial Assurance Requirements, changes the written cancellation notice requirement in subsection (d)(2) from 60 days to 30 days, to be equivalent with the Department of Transportation's (DOT's) requirements on Form E. The rulemaking includes an amendment to the insurance demonstration for medical waste transporters to reflect standard insurance practices, and to reduce staff time spent reviewing and seeking corrections on insurance certificates. In changing the cancellation notice requirement from 60 days to 30 days, the commission can require a form similar to the DOT's Form E, which is a standard familiar to the insurance industry.

**FINAL REGULATORY IMPACT ANALYSIS DETERMINATION**

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking is not subject to §2001.0225 because it does not meet the statutory requirements for a "major environmental rule." Major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The principal intent of this rulemaking is to amend Chapter 37 due to the name change of the agency from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality and to revise and clarify sections relating to financial assurance that owners and operators must provide for certain facilities. The adopted amendments will only conform the rules to agency policy. Therefore, this rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that this rulemaking does not meet the definition of a major environmental rule.

Furthermore, even if the amendments did meet the definition of a major environmental rule, the amendments are not subject to Texas Government Code, §2001.0225, because the adopted rules do not meet any of these four applicability requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted amendments to Chapter 37 do not meet any of these results. For all federally-authorized programs regulated by this chapter, federal authority on the issue of financial assurance has been delegated to the state, and the state legislature has enacted statutes that are consistent with the federal requirements. The state statutes require financial assurance for hazardous and municipal solid waste (Texas Health and Safety Code (THSC), §361.085), radioactive substances (THSC, §401.108), USTs (Texas Water Code (TWC), §26.352), and underground injection control (TWC, §27.073). The financial assurance in these delegated programs relate to radioactive substances (10 Code of Federal Regulations (CFR) Part 10, Appendix A, Criteria 9 and 10), underground injection control (40 CFR 144, Subpart F), municipal solid waste (40 CFR 258, Subpart G), hazardous waste (40 CFR 264, Subpart H; 40 CFR 265, Subpart H), and USTs (40 CFR Part 280, Subpart H). Therefore, the adopted rules do not exceed a standard set by federal regulations because the rules implement state statutes that are analogous to the federal regulations. Second, the adopted rules carry out the general state statutes that require financial assurance, and do not exceed an express requirement of state law. Third, the adopted rules clarify federal rules regarding financial assurance, and do not provide for additional substantive requirements. Therefore, no specific delegation agreement requirements would be exceeded by these adopted rules. Fourth, the commission adopts these rules in accordance with its requirements under specific state law, including TWC, §26.352 and §27.073 and THSC, §§341.035, 341.0355, 361.085 and 371.026. Therefore, the commission does not adopt the rules solely under the commission's general powers.

#### TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact assessment for this rulemaking in accordance with Texas Government Code, Chapter 2007. The principal intent of this rulemaking is to amend Chapter 37 due to the name change of the agency from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality and to revise and clarify sections relating to financial assurance requirements that owners and operators must provide for certain facilities. This rulemaking implements the requirements of TWC, §26.352 and §27.073 and THSC, §§341.035, 341.0355, 361.085, and 371.026. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Chapter 37 implements the federal requirements found in 10 CFR Part 10, Appendix A, Criteria 9 and 10; 40 CFR 144, Subpart F; 40 CFR 258, Subpart G; 40 CFR 264, Subpart H; 40 CFR 265, Subpart H; and 40 CFR Part 280, Subpart H.

Nevertheless, the commission further evaluated this rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the adopted amendments only revise and clarify financial assurance requirements, and do not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the

adopted amendments. Therefore, the adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

#### PUBLIC COMMENT

The proposal was published in the October 25, 2002 issue of the *Texas Register* (27 TexReg 9932). The comment period closed on November 25, 2002, and the commission received no comments.

**SUBCHAPTER B: FINANCIAL ASSURANCE REQUIREMENTS FOR CLOSURE,  
POST CLOSURE, AND CORRECTIVE ACTION**

**§§37.131, 37.141, 37.151**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; THSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; THSC,

§361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities; THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities; THSC, §361.428, which provides the commission with the authority to regulate compost facilities; THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; and THSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

**§37.131. Annual Inflation Adjustments to Closure Cost Estimates.**

During the active life of the facility, the owner or operator must adjust the current cost estimate for inflation within 60 days prior to the anniversary date of the first establishment of the financial assurance mechanism. For owners or operators using the financial test or corporate guarantee, the current cost estimate must be adjusted for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the executive director as specified in this chapter. The adjustment must be made using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its Survey of Current Business, as specified in paragraphs (1) and (2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the current cost estimate by the inflation factor. The result is the adjusted current cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

(3) If there is a revised current cost estimate in current dollars approved by the executive director prior to the anniversary date described in this section, then the owner or operator is not required to make an inflation adjustment. However, a revised current cost estimate in current dollars shall be adjusted for inflation for subsequent years as required by this section.

**§37.141. Increase in Current Cost Estimate.**

Whenever the current cost estimate increases to an amount greater than the amount being provided in the financial assurance mechanism(s), the owner or operator must either cause the amount of the financial assurance to be increased and submit evidence of such increase to the executive director, or obtain additional financial assurance in accordance with this chapter to cover the increase. This adjustment must be made within 60 days after the owner or operator becomes aware, or is notified by the executive director, of the increase.

**§37.151. Decrease in Current Cost Estimate.**

An owner or operator may request that the executive director approve a decrease in the current cost estimate. The revised current cost estimate must be approved by the executive director. Whenever the revised current cost estimate decreases to an amount less than the amount being provided in the financial assurance mechanism(s), the owner or operator may submit a written request for a reduction in the amount of the financial assurance to the executive director. Following written approval by the executive director, the amount of the financial assurance may be reduced to the amount of the revised current cost estimate. An owner or operator may simultaneously request the executive director's approval of both a revised current cost estimate and a reduction in the amount of the financial assurance.

**SUBCHAPTER C: FINANCIAL ASSURANCE MECHANISMS FOR CLOSURE, POST  
CLOSURE, AND CORRECTIVE ACTION**

**§37.251, §37.261**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. The amendments are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; THSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; THSC,

§361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities; THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities; THSC, §361.428, which provides the commission with the authority to regulate compost facilities; THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; and THSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

**§37.251. Financial Test.**

(a) An owner or operator may satisfy the requirements of financial assurance by establishing a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) net working capital and tangible net worth each at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the Texas Commission on Environmental Quality (TCEQ) or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test;

(2) the owner or operator must have:

(A) a current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.351 of this title (relating to Financial Test). If an owner or operator is using the financial test to demonstrate assurance for closure, post closure, or corrective action as specified in Subchapter B of this chapter and liability coverage as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage), the owner or operator must submit the letter specified in the Financial Test for Liability, Part B in §37.651 of this

title (relating to Financial Test for Liability) to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title is not required; and

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the accountant which caused them to believe that the specified data should be adjusted; and

(4) a written verification of the current bond rating from the applicable bond rating agency, if the owner or operator is using Alternative II of the letter signed by the owner's or operator's chief financial officer specified in §37.351 of this title; and

(5) a schedule identifying intangible assets used to calculate tangible net worth.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator must send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, a notice shall be sent to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If

the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed in the independent certified public accountant's report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

**§37.261. Corporate Guarantee.**

(a) An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart which shows the relationship between the two entities; the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity. After the initial submission of these items to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship, the chief financial officer may submit a letter attesting that there has been no change.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure, post closure, or corrective action at the facility(ies) covered by the corporate guarantee in accordance with the permits and other applicable requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund) in the name of the owner or operator in the amount of the current cost estimate;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of termination by certified mail to the owner or operator and the executive director and the owner or operator has obtained, and the executive director has approved, alternative financial assurance; and

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of termination of the corporate guarantee from the guarantor, the guarantor shall provide such alternate financial assurance in the name of the owner or operator.

**SUBCHAPTER D: WORDING OF THE MECHANISMS FOR  
CLOSURE, POST CLOSURE, AND CORRECTIVE ACTION**

**§§37.301, 37.311, 37.321, 37.331, 37.341, 37.351, 37.361, 37.371, 37.381**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; THSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which provides the commission with the authority to

adopt any rules and establish standards of operation for the management of solid waste; THSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities; THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities; THSC, §361.428, which provides the commission with the authority to regulate compost facilities; THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; and THSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

**§37.301. Trust Agreement.**

(a) A trust agreement for closure, post closure, or corrective action, as specified in §37.201 of this title (relating to Trust Fund), must be worded as specified in the Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.301(a)

## TRUST AGREEMENT

TRUST AGREEMENT, the "Agreement," entered into as of (date) by and between (name of the owner or operator), a (name of State) (insert "corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (name of corporate trustee), (insert "incorporated in the State of \_\_\_\_\_" or "a national bank"), the "Trustee."

Whereas, the Texas Commission on Environmental Quality, "TCEQ," an agency of the State of Texas, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a facility(ies) shall provide assurance that funds will be available when needed for closure, post closure, or corrective action of the facility.

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facility(ies) 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 Estimates. 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, physical and mailing addresses, and the current cost estimate, or portions thereof, for which financial assurance is demonstrated by this Agreement. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action).

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of TCEQ. 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, 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 shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall 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 TCEQ.

Section 4. Payment from the Fund. The Trustee shall make payments from the Fund as the TCEQ executive director shall direct, in writing, to provide for the payment of the costs of closure, post closure, or corrective action of the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the TCEQ executive director from the Fund for closure, post closure, or corrective action expenditures in such amounts as the TCEQ executive director shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the TCEQ executive director 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 shall 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:

(i) 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), shall not be acquired or held unless they are securities or other obligations of the Federal or a State government;

(ii) 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

(iii) 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 shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretion 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 shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other 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 corporate 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 proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuations. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the TCEQ executive director a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the TCEQ executive director shall constitute 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 the 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 shall be 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 shall not be 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 TCEQ executive

director, 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 shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall 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 TCEQ executive director to the Trustee shall be in writing, signed by the executive director or the executive director's designee, and the Trustee shall act and shall 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 TCEQ hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or TCEQ, except as provided for herein.

Section 15. Notice of Nonpayment. The Trustee shall notify the Grantor and the TCEQ executive director, by certified mail within ten days following the expiration of the 30-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 shall not be 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 TCEQ executive director, or by the Trustee and the TCEQ executive director 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 shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the TCEQ executive director, or by the Trustee and the TCEQ executive director if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee shall 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 TCEQ executive director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, 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 shall be administered, construed, and enforced according to the laws of the State of Texas.

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 shall 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 is identical to the wording specified in 30 Texas Administrative Code §37.301(a) as such regulations were constituted on the date first above written.

(Signature of Grantor)

By (Title)

Attest:

(Title)

(Seal)

(Signature of Trustee)

By (Title)

Attest:

(Title)

(Seal)

(b) The Certification of Acknowledgment in this subsection is the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §37.201 of this title.

Figure: 30 TAC §37.301(b)

#### CERTIFICATION OF ACKNOWLEDGMENT

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

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

On this (date), before me personally came (owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (address), that she/he is (title) of (corporation), 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)

#### **§37.311. Payment Bond.**

A surety bond guaranteeing payment for closure, post closure, or corrective action, as specified in §37.211 of this title (relating to Surety Bond Guaranteeing Payment), must be worded as specified in the Payment Bond in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.311

PAYMENT BOND

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

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

Principal: (legal name and business address of owner and operator) \_\_\_\_\_.

Type of Organization: (insert "individual," "joint venture," "partnership," or "corporation,") \_\_\_\_\_.

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

Surety(ies): (name(s) and business address(es)) \_\_\_\_\_.

Permit number, name, physical and mailing addresses, and closure, post closure, or corrective action amount(s) for each facility guaranteed by this bond (indicate closure, post closure, or corrective action amounts separately for each facility): \_\_\_\_\_.

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

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

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the Texas Commission on Environmental Quality, hereinafter called TCEQ, 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 co-sureties, 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 the appropriate program area, to comply with permit requirements in order to own or operate each facility identified above, and

Whereas said Principal is required to provide financial assurance for closure, post closure, or corrective action as a condition of the permit or other applicable requirements, 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, or corrective action at, each facility identified above, fund into the standby trust fund the amount(s) identified above for the facility,

Or, if the Principal shall fund into the standby trust fund in such amount(s) within 15 days after a final order to begin final closure or perform corrective action is issued by the TCEQ executive director or a U.S. district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance, as specified in 30 Texas Administrative Code, Chapter 37 (relating to Financial Assurance) and obtain the TCEQ executive director's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the TCEQ executive director 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 TCEQ executive director 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 TCEQ executive director.

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 notice of cancellation by certified mail to the Principal and to the TCEQ executive director provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the TCEQ executive director, 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 TCEQ executive director.

(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, post closure, or corrective action amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the TCEQ executive director.

In Witness Whereof, the Principal and Surety(ies) have executed this Payment 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 is identical to the wording specified in 30 Texas Administrative Code §37.311 as such regulations were 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)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

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

**§37.321. Performance Bond.**

A surety bond guaranteeing performance for closure, post closure, or corrective action, as specified in §37.221 of this title (relating to Surety Bond Guaranteeing Performance), must be worded as specified in the Performance Bond in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.321

**PERFORMANCE BOND**

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

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

Principal: (legal name and business address of owner or operator) \_\_\_\_\_  
\_\_\_\_\_.

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation") \_\_\_\_\_.

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

Surety(ies): (name(s) and business address(es)) \_\_\_\_\_  
\_\_\_\_\_.

Permit number, name, physical and mailing addresses, and closure, post closure, or corrective action amounts(s) for each facility guaranteed by this bond (indicate closure, post closure, or corrective action amounts separately for each facility): \_\_\_\_\_.

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

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

Know All Persons By These Presents, That We, the Principal and Surety(ies) hereto are firmly bound to the Texas Commission on Environmental Quality, hereinafter called TCEQ, 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 co-sureties, 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 the appropriate program area, to comply with permit requirements in order to own or operate each facility identified above, and

Whereas said Principal is required to provide financial assurance for closure, post closure, or corrective action as a condition of the permit or other applicable requirements, 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 such that if the Principal shall faithfully perform closure, post closure, or corrective action, whenever required to do so, of each facility for which this bond guarantees closure or post closure in accordance with the closure plan or post closure plan and other applicable requirements of the permit, or perform corrective action in accordance with the permit or other applicable requirements as 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 30 Texas Administrative Code, Chapter 37 (relating to Financial Assurance) and obtain the TCEQ executive director's written approval of such assurance, within 90 days after the date of notice of cancellation is received by both the Principal and the TCEQ executive director 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 TCEQ executive director that the Principal has been found in violation of the closure, post closure, or corrective action requirements for a facility for which this bond guarantees performance of closure, post closure, or corrective action, the Surety(ies) shall either perform closure, post closure, or corrective action in accordance with the closure plan or post closure plan and other applicable requirements of the permit, or perform corrective action in accordance with the permit or other applicable requirements, or place the amount guaranteed for the facility in the standby trust fund as directed by the TCEQ executive director.

Upon notification by the TCEQ executive director that the Principal has failed to provide alternate financial assurance, as specified in 30 Texas Administrative Code, Chapter 37, and obtain written approval of such assurance from the TCEQ executive director during the 90 days following receipt by both the Principal and the TCEQ executive director 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.

