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PROPOSED RULES

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 258, 264, and 265

[FRL-5087-7]

RIN 2050-A77

Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities and Hazardous Waste Treatment, Storage, and Disposal Facilities

Wednesday, October 12, 1994

***51523** AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to amend the financial assurance regulations under the Resource Conservation and Recovery Act in two program areas. First, the Agency proposes to add two financial assurance mechanisms to those currently available to assure closure, post-closure, or corrective action costs associated with municipal solid waste landfills under subtitle D: (1) a financial test for use by corporate owners and operators, and (2) a guarantee for use by firms that wish to guarantee the costs for an owner or operator. Second, the Agency proposes to modify the domestic asset component of the corporate financial test for hazardous waste treatment, storage, and disposal facilities under subtitle C.

DATES: Comments on this proposed rule must be received on or postmarked on or before December 12, 1994.

ADDRESSES: Written comments on this proposal should be addressed to the docket clerk at the following address: U.S. Environmental Protection Agency, RCRA Docket (OS-305), 401 M Street SW., Washington, DC 20460. Commenters should send one original and two copies and place the docket number (F-93-FTMP-FFFFF) in the comments. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, except for Federal holidays. Docket materials may be reviewed by appointment by calling (202) 260-9327. Copies of docket material may be made at no cost, with a maximum of 100 pages of material from any one regulatory docket. Additional copies are $0.15 per page.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline at 1-800-424-9346 (in Washington,

D.C., call (703) 920-9810), or Dale Ruhter (703) 308-8192, Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Preamble Outline

B. Regulatory Flexibility Act

C. Paperwork Reduction Act

I. Authority

These amendments to part 258 are proposed under the authority of sections 1008, 4004, and 4010 of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6907, 6944, and 6949a. The amendments to parts 264 and 265 are proposed under RCRA sections 3004 and 3005.

II. Background

On October 9, 1991, the Agency promulgated revised criteria for municipal solid waste landfills (MSWLFs), which established minimum Federal standards to assure that MSWLFs are designed and managed in a manner that is protective of human health and the environment, taking into account the practical capability of the MSWLFs (see 56 FR 50978). The minimum Federal standards include location restrictions, facility design and operating criteria, groundwater monitoring, corrective action, financial assurance, closure, and post-closure care requirements.

The Agency proposed the MSWLF criteria, including financial assurance requirements, on August 30, 1988 (see 53 FR 33314). The purpose of the financial assurance requirements of the MSWLF criteria was to assure that adequate funds will be readily available to cover the costs of closure, post-closure care, and corrective action associated with MSWLFs. The Agency believes that these financial assurance provisions are an important part of the MSWLF criteria for two reasons. First, when an owner or operator does not have funds readily available to address the environmental needs at a facility, delays in addressing those needs can result. Second, if the owner or operator does not have funds to address environmental needs at its facilities, those needs are typically addressed under federal or state cleanup authorities, rather than by the party responsible for the facility.

In the August 30, 1988 proposal, rather than propose specific financial assurance mechanisms, the Agency proposed a financial assurance performance standard. The Agency solicited public comment on this performance standard approach and, at the same time, requested comment on whether the Agency should develop financial test mechanisms for use by local governments and corporations.

Commenters on the proposed rule argued that the proposed performance standard lacked sufficient detail to guide States in the development and implementation of requirements with any consistency among States, and that the Agency should develop specific mechanisms that could be used to demonstrate financial assurance. Commenters also supported the development of a local government financial test and a corporate financial test.

In response to comment, the Agency promulgated several specific financial mechanisms in the October 9, 1991, final rule. Those mechanisms include trust funds, surety bonds, letters of credit, insurance, and State assumptions of responsibility (§258.74). In addition, to retain States' flexibility in implementing the subtitle D program, the Agency promulgated the financial assurance performance standard of

§258.74, which allows approved States to use any State-approved mechanism that meets that performance standard.

Commenters on the August 30, 1988, proposal also supported the development of financial tests for local governments and for corporations. The Agency agreed with commenters but, at the time the final MSWLF criteria were promulgated, the Agency had not completed the analyses necessary to propose those financial tests. Thus, in the October 9, 1991, preamble, the Agency announced its intention to develop both a local government and corporate financial test in advance of the effective date of the financial assurance provisions. The Agency then proceeded to conduct the necessary analysis, and develop a local government and corporate financial test for MSWLF owners and operators.

To allow time to develop financial tests, the Agency promulgated an ***51524** effective date of April 9, 1994, for the financial assurance provisions in the July 1, 1991 notice. In doing so, the Agency believed it had allowed adequate time to promulgate the local government and corporate financial tests in advance of the effective date. However, those financial tests are taking longer to develop than the Agency originally anticipated. As the April 1994, deadline approached, the Agency recognized that it would be unable to promulgate final financial tests by that time. Thus, on October 11, 1993, the Agency extended the effective date of the financial assurance provisions until April 9, 1995 (see 58 FR 51536) to allow additional time to develop the financial tests.

The Agency proposed a local government financial test on December 27, 1993 (see 58 FR 68353); this document proposes the corporate financial test for MSWLFs.

III. Summary of Proposed Rule

This proposed rule would add a corporate financial test to the financial assurance mechanisms currently available to owners and operators of subtitle D MSWLFs. It also would allow corporations to use that financial test to guarantee the costs of an owner or operator. It would allow owners and operators to use a combination of financial assurance mechanisms, including this financial test, to assure the costs associated with their facilities. Finally, this rule proposes revisions to one portion of the subtitle C corporate financial test, specifically, to the domestic asset requirement of that test. Discussion of the proposed revisions to the subtitle D provisions can be found in sections IV-V of this preamble. A discussion of the proposed revisions to the subtitle C corporate financial test can be found in section IX.

IV. Section-by-Section Analysis of Proposed Subtitle D Provisions

A. Corporate Financial Test (Section 258.74(e))

This proposed corporate financial test includes a financial component and a domestic asset component. Owners and operators that meet the requirements of the financial test also must comply with certain recordkeeping and reporting requirements. Each requirement is described below.

1. Financial Component (Section 258.74(e)(1))

The financial component is designed to measure viability of the owner or operator, based on its current financial condition. To satisfy the financial component, a firm must have a minimum tangible net worth of $10 million plus the costs it seeks to assure (e.g., closure, post-closure, corrective action), either satisfy a bond rating requirement, or pass one of two financial ratios, and satisfy a domestic asset requirement.

a. Minimum Size Requirement. In §258.74(e)(1)(ii), the Agency is proposing to require firms using the financial test to have a tangible net worth at least equal to the sum of the costs they seek to assure through a financial test plus $10 million. Under proposed §258.74 (e)(3), the costs an owner or operator seeks to assure are equal to the current cost estimates for closure, post-closure care, and corrective action or the sum of such costs to be covered, and any other environmental obligations assured by a financial test. The owner or operator must include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if it assures them through a financial test: obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265.

The Agency is proposing this minimum tangible net worth requirement to ensure that the costs of closure, post-closure care, or corrective action do not force a firm into bankruptcy. Further, an analysis of a sample of bankrupt firms conducted by the Agency demonstrated that firms with less than $10 million in net worth failed four times more frequently than firms with greater than $10 million in tangible net worth.

As a result, the Agency believes that this minimum net worth should be required as an initial screen for corporations in demonstrating financial responsibility for the very large costs of closure, post-closure care, and corrective action. The Agency then combined this requirement with other financial criteria to develop the financial test described in this proposed rule. A more detailed discussion of this analysis can be found in Section V. of this preamble and the Background Document developed in support of this rulemaking.

b. Bond Rating/Financial Ratio Alternatives. The Agency is proposing to allow firms that meet the minimum size requirement to satisfy the remaining requirements of the financial test in one of two ways.

First, under the proposed §258.74(e)(1)(i)(A), a firm could satisfy the financial component if its most recent bond rating is investment grade, that is, Aaa, Aa, A or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's. The Agency is proposing this option because it believes that a firm's bond rating incorporates an evaluation of a firm's financial management practices. Bond ratings reflect the expert opinion of bond rating services, which are organizations that have established credibility in the financial community for their assessments of firm financial conditions. An analysis of bond ratings showed that bond ratings have been a good indicator of firm defaults, and that few firms with investment grade ratings have in fact gone bankrupt.

