

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 258**

[FRL-5654-3]

RIN 2050-AD04

Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: As part of the President's regulatory reform initiative, the Environmental Protection Agency (EPA) is amending the financial assurance provisions of the Municipal Solid Waste Landfill Criteria, under subtitle D of the Resource Conservation and Recovery Act. The financial assurance provisions require owners and operators of municipal solid waste landfills (MSWLFs) to demonstrate that adequate funds will be readily available for the costs of closure, post-closure care, and corrective action for known releases associated with their facilities. The existing regulations specify several mechanisms that owners and operators may use to make that demonstration.

Today's rule increases the flexibility available to owners and operators by adding two mechanisms to those currently available. The additional mechanisms, a financial test for use by local government owners and operators, and a provision for local governments that wish to guarantee the costs for an owner or operator, are designed to be self-implementing. Use of the financial test provided in this rule allows a local government to use its financial strength to avoid incurring the expenses associated with the use of a third-party financial instrument. Demonstrating that the costs of closure, post-closure care, and corrective action for known releases are available protects the environment by assuring that landfills will be properly managed at the end of site life when revenues are no longer being generated and physical structures may begin to break down.

DATES: The effective date for this final rule is April 9, 1997. The compliance date for MSWLF's is April 9, 1997, except for small, dry or remote landfills which have until October 9, 1997 to comply.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, first Floor, 1235 Jefferson Davis Highway, Arlington, VA.

The Docket Identification Number is F-96-LGFF-FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, it is recommended that the public make an appointment by calling 703 603-9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost \$.15/page. The index and some supporting material is available electronically. See the Supplementary Information section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline toll free at (800) 424-9346 or TDD 800 553-7672 (hearing impaired). In the Washington, D.C. metropolitan area, call 703 412-9810 or TDD 703 412-3323; or George Garland, Office of Solid Waste (5306W), U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460 at (703) 308-7272.

SUPPLEMENTARY INFORMATION: The index and the Comment Response Document are available on the Internet. Follow these instructions to access the information electronically:

WWW: <http://www.epa.gov/epaoswer>
Gopher: gopher.epa.gov
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If you are using the gopher or direct dialup method, once you are connected to the EPA Public Access Server, look for this report in the directory EPA Offices and Regions/Office of Solid Waste and Emergency Response (OSWER)/Office of Solid Waste (RCRA).
FTP: [ftp.epa.gov](ftp://ftp.epa.gov)
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OSWRCRA.

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I. Authority

These amendments to Title 40, part 258, of the Code of Federal Regulations are promulgated 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.

II. Background

The Agency proposed revised criteria for municipal solid waste landfills (MSWLFs), including financial assurance requirements, on August 30, 1988 (see 53 FR 33314) pursuant to the authority listed above. The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post-closure care, and corrective action associated with MSWLFs.

In the August 30, 1988 proposal, rather than proposing 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. In response to comments on the August 1988 proposal, the Agency added several specific financial mechanisms to the financial assurance performance standard of § 258.74 in promulgating the October 9, 1991 final rule on MSWLF criteria (56 FR 50978). That provision 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 to demonstrate that they meet the financial assurance performance standard, without the need to produce a third-party instrument to assure that the obligations associated with their landfill will be met.¹ The Agency agreed with commenters and, in the October 9, 1991 preamble, announced its intention to develop both a local government and corporate financial test in advance of the effective date of the financial assurance provisions.

On April 7, 1995, the Agency delayed the date by which MSWLFs must comply with RCRA subtitle D financial

¹ For a description of the third-party instruments available to MSWLF owners and operators, see 56 FR 50978.

assurance requirements until April 9, 1997 (see 60 FR 17649) (remote, very small landfills as defined at 40 CFR 258.1(f)(1) must comply by October 9, 1997). EPA extended the compliance date to provide adequate time to promulgate financial tests for local governments and for corporations before the financial assurance provisions take effect. The delayed effective date also was intended to provide owners and operators sufficient time to determine whether they satisfy the applicable financial test criteria for all of the obligations associated with their facilities, and to obtain a guarantor or an alternate instrument, if necessary. The Agency proposed a local government financial test and a corporate financial test on December 27, 1993 (see 58 FR 68353) and October 12, 1994 (see 59 FR 51523), respectively. The Agency expects to promulgate the final corporate test in the spring of 1997.

III. Summary of Rule

A. Local Government Financial Test

Today's rule allows local government owners and operators of MSWLFs that meet certain financial, public notice, and recordkeeping and reporting requirements to use a financial test to demonstrate financial assurance for MSWLF closure, post-closure and corrective action costs up to a specified maximum limit. The financial test allows a local government to avoid incurring the expenses associated with demonstrating financial assurance through the use of third-party financial instruments, such as a trust fund, letter of credit or insurance policy. Under this approach, a local government must demonstrate that it is capable of meeting its financial obligations at its MSWLF through "self-insurance".

1. Financial Component

A local government must qualify to use the financial test by satisfying either the bond rating provision or the financial ratio alternative. These provisions measure a local government's current financial condition and, thereby, indicate its ability to pay for closure, post-closure and corrective action costs.

(a) Bond Rating Requirement

The financial test's bond rating provision requires a local government to have a current investment grade bond rating (i.e., Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's) on all outstanding general obligation bonds. Today's rule provides that a local government with outstanding general obligation bonds that do not meet the

bond rating requirement is not eligible to use the financial test.

(b) Financial Ratio Alternative to the Bond Rating Requirement

A local government that does not have any outstanding general obligation bonds, or that only has unrated general obligation bonds, may qualify to use the financial test if it satisfies both a liquidity ratio and a debt service ratio.

(c) Compliance with GAAP

A local government that uses the financial ratio alternative to qualify for the financial test must determine whether it satisfies the financial ratios on the basis of a financial statement prepared in accordance with Generally Accepted Accounting Principles (GAAP) for governments.

(d) Operating Deficit Limit

Notwithstanding whether a local government meets the bond rating requirement or the financial ratio alternative, a local government is disqualified from using the financial test if its financial statements prepared in accordance with GAAP show an operating deficit equal to five percent or more of its total annual revenue for each of the past two years.

(e) Adverse or Qualified Auditor's Opinion

A local government is also disqualified from using the financial test if an audit of its most recent financial statement (prepared in accordance with GAAP) receives an adverse opinion, disclaimer of opinion, or other qualified opinion.