The surety(ies) hereby waive(s) notification of amendments to closure plans or post closure plans and other applicable requirements of the permit, or permits requiring corrective action or other applicable requirements for corrective action, applicable laws, statutes, rules, and regulations and agrees 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 notice of cancellation by certified mail to the owner and operator and to the TCEQ executive director provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the TCEQ executive director, 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 TCEQ executive director.

(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, post closure, or corrective action amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the TCEQ executive director.

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 Surety(ies) and that the wording on this surety bond is identical to the wording specified in 30 Texas Administrative Code §37.321 as such regulation 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)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

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

**§37.331. Irrevocable Standby Letter of Credit.**

An irrevocable standby letter of credit for closure, post closure, or corrective action, as specified in §37.231 of this title (relating to Irrevocable Standby Letter of Credit), must be worded as specified in the Irrevocable Standby Letter of Credit in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.331

IRREVOCABLE STANDBY LETTER OF CREDIT

Executive Director

Texas Commission on Environmental Quality

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of (owner's or operator's name and address) up to the aggregate amount of (in words) 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 30 Texas Administrative Code Chapter 37."

This letter of credit is effective as of (date) and shall expire on (date at least 1 year later), but such expiration date shall be automatically extended for a period of (at least 1 year) on (date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and (owner's 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 120 days after the date of receipt by both you and (owner's or operator's name), as shown on the signed return receipts.

Whenever 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.

We certify that the wording of this letter of credit is identical to the wording specified in 30 Texas Administrative Code §37.331 as such regulations were constituted on the date shown immediately below.

(Signature(s) and title(s) of official(s) of issuing institution) \_\_\_\_\_

(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").

**§37.341. Certificate of Insurance.**

A certificate of insurance for closure, post closure, or corrective action, as specified in §37.241 of this title (relating to Insurance), must be worded as specified in the Certificate of Insurance in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.341

**CERTIFICATE OF INSURANCE**

Name and Address of Insurer (herein called the "insurer"): \_\_\_\_\_  
\_\_\_\_\_.

Name and Physical and Mailing Addresses of Insured (herein called the "insured"): \_\_\_\_\_  
\_\_\_\_\_.

Facilities covered: (list for each facility: The permit number, name, physical and mailing addresses, and the amount of insurance for closure, post closure, or corrective action (these amounts for all facilities covered must total the face amount shown below).) \_\_\_\_\_.

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 closure, post closure, or corrective action for the facilities identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 30 Texas Administrative Code §37.241 (relating to Insurance), 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 regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the executive director of the Texas Commission on Environmental Quality, the Insurer agrees to furnish to the executive director a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is identical to the wording specified in 30 Texas Administrative Code §37.341 as such regulations were constituted on the date shown immediately below.

(Authorized signature of Insurer) \_\_\_\_\_

(Name of person signing) \_\_\_\_\_

(Title of person signing) \_\_\_\_\_

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

(Date) \_\_\_\_\_

**§37.351. Financial Test.**

A letter from the chief financial officer for closure, post closure, or corrective action, as specified in §37.251 of this title (relating to Financial Test), must be worded as specified in the Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.351

**FINANCIAL TEST  
LETTER FROM CHIEF FINANCIAL OFFICER**

(Address to TCEQ executive director)

I am the Chief Financial Officer of (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, post closure, or corrective action as specified in 30 Texas Administrative Code (TAC) Chapter 37 (relating to Financial Assurance).

(Fill out the following five paragraphs. For each facility include: the name, permit number, program area (hazardous waste, municipal solid waste, etc.), physical and mailing addresses, and current cost estimate. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action. If your firm has no facilities that belong in a particular paragraph, write "None" in the space indicated.)

1. This firm is the owner or operator of the following facilities in Texas for which financial assurance for closure, post closure, or corrective action is being demonstrated through a financial test specified in 30 TAC Chapter 37. The current cost estimate covered by the test is shown for each facility: \_\_\_\_\_.
  
2. This firm guarantees, through a corporate guarantee specified in 30 TAC Chapter 37, the cost for closure, post closure, or corrective action of the following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are shown for each facility:

\_\_\_\_\_. The firm identified above is (the direct or higher-tier parent corporation of the owner or operator, or engaged in a substantial business relationship with the owner or operator).

3. In States where TCEQ is not administering the financial requirements of 30 TAC Chapter 37, this firm, as owner, operator, or guarantor, is demonstrating financial assurance for the closure, post closure, or corrective action of the following facilities through the use of a test equivalent to a financial test specified in 30 TAC Chapter 37. The current cost estimates covered by such a test are shown for each facility: \_\_\_\_\_.
4. The firm identified above owns or operates the following facilities for which financial assurance for closure, post closure, or corrective action costs, is not demonstrated through the financial test or any other financial assurance mechanisms specified in 30 TAC Chapter 37 or equivalent State mechanisms to TCEQ, a federal agency, or another state. The current cost estimates not covered by such financial assurance are shown for each facility: \_\_\_\_\_.
5. This firm is the owner or operator or guarantor of the following facilities for which financial assurance is being demonstrated under other EPA regulations or state programs authorized by EPA through a financial test or guarantee. The following amounts have not been included in Paragraphs 1- 4. (For each program area identify: the facility name, physical and mailing address, federal or state equivalent regulations, permit number, and current cost estimate. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action).
  - (a) Municipal solid waste management facilities under 30 TAC Chapter 330, 40 CFR Part 258 or equivalent \$ \_\_\_\_\_
  - (b) Underground injection control facilities under 30 TAC Chapter 331, 40 CFR Part 144 or equivalent \$ \_\_\_\_\_
  - (c) Petroleum underground storage tank facilities under 30 TAC Chapter 334, and 40 CFR Part 280 or equivalent \$ \_\_\_\_\_
  - (d) PCB storage facilities under 40 CFR Part 761 or equivalent \$ \_\_\_\_\_
  - (e) Hazardous waste treatment, storage, and disposal facilities under 30 TAC Chapter 335, 40 CFR Parts 264 and 265 or equivalent \$ \_\_\_\_\_

- (f) Additional environmental obligations not shown above \$ \_\_\_\_\_  
Total (a)-(f) \$ \_\_\_\_\_

This (owner, operator, or guarantor) (has or has not) received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on its financial statements for the latest completed fiscal year.

This firm (is required or is not required) to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year. The fiscal year of this firm ends on (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 (date).

(Fill in Alternative I if the criteria of 30 TAC §37.251(b)(1) are used. Fill in Alternative II if the criteria of 30 TAC §37.251(b)(2) are used.)

ALTERNATIVE I

- (1) (a) Sum of current closure, post closure, and corrective action costs  
(total of all cost estimates shown in the five paragraphs above) \$ \_\_\_\_\_
- (b) Amount of annual aggregate liability coverage to be demonstrated by  
a financial test or corporate guarantee \$ \_\_\_\_\_
- (c) Total of lines (a) and (b) \$ \_\_\_\_\_
- \*2. Total liabilities (if any portion of the closure, post closure, or corrective  
action cost(s), 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 \$ \_\_\_\_\_
- \*4. Net Worth \$ \_\_\_\_\_
- \*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 U. S. (required only if less than 90% of firm's assets are located in U.S.) \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions.

10. Is line 3 at least \$10 million? (yes/no)
11. Is line 3 at least 6 times line 1(c)? (yes/no)
12. Is line 7 at least 6 times line 1(c)? (yes/no)
- \*13. Are at least 90% of firm's assets located in the U.S.?  
If not, complete line 14 (yes/no)
14. Is line 9 at least 6 times line 1(c)? (yes/no)
15. Is line 2 divided by line 4 less than 2.0? (yes/no)
16. Is line 8 divided by line 2 greater than 0.1? (yes/no)
17. Is line 5 divided by line 6 greater than 1.5? (yes/no)

ALTERNATIVE II

1. (a) Sum of current closure, post closure, and corrective action costs  
(total of all cost estimates shown in the five paragraphs above) \$ \_\_\_\_\_
- (b) Amount of annual aggregate liability coverage to be demonstrated  
by a financial test or corporate guarantee \$ \_\_\_\_\_
- (c) Total of lines (a) and (b) \$ \_\_\_\_\_
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. Tangible net worth (if any portion of the closure, post closure care, or  
corrective action cost estimate(s), is included in "total liabilities" on  
your firm's financial statements, you may add the amount of that  
portion to this line) \$ \_\_\_\_\_
- \*6. Total assets in U.S. (required only if less than 90% of firm's assets  
are located in U.S.) \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions.

7. Is line 5 at least \$10 million? (yes/no)
8. Is line 5 at least 6 times line 1(c)? (yes/no)
- \*9. Are at least 90% of the firm's assets located in the U.S.?  
If not, complete line 10 (yes/no)

10. Is line 6 at least 6 times line 1(c)? (yes/no)

I hereby certify that the wording of this letter is identical to the wording specified in 30 Texas Administrative Code §37.351 as such regulations were constituted on the date shown immediately below.

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

**§37.361. Corporate Guarantee.**

A corporate guarantee for closure, post closure, or corrective action, as specified in §37.261 of this title (relating to Corporate Guarantee), must be worded as specified in the Corporate Guarantee in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.361

CORPORATE GUARANTEE

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 to the Texas Commission on Environmental Quality (TCEQ) on behalf of (owner or operator) of (business address), which is (one of the following: "our subsidiary;" or "an entity with which guarantor has a substantial business relationship, as defined in 30 TAC §37.11 (relating to Definitions)."

### RECITALS

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 30 Texas Administrative Code (TAC) §37.251 (relating to Financial Test) and §37.261 (relating to Corporate Guarantee).
2. (Owner or operator) owns or operates the following facility(ies) covered by this guarantee: (List for each facility: permit number, name, and physical and mailing addresses. Indicate for each whether guarantee is for closure, post closure, or corrective action).
3. "Closure or post closure plans" as used below refer to the plans maintained as required for the closure or post closure of the facilities as identified above.
4. For value received from (owner or operator), (describe consideration and dollar amount), guarantor guarantees to TCEQ that in the event that (owner or operator) fails to perform (closure, post closure, or corrective action) of the above facility(ies) in accordance with the closure plans, post closure plans, or corrective action, permits, and other applicable requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in 30 TAC §37.201 (relating to Trust Fund), in the name of (owner or operator) in the amount of the current cost estimate.
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 90 days, by certified mail, notice to the TCEQ executive director and to (owner or operator) that the guarantor intends to provide alternate financial assurance as specified in 30 TAC Chapter 37 (relating to Financial Assurance), as applicable, in the name of (owner or operator). Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless (owner or operator) has done so.

6. The guarantor agrees to notify the TCEQ executive director by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.
7. Guarantor agrees that within 30 days after being notified by the TCEQ executive director of a determination that guarantor no longer meets the financial test criteria or is disallowed from continuing as a guarantor of (closure, post closure, or corrective action), guarantor shall establish alternate financial assurance as specified in Subchapter C of 30 TAC Chapter 37 (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), in the name of (owner or operator) unless (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 plans, or corrective action requirements, amendment or modification of the permit, the extension or reduction of the time of performance, or any other modification or alteration of an obligation of the owner or operator.
9. Guarantor agrees to remain bound under this guarantee for so long as (owner or operator) must comply with the applicable financial assurance requirements of 30 TAC Chapter 37 for the above-listed facilities, except as provided in paragraph 10 of this agreement.
10. Guarantor may terminate this guarantee by sending notice by certified mail to the TCEQ executive director and to (owner or operator), provided that this guarantee may not be terminated unless and until (the owner or operator) obtains, and the TCEQ executive director approves, alternate financial assurance.
11. Guarantor agrees that if (owner or operator) fails to provide alternate financial assurance as specified in 30 TAC Chapter 37, as applicable, and obtain written approval of such assurance from the TCEQ executive director within 90 days after a notice of termination by the guarantor is received by the TCEQ executive director from guarantor, guarantor shall provide such alternate financial assurance in the name of the (owner or operator).
12. Guarantor expressly waives notice of acceptance of this guarantee by the TCEQ or by (owner or operator). Guarantor also expressly waives notice of amendments or modifications of the closure plans, post closure plans, or corrective action requirements, and of amendments or modifications of the permit(s).

I hereby certify that the wording of this guarantee is identical to the wording specified in 30 Texas Administrative Code §37.361 as such regulations were constituted on the date first above written.

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

(Name of guarantor) \_\_\_\_\_

(Authorized signature for guarantor) \_\_\_\_\_

(Type name of person signing) \_\_\_\_\_

(Title of person signing) \_\_\_\_\_

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

**§37.371. Local Government Financial Test.**

A letter signed by the local government's chief financial officer, as specified in §37.271 of this title (relating to Local Government Financial Test) must be worded as specified in the Local Government Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.371

LOCAL GOVERNMENT FINANCIAL TEST  
LETTER FROM CHIEF FINANCIAL OFFICER

(Address to TCEQ Executive Director)

I am the chief financial officer of (name and address of local government). This letter is in support of this local government's use of the financial test to demonstrate financial assurance, as specified in 30 Texas Administrative Code (TAC) Chapter 37 (relating to Financial Assurance).

(Fill out the following paragraphs regarding facilities and associated cost estimates. If your local government has no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its permit number, name, physical and mailing addresses, and current closure, post closure, or corrective action cost estimates.)

1. This local government is the owner or operator of the following facilities for which financial assurance for closure, post closure, or corrective action is demonstrated through the financial test specified in 30 TAC §37.271 (relating to Local Government Financial Test). The current cost estimates covered by the test are shown for each facility: \_\_\_\_\_.
2. This local government guarantees, through the guarantee specified in 30 TAC §37.281 (relating to Local Government Guarantee), the current closure, post closure, or corrective action cost estimates of the following facilities owned or operated by (insert owner's name or operator's name). The current cost estimates so guaranteed are shown for each facility: \_\_\_\_\_.

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

(Fill in the Ratio Indicators of Financial Strength if the criteria of §37.271(1)(A) are used. Fill in Bond Rating Indicator of Financial Strength if the criteria of §37.271(1)(B) are used.)

RATIO INDICATORS OF FINANCIAL STRENGTH

1. Sum of current cost estimates

(total of all cost estimates shown in the paragraphs above)	\$ _____
*2. Sum of cash and marketable securities	\$ _____
*3. Total expenditures	\$ _____
*4. Annual debt service	\$ _____
5. Environmental obligations assured by a financial test to demonstrate financial assurance in the following amounts under commission regulations and the Code of Federal Regulations (CFR) or state equivalent rules:	
(a) Municipal Solid Waste under 30 TAC Chapter 330 and 40 CFR Part 258	\$ _____
(b) Hazardous waste treatment, storage and disposal facilities under 30 TAC Chapter 335 and 40 CFR Parts 264 and 265	\$ _____
(c) Petroleum underground storage tanks under 30 TAC Chapter 334 and 40 CFR Part 280	\$ _____
(d) Underground Injection Control System facilities under 30 TAC Chapter 331 and 40 CFR Part 144	\$ _____
(e) PCB commercial storage facilities under 40 CFR Part 761	\$ _____
(f) Additional environmental obligations not shown above	\$ _____
Total (a)-(f)	\$ _____
*6. Total Annual Revenue	\$ _____

Indicate either "yes" or "no" to the following questions.