The proposal to include a bond rating option in this financial test is consistent with other Agency programs. For example, the regulations governing TSDFs under 40 CFR parts 264 and 265, petroleum underground storage tanks under 40 CFR part 280, UIC facilities under 40 CFR part 144, and PCB commercial storage facilities under 40 CFR part 761 all consider bond ratings as part of their financial tests. The local government financial test for owners and operators of MSWLFs under 40 CFR part 258, which was proposed on December 27, 1993 (58 FR 68353) also would allow a bond rating option.

Second, to provide the regulated community with flexibility in meeting the financial test, the Agency is also proposing a ratio alternative to the bond rating. In order to satisfy the ratio requirement, a firm would have to have either:

- a leverage ratio of less than 1.5 based on the ratio of total liabilities to tangible net worth. This ratio attempts to show the degree to which a firm is leveraged. This particular measure shows the relationship between total liabilities to tangible net worth. Firms with higher values for this ratio are more likely to suffer net losses than those with lower values; or

- a profitability ratio of greater than 0.10 based on the ratio of the sum of net income plus depreciation, depletion, and amortization, minus $10 million, to total liabilities. This ratio attempts to show cash-flow from operations relative to the firm's total liabilities. Firms with higher values for this measure are more likely to meet their obligations than those firms with lower values.

The Agency selected these two specific financial ratios with their associated thresholds based on their ***51525** ability to differentiate between viable and bankrupt firms. The Agency's analysis demonstrated that leverage ratios (i.e., total liabilities/net worth) and profitability ratios (i.e., cash flow/total liabilities) are particularly good discriminators of financial health. The Agency selected as thresholds for these ratios values that, together with the other financial test criteria, minimized the costs associated with demonstrating financial responsibility. A more detailed discussion of this analysis can be found in Section V. of this preamble and the Background Document developed in support of this rulemaking.

c. Domestic Assets Requirement. In §258.74(e)(1)(iii), the Agency is proposing that all firms using the financial test have assets in the United States at least equal to the costs they seek to assure through a financial test. (see paragraph a. of this section, "Minimum Size Requirement," for more discussion on assured costs) The domestic asset requirement is intended to ensure that the Agency has access to funds in the event of bankruptcy. Without this requirement, the Agency could experience substantial difficulty in accessing funds of bankrupt firms that have their assets outside of the United States. The Agency recognizes that this minimum assets requirement may be too low and solicits comment on an assets requirement that provides the Agency with adequate assurance that funds will be available in the event that an owner or operator enters bankruptcy, but does not overly burden the regulated community.

2. Recordkeeping and Reporting Requirements (Section 258.74(e)(2)

The Agency is proposing that after a firm has determined that it is eligible to use this corporate financial test, it would be required to document its use of the test by placing three items (discussed below) in the facility operating record. These requirements would help ensure that the self-implementing aspect of the proposed test requirements have been met. In the case of closure and post-closure care, these items would have to be placed in the operating record prior to the initial receipt of waste or the effective date of the final rule, whichever is later, or in the case of corrective action, no later than 120 days following selection of a corrective action remedy. This proposed requirement, in the case of corrective action remedy, is consistent with the subtitle C provision in the subpart S proposed rulemaking (55 FR at 30855 July 27, 1990), as well as the Financial Assurance for Corrective Action (FACA) proposed rulemaking (51 FR at 37854 October 24, 1986). Please refer to these proposals for more discussion on this requirement. In addition, owners and operators would be required to update these items annually, and to notify the State Director and obtain alternative financial assurance if the firm is no longer able to pass the financial test. These proposed criteria are described below.

a. Chief financial officer (CFO) letter. Under §258.74(e)(2)(i), the owner or operator would be required to submit a letter from the firm's CFO. The letter would demonstrate that the firm has complied with the criteria of the test. Specifically, the letter would list all cost estimates covered by a financial test and provide evidence that the firm satisfies the financial criteria of the test (i.e., the financial component, including the minimum size component and domestic assets requirement). The Agency expects that this evidence will include a worksheet or similar demonstration showing that the firm's annual financial data meet the specific measures required by the test.

b. Accountant's opinion. Under §258.74(e)(2)(ii), the Agency is also proposing to require the owner or operator to place in the operating record the opinion from the independent certified public accountant of the firm's financial statements for the latest completed fiscal year. Further requirements of the CFO's letter are described in §258.74(e)(2)(iii). An unqualified opinion (i.e., a "clean opinion") from the accountant demonstrates that the firm has prepared its financial statements in accordance with generally accepted accounting principles for corporations. However, an adverse opinion, disclaimer of opinion, or any qualification in the opinion would automatically disqualify the owner or operator from using the corporate financial test. The State Director of an approved State may evaluate qualified opinions on a case by case basis, however, and accept such opinions if the matters which form the basis for the qualified opinion are insufficient to warrant disallowance of the test.

c. Special report from the independent certified public accountant. The third item to be placed in the operating record would be a special report of the independent certified public accountant upon examination of the chief financial officer's letter. In this report, the accountant would confirm that the data used in the CFO letter to pass the test were appropriately derived from, the audited, year-end financial statements. The purpose of this special report is to ensure that the accountant has confirmed that the financial data used in the CFO letter is appropriately presented.

This report would not be required if the CFO uses financial test figures directly

from the annual financial statements provided to the Securities Exchange Commission (SEC). However, this report is required if the CFO letter uses data that is derived from and is not identical to the data in the annual financial statements provided to the SEC.

For example, in computing financial assurance under one alternative owners and operators are required to recognize total liabilities, including those associated with "post-retirement benefits other than pensions (OPEB)." (Please see the discussion of FASB 106 in section VI of this preamble.) The Financial Accounting Standards Board (FASB) allows the use of two different methods when accounting for these liabilities in annual financial statements. FASB 106 allows employers the option of accounting for OPEB obligations in one year (immediate recognition) or over a consecutive number of years (delayed recognition). Since both the immediate and delayed recognition methods are allowed by FASB 106, EPA does not require owners and operators that are demonstrating they meet the requirements of the financial test to use the same accounting method for OPEB obligations that is used for annual SEC submission purposes. For example, the owner or operator may use the immediate recognition method in the financial statement prepared for the SEC, but the delayed recognition method in computing liabilities for the purpose of demonstrating RCRA financial assurance.

EPA is proposing this approach in today's rule because it does not believe a separate CPA statement is needed where the CFO simply takes figures directly from an audited financial statement. This is a straight forward process. On the other hand, where the CFO "derives" the figures--for example, by using different accounting procedures to determine OPEB liabilities--the process may require a high level of financial expertise. In these cases, EPA believes review by an independent auditor is appropriate. The Agency solicits comment on this approach and whether this approach would be appropriate for the financial test under subtitle C.

d. Annual updates and placement of financial test documentation. The financial test proposed in this action would require firms to place the items ***51526** specified in §258.74(e)(2) in the operating record and notify the State Director that these items have been placed in the facilities operating record. Because the financial condition of firms can change over time, under § 258.74(e)(2), firms will be required to update annually all financial test documentation, including each of the items described above, within 90 days of the close of the firm's fiscal year. Under §258.74 (e)(2)(iv), the owner or operator is not required to submit the items specified in §258.74(e)(2) when he substitutes alternate financial assurance as specified in this section; or is released from the requirements of this section in accordance with §258.71(b), § 258.72(b), or §258.73(b).

e. Alternate financial assurance. Under §258.74(e)(2)(v), if a firm can no longer meet the terms of the financial test, the owner or operator would have to notify the State Director and obtain alternative financial assurance within 120 days of the close of the firm's fiscal year. The alternative financial assurance selected by the owner or operator would have to meet the terms of this section and the required submissions for that assurance would have to be placed in the facility's operating record. The owner or operator would have to notify the State Director that he no longer meets the criteria of the financial test and that alternate financial assurance has been obtained.

f. Current financial test documentation. Under proposed §258.74(e)(2)(vi), the Director of an approved State may, based on a reasonable belief that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, require the owner or operator to provide current financial test documentation as specified in paragraph (e)(2) of this section. Although the Agency anticipates this provision will not be used often, it can be important in situations where the financial condition of the owner or operator comes into question. The State Director should have the flexibility to require the owner or operator to provide current financial test documents if information arises that raises serious questions about the financial conditions of the owner or operator. For example, an owner or operator may be forced into bankruptcy by a large, well-publicized liability judgment. In such cases, the State Director should be able to investigate the owner's or operator's change in financial condition, and require them to demonstrate that they still meet the financial test. The Agency requests comments from the public on this proposed requirement.

