ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264, 270, and 271

[SW-FRL-3029-6]

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, Financial Assurance for Corrective Action

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to amend the financial responsibility and permitting standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984 (RCRA). Today's proposed rule would implement the statutory requirement in the HSWA for demonstrating financial assurance for the costs of completing corrective actions at facilities seeking a permit. The rule would require owners or operators seeking a RCRA permit to demonstrate financial assurance for completion of any required corrective action for a release to any medium from any solid waste management unit. Acceptable mechanisms include a trust fund, surety bond guaranteeing performance, letter of credit, financial test and corporate guarantee.

The Agency is also soliciting comments today on alternative regulatory schemes for addressing the issue of financial assurance for corrective action.

DATE: EPA will accept written comments on this proposed rule and preamble on or before December 23, 1986.

ADDRESS: Commenters must send an original and two copies of their comments to the EPA RCRA Docket (S-212) (WH-562), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Place the docket # F-86-FACP-FFFFF on your comments. For additional details about the OSW docket, see the **"SUPPLEMENTARY INFORMATION"** section.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline from 9:00 a.m. to 4:30 p.m., Monday-Friday, toll free at (800) 424-9346 or in Washington at (202) 382-3000; or Deborah Wolpe, Office of Solid Waste (WH-562B), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC. 20460, (202) 382-4761.

SUPPLEMENTARY INFORMATION: The public docket for this rulemaking is located at: EPA RCRA Docket (Sub-basement), 401 M Street, SW., Washington, DC. 20460. The docket is open from 9:30 a.m. to 3:30 p.m., Monday through Friday, except for Federal holidays. Call the docket clerk at (202) 475-9327 or (202) 382-4675 for an appointment to review docket materials. The public may copy a maximum of 50 pages of material from any one regulatory docket at no cost. Additional copies cost $.20 per page.

The contents of today's preamble are listed in the following outline:

I. Authority

These regulations are being proposed under the authority of sections 2002(a), 3004 and 3005 of the Solid Waste Disposal Act as amended (42 U.S.C. 6912(a), 6924 and 6925).

II. Background

A. Legislative and Regulatory Overview

The Hazardous and Solid Waste Amendments of 1984 (HSWA) were enacted on November 8, 1984. In section 3004(u) of RCRA section 206 of HSWA), Congress required that all RCRA operating or post-closure permits issued to hazardous waste management facilities after November 8, 1984, provide for corrective action for releases of hazardous wastes or constituents from solid waste management units (SWMUs) located at those facilities. Section 3004(u) also requires that such facilities provide assurances of financial responsibility for the cost of completing the corrective action. Congress enacted this provision because it was concerned that the Agency might issue RCRA permits that did not address all leaking units at facilities. The financial

responsibility requirement of this section was intended to ensure that RCRA permits are not issued to owners and operators of facilities who are financially unable to complete a required cleanup.

On July 15, 1985, EPA promulgated very general regulations that codified the section 3004(u) statutory language requiring corrective action and financial assurance (hereinafter referred to as the *Final Codification Rule*, (see 50 FR 28702, 40 CFR §§ 264.90(a)(2) and 264.101(b))). Today's proposal sets out a detailed set of mechanisms to implement this statutory and regulatory requirement for financial assurance for corrective action. The proposal would allow owners and operators of RCRA permitted hazardous waste management units [1] to satisfy financial assurance for corrective action by use of a trust fund, surety bond guaranteeing performance, letter of credit, financial test or corporate guarantee. The proposal would apply to all types of units, for all known releases to any medium (e.g., air, surface water, ground water). It would require that financial assurance be demonstrated when EPA specifies the appropriate corrective action measures in the permit.

B. Scope of Today's Proposal

1. Limitations of Scope

Today's proposal addresses financial assurance for corrective action of known releases at permitted facilities. This proposal, therefore, affects only a portion of the corrective action problem, and will provide only a part of the funds necessary to accomplish all corrective action required at RCRA facilities.

Facilities not subject to today's proposal include interim status facilities and facilities that have lost interim status, but do not have a permit. For some of these facilities, the Agency may use a section 3008(h) Status Corrective Action Order to obtain the necessary corrective action funds. It is also possible that some of these facilities will be addressed under the Comprehensive Emergency Response, Compensation, and Liability Act of 1980 (CERCLA). RCRA enforcement authority may also be used at permitted facilities subject to today's proposal.