7. Is line 2 divided by line 3 greater than or equal to 0.05? (yes/no)
8. Is line 4 divided by line 3 less than or equal to 0.20? (yes/no)
9. Is line 5 divided by line 6 less than or equal to 0.43? (yes/no)

BOND RATING INDICATOR OF FINANCIAL STRENGTH

1. Sum of current cost estimates (total of all cost estimates shown in the paragraphs above) \$ \_\_\_\_\_
2. List the following information on all the outstanding, rated, unsecured general obligation bonds issued to the local government:  
Current bond rating of most recent issuance and name of rating service \_\_\_\_\_  
Date of issuance of bond \_\_\_\_\_  
Date of maturity of bond \_\_\_\_\_
3. Environmental obligations assured by a financial test to demonstrate financial assurance in the following amounts under commission regulations and the Code of Federal Regulations (CFR) or state equivalent rules:
- (a) Municipal Solid Waste under 30 TAC Chapter 330 and 40 CFR Part 258 \$ \_\_\_\_\_
- (b) Hazardous waste treatment, storage and disposal facilities under 30 TAC Chapter 335 and 40 CFR Parts 264 and 265 \$ \_\_\_\_\_

(c)	Petroleum underground storage tanks under 30 TAC Chapter 334 and 40 CFR Part 280	\$ _____
(d)	Underground Injection Control System facilities under 30 TAC Chapter 331 and 40 CFR Part 144	\$ _____
(e)	PCB commercial storage facilities under 40 CFR Part 761	\$ _____
(f)	Additional environmental obligations not shown above	\$ _____
	Total (a)-(f)	\$ _____
*4.	Total Annual Revenue	\$ _____

Indicate either "yes" or "no" to the following question.

5. Is line 3 divided by line 4 less than or equal to 0.43? (yes/no)

I hereby certify that the wording of this letter is identical to the wording specified in 30 TAC §37.371 as such regulations were constituted on the date shown immediately below. I further certify the following: that the local government's financial statements are prepared in conformity with Generally Accepted Accounting Principles for governments, including conformance with General Accounting Standards Board Statement 18, and its financial statements have been audited by an independent Certified Public Accountant (CPA); that the local government has not operated at a deficit equal to 5.0% or more of total annual revenue in each of the past two fiscal years; that the local government is not in default on any outstanding general obligations bonds; that the local government does not have outstanding general obligations rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's; and that the local government has not received an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent CPA.

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

**§37.381. Local Government Guarantee.**

The local government guarantee, as specified in §37.281 of this title (relating to Local Government Guarantee), must be worded as specified in the Local Government Guarantee in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.381

**LOCAL GOVERNMENT GUARANTEE**

Guarantee made this (date), by (name of the local government), herein referred to as guarantor, to the Texas Commission on Environmental Quality, obligee, on behalf of the following (owner or operator) of (business address).

**RECITALS**

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 30 Texas Administrative Code (TAC) §37.281 (relating to Local Government Guarantee).
2. (Owner or operator) owns or operates the following facility(ies) covered by this guarantee: (List for each facility: permit number, name, and physical and mailing addresses. Indicate for each, whether the guarantee is for closure, post closure, or corrective action.)
3. "Closure, post closure, or corrective action plans" as used below refer to the plans maintained as required for the closure, post closure, or corrective action of facilities as identified above.

4. For value received from (owner or operator), guarantor guarantees to the TCEQ that in the event that (owner or operator) fails to perform (closure, post closure, or corrective action) of the above facility(ies) in accordance with the closure, post closure, or corrective action plans, permits, and other requirements whenever required to do so, the guarantor shall do so, or pay a third party to perform closure, post closure, or corrective action or establish a fully funded trust fund as specified in 30 TAC §37.201 (relating to Trust Fund) in the name of (owner or operator) in the amount of the current cost estimate.
5. Guarantor agrees that if, the guarantor fails to meet the financial test criteria, the guarantor shall send within 90 days after the end of the fiscal year, by certified mail, notice to the TCEQ's executive director and to (owner or operator) that the guarantor intends to provide alternate financial assurance as specified in 30 TAC Chapter 37 (relating to Financial Assurance), as applicable, in the name of (owner or operator). Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless (owner or operator) has done so.
6. Within 10 days after its commencement of the proceeding, the guarantor agrees to notify the executive director, by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor.
7. Guarantor agrees that within 30 days after being notified by the executive director of a determination that guarantor no longer meets the financial test criteria or that guarantor is disallowed from continuing as a guarantor of (closure, post closure, or corrective action), guarantor shall establish alternate financial assurance as specified in Subchapter C of 30 TAC Chapter 37 (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), in the name of (owner or operator) unless (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 plans, post closure plans, or corrective action requirements, amendment or modification of the permit, the extension or reduction of the time of performance, or any other modification or alteration of an obligation of the owner or operator.
9. Guarantor agrees to remain bound under this guarantee for so long as (owner or operator) must comply with the applicable financial assurance requirements for the above-listed facilities, except as provided in paragraph 10 of this agreement.
10. Guarantor may terminate this guarantee by sending notice by certified mail to the TCEQ executive director and to (owner or operator), provided that this guarantee may not be

terminated unless and until (the owner or operator) obtains, and the executive director approves, alternate financial assurance.

11. Guarantor agrees that if (owner or operator) fails to provide alternate financial assurance as specified in 30 TAC Chapter 37, as applicable, and obtain written approval of such assurance from the TCEQ executive director within 90 days after a notice of termination by the guarantor is received by the TCEQ executive director from guarantor, guarantor shall provide such alternate financial assurance in the name of the (owner or operator).
  
12. Guarantor expressly waives notice of acceptance of this guarantee by the TCEQ or by (owner or operator). Guarantor also expressly waives notice of amendments or modifications of the closure plans, post closure plans, or corrective action requirements, and of amendments or modifications of the permit(s).

I hereby certify that the wording of this guarantee is identical to the wording specified in 30 Texas Administrative Code §37.381 as such regulations were constituted on the date first above written.

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

(Name of guarantor) \_\_\_\_\_

(Authorized signature for guarantor) \_\_\_\_\_

(Type name of person signing) \_\_\_\_\_

(Title of person signing) \_\_\_\_\_

Signature of witness or Notary: \_\_\_\_\_

**SUBCHAPTER F: FINANCIAL ASSURANCE MECHANISMS FOR LIABILITY**

**§37.551**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. The amendment is also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; THSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; THSC,

§361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities; THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities; THSC, §361.428, which provides the commission with the authority to regulate compost facilities; THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; and THSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

**§37.551. Corporate Guarantee for Liability.**

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee for Liability). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(d) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit the following:

- (1) a description of the substantial business relationship and the value received in consideration of the guarantee;
- (2) an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity;
- (3) an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity;
- (4) an organizational chart which shows the relationship between the two entities; and

(5) the partnership agreement or other agreements, articles, or bylaws which set out the formation, structure, and operation of the guaranteed entity.

(e) After the initial submission of the items required in subsection (d) of this section, the chief financial officer may submit a letter attesting that there has been no change, to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship.

(f) The terms of the corporate guarantee shall provide that if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both, as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage.

(g) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title is a legally valid and enforceable obligation in that state.

(h) In the case of corporations incorporated outside the United States (U.S.), a guarantee may be used to satisfy the requirements of this section only if:

(1) the non-U.S. corporation has identified a registered agent for service of process in each state in which a facility covered by the guarantee is located and in the state in which it has its principal place of business; and

(2) the Attorneys General or Insurance Commissioners of each state in which a facility covered by the guarantee is located and the state in which the guarantor corporation has its principal place of business, has submitted a written statement to the commission that a guarantee executed as described in this section and §37.661 of this title is a legally valid and enforceable obligation in that state.

**SUBCHAPTER G: WORDING OF THE MECHANISMS FOR LIABILITY**

**§§37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661, 37.671**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. The amendments are also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs; TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems; THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.015 and §361.018, which provide the commission with the authority to manage radioactive waste; THSC, §361.017, which provides the commission with the authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; THSC,

§361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities; THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities; THSC, §361.428, which provides the commission with the authority to regulate compost facilities; THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers; and THSC, §401.051 and §401.412, which provide authority for the commission to adopt rules relating to radioactive substances.

**§37.601. Trust Agreement for Liability.**

(a) A trust agreement for a liability trust fund, as specified in §37.501 of this title (relating to Trust Fund for Liability), must be worded as specified in the Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.601(a)

**TRUST AGREEMENT**

TRUST AGREEMENT, the "Agreement," entered into as of (date) by and between (name of the owner or operator), a (name of State) ("corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (name of corporate trustee), ("incorporated in the State of \_\_\_\_\_" or "a national bank"), the "Trustee."

Whereas, the Texas Commission on Environmental Quality, "TCEQ," an agency of the State of Texas, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a facility or group of facilities must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental and/or nonsudden accidental occurrences arising from operations of the facility or group of facilities.

Whereas, the Grantor has elected to establish a trust to assure all or part of such financial responsibility for the facility(ies) 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 This Agreement pertains to the facilities identified on attached Schedule A (on Schedule A, for each facility list the permit number, name, physical and mailing addresses, and the amount of liability coverage, or portions thereof, if more than one instrument affords combined coverage as demonstrated by this Agreement).

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, hereinafter the "Fund," for the benefit of any and all third parties injured or damaged by (sudden and/or nonsudden) accidental occurrences arising from operation of the facility(ies) covered by this guarantee, in the amounts of up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, per occurrence and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, annual aggregate for sudden accidental occurrences and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, per occurrence and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

(a) Bodily injury or property damage for which the Grantor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the Grantor would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of the Grantor under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of the Grantor arising from, and in the course of, employment by the Grantor; or

(2) The spouse, child, parent, brother, or sister of that employee as a consequence of, or arising from, and in the course of employment by the Grantor.

This exclusion applies:

(A) Whether the Grantor may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in Paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by the Grantor;

(2) Premises that are sold, given away or abandoned by the Grantor if the property damage arises out of any part of those premises;

(3) Property loaned to the Grantor;

(4) Personal property in the care, custody or control of the Grantor;

(5) That particular part of real property on which the Grantor or any contractors or subcontractors working directly or indirectly on behalf of the Grantor are performing operations, if the property damage arises out of these operations.

In the event of combination with another mechanism for liability coverage, the fund shall be considered (primary or excess) coverage.

The Fund is established initially as consisting of the property, which is acceptable to the Trustee, 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 shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall 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 TCEQ.

Section 4. Payment for Bodily Injury or Property Damage. The Trustee shall satisfy a third party liability claim by making payments from the Fund only upon receipt of one of the following documents:

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted:

#### Certification of Valid Claim

The undersigned, as parties (Grantor) and (name and address of third party claimant(s)), hereby certify that the claim of bodily injury or property damage caused by a (sudden and/or nonsudden) accidental occurrence arising from operating (Grantor's) facility(ies) should be paid in the amount of\$ ( ).

(Signatures)

Grantor

(Signatures)

Claimant(s)

or (b) A valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by sudden and/or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the 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:

(i) 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), shall not be acquired or held unless they are securities or other obligations of the Federal or a State government;

(ii) 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

(iii) 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 shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretion 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 shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other 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 corporate 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 proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuations. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the TCEQ executive director a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the TCEQ executive director shall constitute 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 the construction of this Agreement of 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 shall be 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 shall not be 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 TCEQ executive director, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall 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 amendments 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 TCEQ executive director to the Trustee shall be in writing, signed by the TCEQ executive director or the executive director's designee, and the Trustee shall act and shall 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 TCEQ executive director hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or TCEQ, except as provided for herein.

Section 15. Notice of Nonpayment. If a payment for bodily injury or property damage is made under Section 4 of this trust, the Trustee shall notify the Grantor of such payment and the amount(s) thereof within five (5) working days. The Grantor shall, on or before the anniversary date of the establishment of the Fund following such notice, either make payments to the Trustee in amounts sufficient to cause the trust to return to its value immediately prior to the payment of claims under Section 4, or shall provide written proof to the Trustee that other financial assurance for liability coverage has been obtained equaling the amount necessary to return the trust to its value prior to the payment of claims. If the Grantor does not either make payments to the Trustee or provide the Trustee with such proof, the Trustee shall within 10 working days after the anniversary date of the establishment of the Fund provide a written notice of nonpayment to the TCEQ executive director.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the TCEQ executive director, or by the Trustee and the TCEQ executive director, 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 shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the TCEQ executive director, or by the Trustee and the TCEQ executive director if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

The executive director will agree to termination of the Trust when the owner or operator substitutes acceptable alternate financial assurance as specified in 30 Texas Administrative Code, Chapter 37 (relating to Financial Assurance).

Section 18. Immunity and Indemnification. The Trustee shall 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 TCEQ executive director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, 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 shall be administered, construed, and enforced according to the laws of the State of Texas.

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 shall 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 is identical to the wording specified in 30 Texas Administrative Code §37.601(a) as such regulations were constituted on the date first above written.

(Signature of Grantor)

By (Title)

Attest:

(Title)

(Seal)

(Signature of Trustee)

By

Attest:

(Title)

(Seal)

(b) A Certification of Acknowledgement must be worded as specified in the Certification of Acknowledgement in this subsection and must accompany the trust agreement for a trust fund as specified in §37.501 of this title.

Figure: 30 TAC §37.601(b)

#### CERTIFICATION OF ACKNOWLEDGMENT

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

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

On this (date), before me personally came (owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (address), that she/he is (title) of (corporation), 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)

#### **§37.611. Payment Bond for Liability.**

A surety bond guaranteeing payment for liability, as specified in §37.511 of this title (relating to Surety Bond Guaranteeing Payment for Liability), must be worded as specified in the Payment Bond for Liability in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.611

PAYMENT BOND FOR LIABILITY

Surety Bond (Number \_\_\_\_\_)

Parties (name and address of owner or operator), Principal, incorporated in (State of incorporation) of (city and state of principal place of business) and (name and address of surety company(ies)), Surety Company(ies), of (surety(ies) place of business).

Permit number, name, and physical and mailing addresses for each facility guaranteed by this bond: \_\_\_\_\_

	Sudden Accidental Occurrences	Nonsudden Accidental Occurrences
Penal Sum Per Occurrence	(\$ Amount)	(\$ Amount)
Annual Aggregate	(\$ Amount)	(\$ Amount)

Purpose: This is an agreement between the Surety(ies) and the Principal under which the Surety(ies), its(their) successors and assignees, agree to be responsible for the payment of claims against the Principal for bodily injury and/or property damage to third parties caused by (sudden and/or nonsudden) accidental occurrences arising from operations of the facility or group of facilities in the sums prescribed herein; subject to the governing provisions and the following conditions.

Governing Provisions:

(a) Rules and regulations of the (U.S. Environmental Protection Agency (EPA) or U.S. Nuclear Regulatory Commission (NRC)).

(b) Rules and regulations of the TCEQ under Title 30 of the Texas Administrative Code.

Conditions:

(a) The Principal is subject to the applicable governing provisions that require the Principal to have and maintain liability coverage for bodily injury and property damage to third parties caused by (sudden and/or nonsudden) accidental occurrences arising from operations of the facility or group of facilities. Such obligation does not apply to any of the following:

(1) Bodily injury or property damage for which the Principal is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the Principal would be obligated to pay in the absence of the contract or agreement.

(2) Any obligation of the Principal under a worker's compensation, disability benefits, or unemployment compensation law or similar law.