B. Corporate Guarantee (Section 258.74(g))

This rule proposes to allow owners and operators to comply with financial responsibility requirements for MSWLFs using a guarantee provided by another private firm (the guarantor). Under such a guarantee, the guarantor promises to pay for or carry out closure, post-closure care or corrective action activities on behalf of the owner or operator of a MSWLF if the owner or operator fails to do so. Guarantees, like other third-party mechanisms, such as letters of credit or surety bonds, ensure that a third party is obligated to cover the costs of closure, post-closure care, or corrective action in the event that the owner or operator goes bankrupt or fails to conduct the required activities. At the same time, a guarantee is an attractive compliance option for owners and operators, especially those affiliated with larger corporations because guarantees are generally much less expensive than other third-party mechanisms.

The proposed rule would allow three types of qualified guarantors: (1) The parent corporation or principal shareholder of the owner or operator (e.g., a corporate parent or grandparent), (2) a firm whose parent company is also the parent company of the owner or operator (a corporate sibling), and (3) other related and non-related firms with a "substantial business relationship" with the owner or operator (including subsidiaries of the owner or operator). Guarantors also would be required to meet the conditions of the corporate financial test.

To comply with the requirements of the corporate guarantee, the owner or operator would be required to place in the facility operating record a copy of the guarantee contract and copies of all of the financial test documentation that is required of the guarantor as specified in the corporate financial test requirements. The terms of the guarantee contract must specify that, if the owner or operator fails to perform closure, post-closure care, or corrective action in accordance with the requirements of part 258, the guarantor will either: (1) carry out those activities or pay the costs of having them conducted by a third party (performance guarantee), or (2) fund a trust to pay the costs of the activities (payment guarantee). The required documentation must be placed in the operating record, in the case of closure and post-closure care, prior to the initial receipt of waste or the effective

date of the final rule, whichever is later, or in the case of corrective action, no later than 120 days following selection of a corrective action remedy. The financial test documentation from the guarantor must be updated annually, in accordance with the requirements of the corporate financial test.

The financial test documentation required of the guarantor is the same as that required of a corporate financial test user except that, in cases where the guarantor is not a corporate parent, grandparent, or sibling, the letter from the chief financial officer must address the "substantial business relationship" (as defined in §264.141(h)) that exists between the owner or operator and the guarantor. In particular, the letter must describe the relationship and the consideration received from the owner or operator in exchange for the guarantee, which is necessary to ensure that the contract is valid and enforceable.

This proposal would require that guarantors agree to remain bound under this guarantee for so long as the owner or operator must comply with the applicable financial assurance requirements of subpart G of part 258, except that guarantors may cancel this guarantee by sending notice to the State Director and to the owner or operator. The proposal would provide that such cancellation cannot become effective earlier than 120 days after receipt of such notice by both the State Director and the owner or operator.

If a guarantee is cancelled, the proposal would require the owner or operator to, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

If the corporate guarantor no longer meets the requirements of the financial test, the owner or operator would have to, within 90 days following the close of the guarantor's fiscal year, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor would be required to provide that alternate assurance within 120 days following the close of the guarantor's most recent fiscal year, place evidence of the alternate assurance in the facility ***51527** operating record, and notify the State Director.

C. Calculation of Obligations

EPA currently allows financial tests as mechanisms to demonstrate financial assurance for environmental obligations under several programs. These include hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265, petroleum underground storage tanks under 40 CFR part 280, UIC facilities under 40 CFR part 144, and PCB commercial storage facilities under 40 CFR part 761. Under each of these programs, the Agency requires that the owner or operator include all of the costs it is assuring through a financial test when it calculates its obligations. This policy prevents an owner or operator from using the same assets to as-

sure different obligations under different programs. The Agency believes this is vital to assure the effectiveness of the financial test and assure that assets are available to assure all of the environmental obligations covered by the test. Thus, consistent with Agency policy, today's proposal requires a firm using a financial test for its subtitle D obligations also to include those costs covered under other Agency programs when it calculates assured costs.

V. Domestic Asset Requirement for the Subtitle C Corporate Financial Test

The Agency is proposing to modify the domestic asset requirement of the current subtitle C financial test. The current regulations at §§ 264.143(f)(1)(i)(D) and (ii)(D); 265.143(e)(1) (i)(D) and (ii)(D); 264.145(f)(1) (i)(D) and (ii)(D); 265.145(e)(1) (i)(D) and (ii)(D); 264.147(f)(1) (i)(D) and (ii)(D); and 265.147(f)(1) (i)(D) and (ii)(D) require that corporations using the financial test have assets located in the U.S. amounting to at least 90% of total assets or at least six times the sum of costs assured through the financial test. The purpose of this requirement is to assure access to funds in the event of bankruptcy. The Agency is concerned that without a domestic asset requirement, it could experience difficulty in accessing funds of bankrupt firms whose assets are located outside of the United States.

When the Agency proposed revisions to the subtitle C corporate financial test in the July 1, 1991, notice, at 56 FR 30201, the Agency did not propose revisions to the domestic asset requirement portion of that financial test. However, commenters on that proposal argued that the domestic asset requirement should be revised, as it unnecessarily limits the use of the test.

In response to comment received on the July 1 notice, the Agency is proposing a revised domestic asset requirement for subtitle C. The Agency is proposing that corporations using the financial test be required to have assets in the U.S. at least equal to the sum of all environmental obligations assured by a financial test. This approach is consistent with the domestic asset requirement proposed in today's corporate financial test for subtitle D. The Agency solicits comment on its proposal to modify the subtitle C domestic asset requirement.

VI. Analysis Supporting This Proposed Rule

The discussion below describes the analysis conducted by the Agency to develop the ratio alternative, minimum net worth requirement, and domestic asset requirement of this proposed corporate financial test. These provisions, which are proposed in this notice for use under the subtitle D program, also were proposed by the Agency on July 1, 1991, for use under the subtitle C program (56 FR 30201). In conducting analysis to support today's proposal, the Agency relied in large part on analysis conducted in support of the July 1, 1991, subtitle C rulemaking. This section of the preamble discusses the subtitle C analysis, and additional analysis conducted to support development of this proposal.

For a more detailed description of the subtitle C analysis, the reader can refer to the preamble of the July 1, 1991, proposal (56 FR 30201), and to the Background Document supporting the July 1 proposal, which can be found in the docket for that rulemaking (Docket No. F-91-RCFP-FFFFF). For a more detailed description of the

analysis to support this subtitle D corporate financial test proposal, the reader can refer to the Background Document for today's rule, which can be found in the docket for this proposal.

A. Development of the Subtitle C Corporate Financial Test

As was discussed above, on July 1, 1991, the Agency proposed revisions to the subtitle C corporate financial test. At that time, the Agency conducted analysis using the following approach.

First, the Agency examined whether the test should include a minimum net worth requirement. Second, the Agency developed various financial tests and analyzed their performance in discriminating between bankrupt and viable firms. Finally, the Agency evaluated those tests that best discriminated between viable and bankrupt firms according to a "least cost" criterion, and selected a financial test. Each of these analytical steps is described below.