2. Public Notice Component

A local government must disclose in its annual budget or financial report the estimated costs of its closure, post-closure and corrective action obligations, including the years when such costs are expected to be incurred. Closure, post-closure, and corrective action costs that are to be incurred during a local government's current budget period must be included as line items in that budget; those costs that are to be incurred in future budget periods need only be disclosed in a supplemental section to a local government's budget or financial report.

3. Recordkeeping and Reporting Component

A local government must review its financial situation every year to determine if it satisfies the requirements of the financial test and is still eligible to use the financial test. If a local government that is using the financial

test determines that it no longer meets the financial test, then it must obtain alternate financial assurance within 210 days of the close of its fiscal year.

If a local government meets the test's financial requirements, it must also satisfy certain public notice and recordkeeping and reporting requirements to demonstrate financial assurance for MSWLF closure, post-closure and corrective action costs. A local government must also place in a MSWLF's operating record:

(1) A letter from the local government's chief financial officer that certifies that the local government satisfies the requirements of the financial test for those costs for which financial assurance is being demonstrated through the financial test,

(2) A local government's independently audited year-end financial statement prepared in accordance with GAAP,

(3) The opinion prepared by the auditor of the local government's year-end financial statement, and

(4) An evaluation by the local government's auditor or by the appropriate state agency that the information in the chief financial officer's letter to the operating record is consistent with the local government's audited year-end financial statement.

4. Calculation of Costs to be Assured

The financial test limits the amount of closure, post-closure and corrective action costs for which a local government may demonstrate financial assurance through use of the test, in proportion to a local government's financial capacity as represented by its annual revenues. A local government may only use the financial test to demonstrate financial assurance for the costs of its total environmental obligations up to a maximum amount that does not exceed 43 percent of the local government's total annual revenues (see discussion below of Calculation of Costs to be Assured, Section IV.A.4).

B. Local Government Guarantee

Today's rule allows local governments to guarantee the closure, post-closure and corrective action costs of other MSWLF owners and operators through the use of the financial test. Furthermore, local governments may combine financial mechanisms and use a financial test or guarantee to cover a portion of the total costs of closure, post-closure care and corrective action, while the remaining costs are covered by an alternative financial mechanism. However, financial mechanisms that guarantee performance of work, instead

of payment of costs, cannot be combined with other instruments.

C. Discounting

Under today's rule, State Directors may allow discounting at an essentially risk free rate of interest for closure, post-closure care, and corrective action cost estimates under certain conditions as described later in this preamble.

D. Effective Date

Today's rule allows State Directors to waive the financial assurance requirements for up to one year until April 9, 1998 for good cause if an owner or operator demonstrates to the Director's satisfaction that the April 9, 1997 effective date does not provide sufficient time to comply with these requirements and that such a waiver will not adversely affect human health and the environment.

IV. Response to Comments and Analysis of Issues

Forty commenters, primarily States, local governments, and their representative associations, commented on the proposed local government financial test. A compilation of all public comments and the Agency's responses is available in the Docket. (See Comment Response Document for Proposed Rule: Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities (40 CFR Part 258, Docket F-93-LGFP-FFFFF).)

A. Local Government Financial Test

The Proposed Local Government Financial Test included several components: Financial, public notice, recordkeeping and reporting, and a limitation on costs to be ensured by the test. (See Comment Response Document, Sections 3.1, 3.2, and 3.3.)

Comment: Several commenters were concerned that the financial test is not stringent enough and would not guarantee that the necessary funds would be available to conduct closure and post-closure care activities. Some commenters further argued that, to the extent that the financial test does not guarantee the availability of funds, local governments using the financial test would be in violation of the financial assurance requirements set out at 40 CFR 258.71(b) and 258.72(b) that MSWLF owners and operators provide continuous coverage of the costs of closure and post-closure care.

Response: EPA is adopting the local government financial test because it believes some local governments possess sufficient financial capacity and fiscal responsibility to satisfy the

objectives of financial responsibility without the use of a third-party mechanism. The test's financial ratios and bond rating criterion are intended to ensure that a local government is financially capable of meeting its assured obligations. The public notice requirement ensures that the local governments using the test are committed to planning for the assured obligations and meeting them in a timely manner. As discussed in greater detail below, EPA believes that a local government that meets the financial, public notice, and recordkeeping and reporting requirements of the financial test will be able to fund the assured MSWLF closure, post-closure care, or corrective action obligations in a timely manner. The purpose of the test is not to predict whether a local government will go bankrupt but rather to indicate whether it will have adequate funds to establish a trust fund or other allowable instrument to provide financial assurance for closure, post-closure care, or corrective action if its financial position deteriorates beyond acceptable levels.

Comment: Some commenters argued that the financial test is too stringent and that it could not be used by many local governments, particularly small local governments.

Response: The purpose of the financial test is not to exempt local governments from the financial assurance requirements, but to allow those local governments that possess sufficient financial capacity and fiscal responsibility to satisfy the objectives of financial responsibility without the use of a third-party mechanism. Inevitably some local governments will not have the financial capacity and fiscal responsibility to benefit from the financial test. Nevertheless, the Agency estimates that 91 percent of all local governments that own or operate a MSWLF would be able to use the test for at least some amount of their subtitle D obligations, while 54 percent of all local governments would be able to use the financial test for all of their subtitle D obligations. Accordingly, the Agency believes that the financial test would allow a reasonable number of local governments to self-insure their MSWLF obligations and still protect public health and the environment by assuring that adequate funds are available for closure, post-closure care, and corrective action.

1. Financial Component (§ 258.74(f)(1))

The proposed financial component would require that all outstanding general obligation bonds be rated investment grade. Alternatively, the

local government could pass three ratios:

- Liquidity Ratio (cash plus marketable securities to total expenditures) must be less than or equal to .05;
- Debt Service Ratio (annual debt service to total expenditures) must be less than or equal to .2; and
- Use of Borrowed Funds Ratio (long term debt issued to capital expenditures) must be less than or equal to 2.

In addition to passing the bond test or the ratio test, the local government would have to:

- Not have an operating deficit greater than 5 percent of expenditures for each of the past two years;
- Prepare financial statements in accordance with Generally Accepted Accounting Principles; and
- Have an unqualified auditor's opinion.

(See Comment Response Document, Section 4.1)

Comment: A commenter suggested that local governments should be able to demonstrate financial assurance for landfill closure, post-closure and corrective action costs without having to demonstrate their financial capability. This commenter believed that one may assume that local governments with taxing authority will be in a position to pay for closure, post-closure and corrective action costs. The commenter argued, therefore, that a local government should qualify to use the financial test, unless there are indications that it is not financially sound, such as a below investment grade bond rating or being in default on a bond issue.

