ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123, 264 and 265

[SWH-FRL-2091-8]

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities: Liability Requirements

AGENCY: Environmental Protection Agency.

ACTION: Revised interim final rule.

SUMMARY: The Environmental Protection Agency is today revising regulations of January 12, 1981, on liability coverage requirements for hazardous waste facility owners or operators. Under these requirements, owners or operators must demonstrate liability coverage for bodily injury and property damage to third parties resulting from facility operations. The major revisions are: addition of the option of a financial test as a means of demonstrating liability coverage to satisfy the requirements; addition of the option of submitting a certificate of insurance as evidence of insurance; and changes in the requirements for the endorsement and certificate. In a future document, EPA will propose to delete two provisions of the January 12, 1981 regulations. These provisions are: the procedure to obtain a variance for liability coverage requirements; and the provision allowing an owner or operator to use State assumption of legal responsibility for liability coverage to satisfy the liability requirements. The January 12, 1981, regulations were issued under an accelerated schedule imposed by a court order. The revisions that are being made today are necessary to eliminate unworkable aspects of the previous regulations, improve their effectiveness, and allow reasonable flexibility in satisfying the requirements.

States applying for Phase II interim authorization to carry out State hazardous waste programs in lieu of EPA must include liability requirements substantially equivalent to those of Parts 264 and 265 as a condition of such authorization. EPA is amending its State program authorization requirements to provide that States which have already submitted draft applications for Phase II to EPA and which do not have liability coverage requirements must establish them as quickly as practicable but may in the meantime receive Phase II interim authorization.

DATES: Effective Date for 40 CFR 264.147 and 265.147: July 15, 1982; except for §§ 264.147(a)(1)(i), (b)(1)(i), (b)(5), (c), (d) and (f)(3)–(6); 264.151(g), (i), and (j); and 265.147(a)(1)(i), (b)(1)(i), (b)(5), (c), (d) and (f)(3)–(6), which contain information collection requirements under review by OMB.

Effective date for 40 CFR 123.129: April 16, 1982.

Comment date: EPA will accept public comments on the revised regulation until June 15, 1982.

ADDRESSES: Comments should be sent to Docket Clerk (Docket No. 3004), Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

Public Docket: The public docket for these regulations is located in Room S269-C, U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C., which is open to the public from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

Submissions and Correspondence to the Regional Administrator: All documents and correspondence to be submitted to the Regional Administrator regarding these financial requirements should be marked "Attention: RCRA Financial Requirements" as part of the address.

Copies of Regulations: Single copies of these regulations will be available while the supply lasts from the RCRA Hotline, at the numbers given below.

FOR FURTHER INFORMATION CONTACT: For general information call the RCRA Hotline at (800) 424-9346 (toll-free) or (202) 382-3000 or write to Emily Sano, Desk Officer, State Programs and Resource Recovery Division, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, 401 M St., SW., Washington, D.C. 20460.

For information on implementation of these regulations, contact the EPA regional offices below:

Region I

Gary Gosbee, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203, (617) 223-1591

Region II

Helen S. Beggun, Chief, Grants Administration Branch, 26 Federal Plaza, New York, New York 10007, (212) 264-9860

Region III

Anthony Donatoni, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106, (215) 597-7937

Region IV

Dan Thoman, Residuals Management Branch, 345 Courtland Street, N.E., Atlanta, Georgia 30308, (404) 881-306

Region V

Thomas Golz, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-4023

Region VI

Henry Onsgard, Attention: RCRA Financial Requirements, 1201 Elm Street, First International Building, Dallas, Texas 75270, (214) 767-3274

Region VII

Robert L. Morby, Chief, Hazardous Materials Branch, 324 E. 11th Street, Kansas City, Missouri 64106, (816) 374-3307

Region VIII

Carol Lee, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203, (303) 837-6258

Region IX

Richard Procunier, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105, (415) 974-8165

Region X

Kenneth D. Feigner, Chief, Waste Management Branch, 1200 6th Avenue, Seattle, Washington 98101, (206) 442-1260.

SUPPLEMENTARY INFORMATION:

I. Authority

These regulations are issued under the authority of Sections 1006, 2002(a), 3004, 3005, 3006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6901, 6905, 6912(a), and 6924.

II. Background

Section 3004(6) of RCRA requires EPA to establish financial responsibility standards for owners or operators of hazardous waste management facilities as may be necessary or desirable to protect human health and the environment. On January 12, 1981, EPA promulgated regulations requiring owners or operators to demonstrate liability coverage for bodily injury and property damage to third parties resulting from facility operations. These regulations were promulgated on an accelerated schedule imposed by a court order, *State of Illinois v. Costle,* No. 78-1689 *et al.* (D.D.C., December 18, 1979). On October 1, 1981, EPA deferred the effective date of these regulations and announced its intent to publish a proposal to eliminate the liability requirements (46 FR 48197). The Agency questioned whether these requirements were necessary or desirable to meet the

requirements of RCRA. In response to this announcement EPA received considerable comment from the public, regulated industries, insurance companies, members of Congress, and State agencies. These comments indicated fairly wide-scale support for a Federal liability coverage requirement for hazardous waste management facilities. There was virtually no opposition to such a requirement.

Some commenters stated that the liability requirements are important to assure that funds will be available for third parties seeking compensation for bodily injury and property damage arising from operation of the facilities. They felt that without such requirements, funds might not be available to compensate injured parties for damages, including payment for medical care and environmental restoration.

Other commenters argued that without a Federal liability coverage requirement there would be lessened public confidence in and greater opposition to proposed and existing hazardous waste facilities. They saw the liability requirements as an important factor facilitating the establishment of new and improved hazardous waste facilities.

Commenters also expected liability requirements to result in other potential benefits for public health and the environment. These include the potential for improved design and operation of the facility resulting from the incentive of lower insurance premiums and the oversight that insurers might provide over facility operations.

Based upon these comments the Agency has concluded that the liability requirements, although not "necessary" requirements are viewed by the public and therefore by the Agency as a desirable part of the RCRA regulatory program. Therefore EPA is placing these requirements in effect 90 days from today's date.

The financial responsibility standards promulgated January 12, 1981, included requirements for both liability insurance and for financial assurance for closure and post-closure care. The amendments promulgated today are limited to the liability requirements; amendments to the requirements for financial assurance for closure and post-closure care were issued April 7, 1982 (47 FR 15032–15074).

A. Proposed Rules

Financial responsibility standards for inclusion in Part 264 (standards to be used in issuing permits) and Part 265 (interim status standards for existing facilities awaiting final disposition of permit applications) were first proposed on December 18, 1978 (43 FR 58995, 59006–07). The proposed regulations included requirements for liability coverage as Part 264 permit standards. Insurance, self-insurance, or other evidence of financial responsibility were allowed as means of demonstrating liability coverage. Facilities in interim status were not required to have coverage because it was questionable whether insurance would be made available to facilities without permits.

In its reproposal of financial requirements on May 19, 1980 (45 FR 33260–78), the Agency added a requirement for coverage of sudden accidental occurrences for facilities in interim status. This was done because there was evidence that many owners or operators already possessed liability insurance covering sudden accidental occurrences as part of their comprehensive general liability policies and that other owners or operators should easily be able to obtain such insurance. For nonsudden accidental occurrences, however, availability of coverage still seemed doubtful for facilities without permits.

B. Interim Final Rule of January 12, 1981

Under the liability requirements (§§ 264.147 and 265.147) promulgated January 12, 1981, an owner or operator of a hazardous waste treatment, storage, or disposal facility was required to have liability insurance for sudden accidental occurrences arising from operations of the facilities (minimum amount: $1 million per occurrence, $2 million annual aggregate). If a facility was a surface impoundment, landfill, or land treatment facility, an owner or operator was required to have insurance also for claims resulting from nonsudden accidental occurrences ($3 million per occurrence, $6 million annual aggregate). These requirements applied to both interim status and permitted facilities. Under variance provisions of the regulations, the Regional Administrator could adjust the amounts of coverage required of an owner or operator, and he could require coverage for nonsudden accidental occurrences for facilities other than land disposal facilities, depending on determinations of risk at the particular facilities.

Because availability of insurance for nonsudden accidental occurrences was, and still is, limited (although increasing), the nonsudden accidental coverage requirement was phased in over 3 years. Owners or operators with the largest sales (sales of $10 million or more) were required to have the insurance 6 months after the effective date; those with sales between $5 and $10 million were required to have the insurance a year later, and the remaining owners or operators were required to have it a year after that.

As evidence of insurance coverage, the January 12, 1981, regulation required the owner or operator to submit a copy of the insurance policy to the Regional Administrator. Each policy had to have an endorsement attached which related to the regulatory requirement.

The preamble to the January 12, 1981, regulation stated that EPA was considering whether an owner or operator should be allowed to satisfy the liability requirements by passing a financial test, and requested comments on whether such a provision should be adopted.

C. Effective Date

The effective date for the January 12, 1981, regulations was deferred to April 13, 1982 (notice published October 1, 1981, 46 FR 48197), because the Agency was considering whether to propose withdrawal of the liability requirements and because amendments to the closure and post-closure financial assurance requirements were still in preparation. For reasons stated above, EPA has decided to proceed with liability coverage requirements.