1. Minimum Net Worth Requirement

In developing the subtitle C corporate financial test, the Agency determined that a minimum net worth requirement was an important element of the test. First, the Agency was concerned that, because of their magnitude, the costs of closure and post-closure care could themselves cause smaller firms to go bankrupt. In addition, the need for a minimum net worth requirement was supported by analysis. The Agency found significantly higher bankruptcy rates for firms with a net worth less than $10 million. For example, firms with less than $10 million in net worth failed four times more frequently than firms with greater than $10 million in net worth. Based on the above, the Agency decided to propose a minimum net worth requirement.

To determine the threshold for this minimum net worth requirement, the Agency analyzed public and private costs associated with different thresholds. The Agency chose $10 million as the threshold because the analysis demonstrated that although a higher threshold would result in savings in public costs, those savings would not offset the additional costs to the regulated community of obtaining alternative financial assurance mechanisms.

2. Develop and Analyze Alternative Financial Tests

The Agency first conducted a search of financial literature and identified possible financial ratios typically used for bankruptcy prediction. In addition to financial ratios, the Agency selected a variety of other financial measures, such as multiples requirements for net worth and net working capital (i.e., one through six times the size of the financial obligation) and "additive" requirements, which required firms to have a certain level of net worth (in addition to the minimum net worth requirement of $10 million) based on the amount of costs they wished to cover with the test.

The Agency then evaluated the performance of these individual financial measures in discriminating between viable and bankrupt firms. Using samples of bankrupt and non-bankrupt firms, the Agency evaluated their ability to "pass" non-bankrupt firms

capable of meeting their financial assurance obligations, and, at the same time, "fail" bankrupt firms that would ***51528** enter bankruptcy without the means to meet those obligations. Each financial measure was evaluated using two performance measures:

Availability (A): Measured as the percentage of total financial assurance obligations facing non-bankrupt firms with over $10 million in net worth that can be covered using a particular financial measure or financial test.

Misprediction (M): Measured as the percentage of total financial assurance obligations facing bankrupt firms that can be covered by bankrupt firms using the financial test.

Those individual financial measures that performed relatively well at differentiating between the two samples had a high differential between the availability (A) and misprediction (M) measures; i.e., they allow viable firms to cover a relatively large percentage of obligations and, at the same time, screen out a large share of obligations of bankrupt firms. Those measures that performed relatively poorly had about the same availability to viable firms and bankrupt firms; i.e., they allowed bankrupt and non-bankrupt firms to cover a similar percentage of obligations. In some cases, poorly-performing measures had a negative differential--they allowed bankrupt firms to cover a higher percentage of obligations than non-bankrupt firms.

The Agency's analysis of ratio measures found that profitability ratios, which measure a firm's net income or cash flow in relation to firm size (e.g., cash flow/total liabilities) and leverage ratios, which measure a firm's debt in relation to firm size (i.e., total liabilities/net worth) were particularly good at discriminating between bankrupt and non-bankrupt firms.

The Agency then combined various profitability and leverage ratios, which had performed well at distinguishing between bankrupt and non-bankrupt firms, to form alternative financial tests. A variety of possible multiple and additive requirements for net worth were then added to each combination of financial ratios.

The process described above led to the development of over 500 "candidate" alternative financial tests. These candidate financial tests were then evaluated in a similar manner against the samples of bankrupt and non-bankrupt firms to determine their ability to pass non-bankrupt firms capable of meeting their financial assurance obligations (availability or "A") and their ability to screen out bankrupt firms that would enter bankruptcy without the means to meet those obligations (misprediction or "M"). From these candidates, "dominant" tests were selected, i.e., tests with the highest ability to pass non-bankrupt firms for given levels of bankruptcy misprediction.

The Agency then calculated the public and private cost of each "dominant" test. The Agency defined public costs as the costs to the public sector of paying for financial assurance obligations for firms that pass the test but later go bankrupt without funding their obligations, and private costs as the cost to viable firms of obtaining alternative financial assurance mechanisms when they cannot pass the test. The amount of public and private costs associated with a particular test depends on the test's performance in terms of its availability to viable firms and

its ability to screen out bankrupt firms.

3. Select a Financial Test for Proposal

The Agency then identified a set of low-cost tests, and selected a test from that group for proposal. The Agency based its selection on policy considerations as well as the total costs of the financial tests. The Agency took this approach, rather than select the lowest cost test, because several tests had very similar total costs but different balances between public and private costs. Using this modified cost-effectiveness approach, the Agency was able to consider the balance of public and private costs among tests of approximately equal total costs.

Exhibit 1 presents total public and private costs of the top two tests identified. Test 94 was the lowest-cost test analyzed, but the Agency proposed Test 902 in the July 1, 1991, rule for several reasons. First, Test 94 included a tax rate adjustment (FR) in the cash flow ratio which may change over time, thus making it a more difficult test to implement and verify. (The estimate shown in Exhibit 1 is that all firms are subject to a 34 percent corporate tax rate). In contrast, Test 902 required a cash flow ratio adjusted by a set value of $10 million, [FN1] rather than by a tax adjusted cost estimate. Second, Test 902 required a net worth of $10 million plus the amount of the cost to be assured (an additive requirement), whereas Test 94 required that the net worth be at least $10 million and that it be at least the amount of the cost to be assured. The Agency believed that the net worth additive requirement of Test 902 would ensure that a firm has net worth sufficient to cover its financial assurance obligations and has an additional $10 million in net worth to cover other debts and obligations as necessary. Finally, Test 902 had a different balance of public and private costs than Test 94. Because it is less available to firms, it had higher private costs than Test 94. However, the substantial improvement in bankruptcy screening (lower misprediction, or "M") led to far lower public costs than Test 94, so that the total costs were close to the total costs of Test 94.

FN1 The Agency analyzed many cash-flow ratios, some of which subtracted a constant amount (e.g., $5 million, $10 million, $15 million), others of which, like the ratio in Test 94, subtracted variable amounts. Of the ratios that subtracted a constant amount, this ratio, which subtracted $10 million, was the most effective in reducing public and private costs.

Exhibit 1.--Results of Alternative Financial Tests for Closure and Post-Closure Care

Test	Test requirements	Private costs	Public costs	Total costs
	[Dollars in thousands]			
94	Cashflow--(.66FR)/total liabilities greater than .05	$2,868 ..	$15,408 .	$18,277
	OR			
	Total liabilities/net worth less than 2.5			
	AND			

	Net worth at least 1closure and post-closure care cost estimate AND Net worth of at least $10 million				
902 ...	Cashflow--$10 million/total liabilities greater than .10	12,075	6,898	...	18,972
	OR Total liabilities/net worth less than 1.5 AND				
	Net worth of at least $10 million plus the amount of closure and post-closure care cost estimate				

***51529** *B. The Subtitle D Corporate Financial Test Analysis*

As was discussed above, the approach used by the Agency to evaluate alternative subtitle D financial tests was consistent with the 1991 subtitle C analysis. However, because candidate measures for the 1991 subtitle C analysis were assembled from a thorough review of available research on bankruptcy predictors, the Agency decided that additional research was not likely to identify any new candidate measures. Therefore, the Agency did not consider it necessary to repeat the process of assembling and testing candidate financial measures, and combining the most promising candidate measures into alternative financial test configurations.

Instead, the Agency used the alternative financial tests identified in the subtitle C analysis as the starting point for the subtitle D analysis. The Agency then developed firm samples and cost estimates for the subtitle D program, and proceeded to evaluate those candidate financial tests using basically the same procedure used for subtitle C, with minor modifications.

1. Firm Samples

The Agency identified 16 non-bankrupt firms (12 public and 4 private) that own or operate MSWLFs. One of the private firms, which appeared to be quite small, was dropped from the sample for lack of financial data. Two of the remaining private firms were deleted because they had tangible net worth less than $10 million. The final non-bankrupt firm sample, then, consisted of 13 firms--12 public and one private. [FN2]

FN2 The Agency believes that the same policy considerations discussed above for subtitle C compel use of a $10 million net worth requirement for subtitle D. In addition, the Agency conducted analysis to determine whether a lower net worth requirement would significantly increase the amount of financial assurance that could be covered by the subtitle D financial test. The Agency found that the 3 small firms excluded by the minimum net worth requirement owned only 12 MSWLFs, which were less than half the size of the landfills owned and operated by larger firms. Therefore, the Agency concluded that a lower minimum net worth requirement would not significantly increase the availability of the subtitle D corporate financial test. The final non-bankrupt firm sample, then, consisted of 13 firms--12 public

and one private.