Response: The Agency believes that it is essential that a local government demonstrate its financial capability to qualify for the financial test, because a local government must have sufficient financial capacity to be able to obtain the necessary closure and post-closure funds at the time that the funds are needed. Although most local governments are able to pay off their financial obligations over time, conflicting financial demands could cause financially weaker local governments to delay necessary closure and post-closure activities at MSWLF's. Any delay in conducting necessary closure and post-closure activities could jeopardize public health and the environment as well as significantly increase response costs for corrective action at a site. In some cases, such increased costs would ultimately have to be borne by State or federal response authorities.

Comment: Another commenter argued that only local governments with a minimum annual revenue of \$3 million should qualify for the local government financial test.

Response: Although the corporate financial test is only available to corporations with at least \$10 million in annual revenues, the Agency has not adopted a similar minimum size requirement for the local government financial test because local governments, unlike corporations, have taxing authority and are, therefore, less likely to become insolvent. Instead of requiring a minimum size for a local government to qualify for the financial test, the test establishes a maximum amount (43 percent of a local government's total annual revenue) up to which a local government may rely on the test to demonstrate financial assurance in order to ensure that the costs being assured are appropriate in relation to the size of a local government.

a. Bond rating requirement
(§ 258.74(f)(1)(i)(A))

Comment: Some commenters believed that the financial test's reliance on the ratings of bonds issued by a local government may be an inappropriate measure of that local government's financial strength. They argued that general obligation bond ratings are not good indicators of the financial health of the local government that issues the bonds, because the ratings indicate the risk associated with the bonds themselves rather than any risk associated with the financial capability of the issuing local government. They also argued that ratings of other kinds of bonds, such as insured bonds or collateralized bonds, do not reflect the issuing local government's financial condition and, therefore, do not reflect any changes in a local government's financial strength over time.

Other commenters argued that the financial test's bond rating requirement is too restrictive, because it limits the bond ratings allowed to general obligation bond ratings and does not include other forms of rated debt, such as revenue bonds.

Response: Today's rule relies on a local government's general obligation bond ratings as a measure of a local government's financial capability because such bond ratings are based on a comprehensive evaluation of a local government's financial condition (See Comment Response Document, Section 4.1.1 for more detail). Today's rule disallows the use of insured general obligation bond ratings, because the rating of such bonds is based on the financial capability of the insurer and

may not reflect a local government's current financial condition. Today's rule does not allow the use of revenue or collateralized bond ratings as a measure of a local government's financial capability because such bond ratings only reflect the financial risk associated with a particular revenue source or asset and not the general financial health of the local government.

Comment: A commenter argued that the financial test's bond rating requirement should be made more stringent by only considering the ratings of general obligation bonds issued within the previous two years by a local government in an amount equal to the funds necessary for closure and post-closure care.

Response: Today's rule does not impose such additional requirements on qualifying for the financial test: The ratings of outstanding general obligation bonds are updated periodically to reflect a local government's current financial condition. In addition, § 258.74(f)(4) of today's rule already requires proportionality between the amount of costs that can be assured under the financial test and a local government's financial capability by limiting the costs to be assured under the financial test to a maximum of 43 percent of the local government's total annual revenue.

Comment: Several commenters pointed out that many local governments may not have ratings on their general obligation debt because it is not always necessary to obtain a rating to market bonds. They explained that the language of the proposed rule would preclude local governments with unrated general obligation bonds from qualifying for the financial test, because not only would they be unable to satisfy the bond rating requirement but they also would be ineligible to use one of the financial ratios to qualify for the financial test; only local governments with no general obligations bonds, rated or unrated, would be eligible to use the financial ratios to qualify for the financial test.

Response: Sections 258.74(f)(1)(i)(A) and (B) of today's rule clarify that the bond rating requirement only applies to local governments with "rated" outstanding general obligation bonds. This clarification provides local governments that have unrated general obligation bonds, and hence that cannot satisfy the bond rating requirement, the opportunity nevertheless to qualify for the financial test by meeting one of the financial ratio alternatives to the bond rating requirement.

b. Financial ratio alternative to the bond rating requirement (§ 258.74(f)(1)(i)(B))

Comment: Some commenters questioned the appropriateness of the proposed financial ratios. Suggested alternatives include the ratio between the total assessed value of a local government's taxable real estate and the actual amount of real estate taxes collected or the ratio between a local government's total general obligation debt and its taxable real estate. Another commenter suggested that ratios that measure a local government's total debt and pension fund obligations should be added to the proposed financial ratios to provide greater certainty of a local government's financial ability to satisfy its closure and post-closure obligations.

Response: EPA considered these and similar measures of a local government's financial health in the course of developing the local government financial test proposed on December 27, 1993. As discussed in the preamble to the proposed rule (58 FR 68353, 68356), EPA analyzed the different financial ratios and thresholds identified in the literature on local government finances and eliminated them from further consideration if they could not be: (A) Calculated easily from the financial statements of local governments, analyzed based on available data, or used because they were clearly less supported in the financial literature relied upon in this rulemaking (See Bibliography of Financial Sources and References in the Docket) than similar measures; (B) if the relationship between the measure and financial health appeared random; (C) if the measures and associated thresholds could not differentiate among local governments; (D) if the measures were highly sensitive to small changes in the threshold value; or (E) if the measures were highly correlated with other measures already in the test that evaluated the same aspect of local government financial health. From the remaining measures, EPA selected those ratios and thresholds that were best substantiated in the public finance literature.

EPA rejected using the ratio between the total assessed value of a local government's taxable real estate and the actual amount of real estate taxes collected because, although the ratio measures a local government's potential revenue, it does not describe a local government's willingness to use this source of revenue. Similarly, EPA rejected using the ratio between a local government's total general obligation debt and its taxable real estate because, although it provides a measure of a local government's revenue from property

taxes, it does not measure willingness to use this revenue source (See Comment Response Document, Section 4.1.2, for more detail). EPA rejected ratios evaluating pension funds because there was no data to allow the Agency to select an appropriate threshold to indicate when pension funds may be in financial difficulty. Finally, EPA decided that measures evaluating total debt were unnecessary, because the debt service ratio already measures a local government's ratio of annual debt service to total expenditures.