The new effective date for the liability requirements is July 15, 1982. Owners or operators are required to submit evidence of coverage for sudden accidental occurrences by this date. This extension is necessary to allow owners or operators time to review today's revisions in the requirements and arrange to establish evidence of sudden accidental occurrence coverage that conforms to these revised requirements. Under the phase-in schedule for the requirement for nonsudden accidental occurrence coverage, owners or operators with annual sales or revenues of $10 million or more will be required to submit evidence of this coverage by January 16, 1983; those with annual sales or revenues of $5 million to $10 million, by January 16, 1984 and all others by January 16, 1985.

Section 3010(b) of RCRA provides that EPA's hazardous waste regulations and revisions thereto take effect 6 months after promulgation. A primary purpose of the provision is to allow persons affected by the rulemaking sufficient lead time to prepare for compliance with major new regulatory requirements. The Agency has set the effective date of today's revised rule at 3 months rather than 6 months from the date of promulgation because the previous requirements are not substantially

changed except in ways that add greater flexibility and feasibility regarding compliance (i.e., addition of the financial test as a means of satisfying the requirements, the addition of the option of submitting a certificate of insurance as evidence of insurance, and changes in the language of the endorsement to the insurance policy).

III. Revisions and Responses to Comments

Because the January 12, 1981, regulations were promulgated on an accelerated schedule, substantial revisions were necessary. Revisions included in today's regulations are as follows:

- A financial test has been added as a means of demonstrating liability coverage to satisfy the requirements. In order to demonstrate that he meets the financial test, the owner or operator must submit to EPA statements from his chief financial officer and from an independent certified public accountant.
- In order to demonstrate that he has obtained insurance, the owner or operator can submit to EPA a certificate of insurance instead of an endorsement to the insurance policy.
- Changes have been made in the Hazardous Waste Facility Liability Endorsement. Essentially the same language is specified for the new certificate of insurance. The changes are:

Language referring to the extent of an insurer's liability has been revised;

The provisions concerning cancellation of the policy have been revised, but a requirement for 60 days' notice of cancellation to EPA has been retained; and

A requirement that insurers must give EPA at least 30 days's notice of any other termination of the policy, including nonrenewal, has been added.

- Minimum qualifications for insurers whose policies are used to satisfy the requirements have been added and proposals for additional qualifications for insurers have been made.
- A requirement that liability coverage must be maintained until certifications of closure are received by EPA has been added.
- Provisions relating to the phasing in of the requirement for coverage of nonsudden accidental occurrences have been clarified.
- A notification requirement has been added for those owners or operators of surface impoundments, landfills, or land treatment facilities who are not required to obtain coverage of nonsudden accidental occurrences until 18 or 30 months after the effective date.
- A proposal has been made to eliminate two provisions of the January 12, 1981 regulation: the procedure to obtain a variance for liability coverage requirements; and the provision allowing an owner or operator to use State assumption of legal responsibility for liability coverage to satisfy the liability requirements.

The required minimum amounts of coverage are unchanged: for sudden accidental occurrences, $1 million per occurrence with a $2 million annual aggregate; for nonsudden accidental occurrences, $3 million per occurrence with a $6 million annual aggregate. Liability insurance is required on an owner or operator basis rather than a facility basis because the use of an annual aggregate coverage requirement takes into account the risk of multiple occurrences among facilities belonging to one owner or operator.

The changes to the regulations are discussed below, together with the comments received from the public.

A. The Financial Test for Liability Coverage

1. *Proposal of December 1978.* Under the December 18, 1978, proposed regulation, an owner or operator could provide the required liability coverage by self-insuring for an amount not to exceed 10 percent of equity (43 FR 59007). Many commenters recommended that the Agency allow use of self-insurance to satisfy the liability requirements. Some commenters suggested that the Agency should limit self-insurance to percentages of equity other than the 10 percent that was proposed, and others suggested criteria other than a percentage of a firm's equity. Several commenters said that the criteria should parallel those in EPA's financial test for closure and post-closure financial responsibility (§§ 264.143, 264.145, 265.143, and 265.145).

The Agency gave these comments extensive consideration. Based on its analyses the Agency concluded that the 10-percent-of-equity measure was inappropriate for several reasons: the Agency's analysis found that equity amounting to 6 times the amount of liability covered, rather than 10 times, was sufficient; the equity percentage by itself does not measure liquidity; and it does not account for the significantly higher failure rates of smaller owners or operators. The Agency has developed a financial test for liability coverage which is more appropriate than the one that was proposed.

2. *The Financial Test for Liability Coverage as Promulgated Today.* An owner or operator may pass the financial test for liability coverage by demonstrating that he meets either of two sets of criteria.

Alternative I:

(A) Tangible net worth of at least $10 million; and

(B) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(C) Assets in the United States amounting to either: (1) at least 90 percent of total assets, or (2) at least six times the amount of liability coverage to be demonstrated by this test.

Alternative II:

(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; and

(B) Tangible net worth of at least $10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting to either: (1) At least 90 percent of total assets, or (2) at least six times the amount of liability coverage to be demonstrated by this test.

Alternative I was developed for testing owners or operators in manufacturing industries likely to be involved in hazardous waste management. Alternative II allows financially sound owners or operators in industries that typically do not maintain high net working capital (such as electric utilities) to use the financial test. By meeting the test, owners or operators demonstrate that they are capable of using their current assets to pay for damages up to the amounts of annual aggregate coverage required by the regulations. Therefore the public is still afforded reasonable assurance that funds will be available to compensate for damages which might result from the operation of their hazardous waste management facilities. Hence, the main objective of the liability requirements is satisfied. When an owner or operator demonstrates that he passes the test for only a portion of the required amounts of coverage, he must obtain liability insurance for the remainder.

A bond rating is required in Alternative II. An analysis of available data on the performance of the two major bond rating services (Moody's and Standard Poor's) showed that the four highest ratings (investment-grade bonds) demonstrate financial viability at least equal to that indicated by meeting the criteria of the first test option. Other elements are included with the bond rating in the second set of criteria in

order to assure that the owners or operators have adequate assets for the amounts of liability coverage to be demonstrated. The Agency will initially accept bond ratings issued only by Moody's or Standard and Poor's. However, in order to determine whether there are other bond rating services that could also be used, EPA request information establishing how well the ratings assigned by other bondrating services have performed over time.

The Agency analyzed many potential tests for liability coverage in conjunction with its analysis of tests for financial assurance for closure and post-closure care. The analysis of tests for both purposes is presented in detail in background documents for the financial tests, and the differences between the two tests are explained.

3. *Reporting Requirements.* To establish that he meets the financial test for liability coverage, an owner or operator uses the same procedures specified for the financial test to assure funds for closure and post-closure care. As evidence of satisfying the financial test, an owner or operator must submit:

(1) A letter to the Regional Administrator signed by his chief financial officer that includes the required data from the owner's or operator's independently audited, year-end financial statements, and

(2) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that the accountant has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements and, in connection with this procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

If an owner or operator is using the financial test to demonstrate both liability coverage and financial assurance for closure and post-closure care, the same letter from the chief financial officer setting forth the required data must be used for both purposes; the wording of the letter is specified in § 264.151(g).

As in the case of the financial test for closure and post-closure care, if the auditor's opinion that is included in his report on examination of the owner's or operator's financial statements is an adverse opinion or contains a disclaimer of opinion, the owner or operator may not use the financial test to satisfy the financial requirements. An adverse opinion states that the financial statements do not present fairly the financial condition of the owner or operator in conformity with generally accepted accounting principles. A disclaimer of opinion states that the auditor does not express an opinion on the financial statements.

The Regional Administrator may disallow use of the financial test based on other qualifications expressed in the auditor's opinion of the owner's or operator's financial statements. For example, if the Regional Administrator determines that the opinion raises questions as to whether the owner or operator will continue as a "going concern," the financial test will be disallowed. Other qualified opinions will be evaluated on a case-by-case basis. The owner or operator must provide evidence of insurance for the entire required amount of coverage within 30 days after disallowance.

After the initial submission of the letter from the chief financial officer and the accountant's reports, a new letter and new reports for each subsequent fiscal year must be submitted to the Regional Administrator within 90 days after the end of the firm's fiscal year. Alternatively, by the end of this 90 day period the owner or operator must provide evidence of third-party liability insurance coverage to the Regional Administrator.

In some cases the effective date of the regulations may come too soon after the end of an owner's or operator's fiscal year to allow adequate time to prepare the required documents based on data for the just-completed fiscal year. To resolve this problem, the financial test provisions allow a one-time extension if an owner's or operator's fiscal year ends during the 90 days before the effective date and if the owner's or operator's financial statements are being independently audited. The extension may last up to the date 90 days after the end of the fiscal year. To obtain the extension the chief financial officer must send a letter to the Regional Administrator by the effective date of these regulations. In the letter he must request the extension; certify that he has grounds to believe that the owner or operator meets the financial test criteria; identify the facilities to be covered and the amounts of liability coverage to be demonstrated by the test; specify the date when the owner's or operator's fiscal year ended; specify the date no more than 90 days after the end of the fiscal year when he will submit the documents required; and certify that the owner's or operator's year-end financial statements are being independently audited.

4. *Use of Both the Financial Test and Insurance.* The financial test may be applied to satisfy a portion of the required amount of liability coverage. In such cases, the owner or operator must obtain liability insurance for the remainder. This enables the owner or operator to be responsible for the first dollars of liability coverage, which are the most expensive to cover through an insurance policy. Use of such "self-retention", or deductibles, is common practice. The amount of self-retention has a signficant effect on the amount of premium charged. In using the test for part of the required amount of coverage, the owner or operator must use that portion of the annual aggregate amount ($2 million for sudden accidental occurrences and $6 million for nonsudden accidental occurrences), that is not covered by insurance as the base for the multiples in the financial test.