The bankrupt firm sample used in the subtitle C corporate financial test analysis was also used for the subtitle D financial test analysis. That sample consisted of 31 firms, which were either known to operate hazardous waste facilities or were likely to do so. The Agency believed that this was the best sample of bankrupt firms available for the subtitle D analysis for several reasons. First, owning and operating MSWLFs entails a capital-intensive, long-term investment in engineering and construction for industrial activity, similar to the industrial activities of many firms in the subtitle C universe. Second, firms in the MSWLF industry, like firms in the subtitle C universe, are subject to environmental regulations and associated compliance costs. Third, the Agency could not identify bankruptcies of MSWLF firms, as they have not been subject to Federal regulatory requirements and, therefore, have not been identified like subtitle C facilities, which were required to notify EPA of their existence in 1980, thus providing the Agency with historical data.

2. Cost Estimates

a. Closure and Post-Closure Care. The Agency's derived estimates of closure and post-closure care costs from data provided by the Regulatory Impacts Analysis (RIA) of the proposed subtitle D MSWLF criteria (56 FR 50978).

Because the analysis predated the effective date of the landfill criteria, the Agency did not have site-specific cost estimates for firms that own or operate MSWLFs. Therefore, the Agency estimated the financial assurance obligations for each firm in the non-bankrupt firm sample, based on the number and size of landfills owned or operated by each firm, and the Agency's estimate of closure and post-closure care costs per landfill.

b. Corrective Action. The Agency took a different approach to analyzing the impact of corrective action costs on the performance of alternative financial tests. As in the case of closure and post-closure care, the Agency did not have site-specific data on the cost of corrective action. However, unlike the costs of closure and post-closure, corrective action costs are not certain to occur. In addition to not having site-specific cost data, the Agency also did not have data on the probability of corrective action being necessary. Therefore, the Agency did not attempt to estimate site-specific costs to analyze the impact of corrective action costs on the performance of alternative financial tests; rather, the Agency conducted a sensitivity analysis, which is described later in this preamble.

3. Results of Evaluation of Candidate Financial Tests for Closure and Post-Closure Care

The Agency calculated the public and private costs for the alternative financial test configurations, and selected a set of dominant tests. [FN3] Table 2 shows the results for the lowest cost tests.

FN3 Note that in the 1991 subtitle C analysis, the alternative financial tests were evaluated against the firm samples to establish a set of dominant tests, and the sum of public and private costs was then calculated for each dominant test.

However, in the subtitle D analysis, the sample size of non-bankrupt firm sample was so small (13 firms) that directly calculating the sum of the public and private costs for each of the alternative test configurations was more analytically efficient.

Table 2.--Financial Tests With Lowest Public and Private Costs for Closure and Post-Closure Care

[Dollars in millions]

Test	Requirements	Private costs (thousands)	Public costs (thousands)	Total costs (thousands)
[FN1] 562	Total Liabilities/Net Worth less than 1.5 OR (Cash Flow--$10 million)/Total Liabilities greater than 0.1 AND Net worth of at least $10 million plus the amount of closure and post-closure care cost estimate	$17.4	$8.8	$26.2
130	Total Liabilities/Net Worth less than 1.5 OR (Cash Flow--$10 million)/Total Liabilities greater than 0.1 AND Net worth of at least the amount of closure and post-closure care cost estimate	17.4	8.8	26.2
58	Total Liabilities/Net Worth less than 1.5 OR (Cash Flow--$10 million)/Total Liabilities less than 0.1	6.1	10.8	16.9

AND

FN1 Subtitle D Test 562 is identical to Subtitle C Test 902, which was selected for proposal under that program.

No minimum net worth requirement

***51530** Though Test 58 was the lowest cost test, the Agency did not select it for proposal because that test did not include a minimum net worth requirement beyond the $10 million. The Agency believes that an additional net worth requirement that is related to the costs to be assured is important to assure that the firm's environmental costs will not increase the probability of firm failure. For example, if a firm had a net worth of $10 million, but closure and post-closure costs of $100 million, those costs would, in all likelihood, cause the firm to enter bankruptcy. Thus, the Agency eliminated Test 58 from consideration and considered for proposal only those financial tests that had a minimum net worth requirement that considered the size of the obligation to be assured.

Tests 562 and 130 are identical except for the minimum net worth requirement. Test 130 requires that the firm's minimum net worth be at least $10 million and that it be at least the amount of the closure and post-closure care cost estimate. Test 562 requires a minimum net worth be equal to $10 million plus the closure and post-closure care cost estimate. The Agency selected Test 562 for proposal for several reasons.

First, the Agency believes that requiring a $10 million minimum net worth requirement in addition to net worth equal to the firm's assured costs protects against environmental obligations themselves causing bankruptcy. Second, there was no difference in the availability of Test 130 and Test 562, so there was no compelling reason to select Test 130. Finally, selection of Test 562, which is identical to the corporate financial test proposed for subtitle C follows the Agency's policy of maintaining consistency among programs wherever possible.

4. Results of Sensitivity Analysis To Determine Effects of Corrective Action Costs on Test Performance

As was mentioned above, the Agency conducted a sensitivity analysis to determine whether the costs of corrective action would affect the performance of the candidate financial tests. This analysis evaluated the alternative tests for closure, post-closure care, and corrective action costs under three scenarios--corrective action costs equal to 50%, 100%, and 200% of the costs of closure and post-closure. Under each scenario, Test 130 and Test 562 were the lowest cost tests with a minimum net worth requirement related to the size of obligation to be assured.

5. Statement of Accounting Standards Number 106 (FASB 106)

Concerns have been raised by some members of the regulated community that the December 1990 Statement issued by the Financial Accounting Standards Board, entitled "Employers' Accounting for Postretirement Benefits Other Than Pensions (OPEB)" (FASB 106), adversely impacts their ability to pass the Agency's corporate financial test for their environmental obligations.

While the Security and Exchange Commission (SEC) is ultimately responsible for specifying Generally Accepted Accounting Principles (GAAP) for publicly-owned firms, the SEC has informally followed policies developed by the FASB, an independent private organization that is funded by various professional accounting associations.

In this case, according to FASB 106, employers who do not already account for these benefits as required by the Statement must do so for fiscal years beginning after December 15, 1992 (This requirement is delayed for certain small, non-public employers to fiscal years beginning after December 15, 1994). FASB 106 allows employers the option of accounting for these benefits in one year (immediate recognition of OPEB) or over a consecutive number of years (delayed recognition of OPEB).

These members of the regulated community that are concerned about FASB 106 have requested that for Security and Exchange Commission purposes, they be allowed to continue to use the immediate recognition method, but for purposes of the Agency's financial test, they be allowed to use the delayed recognition method. Since both the immediate and delayed recognition of these obligations are allowed by the FASB 106 rule, the Agency believes there is enough flexibility in the regulations to allow recognition of OPEB benefits in the manner described above. A more detailed description of EPA's interpretation of the federal regulations governing the corporate financial test within the context of FASB 106 can be found in the docket in support of this proposal. (See Letter to Torger Dahl of Eastman Kodak Company from Michael H. Shapiro, Director of the Office of Solid Waste.) The Agency solicits comment on whether the subtitles D and C corporate financial tests should be revised to clarify how owners and operators can account for FASB 106 when using the financial test ***51531** to demonstrate financial responsibility for their environmental obligations.

6. Domestic Asset Requirement

The Agency is proposing that all firms using the financial test have assets in the United States at least equal to the sum of the costs they seek to assure through the financial test. This domestic asset requirement is intended to ensure that the Agency has access to funds in the event of bankruptcy. Without this requirement, the Agency could experience substantial difficulty in accessing funds of bankrupt firms that have their assets outside of the United States.

The domestic asset requirement proposed for the subtitle D corporate owners and operators of MSWLFs is consistent with revisions to the domestic asset requirement of the subtitle C corporate financial test proposed today (see section V. of this preamble for further discussion).

