

3. Annual Payments Into A Standby Trust Fund When Using A Letter Of Credit

Subpart H of 40 CFR Parts 264/265 requires an owner or operator of a permitted treatment, storage, and disposal facility (TSDF) to establish financial assurance to satisfy closure and post-closure care of the facility. A letter of credit is one of the financial mechanisms that the owner or operator may choose to demonstrate financial assurance (264.143(d)/264.145(d)). A letter of credit allows a financial institution, that is authorized by a federal or state agency to issue letters of credit, to extend credit on behalf of a TSDF. The letter of credit must be irrevocable, issued for a period of at least one year, and in an amount at least equal to the current closure and post-closure cost estimates, unless used in combination with other financial assurance mechanisms (264.143(g)/264.145(g)). An owner or operator using a letter of credit for closure or post-closure financial assurance must also establish a standby trust fund to accompany the letter of credit (264.143(a)/264.145(a)). If an owner or operator is demonstrating financial assurance through the use of a letter of credit, must annual payments be made into the standby trust fund?

No. Under the federal regulations, the owner or operator is not required to make annual payments into the standby trust fund. The standby trust fund merely facilitates drawing on the letter of credit in the event that the owner or operator cannot pay for closure or post-closure care. A standby trust fund (as opposed to a trust fund established under 264.143(a)/264.145(a)) cannot be used as a stand alone financial assurance mechanism under RCRA. The standby trust fund documentation must be worded exactly as the documentation for a trust fund, except for a few requirements: the annual payments into the fund are waived; schedule A of the trust agreement need not be updated; and annual valuations by the trustee or notices of nonpayment are not required. These provisions for establishment of a standby trust fund also apply to an interim status TSDF that is using a letter of credit to establish financial assurance for closure and post-closure care (265.143(c)/265.145(c)).