(1) The liquidity ratio
(§ 258.74(f)(1)(i)(B)(1))

Comment: Several commenters questioned the appropriateness of the liquidity ratio incorporated into today's rule, because they believe that a local government's cash balance is a poor indicator of its financial capability.

Response: Although the liquidity ratio, by itself, may not provide a conclusive measure of a local government's financial capability to conduct closure, post-closure care and corrective action at a MSWLF, it does provide a measure of a local government's ability to meet current and unexpected obligations. EPA is concerned that a local government with a cash shortage would have to delay or restrict its services and would, therefore, be unable to conduct any MSWLF closure, post-closure care or corrective action activities when necessary.

Comment: Another commenter suggested that a working capital ratio would be preferable to a liquidity ratio, because liquidity ratios, which are derived from a local government's balance sheet, can be manipulated to reach a particular result.

Response: EPA adopted a liquidity ratio because such a ratio is appropriate for local governments. A working capital ratio is appropriate to evaluate corporations. Today's rule also limits the potential for satisfying a particular financial ratio through the use of inappropriate accounting practices by requiring that a local government's financial statement comply with Generally Accepted Accounting Principles (GAAP).

Comment: Some commenters questioned the appropriateness of the liquidity ratio threshold that requires that a local government maintain a minimum five percent cash balance in its budget in order to satisfy the liquidity ratio. One commenter believed that a five percent cash balance is too low, another that it is too high, and yet another that such a minimum cash balance requirement would require local

governments, which must maintain a balanced budget under state law, to specifically budget a five percent cash balance.

Response: EPA does not believe that it is necessary to require that a local government maintain more than a five percent cash balance, because it is unnecessary that a local government maintain a sufficient cash balance to be able to respond to all of its potential MSWLF closure, post-closure and corrective action obligations at any one time. Instead, as discussed above, the purpose of the liquidity ratio is to ensure that a local government has the financial flexibility to be able to respond to some unexpected obligations in addition to fulfilling its planned or anticipated obligations. Not only should a local government be financially able to meet its planned MSWLF obligations in the face of other unexpected obligations, but it should also be able to respond to immediate and unexpected MSWLF obligations. It is generally accepted in the financial literature (See Bibliography of Financial Sources and References in the Docket) that a five percent cash balance is a sufficient financial "cushion" for local governments to be able to meet both current and unexpected obligations in most situations. On the other hand, EPA does not believe that a minimum five percent cash balance is too high a cash balance for a local government to be able to maintain or that such a requirement would disqualify many local governments from using the financial test to demonstrate financial assurance. EPA's research shows that over 96 percent of all local governments that own or operate MSWLFs maintain such a minimum cash balance and would satisfy the liquidity ratio. EPA also does not expect that local governments, which must maintain a balanced budget under state law, would have to specifically budget a five percent cash balance in order to satisfy the liquidity ratio. As indicated above, EPA's research shows that the vast majority of local governments already maintain enough of their assets in cash and in current investments to pass the liquidity ratio.

Comment: A commenter questions whether the financial test's liquidity ratio is the standard measure of liquidity typically used in financial analyses and whether it provides a meaningful assessment of a local government's fiscal responsibility.

Response: The financial test's liquidity ratio is a standard measure of liquidity employed in financial analyses of municipal governments (See Bibliography of Financial Sources and

References in the Docket). Additionally, as discussed above, liquidity provides an important measure of a local government's ability to meet current and unexpected obligations.

(2) The debt service ratio
(§ 258.74(f)(1)(i)(B)(2))

Comment: Some commenters question the appropriateness and the value of a debt service ratio, on the grounds that it is unclear how such a ratio contributes to an evaluation of a local government's financial capability and that such a ratio would only apply to other than general obligation bond debt (only local governments without general obligations bonds may use the financial ratio alternative).

Response: As discussed in the December 27, 1993 proposal, debt service represents a fixed expense that limits the flexibility of local governments. High debt service significantly reduces the resources available to fund current operating expenses, the flexibility to fund unexpected needs, and the ability to obtain additional loans or issue additional debt. The Agency believes that local governments that are overly burdened by debt service payments may have greater difficulty paying for assured activities in a timely fashion. Standard & Poors, for example, employs the debt service ratio in evaluating and rating municipal bond issues and considers such a ratio to be high, similar to the threshold percentage in today's rule, when it exceeds 20 percent of annual expenditures. Although the debt service ratio would not measure debt service from rated general obligation bonds, it would measure debt service from unrated or insured general obligation bonds, revenue bonds and debt service attributable to other government funds, including special assessment bonds, certificates of participation and bank loans.

(3) The use of borrowed funds ratio
(Proposed § 258.74(f)(1)(i)(B)(2))

Comment: Commenters noted that borrowed funds, especially those received late in the year, are typically not all spent in that year. Even when they will eventually be spent on capital improvements, these unspent borrowed funds will result in failing this ratio.

Response: We agree that this is a problem and found that attempting to define Current Year Long Term Debt Issued to avoid that problem was very complicated. Moreover, the requirement that a local government not have an operating deficit in excess of 5% for each of the last two years also assures that the local government is not

substantially relying on long term debt to pay short term expenses. That is, there is not a large gap between expenses and revenues which must be filled by long term debt. Since this was the purpose of the use of borrowed funds ratio and the use of borrowed funds ratio may have unintended consequences, the Agency decided to drop the use of borrowed funds ratio.

c. Compliance with GAAP
(§ 258.74(f)(1)(ii))

Comment: Three commenters from Nebraska, including the State of Nebraska, argue that requiring local governments to use GAAP would be unnecessarily burdensome, because most Nebraskan local governments use cash basis accounting to prepare their financial statements and that these local governments would have to prepare duplicate financial statements using GAAP to qualify for the financial test.

Response: The Agency believes that it is necessary for local governments to prepare an annual financial report in compliance with GAAP, because the Agency's analysis of the financial test ratios was predicated on ratios derived from financial statements prepared in accordance with GAAP. The use of other forms of accounting could alter the results of the ratios. Indeed, it appears that although Nebraska state law allows local governments to use cash basis accounting to prepare financial statements, it recommends that statements be prepared in accordance with GAAP. Of course, a State could develop its own financial test pursuant to § 258.74(i) which relied on cash flow accounting, subject to approval of its State MSWLF permit program.

d. Operating Deficit Limit
(§ 258.74(f)(1)(iii)(3))

Comment: Commenters noted that the proposal does not define operating deficit, total revenue, or total expenditures.

Response: Today's rule does define these terms at § 258.74(f)(1)(iv) in accordance with definitions included in the Background Document.