(3) Bodily injury to:

(A) An employee of the Principal arising from, and in the course of, employment by the Principal; or

(B) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by the Principal. This exclusion applies:

(i) Whether the Principal may be liable as an employer or in any other capacity; and

(ii) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(4) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(5) Property damage to:

(A) Any property owned, rented, or occupied by the Principal;

(B) Premises that are sold, given away or abandoned by the Principal if the property damage arises out of any part of those premises;

(C) Property loaned to the Principal;

(D) Personal property in the care, custody or control of the Principal;

(E) That particular part of real property on which the Principal or any contractors or subcontractors working directly or indirectly on behalf of the Principal are performing operations, if the property damage arises out of those operations.

(b) This bond assures that the Principal will satisfy valid third party liability claims, as described in condition (a).

(c) If the Principal fails to satisfy a valid third party liability claim, as described above, the Surety(ies) becomes liable on this bond obligation.

(d) The Surety(ies) shall satisfy a third party liability claim only upon the receipt of one of the following documents:

(1) Certification from the Principal and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted:

#### Certification of Valid Claim

The undersigned, as parties (name of Principal) and (name and address of third party claimant(s)), hereby certify that the claim of bodily injury and/or property damage caused by a (sudden and/or nonsudden) accidental occurrence arising from operating (Principal's) facility(ies) should be paid in the amount of \$(\_\_\_\_\_).

(Signature)

Principal

(Notary) Date

(Signature(s))

Claimant(s)

(Notary) Date

or (2) A valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by sudden and/or nonsudden accidental occurrences arising from the operations of the Principal's facility or group of facilities.

(e) In the event of combination of this bond with another mechanism for liability coverage, this bond will be considered (primary or excess) coverage.

(f) 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. In no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum, provided that the Surety(ies) furnish(es) notice to the TCEQ executive director forthwith of all claims filed and payments made by the Surety(ies) under this bond.

(g) The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and the TCEQ executive director, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal and the TCEQ executive director, as evidenced by the return receipt.

(h) The Principal may terminate this bond by sending written notice to the Surety(ies) and the TCEQ executive director.

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

(j) This bond is effective from (date) (12:01 a.m., standard time, at the address of the Principal as stated herein) and shall continue in force until terminated as described above.

In Witness Whereof, the Principal and Surety(ies) have executed this 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 is identical to the wording specified in 30 Texas Administrative Code §37.611, as such regulations were 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)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

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

**§37.621. Irrevocable Standby Letter of Credit for Liability.**

An irrevocable standby letter of credit for liability, as specified in §37.521 of this title (relating to Irrevocable Standby Letter of Credit for Liability), must be worded as specified in the Irrevocable Standby Letter of Credit for Liability in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.621

**IRREVOCABLE STANDBY LETTER OF CREDIT FOR LIABILITY**

Name and Address of Issuing Institution

Executive Director

Texas Commission on Environmental Quality

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in the favor of (any and all third-party liability claimants or name of trustee of the standby trust fund), at the request and for the account of (owner's or operator's name and physical and mailing addresses) for third-party liability awards or settlements up to (in words) U.S. dollars \$ \_\_\_\_\_ per occurrence and the annual aggregate amount of (in words) U.S. dollars \$ \_\_\_\_\_, for sudden accidental occurrences and/or for third-party liability awards or settlements up to the amount of (in words) U.S. dollars \$ \_\_\_\_\_ per occurrence, and the annual aggregate amount of (in words) U.S. dollars \$ \_\_\_\_\_, for nonsudden accidental occurrences available upon presentation of a sight draft bearing reference to this letter of credit No. \_\_\_\_\_, and (the following language if the letter of credit is being used without a standby trust fund:

- (1) a signed certificate reading as follows:

CERTIFICATE OF VALID CLAIM

The undersigned, as parties, the Principal (name of principal) and (name and address of third party claimant(s)), hereby certify that the claim of bodily injury and/or property damage caused by a (sudden and/or nonsudden) accidental occurrence arising from operations of the Principal's facility(ies) should be paid in the amount of \$ \_\_\_\_\_. We hereby certify that the claim does not apply to any of the following:

(a) Bodily injury or property damage for which the Principal is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the Principal (principal) would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of the Principal under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of the Principal arising from, and in the course of, employment by the Principal; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by the Principal.

This exclusion applies:

(A) Whether the Principal may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

- (1) Any property owned, rented, or occupied by the Principal;
- (2) Premises that are sold, given away or abandoned by the Principal if the property damage arises out of any part of those premises;
- (3) Property loaned to the Principal;
- (4) Personal property in the care, custody or control of the Principal;
- (5) That particular part of real property on which the Principal or any contractors or subcontractors working directly or indirectly on behalf of the Principal are performing operations, if the property damage arises out of these operations.

(Signatures) \_\_\_\_\_

Principal \_\_\_\_\_

(Signatures) \_\_\_\_\_

Claimant(s) \_\_\_\_\_

or

(2) a valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by a sudden and/or nonsudden accidental occurrence arising from operation of the Principal's facility or group of facilities.)

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) on (date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify you, the TCEQ executive director, and (owner's or operator's name) by certified mail that we have decided not to extend this letter of credit beyond the current expiration date.

Whenever 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.

(Insert the following language if a standby trust fund is not being used: In the event that this letter of credit is used in combination with another mechanism for liability coverage, this letter of credit shall be considered ("primary coverage" or "excess coverage").)

We certify that the wording of this letter of credit is identical to the wording specified in 30 Texas Administrative Code §37.621 as such regulations were constituted on the date shown immediately below.

(Signature(s) and title(s) of official(s) of issuing institution) \_\_\_\_\_

(Date) \_\_\_\_\_

This credit is subject to ("the most recent edition of the Uniform Customs and Practice for Documentary Credits, published and copyrighted by the International Chamber of Commerce," or "the Uniform Commercial Code").

**§37.631. Certificate of Insurance for Liability.**

A certificate of liability insurance, as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as specified in the Certificate of Insurance for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.631

**CERTIFICATE OF INSURANCE FOR LIABILITY**

1. (Name of Insurer), the "Insurer", of (address of Insurer) hereby certifies that the Insurer has issued liability insurance covering bodily injury and property damage to (name of Insured), the "Insured," of (address of Insured) in connection with the Insured's obligation to demonstrate financial responsibility under 30 TAC §37.404 (relating to Liability Requirements for Sudden and Nonsudden Accidental Occurrences). The coverage applies at (list permit number, name, and physical and mailing addresses for each facility) for ("sudden accidental occurrences," "nonsudden accidental occurrences," or "sudden and nonsudden accidental occurrences;" if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both). The limits of liability are (the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's liability), exclusive of legal defense costs. The coverage is provided under policy number \_\_\_\_\_, issued on (date). The effective date of said policy is (date).

2. The Insurer further certifies the following with respect to the insurance described in Paragraph 1:

(a) Bankruptcy or insolvency of the Insured shall not relieve the Insurer of its obligations under the policy.

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the Insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 30 TAC §37.541 (relating to Financial Test for Liability).

(c) Whenever required by the TCEQ executive director, the Insurer agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

(d) Cancellation of the insurance, whether by the Insurer, the Insured, or a parent corporation providing insurance coverage for its subsidiary or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the TCEQ executive director.

(e) Any other termination of the insurance will be effective only upon written notice and only after the expiration of 30 days after a copy of such written notice is received by the TCEQ executive director.

I hereby certify that the wording of this instrument is identical to the wording specified in 30 TAC §37.631 as such regulation was constituted on the date first above written, and that the Insurer is

licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, (in Texas or in one or more States).

(Signature of authorized representative of Insurer) \_\_\_\_\_

(Date) \_\_\_\_\_

(Type name) \_\_\_\_\_

(Title) \_\_\_\_\_, Authorized Representative of (Name of Insurer) \_\_\_\_\_

(Address of Representative) \_\_\_\_\_

**§37.641. Endorsement for Liability.**

A liability endorsement as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as specified in the Endorsement for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.641

**ENDORSEMENT FOR LIABILITY**

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering bodily injury and property damage in connection with the insured's obligation to demonstrate financial responsibility under 30 TAC §37.404 (relating to Liability Requirements for Sudden and Nonsudden Accidental Occurrences). The coverage applies at (list permit number, name, and physical and mailing addresses for each facility) for (sudden accidental occurrences, nonsudden accidental occurrences, or sudden and nonsudden accidental occurrences; if coverage is for

multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both). The limits of liability are (the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's liability), exclusive of legal defense costs.

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions of the policy inconsistent with subsections (a) through (e) of this Paragraph are hereby amended to conform with subsections (a) through (e):

(a) Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy to which this endorsement is attached.

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 30 TAC §37.541 (relating to Financial Test for Liability).

(c) Whenever requested by the TCEQ executive director, the Insurer agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

(d) Cancellation of this endorsement, whether by the Insurer, the Insured, or a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the TCEQ executive director.

(e) Any other termination of this endorsement will be effective only upon written notice and only after the expiration of 30 days after a copy of such written notice is received by the TCEQ executive director.

Attached to and forming part of policy No. \_\_\_\_\_ issued by (name of Insurer), herein called the Insurer, of (address of Insurer) to (name of Insured) of (address of Insured) this \_\_\_\_ day of (month, year). The effective date of said policy is (date).

I hereby certify that the wording of this endorsement is identical to the wording specified in 30 TAC §37.641 as such regulation was constituted on the date first above written, and that the Insurer is

licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, (in Texas or in one or more States).

(Signature of Authorized Representative of Insurer) \_\_\_\_\_

(Date) \_\_\_\_\_

(Type Name) \_\_\_\_\_

(Title) \_\_\_\_\_, Authorized Representative of (name of Insurer) \_\_\_\_\_

(Address of Representative) \_\_\_\_\_

**§37.651. Financial Test for Liability.**

A letter from the chief financial officer for liability, as specified in §37.541 of this title (relating to Financial Test for Liability) must be worded as specified in the Financial Test for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.651

FINANCIAL TEST FOR LIABILITY  
LETTER FROM CHIEF FINANCIAL OFFICER

(Address to TCEQ Executive Director)

I am the chief financial officer of (firm's name and physical and mailing addresses). This letter is in support of the use of the financial test to demonstrate financial responsibility for liability coverage (if applicable, "and closure, post closure, or corrective action") as specified in 30 Texas Administrative Code (TAC) Chapter 37 (relating to Financial Assurance).

(Fill out the following paragraphs regarding facilities and liability coverage. If there are no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its permit number, name, and physical and mailing addresses).

The firm identified above is the owner or operator of the following facilities for which liability coverage for (sudden or nonsudden, or both sudden and nonsudden) accidental occurrences is being demonstrated through the financial test specified in 30 TAC §37.541 (relating to Financial Test for Liability): \_\_\_\_\_.

The firm identified above guarantees, through the guarantee specified in 30 TAC §37.551 (relating to Corporate Guarantee for Liability), liability coverage for (sudden or nonsudden or both sudden and nonsudden) accidental occurrences at the following facilities owned or operated by the following: \_\_\_\_\_. The firm identified above is (the direct or higher-tier parent corporation of the owner or operator, or engaged in a substantial business relationship with the owner or operator).

(If you are using the financial test to demonstrate coverage of both liability and closure, post closure, or corrective action, fill in the following five paragraphs. If there are no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include: the permit number, name, the program area (hazardous waste, municipal solid waste, etc.), the physical and mailing addresses, and current cost estimate. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action.)

1. The firm identified above owns or operates the following facilities in Texas for which financial assurance for closure, post closure, or corrective action or liability coverage is demonstrated through a financial test specified in 30 TAC Chapter 37. The current cost estimates covered by the test are shown for each facility: \_\_\_\_\_.
2. The firm identified above guarantees, through a corporate guarantee specified in 30 TAC Chapter 37, the cost for closure, post closure, corrective action, or liability coverage of the

following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are shown for each facility: \_\_\_\_\_.

3. In States where TCEQ is not administering the financial requirements of 30 TAC Chapter 37, this firm, as owner, operator, or guarantor, is demonstrating financial assurance for the closure, post closure, or corrective action of the following facilities through the use of a test equivalent to a financial test specified in 30 TAC Chapter 37. The current cost estimates covered by such a test are shown for each facility: \_\_\_\_\_.
4. The firm identified above owns or operates the following facilities for which financial assurance for closure, post closure, or corrective action, is not demonstrated either to TCEQ, a federal agency or a State through the financial test or any other financial assurance mechanisms specified in 30 TAC Chapter 37 or equivalent State mechanisms. The current cost estimates not covered by such financial assurance are shown for each facility: \_\_\_\_\_.
5. This firm is the owner or operator or guarantor of the following facilities for which financial assurance is being demonstrated under other EPA regulations or state programs authorized by EPA through a financial test or guarantee. The following amounts have not been included in Paragraphs 1 through 4. (For each program area identify: the facility name, physical and mailing addresses, federal or state equivalent regulations, permit number, and current cost estimate. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action.)

- (a) Municipal solid waste management facilities under 30 TAC Chapter 330, 40 CFR part 258 or equivalent \$ \_\_\_\_\_
- (b) Underground injection control facilities under 30 TAC Chapter 331, 40 CFR part 144 or equivalent \$ \_\_\_\_\_
- (c) Petroleum underground storage tank facilities under 30 TAC Chapter 334, and 40 CFR part 280 or equivalent \$ \_\_\_\_\_
- (d) PCB storage facilities under 40 CFR part 761 or equivalent \$ \_\_\_\_\_
- (e) Hazardous waste treatment, storage, and disposal facilities under 30 TAC Chapter 335, 40 CFR parts 264 and 265 or equivalent \$ \_\_\_\_\_

(f)	Additional environmental obligations not shown above	\$ _____
	Total (a) - (f)	\$ _____

This (owner, operator, or guarantor) (has or has not) received an adverse opinion, a disclaimer of opinion, or a going concern qualification from an independent auditor on its financial statements for the latest completed fiscal year.

This firm (is required or is not required) to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year. The fiscal year of this firm ends on (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 (date).

Part A. Liability Coverage for Accidental Occurrences

(Fill in Alternative I if the criteria of 30 TAC §37.541(b)(1) are used. Fill in Alternative II if the criteria of 30 TAC §37.541(b)(2) are used.)

ALTERNATIVE I

1.	Amount of annual aggregate liability coverage to be demonstrated	\$ _____
*2.	Current assets	\$ _____
*3.	Current liabilities	\$ _____
4.	Net working capital (line 2 minus line 3)	\$ _____
*5.	Tangible net worth	\$ _____
*6.	If less than 90% of assets are located in the U. S., give total U.S. assets	\$ _____

Indicate either "yes" or "no" to the following questions:

7. Is line 5 at least \$10 million? (Yes/No)
8. Is line 4 at least 6 times line 1? (Yes/No)
9. Is line 5 at least 6 times line 1? (Yes/No)
- \*10. Are at least 90% of assets located in the U.S.? (If not, complete line 11) (Yes/No)
11. Is line 6 at least 6 times line 1? (Yes/No)

ALTERNATIVE II

1. Amount of annual aggregate liability coverage to be demonstrated \$ \_\_\_\_\_
2. Current bond rating of most recent issuance and name of rating service \_\_\_\_\_
3. Date of issuance of bond \_\_\_\_\_
4. Date of maturity of bond \_\_\_\_\_
- \*5. Tangible net worth \$ \_\_\_\_\_
- \*6. Total assets in U.S. (Required only if less than 90% of assets are located in the U.S.) \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions:

7. Is line 5 at least \$10 million? (Yes/No)
8. Is line 5 at least 6 times line 1? (Yes/No)
9. Are at least 90% of assets located in the U.S.? (If not, complete line 10) (Yes/No)

10. Is line 6 at least 6 times line 1? (Yes/No)

Part B. Closure, Post Closure, Corrective Action, and Liability Coverage

(Fill in Alternative I if the criteria of 30 TAC §37.251(b)(1) and 30 TAC §37.541(b)(1) are used. Fill in Alternative II if the criteria of 30 TAC §37.251(b)(2) and 30 TAC §37.541(b)(2) are used.)

