

Type III Landfill Financial Assurance Amount

Issue

Review of financial assurances provided for Type III solid waste landfills revealed that several did not have adequate bonds for closure and postclosure. The amounts of the bonds had been inappropriately reduced or not increased when necessary to meet the statutory requirements for financial assurance under Section 11523 of Part 115, Solid Waste Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.

Background

The financial assurance requirements for Type III landfills and preexisting units at Type II landfills (did not receive waste after October 9, 1993) are contained in Section 11523(1)(a):

- A bond (surety bond, letter of credit, etc.) in an amount of \$20,000 per acre of licensed landfill (maximum \$1,000,000), providing for maintenance of the closed landfill for a period of 30 years; and
- A perpetual care fund (PCF).

The bond amount can be reduced or released based upon the value of the PCF:

- Reduced, per Section 11523(7), when the amount of the bond plus the PCF exceeds the PCF maximum amount (PCFmax¹) under Section 11525(2); and
- Released, per Section 11523(8), when the PCF exceeds the amount of financial assurance required under Section 11523(1)(a)².

These two provisions operate to require the bond to be maintained in full until the total amount of financial assurance provided (bond plus PCF) reaches the PCFmax.³

Further, under Section 11523(9), the DEQ can require an increase in the amount of the bond (up to the maximum \$20,000 per acre/\$1,000,000 per facility) if money is disbursed⁴ from the PCF prior to closure of the landfill.

¹ The PCFmax as of July 1, 2009, is \$1,805,000.

² Effectively the PCFmax.

³ Section 11524 also provides for the reduction and release of bonds. This section should have been repealed when the financial assurance requirements were amended in 1996. It contains redundant and contradictory provisions to those now contained in Sections 11523 and 11523a.

⁴ Money can be disbursed from the PCF for various reasons, including payment of taxes, payment of the solid waste surcharge, etc., as explained in Section 11525.

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Analysis

These financial assurance requirements establish three principles for the amount of financial assurance expected of Type III landfills:

1. The maximum required total financial assurance is the PCFmax.
2. The total amount of financial assurance should not diminish over time during the active life of the landfill; it should increase.
3. The difference between the PCFmax and total amount of financial assurance should not increase over time during the active life of the landfill.⁵

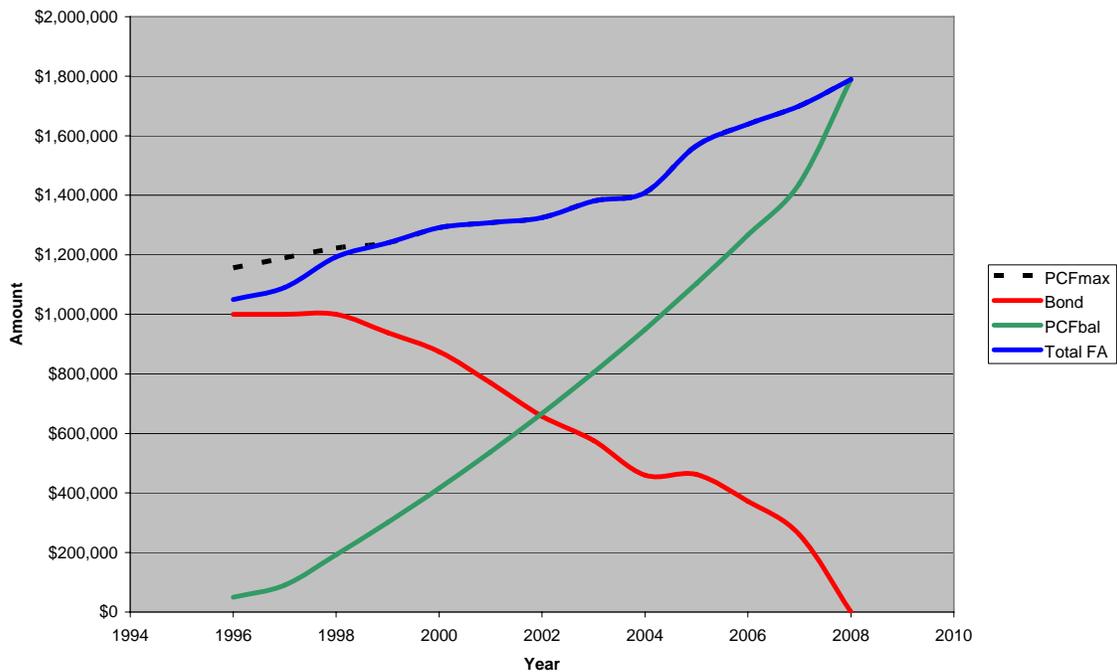
Application of these principles, founded in the statutory requirements, is best illustrated graphically in the following charts.