Comment: There is an inconsistency between the preamble and the text of the December 27, 1993 proposed rule, which provided that the operating deficit limit applied if a local government experienced a greater than five percent deficit in "each", and in "either", of the past two years.

Response: Today's rule clarifies that the operating deficit limit applies if a local government experiences such a deficit in "each" of the past two years.

2. Public Notice Component
(§ 258.74(f)(2))

In order to ensure that a local government using the test acknowledges the obligations it is seeking to assure and that the community decisionmakers are aware of and agree to the commitment of future local government funds, the proposed rule would require that a local government, in each year that the financial test or guarantee is used, identify assured costs in either its budget or its comprehensive annual financial report. (See Comment Response Document, Section 4.2)

Comment: Several commenters noted that the public notice requirement in the proposed rule was inconsistent with the Governmental Accounting Standards Board (GASB) Statement Number 18, "Accounting for Municipal Solid Waste Landfill Closure and Postclosure Care Costs."

Response: The Agency agrees and has modified the public notice requirement to be consistent with GASB 18. Accordingly, a local government in compliance with GASB Statement Number 18, which requires more information than today's rule, will also meet the public notice requirement of the financial test.

Comment: One commenter stated that it may not be possible to include a notice of corrective action in a Comprehensive Annual Financial Report or annual budget within 120 days after the corrective action remedy has been selected.

Response: The Agency recognizes the difficulty raised by the commenter. Today's rule modifies the public notice requirement in the event that corrective action is necessary. The modification allows a local government to place a letter in an MSWLF's operating record, if it is not possible to include a notice of the corrective action in a Comprehensive Annual Financial Report or annual budget within 120 days after the remedy has been selected.

3. Recordkeeping and Reporting Component (§ 258.74(f)(3))

In order to confirm that the self-implementing requirements of the financial test have been met, the proposed rule would require local governments to document their use of the test by placing four items in the facility operating record: (1) A letter signed by the local government's chief financial officer (CFO), (2) the local government's independently audited year-end financial statements for the latest fiscal year, (3) the auditor's unqualified opinion of the year-end financial statement for the latest fiscal

year, and (4) the special report of the independent certified public accountant or State Agency upon examination of the CFO's letter. 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 local government is no longer able to pass the financial test. (See Comment Response Document, Section 4.3)

Comment: Commenters suggested several clarifications to the recordkeeping and reporting requirements. For example, the proposed rule incorrectly provided that the CFO letter only certify that the local government meet "either" requirement and inadvertently omitted the operating deficit requirement from the certification requirement in the local government certification letter.

Response: Today's rule adopts standard language suggested by the American Institute of Certified Public Accountants to be used in the report of the independent CPA or State Agency verifying the accuracy of the information provided by the local government's chief financial officer pursuant to § 258.74(f)(3)(i)(A) of the rule. Today's rule also clarifies that the local government CFO letter to be placed in a facility's operating record must certify that a local government "both" meets the bond rating/financial ratio requirement and that it prepares its financial statements in conformity with Generally Accepted Accounting Principles and provides that the local government CFO letter must also certify that the local government has not had an operating deficit greater than or equal to five percent in each of the past two years.

Comment: Some commenters believed that 90 days was an insufficient amount of time to update the records and several noted that their States allowed 180 days to obtain audited financial reports.

Response: Today's rule doubles the amount of time allowed to update the records to be maintained in a facility's operating record from 90 to 180 days after the end of a local government's fiscal year. Today's rule, like the proposed rule, continues to require that a local government obtain alternate financial insurance—if a local government determines that it no longer meets the financial test based on the results of the annual records update—within thirty days of the deadline by which a local government must update its records; however, to reflect the additional 90 days provided to local governments to update their records, today's rule also extends the total time

from the end of a local government's fiscal year by which a local government must obtain alternate financial assurance from 120 to 210 days.

4. Calculation Of Costs To Be Assured

Under the proposed rule, a local government would not be able to use the financial test to assure closure, post-closure care, and corrective action costs that exceed 43 percent of the local government's total annual revenue. Additionally, if a local government assures the costs of other environmental obligations through the use of other financial tests, then it could use today's financial test for closure, post-closure care, and corrective action costs only to the extent that its total environmental obligations assured through the use of a financial test do not exceed 43 percent of its total annual revenue. This amount was derived from estimates in the financial literature (See Bibliography of Financial Sources and References in the Docket) that a local government may typically incur additional expenditures up to 5 percent of its current annual budget without unreasonable stress. Discounting a 20 year stream of such payments at 10 percent yields the amount of a bond issue (43 percent of expenditures) that might be handled by a local government using future financial flexibility. (See Comment Response Document, Section 4.4.)

Comment: One commenter argued that the financial test should be made more stringent by disqualifying local governments whose financial assurance obligations are greater than 43 percent of their total annual revenues from using the financial test. If only local governments with financial assurance obligations that are less than 43 percent of the local government's total annual revenue could use the financial test, it would, they argue, better ensure that local governments are financially able to fulfill their closure, post-closure care and corrective action obligations.

Response: The 43 percent threshold limit on a local government's ability to "self-insure" its environmental obligations ensures that a local government's environmental obligations, for which a local government proposes to demonstrate financial assurance on the basis of its financial ability, are not disproportionate to its relative financial capability to fulfill those obligations. EPA has determined that a local government may reasonably be expected to be able to pay the costs of its environmental obligations that it is "self-insuring" at any one time up to 43 percent of its total annual revenues. To the extent that the anticipated costs of

a local government's environmental obligations that are being deferred at any one time were to exceed 43 percent of its total annual revenues, EPA believes that it would be substantially less likely that a local government would be financially able to, in fact, fulfill those obligations at the time that they were to become due. Since EPA believes that a community may safely "self-insure" its environmental obligations up to 43 percent of its total annual revenues, it is not necessary to disqualify a community from using the financial test if its total environmental financial assurance costs are greater than 43 percent of its total annual revenues. In such a case, a community should be able to realize the same cost savings as other communities by self-insuring at least a portion of its environmental obligations and obtaining third-party financial assurance instruments for any costs that exceed the 43 percent threshold. Although a requirement that a community be able to self-insure all of its environmental obligations within the 43 percent threshold would certainly limit the number of communities that could use the financial test and, thereby, guarantee that the necessary funds are available in the future by requiring those communities to obtain third-party financial assurance instruments, such a requirement would disproportionately disqualify smaller local governments, which are the local governments that can least afford the expense of obtaining a third-party financial instrument.