CERCLA enforcement authority may be used to obtain funding from responsible parties in cases where the Agency determines that RCRA authorities cannot ensure adequate funding for corrective action. Finally, subject to CERCLA policies and priorities, the Agency may place RCRA facilities on the Superfund National Priorities List as a means of supplementing private funding for corrective action with Federal funding.

In general, the Agency's goal is to have the responsible parties pay, to the extent possible, for any corrective action. The Agency's goal for this regulation is to maximize the portion of corrective action costs at RCRA facilities provided by responsible parties. We estimate that this proposal would increase the share for corrective action provided by owners and operators by approximately eight percent over what would be provided in the absence of this regulation.[2]

Table 1, located at the end of the "Background" section, presents estimates of the levels of private funding that may be obtained from different regulatory options for today's proposed financial assurance rulemaking. Table 2 presents preliminary estimates of the percentage of total corrective action costs that may be obtained through the use of each of the different permitting and enforcement authorities available to the Agency.

2. Sections 3004(u) and 3004(a) authorities

In addition to the authority under section 3004(u) of RCRA (section 206 of HSWA) which this rule proposes to implement, section 3004(a)(6) of RCRA (section 208 of HSWA) explicitly authorizes EPA to promulgate financial responsibility requirements for corrective action as may be necessary or desirable. Section 3004(a) is not linked to the permitting process nor is it limited to known releases. Section 3004(a) reads as follows: ". . . The Administrator shall promulgate regulations establishing . . . performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste . . . Such standards shall include . . . requirements respecting . . . (6) . . . financial responsibility for corrective action, as may be necessary or desirable;". Consequently, the section 3004(a)(6) authority gives EPA a great deal more discretion in writing regulations than EPA has under section 3004(u). This topic is discussed further in Section F, below.

3. Releases Beyond the Facility Boundary

Section 3004(v) of HSWA requires that the owner or operator institute corrective action beyond the facility boundary where necessary to protect human health and the environment, unless the owner or operator demonstrates to EPA that, despite the owner or operator's best efforts, he is unable to obtain the necessary permission to undertake such action. EPA recently proposed to clarify this requirement by issuing a proposed rule that would extend the financial assurance requirements to corrective action beyond the facility boundary (see 51 FR 10706, at 10714, March 28, 1986). If EPA promulgates that rule, the requirements proposed today will apply to releases that extend beyond facility boundaries.

C. Summary of and Rationale for Today's Proposal

EPA is proposing to use the existing financial assurance for closure and post-closure care requirements as a model for implementing financial assurance for corrective action. EPA and the States have had over five years of experience (since January 12, 1981) in implementing the financial assurance requirements for closure and post-closure care under 40 CFR Part 264 Subpart H. (On January 12, 1981, EPA promulgated financial assurance for closure and post-closure care [see 46 FR 2851]. On April 7, 1982, EPA revised those rules [see 47 FR 15032].) Both regulators and the regulated community have gained an understanding of these regulations and of the available instruments for providing financial assurance. The Agency believes that the use of the existing regulatory framework in Subpart H as a guide for regulatory development will lead to efficiencies in implementing the regulations, saving both time and resources on the part of both permit writers and the regulated community.

In addition, EPA carefully analyzed the mechanisms for financial assurance for closure and post-closure care during the regulatory development process and has received comments on these mechanisms on numerous occasions from the regulated community. The Agency has, in the past, analyzed the use of several mechanisms in addition to those used in the existing Subpart H regulations. Among them are: Escrow agreements, certificates of deposit,

[1] The provision also applies to owners and operators of facilities subject to UIC or NPDES permits-by-rule under 40 CFR 270.60, as discussed in the *Final Codification Rule*. EPA requests comments on any unique issues concerning financial assurance as it relates to these permit-by-rule facilities.