VII. National Solid Wastes Management Association (NSWMA) Petition

A. Discussion of the Petition

On February 16, 1990, NSWMA submitted a rulemaking petition to the Agency. The Agency has addressed many of the concerns raised in the petition in a July 1, 1991 proposed rule (56 FR 30201) and a September 16, 1992 final rule (57 FR 42832).

While today's proposed rule addresses two more issues raised in this petition, it does not represent the full Agency response to NSWMA's petition. The Agency continues to examine the concerns raised in NSWMA's petition.

B. The Meridian Test

As part of its analysis, the Agency evaluated the test developed by the Meridian Corporation, which was submitted to EPA on February 16, 1990, along with a rulemaking petition, by the National Solid Wastes Management Association (NSWMA). Using the methodology described above, the Agency found that the test was not as effective at minimizing public and private costs as the test proposed on July 1, 1991. As a result, the Agency has not proposed the test developed by Meridian Corporation for further analysis. The NSWMA petition, the test developed by the Meridian Corporation, and the Agency's analysis of that test can be found in the docket in support of this proposal. The Agency will consider and respond to any comments it receives on the Meridian financial test in evaluating the revisions to the corporate financial test for subtitle C.

C. Request for Comment on Allowing Owners and Operators to Discount Costs

The financial assurance requirements in many EPA program areas (e.g., RCRA subtitles C and D, TSCA PCBs) require owners and operators to calculate cost estimates in current dollars, and aggregate these estimates (even though these costs may be incurred many years in the future). Owners must obtain a financial responsibility instrument for at least the amount of this aggregated cost estimate. The RCRA regulations currently do not allow owners and operators to adjust this aggregated cost estimate to reflect the fact that these activities are scheduled to occur in future years.

The Agency has received many requests to allow owners and operators to meet the financial assurance requirements based on the present value of these future obligations. In a rulemaking petition submitted on February 16, 1990, the National Solid Wastes Management Association (NSWMA) recommended that the Agency allow firms to use a present value based on a discount rate to estimate their costs for post-closure care and for the extended care portion of corrective action. (The NSWMA petition can be found in the docket of today's rulemaking.) In addition, the Agency has received public comment making similar requests during the development of other financial-responsibility-related rules. In the preamble to the proposed local government financial test, the Agency solicited comment on the whether to allow owners and operators to discount costs associated with MSWLFs (see 58 FR 68353 at 68361, December 27, 1993). The Agency recognizes that this is an issue of interest to many parties, and has reviewed and considered all comments received to date.

In general, the argument presented to the Agency has been, because these expenditures are scheduled to occur in the future (often many years in the future), a financial instrument for less than the aggregate costs (i.e. the "present value" of the aggregated costs) would pay off these expenditures in the future. [FN4] This is the case because there is a time dimension to the value of a monetary or financial instrument--$100 in hand today is worth more than a (guaranteed) promise to pay $100 in ten years. One hundred dollars invested today, for example, in a ten-year Treasury bond paying at an interest rate of 7 percent will pay back $197 ten years

from now, assuming that interest is compounded continually.

FN4 In order to make comparisons between alternative financial instruments on capital investment decisions involving different streams of payments over time, financial analysts, economists, etc., calculate the "present value" of the alternatives. This method involves calculating in terms of current dollars using the interest rate--or discount rate--present value of a promised future receipt (or expenditure). For example, at a 7 percent interest rate, an investor would be indifferent between receiving $100 five years from now or receiving $71.30 today. The present value, then of the promise to pay $100 in five years (at a discount rate of 7 percent) would be $71.30. In much the same way, if the Agency allowed owners and operators to discount their future costs when they demonstrated financial responsibility, an owner or operator who had a $10 million closure scheduled to occur 20 years in the future could demonstrate financial responsibility for as little as $2.6 million today, assuming they could invest that amount at the same 7% interest (or discount) rate described above. The effect of discounting becomes more pronounced as the time period and discount rate increase.

The Agency has not proposed to allow owners and operators to discount costs because the Agency remains unconvinced that by doing so it would assure that adequate funds will be available in a timely manner to perform required activities in the event that the owner or operator is unable or unwilling to perform these activities.

First, the Agency is concerned that for an approach based on discounting to be effective, it is important that the owner or operator be able to predict with certainty when the costs will incur. For example, an owner or operator who estimates that the closure costs of its MSWLF will be $10 million to occur 20 years in the future would only have to demonstrate financial responsibility for $2.6 million today, assuming a 7 percent discount rate. If that MSWLF unexpectedly has to close, it may not have sufficient resources to properly complete all closure activities since the amount of financial responsibility could be substantially less than the actual need.

Despite these concerns, the Agency is interested in allowing owners and operators to discount costs under the subtitle D program wherever it can do so and still assure that sufficient resources will be available to perform required activities. The Agency believes that discounting may be more applicable for some activities than others. For example, where the cost of an activity is known, the timing of the activity can be predicted with a greater degree of certainty, or where the activity takes place over an extended time period, it may be appropriate to discount costs.

Although current regulations require owners to have the financial resources to carry out all closure and post-closure activities in one year, some activities, such as post-closure groundwater ***51532** monitoring, can only be done over several decades. Therefore, even if a landfill must close unexpectedly, certain activities (like post-closure care) and the associated costs will still occur over a number of years in the future. EPA could allow owners to discount these costs in computing their obligations. However, where the timing and costs associated with an activity are not known, discounting may not be appropriate.

Because of its interest in allowing owners and operators to discount costs, and because of its concerns about allowing them to do so, the Agency again solicits comment on the practice of discounting, and how it might be applied to the subtitle D program. Members of the public who submitted comments on discounting during the comment period of the local government financial test need not submit those comments again. If the Agency modifies the subtitle D regulations to allow owners and operators to discount costs under that program, the Agency will consider all comments related to discounting that were submitted to the docket for this proposal during the public comment period and to the docket for the local government financial test proposal during the comment period for that rulemaking.

The Agency specifically requests comment and supporting information on the following and on any other issues that commenters identify regarding discounting for MSWLF financial responsibility requirements:

(1) Selection of a discount rate. Possible options include short- or long-term interest rates, private, municipal or Treasury bonds, or some other measure of interest rate.

(2) Selection of a method that provides adequate assurance that funds will be available in the event of unexpected closure.

(3) Selection of a maximum time period over which costs may be discounted, e.g., 5, 10, 20, or 50 years.

(4) Selection of activities that may be appropriate for employing discounting, e.g., post-closure care when the costs and time period for performing this activity may be estimated with reasonable accuracy.

(5) Selection of a method that minimizes the potential complexities involved in administering and enforcing a program that allows discounting of costs.

Commenters should note that this request for comment is limited to whether discounting should be allowed for MSWLF financial assurance, and is not intended to open for comment other financial assurance regulations.

VIII. State Program Approval--Subtitle D

Section 4005(c) of RCRA requires that each State adopt and implement a "permit program or other system of prior approval and conditions" adequate to assure that each facility that may receive household hazardous waste or small quantity generator waste will comply with the revised MSWLF criteria. Each state must adopt and implement a permit program not later than 18 months after October 9, 1991. EPA is required to "determine whether each State has developed an adequate program" pursuant to section 4005(c).

EPA plans to propose a State/Tribal implementation rule which will establish adequacy determination requirements and procedures for State subtitle D permit programs, including submission of a MSWLF permit program application. EPA also plans

to propose to extend eligibility for subtitle D permit program approval to Indian Tribes. The statute, however, does not require these rules to be in place before EPA assesses the adequacy of any State or Tribal program.

As part of these rules, the Agency plans to include procedures for submitting revised applications for State and Tribal program adequacy determinations should a State or Tribe revise its permit program once deemed adequate and the appropriate Regional Administrator determines that a revised application is necessary. Program revision may be necessary when the pertinent Federal statutory or regulatory authority is changed, when State or Tribal statutory or regulatory authority or relevant guidance changes, or when responsibility for the State or Tribal program is shifted within the lead agency or to a new or different State or Tribal agency or agencies.