5. *Guarantees by Parent Corporations To Enable Subsidiaries To Satisfy Liability Requirements.* The Agency considered permitting subsidiary corporations to rely on the assets of their parent corporations to demonstrate financial responsibility for the required liability coverage. However, there are major questions concerning the validity and enforceability of such an arrangement, especially as it may be affected by State insurance laws. Therefore guarantees by parent corporations are not included in today's regulations.

B. The Certificate of Insurance

The January 12, 1981, regulation required owners or operators of hazardous waste management facilities to obtain insurance policies containing a Hazardous Waste Facility Liability Endorsement. The purpose of this endorsement, which was to be worded as specified in the regulations, was to demonstrate that the owner or operator had liability insurance coverage required by the regulations.

The Agency received several significant comments in response to the interim final regulation which suggested that a certificate of insurance, like the endorsement, was a reasonable mechanism by which liability coverage could be demonstrated. A certificate is a statement obtained from the insurer certifying that it has issued insurance as described in the certificate. Unlike the endorsement, the certificate is not part of the insurance policy itself. Insurers suggested that the certificate of

insurance would enable them to develop policies and endorsements that serve broader needs of the insured rather than just the need for the insured to comply with the requirements of this regulation. In reviewing the practices of several other Federal agencies, EPA has found that those agencies require various forms of evidence of liability insurance: endorsements; certificates; endorsements *and* certificates; and "insurance forms" which are in effect certificates in that they do not include language that directly amends the policy.

The Agency concluded from its analysis of the issue that the certificate is a reasonable mechanism by which owners or operators can demonstrate liability coverage. Therefore under this revised interim final regulation the owner or operator is allowed the option of submitting a certificate of insurance that has the same provisions as the endorsement to demonstrate liability coverage. As with the endorsement, if a question arises about the adequacy of an owner's or operator's coverage, EPA can obtain and review the insurance policy. In addition the Agency intends to review a sample of policies to confirm their adequacy in satisfying the purpose of the regulation. Under the regulation, owners or operators must provide a copy of the policy to EPA upon request.

Allowing use of a certificate of insurance as evidence of insurance coverage was not part of the January 12, 1981, interim final regulation. However, the Agency believes this option should be available in the revised interim final rule because it provides adequate assurance of coverage and allows additional flexibility.

C. Changes In The Endorsement

This section describes revisions made to the January 12, 1981, endorsement following evaluation of comments. The new certificate of insurance has the same provisions as the endorsement and incorporates the changes described below.

1. *Extent of Coverage.* Some commenters said the wording of the endorsement raised major problems with respect to the extent of coverage required by the regulations. The January 12, 1981, regulations did not completely define the scope, conditions, and terms of coverage. However, the wording of the endorsement required the insurer to certify that the policy to which the endorsement was attached provides liability insurance "to the extent" such coverage was required by EPA's regulations. Commenters argued that since the regulations did not define precisely the extent of coverage required, the insurer was exposed to an uncertain extent of liability. This would, they said, seriously impair the insurance industry's willingness to provide the insurance coverage required by EPA's regulations.

The Agency recognizes the problems cited by the commenters and, in response, has revised the endorsement to read that the insurer certifies that the policy to which the endorsement is attached provides liability insurance "in connection with" an owner's or operator's obligations under EPA's regulations. The Agency did not intend to modify the contractual obligations arising from the insurance policies used to satisfy the liability requirement. This rewording eliminates the problem noted by the commenters.

Other commenters suggested that EPA adopt a set of specific standards for insurance, precisely defining the extent of coverage required for all hazardous waste management facilities. In response, the Agency has adopoted a more specific definition of the extent of coverage required by this regulation. The regulation now defines the bodily injury and property damage coverage required by this regulation to be the meaning given those terms by applicable State law. However, the terms do not include those liabilities which, consistent with standard industry practice, are excluded from coverage in liability policies for bodily injury and property damage. For example, the insurance policy need not cover injuries or damage caused by war, injuries covered by worker's compensation or disability benefits, or intentional injuries. This action not only provides a more precise definition of the extent of coverage required but also establishes a limitation on the exclusions which may be in a policy used to satisfy the liability requirement.

2. *Coverage of Deductibles.* A second major issue raised by commenters regarding the endorsement was its language relating to deductibles. The language was intended to ensure that the insurer would satisfy liabilities from accidents at a hazardous waste management facility on a first-dollar basis. This certification reduces the burden on the Agency of reviewing the level of the deductible in every policy and determining whether the insured is financially capable of paying claims within the deductible. The commenters suggested that this language could be construed to possibly negate normal policy provisions which defined the level and conditions of the risks assumed by the insurer under the policy. After reevaluating the endorsement, the Agency has eliminated wording that those commenters suggested would negate conditions, limitations, and exclusions contained in the policy. However, the owner or operator still must have insurance coverage on a first-dollar basis. The policy may allow reimbursement by the insured for any such payment within the deductible limits. This provision does not apply with respect to the amount of any deductible for which coverage is demonstrated through the financial test for liability coverage.

3. *Cancellation.* The Agency has been concerned that some insurance companies might cancel claims-made insurance policies upon discovery of an accidental occurrence at a policyholder's facility. (Claims-made policies provide coverage only for claims that are filed during the active life of the policy.) That could leave owners or operators without adequate coverage. To remedy this potential problem the January 12, 1981, regulations contained two provisions: (1) A requirement that coverage under a claims-made policy could not be cancelled or terminated for at least 120 days following an accidental occurrence covered by the policy and (2) a requirement that EPA be given 60 days' advance notice prior to any cancellation. The major problem associated with the 120-day requirement, according to the commenters, was that it effectively converted claims-made policies (commonly used for pollution liability insurance) into "occurrence-based" policies. The commenters contended that an insurer could not be certain that its exposure to liability under a claims-made policy would end on the policy's termination date and that if a new accident occurred during the 120-day period, a new period of 120 days could be triggered.

After reexamining the issue, the Agency agrees that the 120-day requirement creates the potential for open-ended liabilities on the part of the insurers. Such coverage would likely be very expensive if available at all. Because this could adversely affect the availability of insurance, the 120-day requirement has been eliminated. However, the requirement for 60 days' notice prior to cancellation has been retained. Even if an insurance company were to cancel its claims-made policy upon learning of an accidental occurrence at its insured's facility, injured parties would still have at least 60 days in which to make claims.

Some commenters urged EPA to allow cancellation upon a 10-day notice for nonpayment of premium, bankruptcy, or

debtor relief proceedings brought by or against an insured, or for failure to comply with applicable rules governing facility operations. The Agency recognizes the interest of insurers in limiting their exposure, but believes that 60 days' notice can be provided by most insurers and is necessary for adequate coverage of claims.

The original endorsement contained a cancellation provision which required that the policy be canceled when the endorsement was canceled. A commenter stated that this could cause cancellation of policy coverages other than those connected with the endorsement. The Agency decided to eliminate the requirement to avoid such cancellation. Under the revised cancellation provisions, the insurer may cancel the policy or only the endorsement after 60 days' notice to the Regional Administrator.

4. *Other Termination.* The Agency added a provision to the endorsement that the insurer agrees to notify the Agency at least 30 days prior to termination of the policy (for reasons other than cancellation). The notice will serve to alert the Regional Administrator of a potential gap in liability coverage.

D. Other Liability Issues

1. *Qualifications of Insurers.* The proposed liability requirements of May 19, 1980 (45 FR 33273), provided that owners or operators must obtain insurance from insurers licensed or eligible to insure in the jurisdiction where any of the owner's or operator's facilities are located. The Agency received comments to the effect that participation of insurers should not be so restricted. The Agency evaluated the issue and at that time concluded that is was preferable to leave out qualifications for insurers in order not to restrict the market and availability of insurance. The January 12, 1981, regulations, therefore, did not include qualifications for insurers. Several commenters on those regulations urged EPA to establish insurer qualifications.

Minimum qualifications would help assure the integrity of insurers whose policies are used by owners or operators to meet the liability requirements. Therefore today's regulations require owners or operators to obtain insurance from insurers licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States. These qualifications will assure that insurers are subject to some regulatory oversight by State insurance departments but will still permit broad participation in providing the insurance.

EPA invites public comment on additional or different qualifications for insurers. Qualifications for insurers have been recommended by the National Association of Insurance Commissioners. The NAIC recommended that the Agency adopt the following requirement:

"The Regional Administrator shall not accept insurance policies as complying with this section unless such policies are underwritten by an insurance institution which:

"(1) Is domiciled in the United States and authorized to transact the business of insurance as an admitted or nonadmitted insurer in the state where the insured facility is located, or

"(2) Is a captive insurer licensed under a state law authorizing the formation and operation of captive insurers, or

"(3) Is an alien insurer in good standing on the Non-Admitted Insurers Quarterly List published by the Non-Admitted Insurers Information Office of the National Association of Insurance Commissioners."

One commenter said that policies issued by "captive" insurance companies, which often provide necessary supplemental liability coverage for large, financially capable companies, should be accepted as conforming with the requirement. Another commenter urged EPA to accept policies issued by captive insurers domiciled outside the United States if the captive has a parent corporation in the United States to assume its liabilities. The qualifications adopted in today's regulation will not exclude captive insurance companies, whether domestic or foreign-based. Under these requirements, captive insurers may qualify by obtaining a license in one of the several States which currently license captive insurers or by becoming eligible or authorized as a surplus lines or excess insurer in States with standards for nonadmitted insurers.