ALTERNATIVE I

1. Sum of current closure, post closure, and corrective action cost estimates  
  
(total of all cost estimates listed above) \$ \_\_\_\_\_
2. Amount of annual aggregate liability coverage to be demonstrated \$ \_\_\_\_\_
3. Sum of lines 1 and 2 \$ \_\_\_\_\_
- \*4. Total liabilities (if any portion of your current cost estimates is included in your total liabilities, you may deduct that portion from this line and add that amount to lines 5 and 6) \$ \_\_\_\_\_
- \*5. Tangible net worth \$ \_\_\_\_\_
- \*6. Net worth \$ \_\_\_\_\_
- \*7. Current assets \$ \_\_\_\_\_
- \*8. Current liabilities \$ \_\_\_\_\_
9. Net working capital (line 7 minus line 8) \$ \_\_\_\_\_
10. The sum of net income plus depreciation, depletion, and amortization \$ \_\_\_\_\_

\*11. Total assets in the United States (required only if less than 90% of assets located in the United States) \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions:

12. Is line 5 at least \$10 million? (Yes/No)

13. Is line 5 at least 6 times line 3? (Yes/No)

14. Is line 9 at least 6 times line 3? (Yes/No)

\*15. Are at least 90% of assets located in the U.S.? (If not, complete line 16) (Yes/No)

16. Is line 11 at least 6 times line 3? (Yes/No)

17. Is line 4 divided by line 6 less than 2.0? (Yes/No)

18. Is line 10 divided by line 4 greater than 0.1? (Yes/No)

19. Is line 7 divided by line 8 greater than 1.5? (Yes/No)

ALTERNATIVE II

1. Sum of current closure, post closure, and corrective action cost estimates (total of all cost estimates listed above) \$ \_\_\_\_\_

2. Amount of annual aggregate liability coverage to be demonstrated \$ \_\_\_\_\_

3. Sum of lines 1 and 2 \$ \_\_\_\_\_

4. Current bond rating of most recent issuance and name of rating service \_\_\_\_\_

5. Date of issuance of bond \_\_\_\_\_
6. Date of maturity of bond \_\_\_\_\_
- \*7. Tangible net worth (if any portion of the current cost estimates is included in total liabilities you may add that portion to this line) \$ \_\_\_\_\_
- \*8. Total assets in the U.S. (Required only if less than 90% of assets are located in the U.S.) \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions:

9. Is line 7 at least \$10 million? (Yes/No)
10. Is line 7 at least 6 times line 3? (Yes/No)
- \*11. Are at least 90% of assets located in the U.S.? (If not, complete line 12) (Yes/No)
12. Is line 8 at least 6 times line 3? (Yes/No)

I hereby certify that the wording of this letter is identical to the wording specified in 30 TAC §37.651 as such regulations were constituted on the date shown immediately below.

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

**§37.661. Corporate Guarantee for Liability.**

A corporate guarantee for liability as specified in §37.551 of this title (relating to Corporate Guarantee for Liability) must be worded as specified in the Corporate Guarantee for Liability in this section, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.661

**CORPORATE GUARANTEE FOR LIABILITY**

Guarantee made this (date) by (name of guaranteeing entity), a business corporation organized under the laws of (if incorporated within the United States insert "the State of \_\_\_\_\_" and insert name of State; if incorporated outside the United States insert the name of the country in which incorporated, the principal place of business within the United States, and the name and physical and mailing addresses of the registered agent in the State of the principal place of business), herein referred to as guarantor. This guarantee is made on behalf of (owner or operator) of (physical and mailing addresses), which is (one of the following: our subsidiary or an entity with which guarantor has a substantial business relationship as defined in 30 TAC §37.11 (relating to Definitions), to any and all third parties who have sustained or may sustain bodily injury or property damage caused by (sudden and/or nonsudden) accidental occurrences arising from operation of the facility(ies) covered by this guarantee.

**RECITALS**

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 30 Texas Administrative Code (TAC) §37.541 (relating to Financial Test for Liability) and §37.551 (relating to Corporate Guarantee for Liability).
2. (Owner or operator) owns or operates the following facility(ies) covered by this guarantee: (List for each facility: permit number, name, and physical and mailing addresses; and if guarantor is

incorporated outside the United States list the name and physical and mailing addresses of the guarantor's registered agent in each State.) This corporate guarantee satisfies third-party liability requirements for (sudden and/or nonsudden) accidental occurrences in above-named owner or operator facilities for coverage in the amount of (dollar amount) for each occurrence and (dollar amount) annual aggregate.

3. For value received from (owner or operator), guarantor guarantees to any and all third parties who have sustained or may sustain bodily injury or property damage caused by (sudden and/or nonsudden) accidental occurrences arising from operations of the facility(ies) covered by this guarantee that in the event that (owner or operator) fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by (sudden and/or nonsudden) accidental occurrences, arising from the operation of the above-named facilities, or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor will satisfy such judgment(s), award(s) or settlement agreement(s) up to the limits of coverage identified above.
4. Such obligation does not apply to any of the following:
  - (a) Bodily injury or property damage for which (owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that (owner or operator) would be obligated to pay in the absence of the contract or agreement.
  - (b) Any obligation of (owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.
  - (c) Bodily injury to:
    - (1) An employee of (owner or operator) arising from, and in the course of, employment by (owner or operator); or
    - (2) The spouse, child, parent, brother, or sister of that employee as a consequence of, or arising from, and in the course of employment by (owner or operator). This exclusion applies:
      - (A) Whether (owner or operator) may be liable as an employer or in any other capacity; and

- (B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).
  - (d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.
  - (e) Property damage to:
    - (1) Any property owned, rented, or occupied by (owner or operator);
    - (2) Premises that are sold, given away or abandoned by (owner or operator ) if the property damage arises out of any part of those premises;
    - (3) Property loaned to (owner or operator);
    - (4) Personal property in the care, custody or control of (owner or operator);
    - (5) That particular part of real property on which (owner or operator) or any contractors or subcontractors working directly or indirectly on behalf of (owner or operator) are performing operations, if the property damage arises out of these operations.
- 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 90 days, by certified mail, notice to the TCEQ executive director and to (owner or operator) that guarantor intends to provide alternate liability coverage as specified in Subchapter F of 30 TAC Chapter 37 (relating to Financial Assurance Mechanisms for Liability), in the name of (owner or operator). Within 120 days after the end of such fiscal year, the guarantor shall establish such liability coverage unless (owner or operator) has done so.
- 6. The guarantor agrees to notify the TCEQ executive director by certified mail of a voluntary or involuntary proceeding under title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

7. Guarantor agrees that within 30 days after being notified by the TCEQ executive director of a determination that guarantor no longer meets the financial test criteria or is disallowed from continuing as a guarantor, guarantor shall establish alternate liability coverage as specified in Subchapter F of 30 TAC Chapter 37 in the name of (owner or operator), unless (owner or operator) has done so.
8. Guarantor reserves the right to modify this agreement to take into account amendment or modification of the liability requirements set by Subchapter E of 30 TAC Chapter 37 (relating to Financial Assurance Requirements for Liability Coverage), provided that such modification shall become effective only if the TCEQ executive director does not disapprove the modification within 30 days of receipt of notification of the modification.
9. Guarantor agrees to remain bound under this guarantee for so long as (owner or operator) must comply with the applicable requirements of Subchapter E of 30 TAC Chapter 37 for the above-listed facility(ies), except as provided in Paragraph 10 of this agreement.
10. Guarantor may terminate this guarantee by sending notice by certified mail to the TCEQ executive director and to (owner or operator) provided that this guarantee may not be terminated unless and until (the owner or operator) obtains, and the TCEQ executive director approves, alternate financial assurance for liability coverage complying with Subchapter F of 30 TAC Chapter 37.
11. Guarantor hereby expressly waives notice of acceptance of this guarantee by any party.
12. Guarantor agrees that this guarantee is in addition to and does not affect any other responsibility or liability of the guarantor with respect to the covered facilities.
13. The Guarantor shall satisfy a third-party liability claim only on receipt of one of the following documents:
  - (a) Certification from the Principal and the third-party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted:

CERTIFICATION OF VALID CLAIM

The undersigned, as parties the Principal (name of principal) and (name and address of third-party claimant(s)), hereby certify that the claim of bodily injury and/or property damage caused by a (sudden and/or nonsudden) accidental occurrence arising from operating (Principal's) facility should be paid in the amount of \$ (amount).

(Signatures) \_\_\_\_\_

Principal \_\_\_\_\_

(Notary) Date \_\_\_\_\_

(Signature(s)) \_\_\_\_\_

Claimant(s) \_\_\_\_\_

(Notary) Date \_\_\_\_\_

or (b) A valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by (sudden and/or nonsudden) accidental occurrences arising from the operation of the Principal's facility or group of facilities.

14. In the event of combination of this guarantee with another mechanism to meet liability requirements, this guarantee will be considered (primary or excess) coverage.

I hereby certify that the wording of the guarantee is identical to the wording specified in 30 TAC §37.661 as such regulations were constituted on the date shown immediately below.

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

(Name of guarantor) \_\_\_\_\_

(Authorized signature for guarantor) \_\_\_\_\_

(Name of person signing) \_\_\_\_\_

(Title of person signing) \_\_\_\_\_

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

**§37.671. Standby Trust Agreement.**

(a) A standby trust agreement for liability, as specified in §37.521 of this title (relating to Irrevocable Standby Letter of Credit for Liability), must be worded as specified in the Standby Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.671(a)

**STANDBY TRUST AGREEMENT**

Trust Agreement, the "Agreement," entered into as of (date) by and between (name of the owner or operator) a (name of a State) (corporation, partnership, association, or proprietorship), the Grantor, and (name of corporate trustee), (incorporated in the state of \_\_\_\_\_ or a national bank), the trustee.

Whereas the Texas Commission on Environmental Quality, "TCEQ," an agency of the State of Texas, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a facility or group of facilities must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental and/or nonsudden accidental occurrences arising from operations of the facility or group of facilities.

Whereas, the Grantor has elected to establish a standby trust into which the proceeds from a letter of credit may be deposited to assure all or part of such financial responsibility 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. This agreement pertains to the facilities identified on attached schedule A (on schedule A, for each facility list the permit number, name, and physical and mailing addresses of the facility(ies) and the amount of liability coverage, or portions thereof, if more than one instrument affords combined coverage as demonstrated by this Agreement).

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a standby trust fund, hereafter the "Fund," for the benefit of any and all third parties injured or damaged by (sudden and/or nonsudden) accidental occurrences, arising from operation of the facility(ies) covered by this guarantee, in the amounts of up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, per occurrence and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, annual aggregate for sudden accidental occurrences and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, per occurrence and up to (dollar amount in words) U.S. dollars, \$\_\_\_\_\_, annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

(a) Bodily injury or property damage for which the Grantor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the Grantor would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of the Grantor under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of the Grantor arising from , and in the course of, employment by the Grantor; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by the Grantor.

This exclusion applies:

(A) Whether the Grantor may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in Paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by the Grantor;

(2) Premises that are sold, given away or abandoned by the Grantor if the property damage arises out of any part of those premises;

(3) Property loaned to the Grantor;

(4) Personal property in the care, custody or control of the Grantor;

(5) That particular part of real property on which the Grantor or any contractors or subcontractors working directly or indirectly on behalf of the Grantor are performing operations, if the property damage arises out of these operations.

In the event of combination with another mechanism for liability coverage, the fund shall be considered (primary or excess) coverage.

The Fund is established initially as consisting of the proceeds of the letter of credit deposited into the Fund. Such proceeds 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 shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall 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 TCEQ.

Section 4. Payment for Bodily Injury or Property Damage. The Trustee shall satisfy a third party liability claim by drawing on the letter of credit described in Schedule B and by making payments from the Fund only upon receipt of one of the following documents:

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted:

#### CERTIFICATION OF VALID CLAIM

The undersigned, as parties (Grantor) and (name and address of third party claimant(s)), hereby certify that the claim of bodily injury and/or property damage caused by a (sudden or nonsudden) accidental occurrence arising from operating (Grantor's) facility(ies) should be paid in the amount of \$( ).

(Signatures)

Grantors

(Signatures)

Claimant(s)

or (b) A valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by a (sudden or nonsudden) accidental occurrence arising from the operation of the Grantor's facility or group of facilities.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of the proceeds from the letter of credit drawn upon by the Trustee in accordance with the requirements of 30 TAC §37.621 (relating to Irrevocable Standby Letter of Credit for Liability) and Section 4 of this Agreement.

Section 6. Trustee Management. The Trustee shall invest and reinvest the 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:

(i) 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), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) 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 a State government; and

(iii) 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, 15U.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 anyway limiting 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 shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other 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 corporate 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 to the Trustee shall be paid from the Fund.

Section 10. 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 the 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 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be 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 TCEQ Executive Director, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, certifications of valid claims, and instructions to the Trustee shall 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 amendments to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's 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 executive director hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or TCEQ, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the executive director if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the executive director, or by the Trustee and the executive director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be paid to the Grantor. The executive director will agree to termination of the Trust when the owner or operator substitutes alternative financial assurance as specified in this section.

Section 16. Immunity and Indemnification. The Trustee shall 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 and the executive director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, 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 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Texas.

Section 18. 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 shall 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 is identical to the wording specified in 30 TAC §37.671(a) as such regulations were constituted on the date first above written.

(Signature of Grantor)

By (Title)

Attest:

(Title)

(Seal)

(Signature of Trustee)

By (Title)

Attest:

(Title)

(Seal)

(b) A certification of acknowledgment must be worded as specified in the Certification of Acknowledgment in this subsection and must accompany the trust agreement for a standby trust fund as specified in this chapter.

Figure: 30 TAC §37.671(b)

#### CERTIFICATION OF ACKNOWLEDGMENT

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

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

On this (date), before me personally came (owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (address), that she/he is (title) of (corporation), 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)

**SUBCHAPTER I: FINANCIAL ASSURANCE FOR PETROLEUM UNDERGROUND**

**STORAGE TANK SYSTEMS**

**§§37.825, 37.830, 37.835, 37.840, 37.845, 37.855**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under TWC, §26.346, which requires the commission to establish rules relating to the registration of underground and aboveground storage tanks; and TWC, §26.352, which provides the commission with the authority to adopt rules relating to financial assurance for USTs.

**§37.825. Financial Test of Self-Insurance.**

(a) An owner, operator, and/or guarantor, may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Assurance) by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner, operator, and/or guarantor must meet the criteria of subsections (b) or (c) of this section based on year-end financial statements for the latest completed fiscal year.