A State or Tribe that receives permit program approval prior to the final promulgation of today's rule and later elects to adopt the financial test and local government guarantee mechanisms should work with its respective Regional EPA office as it proceeds to make changes to its permit program. EPA does not interpret the statute to require that each and every program change a State or Tribe makes will require a revised permit program application. Rather, only certain changes that raise issues warranting a detailed review by EPA and an opportunity for public comment will necessitate a revised application. EPA believes that State and Tribal compliance with today's proposal will, in most cases, not require a revised permit program application, since this rule merely provides additional options for demonstrating financial assurance. Furthermore, States and Tribes that have adopted financial assurance requirements without this local government test and guarantee are not required to take any action and may elect to retain only their current options since this proposal simply expands the number of options available to owners and operators for demonstrating financial assurance.

IX. Implementation--Subtitle D

As stated above, today's proposal would amend part 258 by adding additional options for corporations to use when demonstrating financial assurance for the costs of closure, post-closure care and clean-up of known releases. States and Tribes will not be required to include these options in their MSWLF programs, since they may choose to establish their own financial assurance programs as long as they meet the financial assurance requirements in Federal criteria. EPA will be able to approve the financial assurance portion of a State or Tribe's program so long as it includes at least one of the options promulgated in October, 1991, or added by today's proposal (if promulgated).

As a matter of Federal law, these proposed tests (if promulgated) will be potentially available in all States and all Tribal jurisdictions. EPA cautions owners and operators that wish to use the options in the Federal program that they should look at the options available under State or Tribal law. If the State or Tribe's rules do not include the option that the owner or operator wishes to use, the owner or operator would run the risk of being out of compliance with State or Tribal law. State and Tribal laws for MSWLFs are fully effective even when not approved by EPA.

In unapproved States or Tribes, if State or Tribal law did not preclude the use of

options proposed today (either because it did not include any financial assurance requirements, included only a general requirement that left the choice of mechanism to the discretion of the owner or operator, or included mechanisms resembling those proposed today) an owner or operator would be able to use the corporate test or guarantee described in today's proposal (if promulgated) to satisfy both State or Tribal and Federal law.

EPA notes that States or Tribes seeking approval for the financial assurance portion of their MSWLF program or wishing to modify an already approved program would have flexibility in adopting Federally promulgated standards. The State or Tribe could simply adopt the Federal ***51533** standard or could adopt a mechanism that meets the five performance standards detailed in the October 9, 1991 final criteria rule. In this case, the mechanism could be used by owners or operators for demonstrating financial responsibility for their MSWLF obligations in that State or Tribe. The five criteria that the financial mechanism would need to meet are the following: (1) Ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed; (2) ensure that funds will be available in a timely fashion when needed; (3) guarantee the availability of the required amount of coverage from the effective date of these requirements or prior to the initial receipt of waste, whichever is later, until the owner or operator is released from financial assurance requirements under §§253.32 (f), (g), (h); (4) provide flexibility to the owner or operator for demonstrating compliance with financial assurance requirements; and (5) be legally valid, binding, and enforceable under State and Federal law.

As a result, while the Agency is developing financial tests that are designed to meet these performance criteria (the financial test proposed in this Federal Register and the financial test proposed on December 27, 1993 (58 FR 68353)), approved States and Tribes could develop their own financial tests that could be used by owners and operators of MSWLFs within those States and Tribes for demonstrating financial responsibility as long as those tests are determined to have met the performance standards. (For a discussion of the effect of EPA's approval of a State or Tribal program on the Federal regulations, see 56 FR 50995.)

Owners and operators who can use the options in today's proposal under State or Tribal law would be required to maintain appropriate documentation of the mechanism in the facility's operating record. They would not be required by Federal law to submit that documentation to the State or Tribe, but only to notify the State or Tribal Director that the required items have been placed in the operating record. Owners and operators using the financial test or guarantee would also be required to update all required financial test information on an annual basis, and retain this information in their operating records. In addition, an owner or operator (or guarantor) that becomes unable to meet the financial test criteria would be required to notify the State or Tribal Director and establish alternate financial assurance within specified deadlines. Finally, in order to cancel a guarantee, the guarantor would have to notify both the State or Tribal Director and the owner or operator at least 120 days prior to cancellation.

The Agency believes that most Tribes have an accounting structure similar or identical to those of most local governments. Tribes that meet the requirements of the local government financial test would be eligible to use that financial test to demonstrate financial responsibility for their subtitle D obligations to the extent

that they meet the provisions of that test. However, the Agency recognizes that there may be Tribes and local government units that use an accounting system similar or identical to those of most corporations. Those Tribes and local government units would be eligible to use this proposed corporate financial test to demonstrate financial responsibility for their subtitle D obligations to the extent that they meet the requirements of this proposal.

X. State Authorization--Subtitle C

On July 1, 1991, the Agency proposed revisions to the subtitle C corporate financial test (56 FR 30201). In that proposal, the Agency considered the effect of those proposed revisions on State Authorization based on the entire test, rather than on the individual components of the entire financial test (see 56 FR 30214 and 30215). This proposal would modify one provision of that July 1, 1991 proposed rule. Specifically, this proposal would modify the domestic assets requirement of the financial test contained in §§ 264.143(f)(1) (i)(D) and (ii)(D); 265.143(e)(1) (i)(D) and (ii)(D); 264.145(f)(1) (i)(D) and (ii)(D); 265.145(e)(1) (i)(D) and (ii)(D); 264.147(f)(1) (i)(D) and (ii)(D); and 265.147(f)(1) (i)(D) and (ii)(D) and the corresponding revisions to the financial test instruments at §264.151 (f) and (g). This proposed change of the domestic asset requirement would not change the effect of State Authorization detailed in the July 1, 1991 proposed rule. As a result, if the Agency does promulgate a revised financial test under subtitle C, the effect on State Authorization would be based on the July 1, 1991 proposal, though a full discussion of the effect on State Authorization of the entire revised subtitle C corporate financial test will be contained in the final rule.

XI. Economic and Regulatory Impacts

A. Executive Order 12866

Under Executive Order 12866, which was published in the Federal Register on October 4, 1993 (see 58 FR 51735), the Agency must determine whether a regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Under the terms of Executive Order 12866, OMB has notified EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record for this rulemaking (see Docket #F-94-FTMP-FFFFF).

The Agency conducted an analysis to estimate the costs that would be avoided by corporations if this corporate financial test were available to them. Since corporations would be able to use the financial test for all or part of their subtitle D obligations, corporations would save the cost of obtaining a third-party instrument for those portions of their obligations. The Agency estimates that the corporate financial test and guarantee mechanisms would save corporations $45 million annually. In performing this analysis, the Agency assumed that the 1991 data used to estimate the number of MSWLFs, the costs of closure and post-closure care for each of the categories of MSWLFs, and the number of corporations are held constant. The financial data of the corporations are also assumed not to have changed since 1991. The Agency also assumed that corporations had, as their only environmental obligations, the costs of closure, post-closure care of their MSWLFs. The Agency further assumed that the cost of obtaining a third-party financial instrument, such as a letter of credit or surety bond, would be 1.5 percent of the cost estimate of closure and post-closure care of the MSWLF. Finally, the Agency assumed that corporate parents would be willing ***51534** to provide guarantees to their subsidiaries to the extent that they are able to provide those guarantees through the financial test. A full discussion of this analysis can be found in the docket for this rulemaking.

The Agency believes that the information it had when it performed its analysis was the most current and the most complete at the time. While the Agency recognizes that changes have occurred in the subtitle D universe since 1991, it does not have information to quantify these changes. As a result, the Agency solicits the public for more current information that can be used to update its analysis. Further, the Agency solicits comment on the assumptions made in order to perform the analysis and solicits the public for information that supports or refutes these assumptions. A detailed analysis of the cost savings associated with this rule is available in the docket.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. at the time an Agency publishes a proposed or final rule, it generally must prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities, unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Agency is aware of three companies that would be excluded from using this proposed financial test because their net worth is less than $10 million. Therefore, pursuant to 5 U.S.C. 605b, we believe that this regulation will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

OMB approved the information collection requirements of the MSWLF criteria, in-

cluding financial assurance criteria, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and assigned OMB control number 2050- 0122. The burden estimate for the MSWLF financial assurance provisions included the burden associated with a landfill obtaining and maintaining any one of the allowable financial assurance instruments, including a financial test. The proposed revision to part 264 does not change the recordkeeping or reporting requirements for subtitle C facilities. The information collection requirements for financial assurance of subtitle C facilities are discussed and approved under OMB control number 2050-0120.