⁵ Assuming the inflationary increase in the PCFmax each year is at least met by deposits into the PCF based on waste disposal, and the interest and earnings on the account.

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Chart 1 illustrates the expectations of financial assurance over time, using actual PCFmax data and hypothetical bond and PCF amounts for a large site. Chart 1 shows for the initial few years that the total amount of financial assurance provided is below the PCFmax. After a few years when the total amount of financial assurance provided equals the PCFmax, the bond can be reduced. When the PCF reaches the PCFmax amount, the bond can be released. This chart is consistent with all 3 principles.

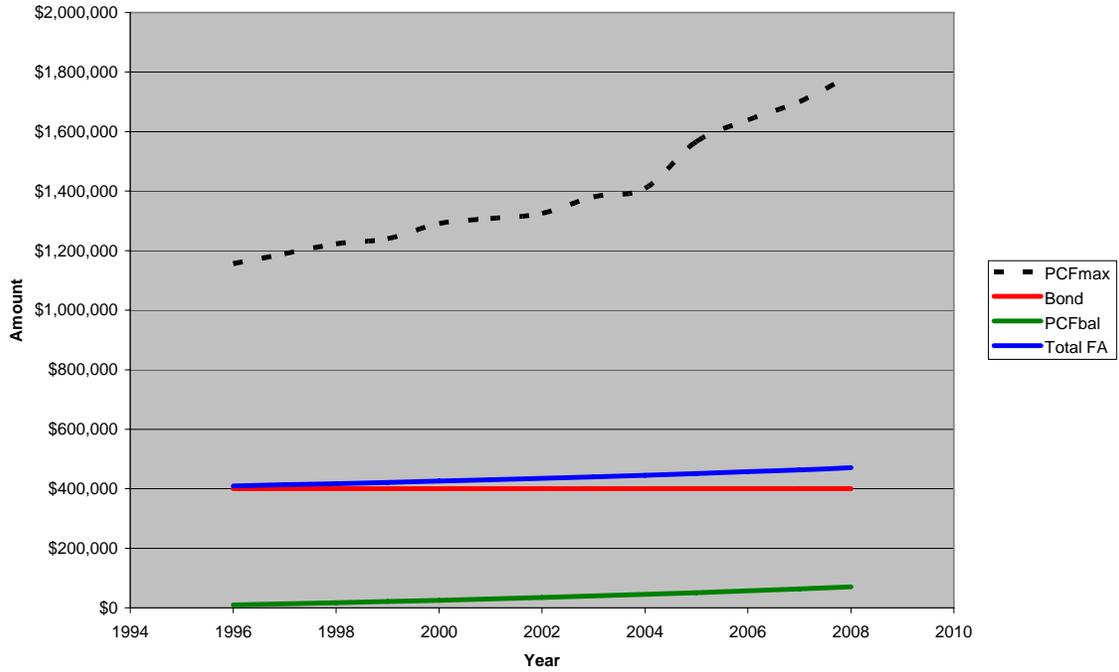
Chart 1: Type III Landfill Financial Assurance (Large Site)



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Chart 2 illustrates the expectations of financial assurance over time, using actual PCFmax data and hypothetical bond and PCF amounts for a smaller site. Unlike the illustration in Chart 1, the total amount of financial assurance in Chart 2 never reaches the PCFmax, and therefore the bond is never reduced. This chart is consistent with all 3 principles.