One commenter said that the Agency should permit only those insurers with a rating of at least "A" in *Best's Insurance Reports* and a Best's financial size rating to issue policies used to satisfy the liability requirements.

EPA invites public comment on the qualifications suggested by the NAIC; on whether specific standards for captive insurers should be included; whether ratings by Best's should be used and, if so, what they should be; and any other aspect of qualifications for insurers.

2. *Availability of Insurance for Nonsudden Accidental Occurrences.* Many commenters were concerned that insurance for nonsudden, or gradual, accidental occurrences will either not be available or, if available, be too expensive, especially for smaller firms. As noted above, coverage for nonsudden accidental occurrences poses special problems to the insurance industry because of the magnitude of the potential risks and its lack of experience with those risks. Therefore the regulation provides for a 3-year phase-in period of the requirement for coverage of nonsudden accidental occurrences. Owners or operators with total sales or revenues of $10 million or more in the fiscal year preceding the effective date of the regulations will have to establish the coverage 6 months after the effective date; those with annual sales or revenues over $5 million but less than $10 million must have the coverage 18 months after the effective date; and all others have up to 30 months after the effective date to obtain nonsudden accidental coverage. The purpose of this phase-in is to encourage development of a broad market for such liability insurance by requiring larger firms which can more readily obtain the insurance to comply first. Smaller owners or operators have an additional 1 to 2 years to comply, during which availability of this insurance should increase further.

The insurance market for coverage of nonsudden accidental occurrences has recently responded to increasing demand and there are good indications that this market can be expected to expand considerably in the near-future. After carefully considering this issue, the Agency has concluded that insurance for nonsudden accidental occurrences as required by these regulations will be available in a competitive market. However, this conclusion is based upon an expected expansion in the number of firms providing insurance for nonsudden accidental occurrences. Consequently, EPA will continue to monitor the development of the market to ensure that the requirements of this regulation can be met.

Several details of the phase-in of the required coverage of nonsudden accidental occurrences have been changed or added since the January 12, 1981, regulations. Since some owners or operators may use the term "revenues" rather than "sales" on their income statements, both terms are now used in the regulations. To avoid confusion about whose sales or revenues are to be used when the owner and operator are different parties or if there is more than one owner or operator, the regulation now says the sales or revenues of the owner or operator with the largest sales or revenues in the fiscal year preceding

the effective date of the regulations will determine which of the three dates applies. This is consistent with the policy that the largest owners or operators should be required to have nonsudden coverage first in order to encourage market development. Compliance for a large owner or operator should not be delayed because it is associated with a smaller one. The revised regulations also specify that the total sales or revenues of the owner or operator must be considered, not only sales or revenues from hazardous waste management or particular locations.

The January 12, 1981, regulations did not contain a requirement that the owners or operators of surface impoundments, landfills, and land treatment facilities report to the Regional Administrator when they will be required to obtain coverage for nonsudden accidental occurrences. This information is not only important for monitoring compliance but also for obtaining a more accurate measure of the numbers of owners or operators that will be needing insurance coverage during each phase, in case adjustments need to be made in the phase-in schedule. A provision has therefore been added which requires owners or operators in the second two phases ($5 million to $10 million and "all others") to send a letter to the Regional Administrator, within 6 months of the effective date of this regulation, which states when they intend to obtain the required coverage.

One commenter said that not enough time was allowed for the owners or operators in the first phase to obtain coverage for nonsudden accidental occurrences. The commenter said the problem arises because 3 to 4 months are necessary to conduct engineering and underwriting surveys and because the accepted insurance industry practice is to complete assessments for new risks at least 60 days before the normal January or July renewal dates for many insurance policies. The 9-month period between promulgation of the revised requirements and the date by which the first group must have coverage for nonsudden accidental occurrences should be sufficient time to obtain these policies. As noted earlier, the market for this coverage is expanding. Also, several insurance companies have stated that policies covering nonsudden accidental occurrences are presently being written in only 4 to 8 weeks. Furthermore, a number of owners or operators in the first phase will be able to employ the financial test as a means of demonstrating all or part of the required coverage. The pressure on market capacity will therefore be mitigated by the availability of this alternative mechanism.

One commenter suggested that the phase-in requirement should be reversed because smaller owners or operators are more likely to need insurance policies to be able to adequately cover liabilities. However, in view of the limited availability of the insurance at present and the need to encourage market growth, it would be counter-productive to begin with those who may have the most difficulty in obtaining liability coverage.

3. *Required Amounts of Coverage and Variances.* Some commenters stated the minimum amounts of required coverage were unusually high for government mandated insurance and hence may cause some small owners or operators that are unable to afford the associated premium to close their facilities. Others commented that the $1 million/$2 million minimums for sudden accidental occurrences were too low. Other commenters suggested that the liability coverage be tailored to the degree and duration of risk at a facility and that the required minimum amounts of coverage be the same for sudden and nonsudden accidental coverage because claims for sudden accidental occurrences are not always less than those for nonsudden accidental occurrences.

Selecting the appropriate level of insurance coverage is a difficult task in the absence of actuarial data or experience with a regulated hazardous waste industry. EPA has compiled a record of many of the hazardous waste damage incidents that have occurred around the country. The quality of information on these incidents varies from complete reports of on-site investigations to abbreviated newspaper reports. The data on third-party damages is sparse, but that which is available shows that the coverage requirements of this regulation are adequate.

Despite the lack of significant third party damage awards in the past, a growing number of court suits are being filed and some request damages at levels much higher than those required by these regulations. If any of these suits are successful the potential third party damage costs associated with operating hazardous waste facilities could become much larger than currently available data shows. EPA will continue to monitor this situation and requests data pertaining to changing needs for liability coverage.

The January 12, 1981, regulations included a variance procedure whereby an owner or operator who demonstrated that the required liability coverage was inconsistent with the degree and duration of risks associated with his facility or facilities, could obtain a variance. Also, the Regional Administrator could increase the amounts of required coverage where risks warrant higher levels of coverage than that provided by the owner or operator. The Regional Administrator could also impose requirements for coverage of nonsudden accidental occurrences for facilities that are not surface impoundments, landfills, or land treatment facilities if such facilities were determined to pose risks of nonsudden accidental occurrences.

There was significant public comment on the variance procedures. Most commenters stated that the procedures were inadequate as they were too general and too discretionary. While there was support for the concept of a variance, commenters stated that the regulation should list specific criteria to be used by the Regional Administrator in making such decisions. Commenters said that in the absence of such criteria the variance was arbitrary and could result in inequitable treatment of owners or operators.

The Agency is simply not able at this time to establish specific standards for variances. Risk assessment of hazardous waste management facilities is a fairly new practice for insurers. There is not an extensive body of actuarial data on this subject. At this time it is not possible to establish standard criteria that could be relied on to account for the many diverse factors that need to be considered on a case-by-case basis.

Data is not available that would enable EPA to set forth in a national regulation the relationship between liability coverage requirements and factors such as type of waste, size of operation, method of treatment, storage or disposal, and proximity to population centers and groundwater and surface water supplies.

EPA agrees with the commenters' concerns that the variance procedure in its January 12, 1981, regulation is unworkable. Therefore, in a future document, EPA will propose to delete that procedure from the regulation. EPA will request comments on the proposal at that time and more importantly will request data and information that could be used to establish specific criteria for a workable variance procedure.

In the absence of a variance procedure all owners or operators will have to obtain liability coverage at the levels prescribed in the regulation. However, differences in risk at different

facilities should be reflected in the premiums for insurance policies with lower risk facilities paying less for the required coverage.

4. *Legal defense costs.* In the January 12, 1981, regulations, EPA required owners or operators to obtain liability insurance in specified amounts exclusive of legal defense costs. This was done because allowing defense costs to be included within the policy limits ("defense in limits") might severely restrict the amount of insurance coverage available to compensate third parties. Unusually large legal defense costs could result in a significant erosion in the compensation available. This is a special problem for liability suits arising out of the operation of hazardous waste management facilities, as this is an area opf expanding liability involving potentially complex issues related to causation and damage.

Some commenters objected to the requirement that the liability coverage exclude legal defense costs for several reasons. Some said that excluding legal defense costs is contrary to insurance industry practice. Others said that excluding legal defense costs from liability coverage would force premiums up, and discourage insurers from offering the required coverage. One commenter emphasized that the Agency should allow insurers to issue policies with defense in limits in order to increase the number of insurers willing to issue policies to hazardous waste management facilities. Another commenter suggested that the Agency require owners or operators to obtain insurance policies with liability coverage 25 percent greater than the amounts otherwise applicable in order to cover defense costs, but allow those policies to be written with defense in limits.

At the heart of the issue is the fact that because hazardous waste management facility insurance is a relatively new market with little claims history, it is not possible to estimate with a reasonable degree of certainty the legal defense costs associated with these policies. This is precisely why the current regulations retain the requirement that insurance policy limits exclude legal defense costs. High defense costs can erode the coverage amounts to the point where funds would not be available to pay third party damage costs.

EPA obtained comments from insurers that indicated they would be in a position to write policies which exclude legal defense costs. Others stated that this requirement is consistent with standard comprehensive general liability policies. Some expressed a preference for exclusion of legal defense costs in order to keep these policies consistent with other types of insurance on the market. Therefore the required coverage amounts are exclusive of defense costs.