(b) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 1. The owner, operator, and/or guarantor must:

(1) have a tangible net worth of at least ten times:

(A) the total of the applicable aggregate amount required by §37.815 of this title based on the number of underground storage tanks for which a financial test is used to demonstrate financial assurance to the agency under this section;

(B) the sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial assurance to the agency under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), 40 Code of Federal Regulations (CFR) Parts 264, 265, or state equivalent;

(C) the sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 331 of this title (relating to Underground Injection Control), 40 CFR Part 144 or state equivalent;

(D) the sum of municipal solid waste cost estimates for which a financial test is used to demonstrate financial assurance to the agency under Chapter 330 (relating to Municipal Solid Waste), 40 CFR Part 258 or state equivalent;

(E) the sum of current polychlorinated biphenyl (PCB) cost estimates for which a financial test is used to demonstrate financial assurance to the EPA under 40 CFR Part 761; and

(F) the sum of additional financial assurance obligations not identified in subparagraphs (A) - (E) of this paragraph and for which a financial test or other form of self-insurance is used to meet financial assurance obligations under the commission or other federal or state environmental regulations;

(2) have a tangible net worth of at least \$10 million;

(3) have a letter signed by the chief financial officer as specified in subsection (d) of this section;

(4) either:

(A) file financial statements annually with the United States Securities and Exchange Commission (SEC), the Energy Information Administration, or the Rural Electrification Administration; or

(B) report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A;

(5) the firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(c) The owner, operator, and/or guarantor must meet the requirements of this subsection referred to as Alternative 2.

(1) The owner, operator, and/or guarantor must meet the financial test requirements of §37.541(a) and (b) of this title (relating to Financial Test for Liability), substituting the appropriate amounts specified in §37.815(b)(1) and (2) of this title for the "amount of liability coverage" each time specified in that section.

(2) The fiscal year-end financial statements of the owner or operator, and/or guarantor, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

(A) The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(B) The owner, operator, and/or guarantor, must have a letter signed by the chief financial officer as specified in subsection (d) of this section.

(3) If the financial statements of the owner, operator, and/or guarantor, are not submitted annually to the SEC, the Energy Information Administration or the Rural Electrification Administration, the owner, operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(A) the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the independent certified public accountant which indicated that the specified data should be adjusted.

(d) To demonstrate that it meets the financial test under subsection (b) or (c) of this section, the chief financial officer of the owner, operator, and/or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the 12-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in parentheses are to be replaced by the relevant information and the parentheses deleted.

Figure: 30 TAC §37.825(d)

#### LETTER FROM CHIEF FINANCIAL OFFICER

I am the chief financial officer of (insert: name and address of the owner, operator, or guarantor). This letter is in support of the use of (insert: "the financial test of self-insurance," and/or "guarantee") to demonstrate financial assurance for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage") caused by (insert: "sudden accidental releases" and/or "nonsudden accidental releases") in the amount of at least (insert: dollar amount) annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test by this (insert: "owner or operator," and/or "guarantor"): (List for each facility: the name and address of the facility where tanks assured by this financial test are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the

registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7(relating to Registration for USTs).)

This firm is the owner, operator, or guarantor of the following facilities for which financial assurance is being demonstrated under other TCEQ, EPA regulations, or state program authorized by EPA through a financial test or guarantee. (For each program area identify: the facility name, physical and mailing addresses, federal or state equivalent regulations, permit number, current cost estimate, and liability coverage. Identify for each current cost estimate the amount designated for closure, post closure, corrective action, or liability coverage.)

- |     |   |          |
|-----|---|----------|
| (a) | Municipal solid waste management facilities under 30 TAC<br>Chapter 330, 40 CFR part 258 or equivalent                          | \$ _____ |
| (b) | Underground injection control facilities under 30 TAC<br>Chapter 331, 40 CFR part 144 or equivalent                             | \$ _____ |
| (c) | PCB storage facilities under 40 CFR part 761 or equivalent  | \$ _____ |
| (d) | Hazardous waste treatment, storage, and disposal facilities<br>under 30 TAC Chapter 335, 40 CFR parts 264 and 265 or equivalent | \$ _____ |
| (e) | Additional environmental obligations not shown above  | \$ _____ |
|     | Total (a)-(e) \$ _____  |          |

This (insert "owner or operator," or "guarantor") has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on its financial statements for the latest completed fiscal year.

(Fill in the information for Alternative I if the criteria of §37.825(b) of this title (relating to Financial Test of Self-Insurance) are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of §37.825(c) of this title are being used to demonstrate compliance with the financial test requirements.)

ALTERNATIVE I

- |     |   |                |
|-----|---|----------------|
| 1.  | Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee   | \$ _____       |
| 2.  | Sum of current cost estimates for closure, post closure, corrective action, and liability coverage (total of (a)-(e) directly above)                                  | \$ _____       |
| 3.  | Sum of lines 1 and 2  | \$ _____       |
| 4.  | Total tangible assets   | \$ _____       |
| 5.  | Total liabilities (if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6) | \$ _____       |
| 6.  | Tangible net worth (subtract line 5 from line 4)  | \$ _____       |
|     |   | Yes    No      |
| 7.  | Is line 6 at least \$10 million?  | _____    _____ |
| 8.  | Is line 6 at least 10 times line 3?   | _____    _____ |
| 9.  | Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?  | _____    _____ |
| 10. | Have financial statements for the latest fiscal year been filed with the Energy Information Administration?   | _____    _____ |
| 11. | Have financial statements for the latest fiscal year been filed with the Rural Electrification Administration?  | _____    _____ |

12. Has financial information been provided to Dun and Bradstreet,  
and has Dun and Bradstreet provided a financial strength rating of 4A or 5A?

(Answer "Yes" only if both criteria have been met.)

\_\_\_\_\_

ALTERNATIVE II

1. Amount of annual UST aggregate coverage being assured by a  
financial test, and/or guarantee \$ \_\_\_\_\_
2. Sum of current cost estimates for closure, post closure,  
corrective action and liability coverage (total of (a)-(e) directly above) \$ \_\_\_\_\_
3. Sum of lines 1 and 2 \$ \_\_\_\_\_
4. Total tangible assets \$ \_\_\_\_\_
5. Total liabilities (if any of the amount reported on line 3 is  
included in total liabilities, you may deduct that amount from this  
line and add that amount to line 6) \$ \_\_\_\_\_
6. Tangible net worth (subtract line 5 from line 4) \$ \_\_\_\_\_
7. Total assets in the U.S. (required only if less than 90 percent  
of assets are located in the U.S.) \$ \_\_\_\_\_
- Yes No
8. Is line 6 at least \$10 million? \_\_\_\_\_
9. Is line 6 at least 6 times line 3? \_\_\_\_\_

10. Are at least 90 percent of assets located in the U.S.?  
(If "No," complete line 11.) \_\_\_\_\_
11. Is line 7 at least 6 times line 3?  
(Fill in either lines 12-15 or lines 16-18) \_\_\_\_\_
12. Current assets \$ \_\_\_\_\_
13. Current liabilities \$ \_\_\_\_\_
14. Net working capital (subtract line 13 from 12) \$ \_\_\_\_\_
- Yes No
15. Is line 14 at least 6 times line 3? \_\_\_\_\_
16. Current bond rating of most recent bond issue \_\_\_\_\_
17. Name of rating service \_\_\_\_\_
18. Date of maturity of bond \_\_\_\_\_
- Yes No
19. Have financial statements for the latest fiscal year been filed  
with the SEC, the Energy Information Administration, or the Rural  
Electrification Administration? \_\_\_\_\_

(If "No," please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4-18 above and the financial statements for the latest fiscal year.)

(For both Alternative I and Alternative II complete the certification with this statement.)

I hereby certify that the wording of this letter is identical to the wording specified in Title 30, TAC, §37.825, as this regulation was constituted on the date shown immediately below.

(Insert signature) \_\_\_\_\_

(Insert name) \_\_\_\_\_

(Insert title) \_\_\_\_\_

(Insert date) \_\_\_\_\_

(e) If an owner or operator using the test to provide financial assurance finds that he or she no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(f) The agency may require reports of financial condition at any time from the owner, operator, and/or guarantor. If the agency finds, on the basis of these reports or other information, that the owner, operator, and/or guarantor, no longer meets the financial test requirements of subsections (b) or (c) and (d) of this section, the owner or operator must obtain alternative coverage within 30 days after notification of this finding.

(g) If the owner or operator fails to obtain alternate financial assurance within 150 days of finding that he or she no longer meets the requirements of the financial test based on the year-end

financial statements, or within 30 days of notification by the executive director that he or she no longer meets the requirements of the financial test, the owner or operator must notify the executive director of this failure within ten days.

**§37.830. Guarantee.**

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:

(1) a firm that:

(A) possesses a controlling interest in the owner or operator;

(B) possesses a controlling interest in a firm described under subparagraph (A)

of this paragraph; or

(C) is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or

(2) a firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of §37.825 of this title (relating to Financial Test of Self-Insurance) based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in §37.825(d) of this title and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the agency notifies the guarantor that he or she no longer meets the requirements of the financial test of §37.825(b) or (c) and (d) of this title the guarantor must notify the owner or operator within ten days of receiving this notification from the agency. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternate coverage as specified in §37.890(c) of this title (relating to Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance).

(c) The guarantee must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.830(c)

#### GUARANTEE

Guarantee made this (insert date) by (insert name of guaranteeing entity), a business entity organized under the laws of the state of (insert name of state), herein referred to as guarantor, to the Texas Commission on Environmental Quality (TCEQ) and to any and all third parties, and obligees, on behalf of (insert owner or operator) of (insert business address).

### Recitals

1. Guarantor meets or exceeds the financial test criteria of Title 30, Texas Administrative Code (TAC), §37.825(b) or (c) and (d) and agrees to comply with the requirements for guarantors as specified in Title 30, TAC, §37.830(b).

2. (Insert owner or operator) owns or operates the following underground storage tank(s) covered by this guarantee: (List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. Alternatively, if the number of tanks which a firm owns or operates in the United States exceeds 20, and all of these tanks are being covered by the same guarantee, state the exact location where the information relating to the number of tanks at each facility and the names and addresses of the facilities where the tanks are located can be found. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, TAC, §334.7 (relating to Registration for USTs), and the name and address of the facility.) This guarantee satisfies Title 30, TAC, Chapter 37, Subchapter I (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) requirements for assuring funding for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "nonsudden accidental releases" or "accidental release"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the above-identified underground storage tank(s) in the amount of (insert dollar amount) per occurrence and (insert dollar amount) annual aggregate.

3. (Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator) or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)) (insert owner or operator), guarantor guarantees to the TCEQ and to any and all third parties that:

In the event that (insert owner or operator) fails to provide alternate coverage within 60 days after receipt of a notice of cancellation of this guarantee and the Executive Director of the TCEQ has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the Executive Director of the TCEQ, shall fund a standby trust fund in accordance with the provisions of Title 30, TAC, of §37.880 (relating to Drawing on Financial Assurance Mechanisms), in an amount not to exceed the coverage limits specified above.

In the event that the Executive Director of the TCEQ determines that (insert owner or operator) has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with Title 30, TAC, Chapter 334, Subchapter D (relating to Release Reporting and Corrective Action) of the guarantor upon written instructions from the executive director of the TCEQ shall fund a standby trust in accordance with the provisions of Title 30, TAC, §37.880, in an amount not to exceed the coverage limits specified above.

If (insert owner or operator) fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by (insert "sudden" and/or "nonsudden") accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from injury or damage, the guarantor, upon written instructions from the Executive Director of the TCEQ, shall fund a standby trust in accordance with the provisions of Title 30, TAC, §37.880 to satisfy these judgement(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

4. Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of Title 30, TAC, §37.825(b) or (c) and (d), the guarantor shall send within 120 days of this failure, by certified mail, notice to (insert owner or operator). The guarantee will terminate 120 days from the date of receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

5. Guarantor agrees to notify (insert owner or operator) and the Executive Director of the TCEQ by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

6. Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of (insert owner or operator) under Title 30, TAC, Chapter 334 (relating to Underground and Aboveground Storage Tanks).

7. Guarantor agrees to remain bound under this guarantee for so long as (insert owner or operator) must comply with the applicable financial responsibility requirements of Title 30, TAC, Chapter 37, Subchapter I for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to (insert owner or operator), this cancellation to become effective no earlier than 120 days after receipt of the notice by (insert owner or operator), as evidenced by the return receipt.

8. The guarantor's obligation does not apply to any of the following:

a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);

c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank;

e. Bodily damage or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815.

9. Guarantor expressly waived notice of acceptance of this guarantee by the TCEQ, by any or all third parties, or by (insert owner or operator).

I hereby certify that the wording of this guarantee is identical to the wording specified in Title 30, TAC, §37.830(c), as this regulation was constituted on the effective date shown immediately below.

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

(Insert name of guarantor) \_\_\_\_\_

(Insert authorized signature for guarantor) \_\_\_\_\_

(Insert name of person signing) \_\_\_\_\_

(Insert title of person signing) \_\_\_\_\_

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

(d) An owner or operator who uses a guarantee to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

**§37.835. Insurance and Risk Retention Group Coverage.**

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. This insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

(b) Each insurance policy must be amended by an endorsement as specified in paragraph (1) of this subsection or evidenced by a certificate of insurance as specified in paragraph (2) of this subsection, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

(1) Endorsement.

Figure: 30 TAC §37.835(b)(1)

ENDORSEMENT

Name: (Insert name of each covered location) \_\_\_\_\_

Address: (Insert address of each covered location) \_\_\_\_\_

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

Period of Coverage: (Insert current policy period) \_\_\_\_\_

Name of Insurer or Risk Retention Group: \_\_\_\_\_

Address of Insurer or Risk Retention Group: \_\_\_\_\_

Name of Insured: \_\_\_\_\_

Address of Insured: \_\_\_\_\_

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

(List the number of tanks at each facility and the names(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7, (relating to Registration for USTs), and the name and address of the facility.) for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified in this paragraph.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The insurance afforded with respect to these occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subparagraphs (a) through (e) of this paragraph are to be amended to conform with these subparagraphs:

a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this endorsement is attached.

b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, TAC, §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the Texas Commission on Environmental Quality (TCEQ), the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, TAC, §37.835(b)(1) (relating to Insurance and Risk Retention Group Coverage) and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer or Risk Retention Group) \_\_\_\_\_

(Insert name of person signing) \_\_\_\_\_

(Insert title of person signing) \_\_\_\_\_, Authorized Representative of (Insert name of Insurer or Risk Retention Group) \_\_\_\_\_

(Insert address of Representative) \_\_\_\_\_

(2) Certificate of Insurance.

Figure: 30 TAC §37.835(b)(2)

#### CERTIFICATE OF INSURANCE

Name: (Insert name of each covered location) \_\_\_\_\_

Address: (Insert address of each covered location) \_\_\_\_\_

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

Endorsement (if applicable): \_\_\_\_\_

Period of Coverage: (Insert current policy period) \_\_\_\_\_

Name of Insurer or Risk Retention Group: \_\_\_\_\_

Address of Insurer or Risk Retention Group: \_\_\_\_\_

Name of Insured: \_\_\_\_\_

Address of Insured: \_\_\_\_\_

Certification:

1. (Insert name of Insurer or Risk Retention Group), (insert the "Insurer" or "Group"), as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

(List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code, §334.7 (relating to Registration for USTs), and the name and address of the facility.) for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tank(s) identified above.

The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location), exclusive of legal defense costs. This coverage is provided under (insert policy number). The effective date of said policy is (insert date).