Comment: Other commenters suggested that the 43 percent threshold was either too high or too low thereby making the financial test, respectively, not stringent enough or too stringent.

Response: EPA believes that the 43 percent threshold is appropriate. As discussed in greater detail in the Comment Response Document, Section 4.4, the threshold is based on information contained in the public financial literature (See Bibliography of Financial Sources and References in the Docket) about the percent of total revenues that a local government should be able to devote in the course of a year to meet environmental obligations over a twenty year period and not experience undue financial difficulty.

B. Local Government Guarantee (§ 258.74(h))

Under the proposed rule, a local government could guarantee the costs of closure, post-closure and corrective action associated with a MSWLF owner by another local government or by a private business. The local government guarantor would have to promise to take

responsibility for the obligations of the owner or operator if the owner or operator fails to do so and provide proof that it passes the financial test requirements. (See Comment Response Document, Sections 5.1 and 5.2)

Comment: Some commenters opposed allowing a local government to guarantee the costs of the environmental obligations of other MSWLFs because MSWLF owners and operators are less likely to manage their MSWLFs appropriately if they do not have to pay closure, post-closure or corrective action costs. One commenter was particularly concerned about the potential for abuse inherent in the use of public funds or credit to guarantee the closure, post-closure and corrective action costs of privately-owned MSWLFs and pointed out that such practices are prohibited in many states.

Response: Today's rule maintains the local governments guarantee as proposed and does not restrict its use. As discussed above, EPA believes that a local government that meets the financial, public notice, and recordkeeping and reporting requirements of the financial test will be able to fund the assured MSWLF closure, post-closure care or corrective action obligations in a timely manner. A local government may, of course, only guarantee the closure, post-closure or corrective action costs of another MSWLF owner and operator, if such an arrangement is consistent with state law. Even if a local government guarantee is not precluded by state law, a state may nevertheless disallow the use of the guarantee if it determines that there is the potential for abuse.

Comment: Commenters suggested several clarifications to provisions of the proposed local government guarantee.

Response: Today's rule clarifies that if a guarantee is cancelled, then pursuant to § 258.74(h)(1)(iii) the owner or operator of the MSWLF must obtain alternate financial assurance within 120 days following "the guarantor's notice of cancellation" (not within 120 days following "the close of the guarantor's fiscal year"). Similarly, today's rule clarifies that if the local government guarantor no longer qualifies to use the financial test, then, pursuant to § 258.74(h)(2)(iii), the owner or operator of the MSWLF must obtain alternate financial assurance within 90 days following "the determination that the guarantor no longer meets the requirements of paragraph (f)(1) of this section"; not within 90 days following "the guarantor's notice of cancellation."

C. Discounting of Costs in Calculating Financial Assurance Cost Estimates

The financial assurance requirements under RCRA subtitle D currently 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. In the preamble to the December 27, 1993 proposed rule (58 FR 68353, 68361), EPA solicited comments on whether MSWLF owners and operators should be allowed to use a present value based on a discount rate to estimate certain financial assurance costs. Cost discounting would allow owners and operators to adjust an aggregated cost estimate to reflect the fact that activities are scheduled to occur in the future and to obtain a financial instrument for less than the aggregate costs (i.e. the "present value" of the aggregated costs). (See Comment Response Document, Section 7)

Comment: A number of commenters opposed allowing MSWLF owners and operators to discount financial assurance costs because of their belief that landfill owners and operators often underestimate cost estimates and that the timing of a closure event is uncertain. One commenter suggested that the risks of discounting could be minimized with State oversight if EPA provided specific guidelines.

Response: The Financial Accounting Standards Board (which sets standards for corporate accounting) allows discounting only when costs and timing of closure are certain and then only for an essentially risk free rate, adjusted for inflation. The Agency agrees with commenters that cost estimates are frequently underestimated and that the closure date is usually uncertain because sites may fill up more quickly than expected or they may close because of enforcement actions as a result of rule violations. We also agree with the Financial Accounting Standards Board that discounting is only appropriate when cost estimates and closure dates are certain. For these reasons, the Agency has decided against allowing discounting without State oversight.

Because the Agency recognizes that there are cases where cost estimates are accurate and closure dates are certain, we have decided to allow State Directors to allow discounting for closure, post-closure, and corrective action costs if they believe that cost estimates are accurate and the closure date is certain and where the local government has submitted a finding

from a Registered Professional Engineer that cost estimates are accurate and certifies that there are no known factors which would change the estimated closure date. The State must also determine that the facility is in compliance with all regulations it determines to be applicable and appropriate. Consistent with other elements of this rule, cost estimates must be adjusted annually to reflect inflation and remaining site life. The discount rate used may not be greater than the rate of return for essentially risk free investments, such as 1 year Treasury bills, net of inflation. As noted above, discounting at an essentially risk free rate of return is that allowed by the Financial Accounting Standards Board and was suggested by several commenters. The Government Accounting Standards Board notes that EPA is already allowing for discounting for inflation because it allows annual adjustments of cost estimates for inflation. For this reason the Agency requires that inflation be deducted from an essentially risk free rate of return in calculating a discount rate. The resulting rate allows conservatively invested funds to grow to the needed amount in the time available. (See Comment Response Document, Section 7)

D. Different Financial Tests for Local Government Owners and Operators of MSWLFs and Underground Storage Tanks

The financial test proposed for use by local government owners and operators of MSWLFs under subtitle D of RCRA was different from the previously adopted financial test for use by local government owners and operators of underground storage tanks (USTs) under subtitle I of RCRA. As discussed in the preamble to the December 27, 1993 proposed rule (58 FR 68353, 68362), while EPA generally strives to maintain consistency between programs, EPA believes that there are important policy reasons to use a different test for the two programs. All commenters on this issue agreed with EPA that the financial test for local government owners and operators of USTs would be inappropriate for use by local government owners and operators of MSWLFs. The Agency agrees with commenters and has not allowed the UST test to be used for MSWLF's. (See Comment Response Document, Section 8)

E. Effective Date for Financial Responsibility Requirements for Municipal Solid Waste Landfills

The effective date for financial responsibility requirements for MSWLF's is April 9, 1997 except for small, dry or remote landfills which have until October 9, 1997 to comply (see 60 FR 52337, October 6, 1995). In response to commenters who said that they needed up to 18 months after promulgation of the local government financial test to comply with the financial responsibility requirements for municipal solid waste landfills, the Agency has decided to allow State Directors to waive the financial assurance requirements for up to an additional 12 months as described earlier in section III of this preamble. This would provide the 18 months requested by certain commenters. (See also Comment Response Document, Section 12.5)

V. Economic and Regulatory Impacts

A. Executive Order 12866

Under Executive Order 12866, EPA must determine the economic impact of a rule. The Agency estimates that today's rule will save local government owners and operators of MSWLFs \$105.1 million annually: \$96.6 million attributable to the availability of the local government financial test and \$8.5 million attributable to the availability of the local government guarantee. A complete discussion of the Agency's analysis can be found in the docket for today's rule.