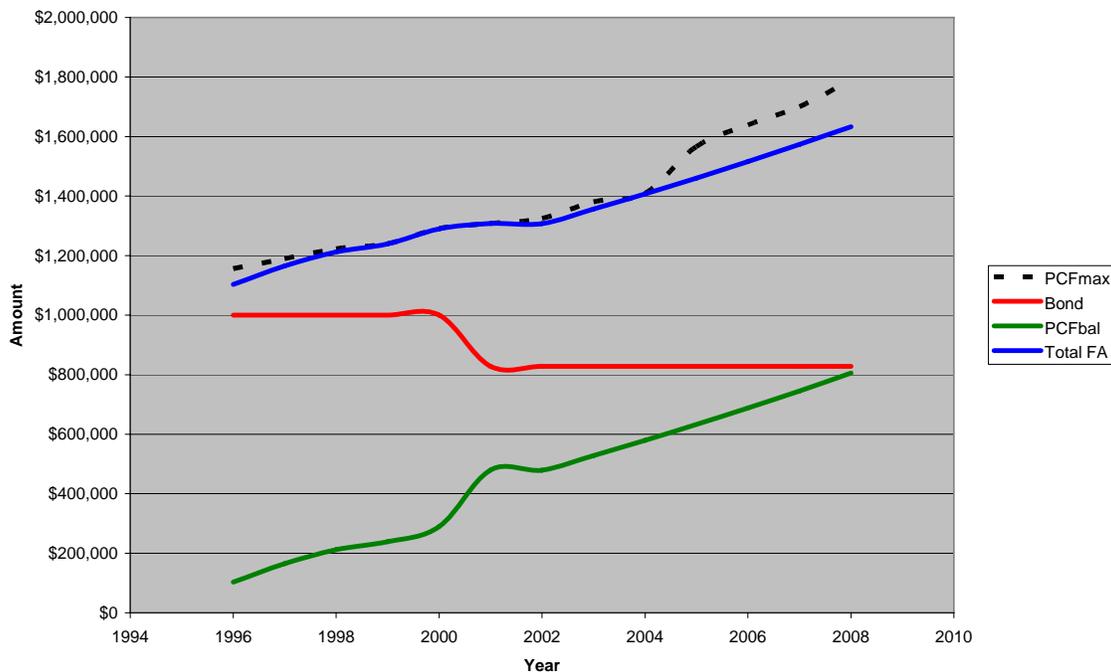
Chart 2: Type III Landfill Financial Assurance (Small Site)



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Chart 3 illustrates a scenario when insufficient bonding can occur. During the initial years, the total amount of financial assurance approaches the PCFmax as the maximum bond amount of \$1,000,000 is maintained and the PCF increases. The bond amount is subsequently reduced when the total amount of financial assurance would exceed the PCFmax. However, the reduced bond is not increased in later years when the total amount of financial assurance falls below the PCFmax. This is a departure from the third financial assurance principle, which does not allow for the difference between the PCFmax and total amount of financial assurance to increase. The cure in this example would be for the bond to be increased, up to the maximum amount of \$20,000 per acre/\$1,000,000 per facility.