2. The (insert "Insurer" or "Group") further certifies the following with respect to the insurance described in paragraph 1:

a. Bankruptcy or insolvency of the insured shall not relieve the (insert "Insurer" or "Group") of its obligations under the policy to which this certificate applies.

b. The (insert "Insurer" or "Group") is liable for the payment of amounts within any deductible applicable to the policy, to the provider of corrective action or a damaged third-party, with a right of

reimbursement by the insured for any payment made by the (insert "Insurer" or "Group"). This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in Title 30, TAC, §37.825 of this title (relating to Financial Test of Self-Insurance), §37.830 of this title (relating to Guarantee), §37.835 of this title (relating to Insurance and Risk Retention Group Coverage), §37.840 of this title (relating to Surety Bond), §37.845 of this title (relating to Letter of Credit), and §37.850 of this title (relating to Trust Fund).

c. Whenever requested by the Executive Director of the TCEQ, the (insert "Insurer" or "Group") agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the (insert "Insurer" or "Group"), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of this written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of ten days after a copy of such written notice is received by the insured.

(Insert for claims-made policies:

e. The insurance covers claims otherwise covered by the policy that are reported to the (insert "Insurer" or "Group") within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.)

I hereby certify that the wording of this instrument is identical to the wording in Title 30, Texas Administrative Code, §37.835(b)(2), and that the (insert "Insurer" or "Group") is (insert "licensed to transact the business of insurance" or "eligible to provide insurance as an excess or surplus lines insurer") in Texas.

(Insert signature of authorized representative of Insurer) \_\_\_\_\_

(Type name) \_\_\_\_\_

(Insert title) \_\_\_\_\_, Authorized Representative of (insert name of Insurer or Risk Retention Group) \_\_\_\_\_

(Insert address of representative) \_\_\_\_\_

(c) Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer in Texas.

**§37.840. Surety Bond.**

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the United States Department of the Treasury.

(b) The surety bond must be worded as follows, except that instructions in parentheses must be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.840(b)

**PERFORMANCE BOND**

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

Period of coverage: \_\_\_\_\_

Principal: (insert legal name and business address of owner or operator) \_\_\_\_\_

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation") \_\_\_\_\_

State of incorporation (if applicable): \_\_\_\_\_

Surety(ies): (insert name(s) and business address(es)) \_\_\_\_\_

Scope of Coverage: (List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under Title 30, Texas Administrative Code (TAC), §334.7 (relating to Registration for USTs). List the coverage guaranteed by the bond: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank.")

Penal sums of bond: Per occurrence \$ \_\_\_\_\_ Annual aggregate \$ \_\_\_\_\_

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

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to the Texas Commission on Environmental Quality (TCEQ) in the above penal sums 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 co-sureties, we, the Sureties, bind ourselves in these sums 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 these sums only as is set forth opposite the name of this Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Texas Water Code, Chapter 26, Subchapter I, as amended, to provide financial assurance for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location) arising from operating the underground storage tanks identified above; and

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

Now, therefore, the conditions of the obligation are that if the Principal shall faithfully (insert "take corrective action, in accordance with Title 30, TAC, Chapter 334, Subchapter D (relating to Release Reporting and Corrective Action) and the Executive Director of the TCEQ's instructions for," and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden" or "nonsudden" or "sudden and nonsudden") accidental releases arising from operating the tank(s) identified above, or if the Principal shall provide alternate financial assurance, as specified in Title 30, TAC, Chapter 37, Subchapter I (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

This obligation does not apply to any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or
- e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815.

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 Executive Director of the TCEQ that the Principal has failed to (insert "take corrective action, in accordance with Title 30, TAC, Chapter 334, Subchapter D and the executive director's instructions," and/or "compensate injured third parties") as guaranteed by this bond, the Surety(ies) shall either perform (insert "corrective action in accordance with Title 30, TAC, Chapter 334, Subchapter D and the executive director's instructions," and/or "third-party liability compensation") or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by the Executive Director of the TCEQ under Title 30, TAC, §37.880 (relating to Drawing on Financial Assurance Mechanisms).

Upon notification by the TCEQ Executive Director that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that the executive director has determined or suspects that a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by the executive director under Title 30, TAC, §37.880.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no 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 this payment or payments shall amount in the annual aggregate to

the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Whereof, the Principal and Surety(ies) have executed this 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 is identical to the wording specified in Title 30, TAC, §37.840(b) (relating to Surety Bond), as this regulation was constituted on the date this bond was executed.

**PRINCIPAL**

(Insert signature(s)) \_\_\_\_\_

(Insert name(s)) \_\_\_\_\_

(Insert title(s)) \_\_\_\_\_

(Insert corporate seal)

**CORPORATE SURETY(IES)**

(Insert name and address) \_\_\_\_\_

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

Liability limit: \$ \_\_\_\_\_

(Insert signature(s)) \_\_\_\_\_

(Insert name(s) and titles(s)) \_\_\_\_\_

(Insert corporate seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

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

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.

(d) The owner or operator who uses a surety bond to satisfy the requirements of §37.815 of this title must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

**§37.845. Letter of Credit.**

(a) An owner or operator may satisfy the requirements of §37.815 of this title (relating to Amount and Scope of Required Financial Responsibility) by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that

has the authority to issue letters of credit in Texas and whose letter of credit operations are regulated and examined by a federal or state agency.

(b) The letter of credit must be worded as follows, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.845(b)

#### IRREVOCABLE STANDBY LETTER OF CREDIT

(Insert name and address of issuing institution)

(Insert name and address of Executive Director of the Texas Commission on Environmental Quality)

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. \_\_\_\_\_ in your favor, at the request and for the account of (insert owner or operator name) of (insert address) up to the aggregate amount of (insert in words) U.S. dollars (\$(insert dollar amount)), 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 under regulations issued under authority of Texas Water Code, Chapter 26, Subchapter I, as amended".

This letter of credit may be drawn on to cover (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases") arising from operating the underground storage tank(s) identified below in the amount of (insert in words), \$(insert dollar amount), per occurrence and (insert in words), \$(insert dollar amount), annual aggregate:

(List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the name and address of the facility and the tank identification number provided in the registration information submitted under Title 30, TAC, §334.7 (relating to Registration for USTs).)

The letter of credit may not be drawn on to cover any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;
- d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or
- e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, TAC, §37.815 (relating to Amount and Scope of Required Financial Responsibility).

This letter of credit is effective as of (insert date) and shall expire on (insert date), but this expiration date shall be automatically extended for a period of (insert at least the length of the original term) on (insert expiration date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify (insert owner or operator) by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event the (insert owner or operator) is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by (insert owner or operator), as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor this draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of (insert owner or operator) in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in Title 30, TAC, §37.845(b) (relating to Letter of Credit) as this regulation was constituted on the date shown immediately below.

(Insert signature(s) and title(s) of official(s) of issuing institution) \_\_\_\_\_

(Insert 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").

(c) An owner or operator who uses a letter of credit to satisfy the requirements of §37.815 of this title must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid under a draft by the executive director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the executive director under §37.880 of this title (relating to Drawing on Financial Assurance Mechanisms). This standby trust fund must meet the requirements specified in §37.855 of this title (relating to Standby Trust Fund).

(d) The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit must provide that credit be automatically renewed for the same term as the original term, unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

**§37.855. Standby Trust Fund.**

(a) An owner or operator using any one of the mechanisms authorized by §37.830 of this title (relating to Guarantee), §37.840 of this title (relating to Surety Bond), or §37.845 of this title (relating to Letter of Credit) must establish a standby trust fund when the mechanism is acquired. The trustee of

the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the State of Texas.

(b) The standby trust agreement or trust agreement must be worded as follows, except the instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

Figure: 30 TAC §37.855(b)

#### TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of (insert date) by and between (insert name of the owner or operator), a (insert name of state) (insert "corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (insert name of corporate trustee), (insert "Incorporated in the state of \_\_\_\_\_" or "a national bank"), the "Trustee."

Whereas, the Texas Commission on Environmental Quality (TCEQ) has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed or corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank. The attached Schedule A lists the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located that are covered by the standby trust agreement;

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.

c. The term "Executive Director" means the Executive Director of the TCEQ.

Section 2. Identification of the Financial Assurance Mechanism. This Agreement pertains to the (insert the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments). (This paragraph is only applicable to the standby trust agreement.)

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the TCEQ. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. (Note: The Fund is established initially as a standby to receive payments and shall not consist of any property.) Payments made by the provider of financial assurance under the Executive Director's instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee under this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by the TCEQ.

Section 4. Payment for (insert "Corrective Action" and/or "Third-Party Liability Claims"). The Trustee shall make payments from the Fund as the Executive Director shall direct, in writing, to provide for the payment of the costs of (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "accidental releases") arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

- a. Any obligation of (insert owner or operator) under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;
- b. Bodily injury to an employee of (insert owner or operator) arising from, and in the course of, employment by (insert owner or operator);
- c. Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or water craft;
- d. Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by (insert owner or operator) that is not the direct result of a release from a petroleum underground storage tank; or
- e. Bodily injury or property damage for which (insert owner or operator) is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of Title 30, Texas Administrative Code (TAC), §37.815 (relating to Amount and Scope of Required Financial Assurance).

The Trustee shall reimburse the Grantor, or other persons as specified by the Executive Director, from the Fund for corrective action expenditures and/or third-party liability claims in amounts as the Executive Director specifies in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Executive Director specifies in writing. Upon refund, these 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 shall consist of cash and 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 beneficiaries 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 these 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 tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80A-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a 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 USC 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 these shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting 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 shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any sale or other 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 these securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of these securities in a qualified central depository even though, when so deposited, these securities may be merged and held in bulk in the name of the nominee of this 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 these 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 corporate 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 shall be paid from the Fund.

Section 10. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the 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 11. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but this resignation or replacement shall not be 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 successor Trustee or for instructions. The successor Trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before this change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by persons as are designated in the attached Schedule B or other designees as the Grantor may designate by amendment to Schedule B. 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 Executive Director to the Trustee shall be in writing, signed by the Executive Director or the Executive Director's designee, and the Trustee shall act and shall be fully protected in acting in accordance with these 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 Executive Director hereunder has occurred. The Trustee shall have no duty to act in the absence of these orders, requests, and instructions from the Grantor and/or the Executive Director, except as provided for herein.

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and the Executive Director if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and the Executive Director, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 16. Immunity and Indemnification. The Trustee shall 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 Executive Director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, 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 this defense.

Section 17. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the state of Texas, or the Comptroller of the Currency in the case of National Association banks.

Section 18. 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 shall 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 (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in Title 30, TAC, §37.855(b) (relating to Standby Trust Fund), as this regulation was constituted on the date written above.

(Insert signature of grantor)

(Insert name of the grantor)

(Insert title)

Attest:

(Insert signature of trustee)

(Insert name of the trustee)

(Insert title)

(Insert seal)

Attest:

(Insert signature of witness)

(Insert name of witness)

(Insert title)

(Insert seal)

(c) The standby trust agreement or trust agreement must be accompanied by a formal certification of acknowledgment similar to the following:

Figure: 30 TAC §37.855(c)

#### CERTIFICATION

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

On this (insert date), before me personally came (insert owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (insert address), that she/he is (insert title) of (insert corporation), the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to this instrument is this 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.

(Insert signature of Notary Public)

(Insert name of Notary Public)

(d) The executive director will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the executive director determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

(e) An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this rule.

**SUBCHAPTER K: FINANCIAL ASSURANCE REQUIREMENTS FOR CLASS A OR B  
PETROLEUM-SUBSTANCE CONTAMINATED SOIL STORAGE,  
TREATMENT, AND REUSE FACILITIES**

**§37.1001**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendment is also adopted under THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; and THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers.

**§37.1001. Applicability.**

This subchapter applies to an owner or operator of Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K of this title (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil). This subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure and liability.

**SUBCHAPTER L: FINANCIAL ASSURANCE FOR USED OIL RECYCLING**

**§§37.2001, 37.2003, 37.2011**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under THSC, §371.024 and §371.028, which require the commission to adopt rules and procedures necessary to implement the used oil recycling program relating to used oil; and THSC, §371.026, which provides the authority for the commission to require financial assurance from used oil handlers.

**§37.2001. Applicability.**

This subchapter applies to used oil transporters required to provide evidence of financial assurance under §324.22 of this title (relating to Soil Remediation for Used Oil Handlers). This subchapter also applies to an owner or operator of a used oil transfer, processing, rerefining, and off-specification used oil burning facilities, hereinafter referred to as "used oil handlers," which are required to provide evidence of financial assurance under §324.22 of this title. This subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for soil remediation and automobile insurance.

**§37.2003. Definitions.**

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 324 of this title (relating to Used Oil), except the term “closure” for purposes of this subchapter includes the term “soil remediation” as used in Chapter 324 of this title.

**§37.2011. Financial Assurance Requirements for Used Oil Handlers.**

In addition to the requirements of this subchapter, used oil handlers who must demonstrate financial assurance for soil remediation must do so in an amount as specified in §324.22(c) or (d) of this title (relating to Financial Responsibility Technical Requirements) and must comply with Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action).

**SUBCHAPTER M: FINANCIAL ASSURANCE REQUIREMENTS FOR SCRAP TIRE SITES**

**§37.3001**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendment is also adopted under THSC, §361.112, which provides the commission with the authority to regulate scrap tire facilities.

**§37.3001. Applicability.**

This subchapter applies to an owner or operator required to provide financial assurance under Chapter 328, Subchapter F of this title (relating to Management of Used or Scrap Tires). This subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.

**SUBCHAPTER O: FINANCIAL ASSURANCE FOR PUBLIC  
DRINKING WATER SYSTEMS AND UTILITIES**

**§37.5011**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendment is also adopted under TWC, §26.011, which provides the commission with the authority to adopt rules to regulate water quality; THSC, §341.031, which provides authority for the commission to adopt rules to implement the federal Safe Drinking Water Act; and THSC, §341.035 and §341.0355, which provide the commission with the authority to require financial assurance for public drinking water systems.

**§37.5011. Financial Assurance for a Public Water System or Retail Public Utility.**

(a) Financial assurance demonstrations shall comply with the wordings of the mechanisms as described in Subchapter A of this chapter (relating to General Financial Assurance Requirements), Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), and Subchapter D of this chapter (relating to Wording of the Mechanisms for Closure, Post Closure, and Corrective Action), except operation should be substituted for closure.

(b) The prospective owner or operator of a public water system may be ordered to provide adequate financial assurance to operate the system as specified in §290.39(f) of this title (relating to General Provisions). A public water system that was constructed without approval or has a history of noncompliance or is subject to commission enforcement action as specified in §290.39(n) of this title, may be required to provide financial assurance to operate the system in accordance with applicable laws and rules. Financial assurance may be required of an applicant requesting approval for a certificate or a certificate amendment or a person establishing, purchasing or acquiring a retail public utility as specified in §291.102(d) of this title (relating to Criteria for Considering and Granting Certificates or Amendments), and §291.109(c) of this title (relating to Report of Sale, Merger, Etc: Investigation; Disallowance of Transaction). A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial assurance as specified in §291.111(c) of this title (relating to Purchase of Voting Stock in Another Utility). The commission may order a utility that has failed to provide continuous and adequate service to provide financial assurance to ensure that the system will be operated as required by §291.114 of this title (relating to Requirements to Provide Continuous and Adequate Service). Such financial assurance will allow for payment of improvements and repairs to the water or sewer system.

(c) If rate increases or customer surcharges are determined by the executive director to be an acceptable form for demonstrating financial assurance in accordance with §290.39(n)(3) of this title, such funds shall be deposited into an escrow account with an escrow agent that has the authority to act as an escrow agent and whose escrow operations are regulated and examined by a federal or state agency. At least annually a statement of the account shall be submitted to the executive director.