To calculate the cost savings associated with today's rule, the Agency updated the information used to calculate the anticipated cost savings discussed in the December 27, 1993 proposed rule (58 FR 68353, 68363). The Agency updated the 1987 data on the universe of existing MSWLF landfills by accounting for the number of MSWLF landfills that have been closed since then and adjusted accordingly the representative sample of local government owners and operators of MSWLFs used to determine how many local governments would meet the financial ratios of the financial test. The Agency also adjusted the costs of closure and post-closure care for inflation. Based on this updated information, the Agency believes that 91 percent of all local governments that own or operate a MSWLF would be able to use the test for at least some amount of their Subtitle D obligations, while 54 percent of all local governments would be able to use the financial test for all their subtitle D obligations.

Of approximately 3400 landfills in this analysis, 2700 are publicly owned, and of those 1500 (54%) were estimated to be able to use the financial test for all of their Subtitle D obligations. Of the remaining 1200, about half would be able to satisfy the financial test on their own and with the guarantee assistance of local governments that also use their landfill. The other half, about 600, would not be able to pass the financial test nor get help with the guarantee and so would need to set up a mechanism for financial assurance. EPA estimated that the cost to these landfills to obtain letters of credit is about \$18.1 million per year (1.5% annual administrative cost for letters of credit "times" the closure and post-closure costs for these landfills of about \$1.2 billion). These landfills could also assure by establishing trust funds, entailing the costs of the funds set aside, the opportunity cost of the funds, and trust fund administrative costs. EPA believes that the cost if all chose to establish trust funds would be similar to the cost of using a letter of credit. Of these 600 or so landfills, 520 are owned by local governments with populations of 10,000 or less.

Today's rule will not result in an adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

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. Today's rule adds a local government financial test and local government guarantee as two additional mechanisms that can be used to demonstrate financial responsibility for environmental obligations. Entities able to use these mechanisms will be allowed to demonstrate financial responsibility for their environmental obligations without incurring the costs of obtaining a third-party mechanism. The Agency has allowed local governments of any size to use up to 43% of their revenues to assure environmental obligations if they pass the financial test. This contrasts with suggestions from some commenters that a minimum size requirement should be

part of the test. Because this rule is deregulatory in nature, I certify pursuant to 5 U.S.C. 605b, 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, including 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 financial assurance provisions included the burden associated with obtaining and maintaining any one of the allowable financial assurance instruments, including a financial test.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising

small governments on compliance with the regulatory requirements.

Today's rule is not subject to the requirements of sections 202, 203 and 205 of the UMRA. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. On the contrary, as described above, the Agency estimates that today's rule will save local government owners and operators of MSWLFs \$105.1 million annually by allowing local governments to use a financial test or a local government guarantee to demonstrate financial responsibility for environmental obligations without incurring the costs of obtaining a third-party mechanism. Although today's rule is specifically intended to "significantly or uniquely affect small governments," the Agency does not believe that today's rule is subject to section 203 of the UMRA to the extent today's rule provides regulatory flexibility for local governments and does not to impose additional regulatory requirements. Indeed, today's rule is being promulgated in response to a long standing request by local governments after substantial input from such local governments into the rule's development.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 258

Environmental protection, Closure, Corrective action, Financial assurance, Waste treatment and disposal, Water pollution control.

Dated: November 15, 1996.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is 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 6949a(c); 33 U.S.C. 1345(d) and 1345(e).

2. Section 258.70 is amended by adding paragraph (c) to read as follows:

§ 258.70 Applicability and effective date.

* * * * *

(c) The Director of an approved State may waive the requirements of this section for up to one year until April 9, 1998 for good cause if an owner or operator demonstrates to the Director's satisfaction that the April 9, 1997 effective date for the requirements of this section does not provide sufficient time to comply with these requirements and that such a waiver will not adversely affect human health and the environment.

3. Section 258.74 is amended by adding text to paragraphs (f) and (h) and by revising paragraph (k) to read as follows:

§ 258.74 Allowable mechanisms.

* * * * *

(f) *Local government financial test.* An owner or operator that satisfies the requirements of paragraphs (f)(1) through (3) of this section may demonstrate financial assurance up to the amount specified in paragraph (f)(4) of this section:

(1) *Financial component.* (i) The owner or operator must satisfy paragraph (f)(1)(i)(A) or (B) of this section as applicable:

(A) If the owner or operator has outstanding, rated, general obligation bonds that are not secured by insurance, a letter of credit, or other collateral or guarantee, it must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such general obligation bonds; or

(B) The owner or operator must satisfy each of the following financial ratios based on the owner or operator's most recent audited annual financial statement:

(1) A ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05; and

(2) A ratio of annual debt service to total expenditures less than or equal to 0.20.

(ii) The owner or operator must prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments and have its financial statements audited by an independent certified public accountant (or appropriate State agency).

(iii) A local government is not eligible to assure its obligations under § 258.74(f) if it:

(A) Is currently in default on any outstanding general obligation bonds; or

(B) Has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's; or

(C) Operated at a deficit equal to five percent or more of total annual revenue in each of the past two fiscal years; or

(D) Receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate State agency) auditing its financial statement as required under paragraph (f)(1)(ii) of this section. However, 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 the qualification insufficient to warrant disallowance of use of the test.

(iv) The following terms used in this paragraph are defined as follows:

(A) *Deficit* equals total annual revenues minus total annual expenditures;

(B) *Total revenues* include revenues from all taxes and fees but does not include the proceeds from borrowing or asset sales, excluding revenue from funds managed by local government on behalf of a specific third party;

(C) *Total expenditures* include all expenditures excluding capital outlays and debt repayment;

(D) *Cash plus marketable securities* is all the cash plus marketable securities held by the local government on the last day of a fiscal year, excluding cash and marketable securities designated to satisfy past obligations such as pensions; and

(E) *Debt service* is the amount of principal and interest due on a loan in a given time period, typically the current year.