The public may send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, 2136, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 728 Jackson Place NW., Washington, DC 20503 (marked "Attention: Desk Officer for EPA").

List of Subjects

40 CFR Part 258

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal.

40 CFR Part 264

Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 265

Hazardous waste, Reporting and recordkeeping requirements.

Dated: September 30, 1994.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, chapter I, title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 258--CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

1. The authority citation for part 258 continues to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6912(a), 6944(a), and 6949(c); 33 U.S.C. 1345 (d) and (e).

40 CFR § 258.74

2. Section 258.74 is amended by adding paragraphs (e) and (g) to read as follows:

40 CFR § 258.74

§258.74 Allowable mechanisms.

* * * * *

(e) Corporate financial test. An owner or operator that satisfies the requirements of this paragraph may demonstrate financial assurance up to the amount specified herein:

(1) Financial Component. (i) The owner or operator must satisfy one of the following three conditions:

(A) A current rating for its 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; or

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

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

(ii) The tangible net worth of the owner or operator must be greater than the sum of the current closure, post-closure care, corrective action cost estimates and any other environmental obligations covered by a financial test plus $10 million.

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

(2) Recordkeeping and reporting requirements. (i) The owner or operator must place the following items into the facility's operating record:

(A) A letter signed by the owner's or operator's chief financial officer that:

(1) 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 40 CFR part 258, cost estimates required for UIC facilities under 40 CFR part 144, if applicable, cost estimates required for petroleum underground storage tank facilities under 40 CFR part 280, if applicable, cost estimates required for PCB storage facilities under 40 CFR part 761, if applicable, and cost estimates required for hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265, if applicable;

(2) Provides evidence that the firm meets the conditions of either paragraph (e)(1)(i) or paragraph (e)(1)(ii) 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 except as provided in paragraph (e)(2)(i)(B)(1) of this section:

(1) To be eligible to use the financial test, the owner's or operator's financial statements referenced in paragraph (e)(2) of this section 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. The Director of an approved State may evaluate qualified opinions on a case by case basis and allow use of the financial test in cases where the Director deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the Director of an approved State does not allow use of the test, the owner or operator must provide alternate financial assurance as specified in this section.

(2) [Reserved]

***51535** (C) If the Chief Financial Officer's letter providing evidence of financial assurance includes financial data that are different from data in the audited financial statements referred to in paragraph (e)(2)(i)(B) of this section or any other audited financial statement or data filed with the SEC, a special report from the owner's or operator's independent certified public accountant to the owner or operator is required stating that:

(1) He has compared 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; and

(2) In connection with that examination, no matters came to his attention which caused him to believe that the data in the chief financial officer's letter should be adjusted.

(ii) An owner or operator must place the items specified in paragraph (e)(2) of this section in the operating record and notify the State Director that these items have been placed in the operating record before the initial receipt of waste or before the effective date of this section, whichever is later, in the case of closure, post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §258.58.

(iii) After the initial placement of items specified in paragraph (e)(2) of this section in the operating record, the owner or operator must update the information and place updated information in the operating record within 90 days following the close of the owner or operator's fiscal year. This information must consist of all three items specified in paragraph (e)(2) of this section.

(iv) The owner or operator is no longer required to submit the items specified in paragraph (e)(2) of this section when:

(A) He substitutes alternate financial assurance as specified in this section; or

(B) He is released from the requirements of this section in accordance with § 258.71(b), §258.72(b), or §258.73(b).

(v) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 120 days following the close of the owner or operator's fiscal year, obtain alternative financial assurance that meets the requirements of this section, place the required submissions for that assurance in the operating record, and notify the State Director that the owner or operator no longer meets the criteria of the financial test and that alternate assurance has been obtained.

(vi) The Director of an approved State may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require at any time the owner or operator to provide current financial test documentation as specified in paragraph (e)(2) of this section. If the Director of an approved State finds that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section.

(3) Calculation of costs to be assured. When calculating the "current cost estimates for closure, post-closure care, 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 paragraph (e)(1) of this section, the owner or operator must include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if it assures them through a financial test: obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265.

* * * * *

(g) Corporate Guarantee. (1) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraph (e) of this section and must comply with the terms of the guarantee. A certified copy of the guarantee must be placed in the facility's operating record along with copies of the letter from the guarantor's chief financial officer and accountants' opinions as specified in paragraph (e)(2) of this section. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter from the guarantor's chief financial officer must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

(2) The guarantee must be effective and all required submissions placed in the operating record before the initial receipt of waste or before the effective date of this section, whichever is later, in the case of closure and post-closure care, or

no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §258.58.

(3) The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform closure, post-closure care, and/or corrective action of a facility covered by the guarantee, the guarantor will:

(A) Perform, or pay a third party to perform, closure, post-closure care, and/or corrective action as required (performance guarantee); or

(B) Establish a fully funded trust fund as specified in paragraph (a) of this section in the name of the owner or operator (payment guarantee).

(ii) The guarantee will remain in force unless the guarantor sends prior notice of cancellation by certified mail to the owner or operator and to the State Director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the State Director, as evidenced by the return receipts.

(iii) If a guarantee is cancelled, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

(4) If a corporate guarantor no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 90 days following the close of the guarantor's fiscal year, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days following the close of the guarantor's ***51536** fiscal year, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

(5) The owner or operator is no longer required to submit the items specified in paragraph (g)(1) of this section when:

(i) The owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The owner or operator is released from the requirements of this section in accordance with §258.71(b), §258.72(b), or §258.73(b).

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PART 264--STANDARDS FOR OWNERS OR OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for part 264 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924 and 6925.

40 CFR § 264.143

3. Section 264.143 is amended by revising paragraphs (f)(1)(i)(D) and (f)(1)(ii)(D) to read as follows:

40 CFR § 264.143

§264.143 Financial assurance for closure.

* * * * *
(f) * * *

(1) * * *

(i) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

* * * * *
(ii) * * *

40 CFR § 264.145

3. Section 264.145 is amended by revising paragraphs (f)(1)(i)(D) and (f)(1)(ii)(D) to read as follows:

40 CFR § 264.145

§264.145 Financial assurance for post-closure care.

* * * * *
(f) * * *

(1) * * *

(i) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

* * * * *

40 CFR § 264.147

3. Section 264.147 is amended by revising paragraphs (f)(1)(i)(C) and (f)(1)(ii)(D) to read as follows:

40 CFR § 264.147

§264.147 Liability requirements.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(C) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

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PART 265--INTERIM STATUS STANDARDS FOR OWNERS OR OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for Part 265 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6924, 6925, 6935, and 6936.

40 CFR § 265.143

3. Section 265.143 is amended by revising paragraphs (e)(1)(i)(D) and

(e)(1)(ii)(D) to read as follows:

40 CFR § 265.143

§265.143 Financial assurance for closure.

* * * * *
(e) * * *

(1) * * *

(i) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

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40 CFR § 265.145

3. Section 265.145 is amended by revising paragraphs (e)(1)(i)(D) and (e)(1)(ii)(D) to read as follows:

40 CFR § 265.145

§265.145 Financial assurance for post-closure care.

* * * * *
(e) * * *

(1) * * *

(i) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

* * * * *

40 CFR § 265.147

3. Section 265.147 is amended by revising paragraphs (f)(1)(i)(C) and (f)(1)(ii)(D) to read as follows:

40 CFR § 265.147

§265.147 Liability requirements.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(C) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

(ii) * * *

(D) Assets located in the United States amounting to at least the sum of all obligations covered by a financial test.

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