5. *Period of Required Coverage.* The regulations of January 12, 1981, and the preceding proposals did not specify when an owner or operator was no longer required to assure liability coverage. Coverage in these regulations was for claims "arising from the operations" of facilities, but the period for which coverage was required was not clearly defined. Coverage should extend until closure because closure activities could give rise to an accident at the site. The present regulations therefore require that the owner or operator maintain liability coverage until certifications of closure, as specified in §§ 264.115 and 265.115, are received by the Regional Administrator.

6. *Submission of Policies.* The January 12, 1981, regulation required that owners or operators send copies of insurance policies used to comply with the liability requirements to the Regional Administrator. The purpose of this was to give EPA an opportunity to review the exclusions, terms, and conditions in these policies.

Several commenters pointed out that a review of all insurance policies would impose a substantial burden on the Agency, and requiring submission of policies would be burdensome to insurance companies and to owners or operators. The current regulations only require an owner or operator to submit a policy if requested to do so by EPA. The regulations now state that by the compliance date an owner or operator must only send a signed duplicate original of either the endorsement or certificate of insurance to EPA. The owner or operator must also send the policy at a later date if requested to do so by the Agency. In the endorsement and the certificate the insurer also agrees to submit a copy of the policy and all endorsements to EPA if requested.

7. *Definitions and Usage.* One commenter stated that the definitions of liability and insurance terms in §§ 264.141 and 265.141 are vague and do not correspond to conventional insurance definitions. Hence, this commenter recommended that EPA delete the definitions of these terms from the regulations.

Today's regulations provide general definitions of the coverage required of policies which can be used to satisfy these requirements. New definitions of "bodily injury" and "property damage" have been included to more explicitly define required coverage (see previous discussion on extent of coverage). The other definitions are intended to be consistent with common meanings. This is so stated in the regulations. The Agency will continue to consider specific suggestions on how the definitions can be improved.

Another commenter recommended that the Agency's intended meaning of the term "insurance policy" as used in the regulations should be in accordance with standard industry usage of the term. The regulations are intended to follow standard industry usage.

Another commenter stated that the regulations should not use the term "occurrence" as in "nonsudden accidental occurrence" because it implies that the policy covering the event must be an occurrence-based policy. In using the word "occurrence" the regulations did not intend to limit policies to occurrence-based policies. As indicated by the definition given for "accidental occurrence" in §§ 264.141 and 265.141, the term means "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

8. *Other Provisions of Subpart H Financial Requirements.* The liability coverage requirements are referred to in §§ 264.148 and 265.148 (Incapacity of Owners or Operators, Guarantors, or Financial Institutions), §§ 264,149 and 265.149 (Use of State-Required Mechanisms); and §§ 264.150 and 265.150 (State Assumption of Responsibility). These sections have relevance to the liability requirements as follows:

- Under §§ 264.148 and 265.148, if the insurer for the policy used to satisfy the liability requirements enters bankruptcy or has its authority to issue the policy revoked or suspended, the owner or operator will have to establish alternative liability coverage within 60 days after such an event.
- Under §§ 264.149 and 265.149, for a facility located in a State where EPA is administering the financial requirements but where the State has hazardous waste regulations that include requirements for liability coverage, an owner or operator may use State-required financial mechanisms to satisfy requirements of §§ 264.147 and 265.147 if the Regional Administrator determines that the State mechanisms are at least equivalent to mechanisms specified in these regulations.

Sections 264.150 and 265.150 provide that if a State assumes legal

responsibility for an owner's or operator's compliance with the liability requirements of these regulations or assures that funds will be available from State sources to cover the requirements, such assurances may be used to satisfy the liability requirements of §§ 264.147 or 265.147. EPA is not aware of any instance where this is being done or considered and therefore will propose in a future document to delete this provision as it applies to liability requirements. The Agency will request comments on the proposal at that time.

9. *Relation to CERCLA Provisions.* The Agency received comments on the relation between the liability requirements during operating life under RCRA and post-closure liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96–510 (CERCLA). One commenter pointed out that a 5-year gap in liability coverage may exist after a facility has closed but before the Post Closure Liability Trust Fund to be established under CERCLA assumes liability coverage.

EPA is not requiring liability coverage after closure because the availability of post-closure liability insurance is very limited at this time. The problem of liability coverage during the post-closure period is currently being examined in studies required by CERCLA. The Treasury Department is studying approaches based on private insurance. EPA is studying the adequacy of the Post-Closure Liability Trust Fund as specified in the present provisions of CERCLA.

Another commenter was concerned that the "strict liability" concept in CERCLA might adversely affect the development of an insurance market providing pollution liability coverage. EPA has not observed a specific effect on the pollution insurance market. As noted earlier, the market is currently expanding. This is probably due to a number of factors including anticipation of the RCRA liability requirements, current economic conditions, and demand resulting from increased concern about pollution risks. The CERCLA liability provisions as well as numerous damage incidents have probably contributed to this concern.

IV. Amendment to the State Program Authorization Requirements

A. Amendment to 40 CFR 123.129

Section 3006 of RCRA provides that States with "substantially equivalent" hazardous waste programs can be granted interim authorization to carry out their State programs "in lieu of" the Federal program in those States. Interim authorization is being granted in two phases: Phase I (corresponding to the Federal program promulgated on May 19, 1980) and Phase II (consisting of the procedures and standards for permitting hazardous waste management facilities). See 40 CFR Part 123, Subpart F as amended. 46 FR 8298 (January 26, 1981). Phase II will consist of several components, two of which have been announced to date. Component A covers storage facilities and Component B covers incinerators. EPA will announce a component for land disposal facilities in the future. In its January 26, 1981, notice of the content of Components A and B (46 FR 7964), EPA explained that States applying for Phase II Components A and B authorization must demonstrate substantial equivalence to certain Federal regulations, including the financial requirements in Subpart H of 40 CFR Parts 264 and 265.

On October 1, 1981, EPA announced that it was considering withdrawing the Federal liability insurance requirements and deferred the effective date of those requirements (see 46 FR 48197). Subsequentlly, a few States submitted draft applications to EPA for authorization of Components A and B without liability requirements. Because EPA was considering whether or not to withdraw the Federal liability insurance requirements, EPA informed such States that they could receive interim authorization for Components A and B without State liability insurance requirements. These States have relied on the Agency's representation and are developing final applications for such authorization. Therefore, EPA today is amending 40 CFR 123.129 to allow interim authorization of those States which have submitted draft applications to EPA prior to today's date without State liability requirements. However, such States must commit in their Memorandum of Agreement to adopt State liability coverage requirements substantially equivalent to those in Subpart H of 40 CFR Parts 264 and 265 as quickly as practicable but in no case later than the State's application for an additonal Component of Phase II interim authorization.

The liability coverage requirements are an important part of the assurance provided to the public by the RCRA regulator program. In view of their importance, EPA was reluctant to grant this exemption to any States since the liability requirements would not be in effect within those States. However, requiring those States which relied on the Agency's comments on their draft applications to make statutory or regulatory amendments at this time would cause substantial and unnecessary disruption in the authorization process. For that reason, EPA decided to limit this exemption to those States which have submitted their draft Phase II interim authorization applications to EPA by today's date.

B. Interim Final Promulgation

EPA believes that use of advance notice and comment procedures for the amendment to § 123.129 would be impracticable and contrary to the public interest, and therefore finds that good cause exists for adopting this change in interim final form (see 5 U.S.C 553(b)(B)). Delay in promulgating this amendment could cause significant harm to States which are applying for interim authorization. As noted above, because EPA was considering withdrawing its liability insurance requirements, EPA told a few States that they could receive interim authorization for Components A and B without State liability insurance requirements. Because those States have relied on EPA's statements, the Agency is amending the State authorization requirements to allow them to receive interim authorization in an orderly fashion. If today's amendment to § 123.129 were not promulgated as an interim final rule, those States which have proceeded expeditiously toward obtaining Phase II authorization and which in good faith relied on EPA representations about State program authorization requirements would be severely penalized. They would be forced to make statutory or regulatory amendments prior to receiving Phase II authorization and thus their authorizations could be delayed for many months.

Today's amendment to § 123.129 provides an exception for those States which requires them to adopt liability coverage requirements as quickly as possible, but allows them to receive interim authorization if they meet all of the other requirements of Part 123, Subpart F.

C. Effective Date

Section 3010(b) of RCRA provides that EPA's hazardous waste regulations and revisions thereto take effect six months after their promulgation. In addition, 5 U.S.C. 553(d) of the Administrative Procedure Act requires that substantive rules not become effective until at least 30 days after promulgation. A primary purpose of these requirements is to allow persons affected by the rulemaking sufficient lead time to prepare to comply with major new regulatory requirements. However, for

the amendment promulgated today, the Agency believes that delaying the effective date for any period of time would cause substantial and unnecessary disruption in the implementation of the State authorization process and thus would be contrary to the public interest.

As discussed above in the section on interim final promulgation, today's amendments relieve a restriction on certain States. Thus the affected States do not need lead time to comply with these amendments. Indeed, significant hardship to the affected States could result if the effective date of today's amendments were delayed. Consequently, the Agency finds good cause for making these amendments effective immediately upon promulgation.