[2] We have assumed that, in the absence of this regulation, permitted facilities would comply with the section 3004(u) financial assurance requirement by using one of the financial assurance mechanisms currently allowed for demonstrating financial assurance for closure and post-closure care of hazardous waste management facilities.

security interests, and pledges of collateral. We are rejecting these mechanisms for financial assurance for corrective action for the same reasons we rejected them for closure and post-closure care, as discussed in the Background Document on Parts 264 and 265 Subpart H (December 31, 1980). We are soliciting comments on whether other mechanisms EPA has not previously considered could be used effectively for financial assurance for corrective action. Any attempt, however, to develop an entirely new financial assurance framework would require substantial additional research for regulatory development and could delay the promulgation of regulations that implement the Congressional mandate.

The Agency proposes to allow owners or operators to demonstrate financial assurance for corrective action of known releases through the following mechanisms: Trust fund; surety bond guaranteeing performance; letter of credit; financial test; or corporate guarantee. The list of allowable mechanisms is the same as that for closure and post-closure care, with the exception of insurance and surety bonds guaranteeing payment into a standby trust fund. As explained in detail later, we are proposing to omit these latter two instruments as mechanisms for assuring corrective action costs. EPA is also proposing two other changes to the current closure and post-closure care financial assurance mechanisms:

(1) To modify, for purposes of assuring corrective action costs, the existing financial assurance trust fund by changing both the length of the pay-in period and the pay-in formula. We are proposing to set the pay-in period for financial assurance for corrective action required in section 3004(u) as the shorter of one-half of the length of the corrective action period of twenty years. The pay-in formula would be structured so that the trust fund is fully funded at the end of the pay-in period. Currently, for a permitted facility, the pay-in period for the closure and post-closure trust fund is the term of the initial RCRA permit or the remaining operating life of the facility, whichever period is shorter. For an interim status facility, the pay-in period is 20 years, beginning with the effective date of the regulations (July 6, 1982), or the remaining operating life, whichever is shorter; and

(2) To change the wording of the existing Subpart H mechanisms to allow their use for financial assurance for corrective action, because the present Subpart H regulations require the owner or operator to word the instruments exactly as specified in the regulations.

The Agency is also proposing that the financial assurance be demonstrated at the time the corrective action measures are specified in the permit (rather than at some point before the actual measures are specified). This may be at the time the permit is issued, or later, as described below.

EPA's 1982 regulations require owners and operators of "regulated units" to correct releases of hazardous constituents to ground water. Section 3004(u) expands the requirement for corrective action to all solid waste management units. The term "solid waste management unit" includes not only "regulated units", but also other hazardous waste units, and units that accepted solid wastes that did not meet EPA's regulatory definition of hazardous waste, but nonetheless contained hazardous constituents.

For regulated units at which ground water contamination has been detected prior to permitting, the corrective action measures, and, therefore, financial assurance, must be specified at the time of permitting. This is because the 1982 regulations already require that owners and operators of these units characterize ground water contamination and submit detailed plans and engineering studies for corrective action prior to permit issuance (40 CFR 270.14(c) through (c)(8)). Although section 3004(u) authorizes the use of schedules of compliance when appropriate to avoid the delay of permit issuance, the current regulations do not allow additional time for investigations and plans for ground water releases from "regulated units". In a separate proposed rulemaking, EPA is considering revising the regulations for "regulated units" to allow owners and operators to submit plans and engineering studies after permit issuance rather than before. If EPA makes this revision, owners and operators would be able to demonstrate financial assurance after permit issuance as described in the next two paragraphs.

Releases from "regulated units" to air, soils, and other environmental media, however, are not subject to the 1982 regulations. Nor are releases to any media (including ground water) from "non-regulated" solid waste management units. In many cases, corrective action for these types of releases may be undertaken after permit issuance through schedules of compliance as provided for in section 3004(u). Therefore, for these units, owners and operators may submit the demonstration of financial assurance after permit issuance.

If a release to any medium from any unit requiring corrective action is identified after the permit is issued, we are proposing that the cost estimate must be completed, and the financial assurance must be demonstrated when the corrective action measures are specified. The permit will then be modified to specify the changes.

Failure to Demonstrate Financial Assurance. If a facility with regulated units requiring corrective action for releases to ground water at the time of permitting fails to demonstrate financial assurance for corrective action in the permit application, EPA will not issue the permit. If the permit has already been issued, and the owner or operator does not make the necessary demonstration once corrective action measures are specified, EPA may either revoke the permit for noncompliance with a permit condition or take other enforcement action.