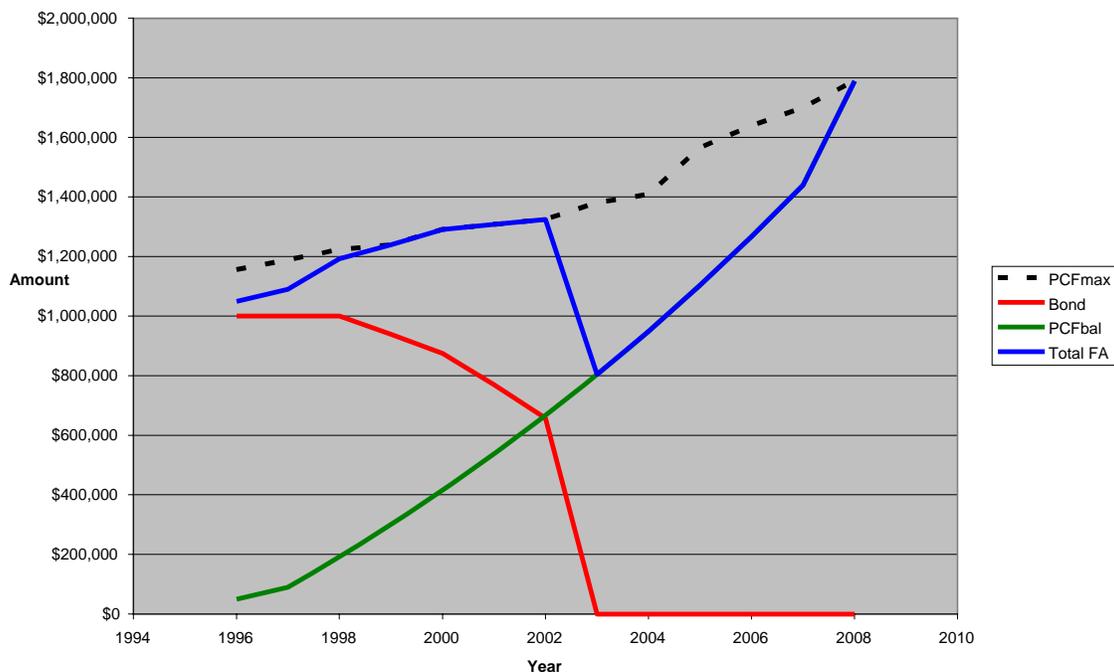
Chart 3: Type III Landfill (Large Site) Insufficient Bond



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Chart 4 illustrates what can happen if Section 11523(8) is narrowly interpreted and the bond is released prematurely. In this example, if Section 11523(8) is interpreted to mean that the bond must be released when the PCF reaches the required bond amount under Section 11523(1)(a), then the amount of financial assurance drops dramatically – nearly in half – until it builds up again based on continuing deposits into the PCF. As described earlier, Sections 11523(7) and (8) operate together to allow for a reduction to - and the ultimate release of - the bond based on the total amount of financial assurance equaling or exceeding the PCFmax. This example is inconsistent with the second and third principles. The bond should not have been released.

Chart 4: Type III Landfill Financial Assurance (Large Site) Section 23(8) Misapplied



Based on a review of financial assurances for Type III landfills, it appears that the requirements under Sections 11523 and 11525 are not being consistently and appropriately applied, resulting in inadequate financial assurances.

One reason for inadequate financial assurance at Type III landfills may be Form A of the operating license application form. On Form A, an applicant for a Type III landfill enters the acreage and the bond and PCF amounts. If the bond plus the PCF equals or exceeds the \$20,000 per acre/\$1,000,000 per facility bonding requirement, it appears on Form A that the facility has adequate financial assurance. As explained previously, the bond amount cannot be combined with the PCF amount to demonstrate adequate bonding for a Type III

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landfill; the PCF can only be used to offset the bond after the combination of the two exceeds the PCFmax.

Another reason for inadequate financial assurance at Type III landfills may be the DEQ's failure to require an increase in a previously reduced bond. While there may be justification for reducing a bond at one point, the DEQ is also justified in requiring an increase based on the following:

- Disbursements from the PCF
- Submittal of a renewal operating license application, at which time the required \$20,000 per acre/\$1,000,000 per facility bonding must be demonstrated

Recommendation

All active Type III landfills should be required to increase inadequate bonds at the time of the renewal operating license application, or in association with the next PCFmax adjustment in July 2009, whichever is sooner. Guidance similar to that provided in this summary should be posted on the DEQ's web page, and a memo containing the guidance should be sent to all Type III landfill owners and operators, as well. In addition, the application form and instructions must be revised to clarify the bonding requirements for Type III landfills.