V. Executive Order 12291

Executive Order 12291 (46 FR 13193, February 19, 1981) requires that EPA prepare a Regulatory Impact Analysis for each major rule. The Order defines a "major rule" as any regulation that is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or
- Significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

These revised regulations are not "major" in themselves; rather, they are changes to existing regulations that will result in lower costs. Nevertheless, a Regulatory Impact Analysis of these requirements will be performed because they constitute a significant component of the body of RCRA regulations. The final analysis is scheduled to be completed in the spring of 1983, after the Agency determines how it will comply with Executive Order 12291 and publishes that guidance in the **Federal Register.**

Preliminary estimates of costs are as follows:

The annual cost of liability insurance for sudden accidental occurrences is estimated to average $1,500 per site for storage facilities and $3,000 per site for other types of facilities. The average annual cost of liability insurance for nonsudden accidental occurrences is estimated at $16,500 per site for landfills, surface impoundments, and land treatment facilities. These estimates are in pre-tax dollars. Some of the costs of liability insurance will be incurred in the absence of the regulations. For example, many existing facilities already have coverage for sudden accidental occurrences. At least half of total premium payments will go to compensating injured third parties; this portion of the insurance costs may be seen as transfer payments rather than as costs to society.

The annual cost of the financial test is estimated at $75–$100 per facility. This is the cost of preparing the required letter reporting financial data and the cost of the auditor's report. It is assumed that the user of the financial test will have several sites.

Of approximately 11,000 hazardous waste management facilities, about 2,600 are land disposal facilities that will ultimately be required to demonstrate liability coverage for nonsudden accidental occurrences under State or Federal RCRA program.

VI. Paperwork Reduction Act

Under the Federal Reports Act of 1942, as amended by the Paperwork Reduction Act of 1980, the Office of Management and Budget (OMB) reviews reporting requirements in regulations in order to minimize the reporting burden on respondents and the cost to government. EPA submitted an information collection report to OMB in March 1981 covering the financial responsibility mechanisms promulgated as interim final regulations on January 12, 1981.

The revised regulation promulgated today substantially reduces the reporting burden by requiring the owner or operator to submit only the endorsement or certificate of insurance rather than the entire policy. The revised regulation adds a requirement that owners or operators of surface impoundments, landfills, and land treatment facilities who have less than $10 million in sales or revenues must notify the Regional Administrator within 6 months after the effective date (to enable monitoring of the phase-in of the requirement for coverage of nonsudden accidental occurrences). However, this is a requirement for one-time reporting by the owner or operator. Under the Paperwork Reduction Act the information provisions in this rule will be submitted for approval to the Office of Management and Budget (OMB). They are not effective until OMB approves them. A notice of that approval will be published in the **Federal Register.**

VII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), Federal agencies must, in developing regulations, analyze their impact on small entities (small businesses, small government jurisdictions, and small organizations). This requirement applies to Federal regulations proposed after January 1, 1981. Such an analysis will be conducted in conjunction with the Regulatory Impact Analysis.

VIII. Supporting Documents

A background document was prepared for the regulations as promulgated January 12, 1981. The most significant issues raised by commenters on the January 12 regulations are discussed in this preamble. Responses to other comments are presented in a summary that has been included in the docket for these regulations. The financial test for liability coverage is the subject of a separate background document. The background documents are available for review in the EPA regional office libraries and at the EPA headquarters library, Room 2404 Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460.

EPA is also preparing guidance manuals on the financial requirements to assist owners or operators and regulatory officials and will make them available from EPA headquarters and the regional offices.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

List of Subjects in 40 CFR Part 264

Hazardous materials, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds, Waste treatment and disposal.

List of Subjects in 40 CFR Part 265

Hazardous materials, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds, Waste treatment and disposal, Waste supply.

List of Subjects in 40 CFR Part 123

Hazardous materials, Indians—lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control, Water supply, Intergovernmental relations, Penalties, Confidential business information.

Dated: April 9, 1982.

Anne M. Gorsuch,

Administrator.

For the reasons set out in the preamble, Title 40 CFR Parts 264, 265, and 123 are amended as set forth below:

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

Subpart H—Financial Requirements

a. Section 264.141 is revised to read as follows:

§ 264.141 Definitions of terms as used in this subpart.

(a) "Closure plan" means the plan for closure prepared in accordance with the requirements of § 264.112.

(b) "Current closure cost estimate" means the most recent of the estimates prepared in accordance with §§ 264.142 (a), (b), and (c).

(c) "Current post-closure cost estimate" means the most recent of the estimates prepared in accordance with §§ 264.144 (a), (b), and (c).

(d) "Parent corporation" means a corporation which directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a "subsidiary" of the parent corporation.

(e) "Post-closure plan" means the plan for post-closure care prepared in accordance with the requirements of §§ 264.117–264.120.

(f) The following terms are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.

"Assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity.

"Current assets" means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

"Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

"Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

"Liabilities" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

"Net working capital" means current assets minus current liabilities.

"Net worth" means total assets minus total liabilities and is equivalent to owner's equity.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

(g) In the liability insurance requirements the terms "bodily injury" and "property damage" shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practices, are excluded from coverage in liability policies for bodily injury and property damage. The Agency intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

"Accidental occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Legal defense costs" means any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

"Nonsudden accidental occurrence" means an occurrence which takes place over time and involves continuous or repeated exposure.

"Sudden accidental occurrence" means an occurrence which is not continuous or repeated in nature.

b. Section 264.147 is revised to read as follows:

§ 264.147 Liability requirements.

(a) *Coverage for sudden accidental occurrences.* An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 264.151(i). The wording of the certificate of insurance must be identical to the wording specified in § 264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrators if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy. An owner or operator of a new facility must submit the signed duplicate original of the Hazardous Waste Facility Liability Endorsement or the Certificate of Liability Insurance to the Regional Administrator at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The insurance must be effective before this initial receipt of hazardous waste.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test for liability coverage as specified in paragraph (f) of this section.

(3) An owner or operator may demonstrate the required liability coverage through use of both the financial test and insurance as these mechanisms are specified in this section. The amounts of coverage demonstrated must total at least the minimum amounts required by this paragraph.

(b) *Coverage for nonsudden accidental occurrences.* An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for

bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in paragraphs (b)(1), (b)(2), and (b)(3) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 264.151(i). The wording of the certificate of insurance must be identical to the wording specified in § 264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrators if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy. An owner or operator of a new facility must submit the signed duplicate original of the Hazardous Waste Facility Liability Endorsement or the Certificate of Liability Insurance to the Regional Administrator at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal. The insurance must be effective before this initial receipt of hazardous waste.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test for liability coverage as specified in paragraph (f) of this section.

(3) An owner or operator may demonstrate the required liability coverage through use of both the financial test and insurance as these mechanisms are specified in this section. The amounts of coverage must total at least the minimum amounts required by this paragraph.

(4) For existing facilities, the required liability coverage for nonsudden accidental occurrences must be demonstrated by the dates listed below. The total sales or revenues of the owner or operator in all lines of business, in the fiscal year preceding the effective date of these regulations, will determine which of the dates applies. If the owner and operator of a facility are two different parties, or if there is more than one owner or operator, the sales or revenues of the owner or operator with the largest sales or revenues will determine the date by which the coverage must be demonstrated. The dates are as follows:

(i) For an owner or operator with sales or revenues totalling $10 million or more, 6 months after the effective date of these regulations.

(ii) For an owner or operator with sales or revenues greater than $5 million but less than $10 million, 18 months after the effective date of these regulations.

(iii) All other owners or operators, 30 months after the effective date of these regulations.

(c) *Request for variance.* If an owner or operator can demonstrate to the satisfaction of the Regional Administrator that the levels of financial responsibility required by paragraphs (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the owner or operator may obtain a variance from the Regional Administrator. The request for a variance must be submitted to the Regional Administrator as part of the application under § 122.25 of this Chapter for a facility that does not have a permit, or pursuant to the procedures for permit modification under § 124.5 of this Chapter for a facility that has a permit. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The Regional Administrator may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the Regional Administrator to determine a level of financial responsibility other than that required by paragraph (a) or (b) of this section. Any request for a variance for a permitted facility will be treated as a request for a permit modification under §§ 122.15(a)(7)(iii) and § 124.5 of this Chapter.

(d) *Adjustments by the Regional Administrator.* If the Regional Administrator determines that the levels of financial responsibility required by paragraph (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the Regional Administrator may adjust the level of financial responsibility required under paragraph (a) or (b) of this section as may be necessary to protect human health and the environment. This adjusted level will be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the Regional Administrator determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill, or land treatment facility, he may require that an owner or operator of the facility comply with paragraph (b) of this section. An owner or operator must furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator requests to determine whether cause exists for such adjustments of level or type of coverage. Any adjustment of the level or type of coverage for a facility that has a permit will be treated as a permit modification under §§ 122.15(a)(7)(iii) and 124.5 of this Chapter.

(e) *Period of coverage.* An owner or operator must continuously provide liability coverage for a facility as required by this section until certifications of closure of the facility, as specified in § 264.115, are received by the Regional Administrator.

(f) *Financial test for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of paragraph (f)(1)(i) or (f)(1)(ii):

(i) The owner or operator must have:

(A) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) Tangible net worth of at least $10 million; and

(C) Assets in the United States amounting to either: (*1*) at least 90 percent of his total assets; or (*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(ii) The owner or operator must have:

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

(B) Tangible net worth of at least $10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting to either: (*1*) at least 90 percent of his total assets; or (*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase "amount of liability coverage" as used in paragraph (f)(1) of this section refers to the annual aggregate amounts for which coverage is required under paragraphs (a) and (b) of this section.