**SUBCHAPTER Q: FINANCIAL ASSURANCE FOR UNDERGROUND**

**INJECTION CONTROL WELLS**

**§37.7021, §37.7041**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under TWC, §27.019, which provides the commission with the authority to adopt rules and procedures necessary for the management of underground injection well facilities; and TWC, §27.073, which provides the commission with the authority to require financial assurance for underground injection well facilities.

**§37.7021. Financial Assurance Requirements for Plugging and Abandonment**

(a) An owner or operator subject to this subchapter shall establish financial assurance for the plugging and abandonment of each existing and new Class I well, Class III well, Class I salt cavern disposal well and associated salt cavern, or as otherwise directed by the executive director, in a manner that meets the requirements of this section, in addition to the requirements specified under Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post

Closure, and Corrective Action) and §331.143 of this title (relating to Cost Estimate for Plugging and Abandonment).

(b) An owner or operator subject to this subchapter may use any of the following mechanisms as specified in Subchapter C of this chapter to demonstrate financial assurance for plugging and abandonment:

(1) trust fund (fully funded or pay-in trust), except that the executive director will respond in writing within 60 days to requests for reimbursement made in accordance with §37.201(j) of this title (relating to Trust Fund);

(2) surety bond guaranteeing payment;

(3) surety bond guaranteeing performance;

(4) irrevocable standby letter of credit;

(5) insurance;

(6) financial test; or

(7) corporate guarantee.

(c) Owners or operators shall comply with §37.31 of this title (relating to Submission of Documents), except that evidence of financial assurance shall be submitted at least 60 days prior to commencement of drilling operations for new wells and for salt cavern disposal wells. All financial assurance mechanisms shall be in effect before commencement of drilling operations. For converted wells and other previously constructed wells, financial assurance shall be provided at least 30 days prior to permit issuance and be in effect upon permit issuance.

(d) Owners or operators using a financial test or corporate guarantee must comply with §37.141 of this title (relating to Increase in Current Cost Estimate) except that mechanism increases must be made within 90 days after the close of each succeeding fiscal year.

**§37.7041. Financial Assurance Requirements for Liability.**

(a) An owner or operator of hazardous waste injection wells subject to this subchapter shall be required to establish and maintain liability coverage for sudden and nonsudden bodily injury and property damage to third parties caused by accidental occurrences arising from operations of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A and E - G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability), §305.154(a)(11) of this title (relating to Standards), and §331.142 of this title (relating to Financial Responsibility).

(1) An owner or operator required to establish and maintain liability coverage for sudden accidental occurrences must do so in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs.

(2) An owner or operator required to establish and maintain liability coverage for nonsudden accidental occurrences must do so in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs.

(3) Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence and \$8 million annual aggregate.

(b) An owner or operator subject to this subchapter may use any of the mechanisms specified in Subchapter F of this chapter to demonstrate financial assurance for sudden and nonsudden liability.

(c) Owners or operators required to provide liability coverage may not use a claims made insurance policy as security unless the applicant places in escrow, as provided by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy by the state on notice of termination of coverage.

**SUBCHAPTER R: FINANCIAL ASSURANCE FOR MUNICIPAL  
SOLID WASTE FACILITIES**

**§37.8061, §37.8071**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendments are also adopted under THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; and THSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities.

**§37.8061. Corporate Financial Test for Municipal Solid Waste Facilities.**

An owner or operator may satisfy the requirements of financial assurance for closure, post closure, or corrective action by obtaining a corporate financial test or a corporate financial test and corporate guarantee, which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action).

(1) To pass this test, the owner or operator must satisfy one of the following three conditions:

(A) the owner or operator must have a current bond rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(B) a ratio of total liabilities to net worth less than 1.5; or

(C) a ratio of the sum of net income plus depreciation, depletion, and amortization, minus \$10 million, to total liabilities greater than 0.10.

(2) The tangible net worth of the owner or operator must be greater than:

(A) the sum of the current cost estimates, and any other environmental obligations under the Texas Commission on Environmental Quality (TCEQ) or other federal or state environmental regulations, including guarantees, covered by a financial test, plus \$10 million, except as provided in subparagraph (B) of this paragraph; or

(B) \$10 million in tangible net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements provided all of the current cost estimates and any other environmental obligations covered by a financial test are recognized as

liabilities on the owner's or operator's audited financial statements and subject to the approval of the executive director.

(3) The owner or operator must have assets located in the United States amounting to at least the sum of the current cost estimates, and any other environmental obligations covered by a financial test as described in paragraph (8) of this section.

(4) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(A) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.8071 of this title (relating to Wording of Financial Assurance Mechanisms) that:

(i) lists all the current cost estimates covered by a financial test, including, but not limited to, cost estimates required for municipal solid waste management facilities under Chapter 330 of this title (relating to Municipal Solid Waste) and 40 Code of Federal Regulations (CFR) Part 258; cost estimates required for underground injection control (UIC) facilities under Chapter 331 of this title (relating to Underground Injection Control) and 40 CFR Part 144; cost estimates required for petroleum underground storage tank facilities under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks) and 40 CFR Part 280; cost estimates required for polychlorinated biphenyl (PCB) storage facilities under 40 CFR Part 761; and cost

estimates required for hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) and 40 CFR Parts 264 and 265; and

(ii) provides evidence demonstrating that the firm meets the conditions of either paragraph (1)(A) or (B) or (C) of this section and paragraphs (2) and (3) of this section;

(B) a copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance by the executive director. The executive director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the executive director deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the executive director does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this section; and

(C) a special report which is based upon an agreed procedures engagement in accordance with professional auditing standards which:

(i) describes the procedures performed in comparing the data in the chief financial officer's letter derived from the independently audited year-end financial statements for the latest fiscal year with the amounts in such financial statements;

(ii) states the findings of that comparison and the reasons for any differences; and

(iii) includes a report from the independent certified public accountant verifying that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, verifying how these obligations have been measured and reported, and verifying that the tangible net worth of the firm is at least \$10 million plus the amount of any guarantees provided. This report is required if the chief financial officer's letter has assured for environmental obligations as provided in paragraph (2)(B) of this section.

(5) After the initial submission of items specified in paragraph (4) of this section, the owner or operator must annually send updated information to the executive director within 90 days following the close of the owner's or operator's fiscal year. This information shall consist of all items specified in paragraph (4) of this section. An additional 45 days may be provided to an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements.

(6) If the owner or operator no longer meets the requirements of paragraphs (1) - (3) of this section, the owner or operator shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter and provide the alternate financial assurance mechanism within 120 days following the close of the owner's or operator's fiscal year.

(7) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraphs (1) - (3) of this section, require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in paragraph (4) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraphs (1) - (3) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(8) When calculating the current cost estimates for closure, post closure, or corrective action, or the sum of the combination of such costs to be covered, and any other environmental obligations assured by a financial test referred to in this section, the owner or operator must include cost estimates required for municipal solid waste management facilities under Chapter 330 of this title and 40 CFR Part 258. The owner or operator must also include current cost estimates required for the following environmental obligations, if the owner or operator assures them through a financial test: obligations including, but not limited to, UIC facilities under Chapter 331 of this title and 40 CFR Part 144; petroleum underground storage tank facilities under Chapter 334 of this title and 40 CFR Part 280;

PCB storage facilities under 40 CFR Part 761; and hazardous waste treatment, storage, and disposal facilities under Chapter 335 of this title and 40 CFR Parts 264 and 265.

**§37.8071. Wording of Financial Assurance Mechanisms.**

A letter from the chief financial officer for closure, post closure, or corrective action, as specified in §37.8061 of this title (relating to Corporate Financial Test for Municipal Solid Waste Facilities) must be worded as specified in the Corporate Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.8071

**CORPORATE FINANCIAL TEST  
LETTER FROM CHIEF FINANCIAL OFFICER**

(Address to TCEQ executive director)

I am the Chief Financial Officer of (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, post closure, or corrective action as specified in 30 Texas Administrative Code (TAC) Chapter 37 (relating to Financial Assurance). (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, physical and mailing addresses, and current cost estimates. Identify for each current cost estimate the amount designated for closure, post closure, or corrective action.)

1. This firm is the owner or operator of the following facilities in Texas for which financial assurance for closure, post closure, or corrective action is being demonstrated through the financial test specified in 30 TAC §37.8061 (relating to Corporate Financial Test for Municipal Solid Waste Facilities). The current cost estimates covered by the test are shown for each facility: \_\_\_\_\_.

2. This firm guarantees, through the corporate guarantee specified in 30 TAC §37.261 (relating to Corporate Guarantee), the current closure, post closure, or corrective action cost of the following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are

shown for each facility: \_\_\_\_\_. The firm identified above is: (complete the sentence with the applicable relationship: the direct or higher-tier parent corporation of the owner or operator or a firm with a substantial business relationship with the owner or operator).

3. In States where TCEQ is not administering the financial requirements of 30 TAC Chapter 37, this firm, as owner, operator, or guarantor, is demonstrating financial assurance for the current cost estimates of the following facilities through the use of a test equivalent to the financial test specified in 30 TAC §37.8061. The current cost estimates covered by such a test are shown for each facility: \_\_\_\_\_.

4. The firm identified above owns or operates the following facilities for which financial assurance for current cost estimates has not been demonstrated to the TCEQ, to a federal agency, or to another state, by a financial test, by an equivalent mechanism, or by any other financial assurance mechanism specified in 30 TAC Chapter 37. The current cost estimates not covered by such financial assurance are shown for each facility: \_\_\_\_\_.

This firm (is required or is not required) to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year. The fiscal year of this firm ends on (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 (date).

1. (a) Sum of current cost estimates (total of all cost estimates shown in the paragraphs above) \$ \_\_\_\_\_

(b) Environmental obligations assured by a financial test to demonstrate regulations and the Code of Federal Regulations (CFR) or state equivalent rules not disclosed in line 1(a):

(1) Municipal Solid Waste under 30 TAC Chapter 330 and 40 CFR Part 258 \$ \_\_\_\_\_

(2) Hazardous waste treatment, storage and disposal facilities under 30 TAC Chapter 335 and 40 CFR Parts 264 and 265 \$ \_\_\_\_\_

(3) Petroleum underground storage tanks under 30 TAC Chapter 334 and 40 CFR Part 280 \$ \_\_\_\_\_

(4) Underground Injection Control System facilities under 30 TAC Chapter 331 and 40 CFR Part 144 \$ \_\_\_\_\_

(5) PCB commercial storage facilities under 40 CFR Part 761 \$ \_\_\_\_\_

- (6) Additional environmental obligations not shown above \$ \_\_\_\_\_
- Total (1) - (6) \$ \_\_\_\_\_
- (c) Total of lines (a) and (b) \$ \_\_\_\_\_
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 \$ \_\_\_\_\_
- \*6. Tangible net worth \$ \_\_\_\_\_
- \*7. Net Worth \$ \_\_\_\_\_
- \*8. The sum of net income plus depreciation, depletion and amortization minus \$10 million \$ \_\_\_\_\_
- \*9. Total assets in U. S. \$ \_\_\_\_\_

Indicate either "yes" or "no" to the following questions. If lines 2, 3, and 4 apply, then answer lines 12a, 12b, and 13. If lines 2, 3, and 4 do not apply, then answer lines 10, 11, 12a, 12b, and 13.

10. Is line 5 divided by line 7 less than 1.5? (yes/no)
11. Is line 8 divided by line 5 greater than 0.1? (yes/no)
- \*12a. Is line 6 greater than the sum of: line 1(c), total of any guarantees, plus \$10 million or (yes/no)
- \*12b. Are all cost estimates reported in line 1(c) recognized as liabilities in the firm's year-end audited financial statements? (yes/no)
- If yes, then is line 6 greater than \$10 million including any guarantees not recognized as liabilities on the financial statements? (yes/no)
- \*13. Are assets located in the U.S. equal to or greater than line 1(c)? (yes/no)

I hereby certify that the wording of this letter is identical to the wording specified in 30 Texas Administrative Code §37.8071 as such regulations were constituted on the date shown immediately below.

(Signature) \_\_\_\_\_

(Name) \_\_\_\_\_

(Title) \_\_\_\_\_

(Date) \_\_\_\_\_

**SUBCHAPTER U: FINANCIAL ASSURANCE FOR MEDICAL WASTE TRANSPORTERS**

**§37.9070**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

The amendment is also adopted under THSC, §361.011, which provides the commission with the authority to manage municipal solid waste; THSC, §361.024, which provides the commission with the authority to adopt any rules and establish standards of operation for the management of solid waste; and THSC, §361.085, which provides the commission with the authority to require financial assurance demonstrations for permitted facilities.

**§37.9070. Financial Assurance Requirements.**

(a) Owners or operators registered to transport medical waste are required to demonstrate for automobile liability and pollution liability and must comply with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action), except the following sections do not apply:

(1) §37.11 of this title (relating to Definitions); §37.31 of this title (relating to Submission of Documents); §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms); §37.51 of this title (relating to Use of a Financial Assurance Mechanism for Multiple

Facilities); and §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas);

(2) §37.131 of this title (relating to Annual Inflation Adjustments to Current Cost Estimates) and §37.161 of this title (relating to Establishment of a Standby Trust).

(b) Owners or operators required to provide financial assurance under this subchapter may only use those financial assurance mechanisms as specified in §37.9075 of this title (relating to Financial Assurance Mechanisms).

(c) Owners or operators who transport medical waste are required to demonstrate financial assurance for automobile liability and pollution liability in the dollar limits specified in this subsection and are responsible for any liability costs that exceed these dollar limits. Such owners or operators must provide:

(1) a combined, single-limit automobile liability insurance policy with limits of at least \$1 million per accident, exclusive of legal defense costs, that meets the requirements of subsection (d) of this section; and

(2) a pollution liability policy with a limit of \$500,000, exclusive of legal defense costs, if the transporter registers one to seven vehicles or a pollution liability policy with a limit of \$1 million, exclusive of legal defense costs, if the transporter registers more than seven vehicles; or

(3) an irrevocable letter of credit that meets the requirements specified in this subchapter, made payable to the Texas Commission on Environmental Quality in the following amount:

(A) \$10,000, if three or less self-contained trucks or transport vehicles (not tractor-trailer units) are registered;

(B) \$35,000, if more than three self-contained trucks or transporter vehicles (not tractor-trailer units) are registered;

(C) \$25,000, if three or less tractor-trailer vehicles are registered; or

(D) \$50,000, if more than three tractor-trailer vehicles are registered.

(d) Owners or operators who transport medical waste shall comply with the following insurance requirements.

(1) The owner or operator who transports medical waste must be the named insured on the certificate of insurance and the certificate holder must be listed as the Texas Commission on Environmental Quality.

(2) The cancellation statement on the certificate shall read exactly as follows: "Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail a 30-day written cancellation notice to the certificate holder."

(3) Upon the executive director's receipt of a cancellation notice, the owner or operator who transports medical waste shall obtain alternate insurance coverage and submit evidence of such coverage to the commission before the effective date of the cancellation. Failure to do so will result in revocation of the registration.

(4) Evidence of pollution liability coverage is demonstrated by submitting an MCS 90 form along with the original certificate for the automobile coverage. The schedule of insured vehicles must accompany the certificate of insurance.

(5) Insurance coverage must be issued for at least one year by a carrier that is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer in Texas. The insurer must be acceptable to the executive director.

(6) An original or certified copy of the insurance policy shall be provided within 30 days from the date requested by the executive director.