(2) *Public notice component.* The local government owner or operator must place a reference to the closure and post-closure care costs assured through the financial test into its next comprehensive annual financial report (CAFR) after the effective date of this section or prior to the initial receipt of waste at the facility, whichever is later. Disclosure must include the nature and source of closure and post-closure care requirements, the reported liability at the balance sheet date, the estimated total closure and post-closure care cost remaining to be recognized, the percentage of landfill capacity used to date, and the estimated landfill life in years. A reference to corrective action costs must be placed in the CAFR not later than 120 days after the corrective action remedy has been selected in accordance with the requirements of

§ 258.58. For the first year the financial test is used to assure costs at a particular facility, the reference may instead be placed in the operating record until issuance of the next available CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget. For closure and post-closure costs, conformance with Government Accounting Standards Board Statement 18 assures compliance with this public notice component.

(3) *Recordkeeping and reporting requirements.* (i) The local government owner or operator must place the following items in the facility's operating record:

(A) A letter signed by the local government's chief financial officer that:

(1) Lists all the current cost estimates covered by a financial test, as described in paragraph (f)(4) of this section;

(2) Provides evidence and certifies that the local government meets the conditions of paragraphs (f)(1)(i), (f)(1)(ii), and (f)(1)(iii) of this section; and

(3) Certifies that the local government meets the conditions of paragraphs (f)(2) and (f)(4) of this section.

(B) The local government's independently audited year-end financial statements for the latest fiscal year (except for local governments where audits are required every two years where unaudited statements may be used in years when audits are not required), including the unqualified opinion of the auditor who must be an independent, certified public accountant or an appropriate State agency that conducts equivalent comprehensive audits;

(C) A report to the local government from the local government's independent certified public accountant (CPA) or the appropriate State agency based on performing an agreed upon procedures engagement relative to the financial ratios required by paragraph (f)(1)(i)(B) of this section, if applicable, and the requirements of paragraphs (f)(1)(ii) and (f)(1)(iii) (C) and (D) of this section. The CPA or State agency's report should state the procedures performed and the CPA or State agency's findings; and

(D) A copy of the comprehensive annual financial report (CAFR) used to comply with paragraph (f)(2) of this section or certification that the requirements of General Accounting Standards Board Statement 18 have been met.

(ii) The items required in paragraph (f)(3)(i) of this section must be placed in the facility operating record as follows:

(A) In the case of closure and post-closure care, either before the effective

date of this section, which is April 9, 1997, or prior to the initial receipt of waste at the facility, whichever is later, or

(B) In the case of corrective action, not later than 120 days after the corrective action remedy is selected in accordance with the requirements of § 258.58.

(iii) After the initial placement of the items in the facility's operating record, the local government owner or operator must update the information and place the updated information in the operating record within 180 days following the close of the owner or operator's fiscal year.

(iv) The local government owner or operator is no longer required to meet the requirements of paragraph (f)(3) of this section when:

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

(B) 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).

(v) A local government must satisfy the requirements of the financial test at the close of each fiscal year. If the local government owner or operator no longer meets the requirements of the local government financial test it must, within 210 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, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If the Director of an approved State finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of the local government financial test, the local government must provide alternate financial assurance in accordance with this section.

(4) *Calculation of Costs to be Assured.* The portion of the closure, post-closure, and corrective action costs for which an owner or operator can assure under this paragraph is determined as follows:

(i) If the local government owner or operator does not assure other environmental obligations through a financial test, it may assure closure, post-closure, and corrective action costs

that equal up to 43 percent of the local government's total annual revenue.

(ii) If the local government assures other environmental obligations through a financial test, including those 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, it must add those costs to the closure, post-closure, and corrective action costs it seeks to assure under this paragraph. The total that may be assured must not exceed 43 percent of the local government's total annual revenue.

(iii) The owner or operator must obtain an alternate financial assurance instrument for those costs that exceed the limits set in paragraphs (f)(4) (i) and (ii) of this section.

* * * * *

(h) *Local Government Guarantee.* An owner or operator may demonstrate financial assurance for closure, post-closure, and corrective action, as required by §§ 258.71, 258.72, and 258.73, by obtaining a written guarantee provided by a local government. The guarantor must meet the requirements of the local government financial test in paragraph (f) of this section, and must comply with the terms of a written guarantee.

(1) *Terms of the written guarantee.* The guarantee must be effective 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. 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; or

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

(ii) The guarantee will remain in force unless the guarantor sends 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 following the guarantor's notice of cancellation, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

(2) *Recordkeeping and reporting.* (i) The owner or operator must place a certified copy of the guarantee along with the items required under paragraph (f)(3) of this section into the facility's 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.

(ii) The owner or operator is no longer required to maintain the items specified in paragraph (h)(2) of this section when:

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

(B) 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).

(iii) If a local government guarantor no longer meets the requirements of paragraph (f) of this section, the owner or operator must, within 90 days, 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 obtain alternate financial assurance within that 90-day period, the guarantor must provide that alternate assurance within the next 30 days.

* * * * *

(k) *Use of multiple mechanisms.* An owner or operator may demonstrate financial assurance for closure, post-closure, and corrective action, as required by §§ 258.71, 258.72, and 258.73, by establishing more than one financial mechanism per facility, except that mechanisms guaranteeing performance, rather than payment, may not be combined with other instruments. The mechanisms must be as specified in paragraphs (a), (b), (c), (d), (f), (h), (i), and (j) of this section, except that financial assurance for an amount at least equal to the current cost estimate for closure, post-closure care and/or corrective action may be

provided by a combination of mechanisms, rather than a single mechanism.

* * * * *

4. Section 258.75 is added to subpart G to read as follows:

§ 258.75 Discounting.

The Director of an approved State may allow discounting of closure cost estimates in § 258.71(a), post-closure cost estimates in § 258.72(a), and/or

corrective action costs in § 258.73(a) up to the rate of return for essentially risk free investments, net of inflation, under the following conditions:

(a) The State Director determines that cost estimates are complete and accurate and the owner or operator has submitted a statement from a Registered Professional Engineer so stating;

(b) The State finds the facility in compliance with applicable and appropriate permit conditions;

(c) The State Director determines that the closure date is certain and the owner or operator certifies that there are no foreseeable factors that will change the estimate of site life; and

(d) Discounted cost estimates must be adjusted annually to reflect inflation and years of remaining life.

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