(3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the Regional Administrator:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 264.151(g). If an owner or operator is using the financial test to demonstrate both assurance for closure or post-closure care, as specified by §§ 264.143(f), 264.145(f), 265.143(e), and 265.145(e), and liability coverage, he must submit the letter specified in § 264.151(g) to cover both forms of financial responsibility; a separate letter as specified in § 264.151(f) is not required.

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

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

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

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) An owner or operator of a new facility must submit the items specified in paragraph (f)(3) of this section to the Regional Administrator at least 60 days before the date on which hazardous waste is first received for treatment, storage, or disposal.

(5) After the initial submission of items specified in paragraph (f)(3) of this section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must obtain insurance for the entire amount of required liability coverage as specified in this section. Evidence of insurance must be submitted to the Regional Administrator within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(7) The Regional Administrator may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (f)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Regional Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this section within 30 days after notification of disallowance.

c. Section 264.151 is amended by revising paragraph (g) and adding paragraphs (i) and (j) to read as follows:

§ 264.151 Wording of the instruments.

* * * * *

(g) A letter from the chief financial officer, as specified in §§ 264.147(f) or 265.147(f) of this chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Letter from Chief Financial Officer (to demonstrate liability coverage or to demonstrate both liability coverage and assurance of closure or post-closure care).

[Address to Regional Administrator of every Region in which facilities for which financial responsibility is to be demonstrated through the financial test are located.]

I am the chief financial officer of [owner's or operator's name and address]. This letter is in support of the use of the financial test to demonstrate financial responsibility for liability coverage [insert "and closure and/or post-closure care" if applicable] as specified in Subpart H of 40 CFR Parts 264 and 265.

[Fill out the following paragraph regarding facilities and liability coverage. For each facility, include its EPA Identification Number, name, and address.]

The owner or operator identified above is the owner or operator of the following facilities for which liability coverage is being demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265: ————.

[If you are using the financial test to demonstrate coverage of both liability and closure and post-closure care, fill in the following four paragraphs regarding facilities and associated closure and post-closure cost estimates. If there are no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its EPA Identification Number, name, address, and current closure and/or post-closure cost estimates. Identify each cost estimate as to whether it is for closure or post-closure care.]

1. The owner or operator identified above owns or operates the following facilities for which financial assurance for closure or post-closure care is demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure cost estimates covered by the test are shown for each facility: ————.

2. The owner or operator identified above guarantees, through the corporate guarantee specified in Subpart H of 40 CFR Parts 264 and 265, the closure and post-closure care of the following facilities owned or operated by its subsidiaries. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility: ————.

3. In States where EPA is not administering the financial requirements of Subpart H of 40 CFR Parts 264 and 265, this owner or operator is demonstrating financial assurance for the closure or post-closure care of the following facilities through the use of a test equivalent or substantially equivalent to the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure cost estimates covered by such a test are shown for each facility: ————.

4. The owner or operator identified above owns or operates the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is *not* demonstrated either to EPA or a State through the financial test or any other financial assurance mechanism specified in Subpart H of 40 CFR Parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility: ————.

This owner or operator [insert "is required" or "is not required"] to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this owner or operator ends on [month, day]. The figures for the following items marked with an asterisk are derived from this owner's or operator's independently audited, year-end financial statements for the latest completed fiscal year, ended [date].

[Fill in part A if you are using the financial test to demonstrate coverage *only* for the liability requirements.]

Part A. Liability Coverage for Accidental Occurrences

[Fill in Alternative I if the criteria of paragraph (f)(1)(i) of §§ 264.147 or 265.147 are used. Fill in Alternative II if the criteria of paragraph (f)(1)(ii) of §§ 264.147 or 265.147 are used.]

ALTERNATIVE I

1. Amount of annual aggregate liability coverage to be demonstrated	$————	
*2. Current assets	$————	
*3. Current liabilities	$————	
4. Net working capital (line 2 minus line 3)	$————	
*5. Tangible net worth	$————	
*6. If less than 90% of assets are located in the U.S., give total U.S. assets	$————	
	YES	NO
7. Is line 5 at least $10 million?	—	—
8. Is line 4 at least 6 times line 1?	—	—
9. Is line 5 at least 6 times line 1?	—	—
*10. Are at least 90% of assets located in the U.S.? If not, complete line 11.	—	—
11. Is line 6 at least 6 times line 1?	—	—

ALTERNATIVE II

1. Amount of annual aggregate liability coverage to be demonstrated	$————	
2. Current bond rating of most recent issuance and name of rating service	$————	
3. Date of issuance of bond	$————	
4. Date of maturity of bond	$————	
*5. Tangible net worth	$————	
*6. Total assets in U.S. (required only if less than 90% of assets are located in the U.S.)	$————	
	YES	NO
7. Is line 5 at least $10 million?	—	—
8. Is line 5 at least 6 times line 1?	—	—
*9. Are at least 90% of assets located in the U.S.? If not, complete line 10.	—	—
10. Is line 6 at least 6 times line 1?	—	—

[Fill in part B if you are using the financial test to demonstrate assurance of both liability coverage *and* closure or post-closure care.]

Part B. Closure or Post-Closure Care and Liability Coverage

[Fill in Alternative I if the criteria of paragraphs (f)(1)(i) of §§ 264.143 or 264.145 and (f)(1)(i) of § 264.147 are used or if the criteria of paragraphs (e)(1)(i) of §§ 265.143 or 265.145 and (f)(1)(i) of § 265.147 are used. Fill in Alternative II if the criteria of paragraphs (f)(1)(ii) of §§ 264.143 or 264.145 and (f)(1)(ii) of § 264.147 are used or if the criteria of paragraphs (e)(1)(ii) of §§ 265.143 or 265.145 and (f)(1)(ii) of § 265.147 are used.]

ALTERNATIVE I

1. Sum of current closure and post-closure cost estimates (total of *all* cost estimates listed above)	$————
2. Amount of annual aggregate liability coverage to be demonstrated	$————
3. Sum of lines 1 and 2	$————
*4. Total liabilities (if any portion of your closure or post-closure cost estimates is included in your total liabilities, you may deduct that portion from this line and add that amount to lines 5 and 6)	$————

ALTERNATIVE I—Continued

*5. Tangible net worth	$————	
*6. Net worth	$————	
*7. Current assets	$————	
*8. Current liabilities	$————	
9. Net working capital (line 7 minus line 8)	$————	
*10. The sum of net income plus depreciation, depletion, and amortization	$————	
*11. Total assets in U.S. (required only if less than 90% of assets are located in the U.S.)	$————	
	YES	NO
12. Is line 5 at least $10 million?	—	—
13. Is line 5 at least 6 times line 3?	—	—
14. Is line 9 at least 6 times line 3?	—	—
*15. Are at least 90% of assets located in the U.S.? If not, complete line 16	—	—
16. Is line 11 at least 6 times line 3?	—	—
17. Is line 4 divided by line 6 less than 2.0?	—	—
18. Is line 10 divided by line 4 greater than 0.1?	—	—
19. Is line 7 divided by line 8 greater than 1.5?	—	—

ALTERNATIVE II

1. Sum or current closure and post-closure cost estimates (total of *all* cost estimates listed above)	$————	
2. Amount of annual aggregate liability coverage to be demonstrated	$————	
3. Sum of lines 1 and 2	$————	
4. Current bond rating of most recent issuance and name of rating service	$————	
5. Date of issuance of bond	$————	
6. Date of maturity of bond	$————	
*7. Tangible net worth (if any portion of the closure or post-closure cost estimates is included in "total liabilities" on your financial statements you may add that portion to this line)	$————	
*8 Total assets in the U.S. (required only if less than 90% of assets are located in the U.S.)	$————	
	YES	NO
9. Is line 7 at least $10 million?	—	—
10. Is line 7 at least 6 times line 3?	—	—
*11. Are at least 90% of assets located in the U.S.? If not, complete line 12	—	—
12. Is line 8 at least 6 times line 3?	—	—

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 264.151(g) as such regulations were constituted on the date shown immediately below.

[Signature]

[Name]

[Title]

[Date]

* * * * *

(i) A hazardous waste facility liability endorsement as required in §§ 264.147 or 265.147 must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Hazardous Waste Facility Liability Endorsement

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering bodily injury and property damage in connection with the insured's obligation to demonstrate financial responsibility under 40 CFR 264.147 or 265.147. The coverage applies at [list EPA Identification Number, name, and address for each facility] for [insert "sudden accidental occurrences," "nonsudden accidental occurrences," or "sudden and nonsudden accidental occurrences"; if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both]. The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's liability], exclusive of legal defense costs.

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

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

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 40 CFR 264.147(f) or 265.147(f).

(c) Whenever requested by a Regional Administrator of the U.S. Environmental Protection Agency (EPA), the Insurer agrees to furnish to the Regional Administrator a signed duplicate original of the policy and all endorsements.

(d) Cancellation of this endorsement, whether by the Insurer or the insured, will be effective only upon written notice and only after the expiration of sixty (60) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

(e) Any other termination of this endorsement will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

Attached to and forming part of policy No. ——— issued by [name of Insurer], herein called the Insurer, of [address of Insurer] to [name of insured] of [address] this — day of ———, 19—. The effective date of said policy is — day of ———, 19—.

I hereby certify that the wording of this endorsement is identical to the wording specified in 40 CFR 264.151(i) as such regulation was constituted on the date first above written, and that the Insurer is

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

[Signature of Authorized Representative of Insurer]
[Type name]
[Title], Authorized Representive of [name of Insurer]
[Address of Representative]

(j) A certificate of liability insurance as required in §§ 264.147 or 265.147 must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Hazardous Waste Facility Certificate of Liability Insurance

1. [Name of Insurer], (the "Insurer"), of [address of Insurer] hereby certifies that it has issued liability insurance covering bodily injury and property damage to [name of insured], (the "insured"), of [address of insured] in connection with the insured's obligation to demonstrate financial responsibility under 40 CFR 264.147 or 265.147. The coverage applies at [list EPA Identification Number, name, and address for each facility] for [insert "sudden accidental occurrences," "nonsudden accidental occurrences," or "sudden and nonsudden accidental occurrences"; if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both]. The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's liability], exclusive of legal defense costs. The coverage is provided under policy number ———, issued on [date]. The effective date of said policy is [date].

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

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

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated as specified in 40 CFR 264.147(f) or 265.147(f).

(c) Whenever requested by a Regional Administrator of the U.S. Environmental Protection Agency (EPA), the Insurer agrees to furnish to the Regional Administrator a signed duplicate original of the policy and all endorsements.

(d) Cancellation of the insurance, whether by the Insurer or the insured, will be effective only upon written notice and only after the expiration of sixty (60) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

(e) Any other termination of the insurance will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is (are) located.

I hereby certify that the wording of this instrument is identical to the wording specified in 40 CFR 264.151(j) as such regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

[Signature of authorized representative of Insurer]
[Type name]
[Title], Authorized Representative of [name of Insurer]
[Address of Representative]

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

Subpart H—Financial Requirements

a. Section 265.141 is revised to read as follows:

§ 265.141 Definitions of terms as used in this subpart.

(a) "Closure plan" means the plan for closure prepared in accordance with the requirements of § 265.112.

(b) "Current closure cost estimate" means the most recent of the estimates prepared in accordance with §§ 265.142 (a), (b), and (c).

(c) "Current post-closure cost estimate" means the most recent of the estimates prepared in accordance with §§ 265.144 (a), (b), and (c).

(d) "Parent corporation" means a corporation which directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a "subsidiary" of the parent corporation.

(e) "Post-closure plan" means the plan for post-closure care prepared in accordance with the requirements of §§ 265.117–265.120.

(f) The following terms are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.

"Assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity.

"Current assets" means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

"Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

"Independently audited' refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

"Liabilities" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

"Net working capital" means current assets minus current liabilities.

"Net worth" means total assets minus total liabilities and is equivalent to owner's equity.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

(g) In the liability insurance requirements the terms "bodily injury" and "property damage" shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practice, are excluded from coverage in liability policies for bodily injury and property damage. The Agency intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

"Accidental occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

"Legal defense costs" means any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

"Nonsudden accidental occurrence" means an occurrence which takes place over time and involves continuous or repeated exposure.

"Sudden accidental occurrence" means an occurrence which is not continuous or repeated in nature.

b. Section 265.147 is revised to read as follows:

§ 265.147 Liability requirements.

(a) *Coverage for sudden accidental occurrences.* By the effective date of these regulations, an owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 264.151(i). The wording of the certificate of insurance must be identical to the wording specified in § 264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrator if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test for liability coverage as specified in paragraph (f) of this section.

(3) An owner or operator may demonstrate the required liability coverage through use of both the financial test and insurance as these mechanisms are specified in this section. The amounts of coverage demonstrated must total at least the minimum amounts required by this paragraph.

(b) *Coverage for nonsudden accidental occurrences.* An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily damage and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in paragraphs (b)(1), (b)(2), and (b)(3) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in § 264.151(i). The wording of the certificate of insurance must be identical to the wording specified in § 264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Regional Administrator, or Regional Administrators if the facilities are located in more than one Region. If requested by a Regional Administrator, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) An owner or operator may meet the requirements of this section by passing a financial test for liability coverage as specified in paragraph (f) of this section.

(3) An owner or operator may demonstrate the required liability coverage through use of both the financial test and insurance as these mechanisms are specified in this section. The amounts of coverage must total at least the minimum amounts required by this paragraph.

(4) The required liability coverage for nonsudden accidental occurrences must be demonstrated by the dates listed below. The total sales or revenues of the owner or operator in all lines of business, in the fiscal year preceding the effective date of these regulations, will determine which of the dates applies. If the owner and operator of a facility are two different parties, or if there is more than one owner or operator, the sales or revenues of the owner or operator with the largest sales or revenues will determine the date by which the coverage must be demonstrated. The dates are as follows:

(i) For an owner or operator with sales or revenues totalling $10 million or more, 6 months after the effective date of these regulations.

(ii) For an owner or operator with sales or revenues greater than $5 million but less than $10 million, 18 months after the effective date of these regulations.

(iii) All other owners or operators, 30 months after the effective date of these regulations.

(5) By the date 6 months after the effective date of these regulations an owner or operator who is within either of the last two categories (paragraphs (b)(4)(ii) or (b)(4)(iii) of this section) must, unless he has demonstrated liability coverage for nonsudden accidental occurrences, send a letter to the Regional Administrator stating the date by which he plans to establish such coverage.

(c) *Request for variance.* If an owner or operator can demonstrate to the satisfaction of the Regional Administrator that the levels of financial responsibility required by paragraphs (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the owner or operator may obtain a variance from the Regional Administrator. The request for a variance must be submitted in writing to the Regional Administrator. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The Regional Administrator may require an owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the Regional Administrator to determine a level of financial responsibility other than that required by paragraphs (a) or (b) of this section. The Regional Administrator will process a variance request as if it were a permit modification request under

§ 122.15(a)(7)(iii) of this Chapter and subject to the procedures of § 124.5 of this Chapter. Notwithstanding any other provision, the Regional Administrator may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of pubic interest in a tentative decision to grant a variance.

(d) *Adjustments by the Regional Administrator.* If the Regional Administrator determines that the levels of financial responsibility required by paragraphs (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the Regional Administrator may adjust the level of financial responsibility required under paragraphs (a) or (b) of this section as may be necessary to protect human health and the environment. This adjusted level will be based on the Regional Administrator's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the Regional Administrator determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill, or land treatment facility, he may require that an owner or operator of the facility comply with paragraph (b) of this section. An owner or operator must furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator requests to determine whether cause exists for such adjustments of level or type of coverage. The Regional Administrator will process an adjustment of the level of required coverage as if it were a permit modification under § 122.15(a)(7)(iii) of this Chapter and subject to the procedures of § 124.5 of this Chapter. Notwithstanding any other provision, the Regional Administrator may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to adjust the level or type of required coverage.

(e) *Period of coverage.* An owner or operator must continuously provide liability coverage for a facility as required by this section until certifications of closure of the facility, as specified in § 265.115, are received by the Regional Administrator.

(f) *Financial test for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of paragraph (f)(1)(i) or (f)(1)(ii):

(i) The owner or operator must have:

(A) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) Tangible net worth of at least $10 million; and

(C) Assets in the United States amounting to either: (*1*) At least 90 percent of his total assets; or (*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(ii) The owner or operator must have:

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

(B) Tangible net worth of at least $10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting to either: (*1*) at least 90 percent of his total assets; or (*2*) at least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase "amount of liability coverage" as used in paragraph (f)(1) of this section refers to the annual aggregate amounts for which coverage is required under paragraphs (a) and (b) of this section.

(3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the Regional Administrator:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in § 264.151(g). If an owner or operator is using the financial test to demonstrate both assurance for closure or post-closure care, as specified by §§ 264.143(f), 264.145(f), 265.143(e), and 265.145(e), *and* liability coverage, he must submit the letter specified in § 264.151(g) to cover both forms of financial responsibility; a separate letter as specified in § 264.151(f) is not required.

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

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

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

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) The owner or operator may obtain a one-time extension of the time allowed for submission of the documents specified in paragraph (f)(3) of this section if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the Regional Administrator of each Region in which the owner's or operator's facilities to be covered by the financial test are located. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA Identification Number, name, address, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these regulations;

(v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (f)(3) of this section; and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (f)(3) of this section, the owner or operator must send updated information to the Regional Administrator within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must obtain

insurance for the entire amount of required liability coverage as specified in this section. Evidence of insurance must be submitted to the Regional Administrator within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(7) The Regional Administrator may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (f)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Regional Administrator will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this section within 30 days after notification of disallowance.

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for Part 123 reads as follows:

Authority: Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300 (f) *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. In § 123.129, paragraph (a) is amended by designating existing paragraph (a) as (a)(1) and adding new paragraphs (a)(2) and (a)(3) to read as follows:

§ 123.129 Additional program requirements for interim authorization for phase II.

(a)(1) * * *

(2) The Administrator may authorize a State program for Phase II Components A or B, or both, even though the State program does not include liability coverage requirements, if (i) the State submitted a draft application for the component or components of Phase II interim authorization to EPA prior to [insert date of publication in the **Federal Register**], and (ii) the State commits in its Memorandum of Agreement to adopt State liability coverage requirements as quickly as practicable, but in no case later than the State's application for an additional component of Phase II interim authorization.

(3) Any State which receives interim authorization for Components A or B or both without liability coverage requirements, pursuant to paragraph (a)(2) of this section, may not receive an additional component of Phase II interim authorization unless it has liability coverage requirements in effect.

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