D. Modifications to Existing Subpart H Regulations

1. Corrective Action Trust Fund

The Agency focused its regulatory development efforts on the design of a modified trust fund for financial assurance for corrective action for known releases. EPA believes that most owners or operators who are unable to pass the financial test, or who are unable to obtain a corporate guarantee, will rely on the trust fund to meet financial assurance requirements for corrective action. Consequently, EPA developed and analyzed several options for trust fund alternatives.

The existing trust fund mechanism under Subpart H needed modification for two reasons: (1) Because the size and duration of corrective action costs are significantly greater than those for closure and post-closure care; and (2) financial assurance for corrective action costs for known releases is a current obligation, whereas the costs of closure and post-closure care are future obligations.

Due to the size and duration of corrective action costs, more stringent financial assurance requirements may induce bankruptcies among facility owners and operators, thus increasing the number of unfunded corrective actions. This would defeat the purpose of the more stringent requirements, which is to assure that all corrective action costs will be paid by owners or operators. Corrective action cost estimates are typically several times larger than closure and/or post-closure

care cost estimates. We expect that corrective actions to ground water may often take up to 50 years and may take as long as 100 years. In contrast, closure activities are normally completed within six months after receiving the final volume of hazardous waste, and post-closure care is usually limited (by 40 CFR 264.117) to thirty years after the date of completing closure (although the Agency may change the period).

In addition, the financial assurance requirements for closure and post-closure care are designed to provide assurance before the beginning of closure or post-closure care; thus, financial assurance is being provided for a future obligation. Corrective action costs for known releases will be incurred concurrently with the costs of providing financial assurance for corrective action. Particularly in the case of small firms unable to use the financial test, the Agency is concerned that the impact of current corrective action costs in addition to financial assurance costs may increase the number of bankruptcies and the amount of unfunded corrective actions.

We are proposing the following modifications to the trust fund formulae in the existing regulations:

(1) The trust fund payment formula is changed from (CE-CV)/Y (where CE is the current cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period) to (BR-CV)/Y (where BR is the balance required at the end of the pay-in period). The new formula requires that only the costs of corrective action expected to be incurred after the end of the pay-in period be used to derive annual payments into the trust fund, whereas the existing formula would require the use of the total remaining corrective action costs expected to be incurred.

(2) The trust fund pay-in period is modified to twenty years or one-half of the corrective action period, whichever is shorter. Currently the pay-in period for the closure and post-closure care trust fund for a permitted facility is defined as the shorter of the remaining initial permit term or the remaining operating life. Neither of these criteria should apply to corrective action. The term of the RCRA permit is too variable to be used as a criterion in the case of financial assurance for corrective action. One facility may have two years left in its permit term when a release is discovered while another may know of a release at the time of permitting. The former facility would have at most two years to fund the trust fund, while the latter may have ten years to fund the trust fund. This is not true in the case of closure, for example, where the obligation to close properly is always known at the beginning of the permit term.

The other factor currently used to determine the pay-in period for closure and post-closure trust funds, the operating life, ignores the fact that these regulations apply to closed facilities with a post-closure permit and no remaining operating life, as well as applying to operating facilities.

Consequently, we rejected both methods for determining the pay-in period. In their place, EPA is proposing a pay-in period of twenty years or one-half of the corrective action period, whichever is shorter. Our analysis suggests that a twenty-year maximum pay-in period would provide greater coverage of corrective action costs by owners and operators than would pay-in periods of greater than or less than twenty years (see the Sept. 26, 1986 Background Document for further discussion of 20-year term). The one-half corrective action period is included to take into account short-term corrective actions. Otherwise, if the corrective action period is less than, or close to, twenty years duration, little or no financial assurance would be provided. By reducing the variability in length of the pay-in period, the Agency also believes it is increasing equity between firms in similar circumstances.

2. Surety Bond Guaranteeing Payment

EPA is not proposing to allow a surety bond guaranteeing payment into a standby trust fund (financial guarantee bond) as a mechanism for demonstrating financial assurance for corrective action for known releases. A financial guarantee bond for closure and post-closure care works as follows: The owner or operator must, before the beginning of final closure or post-closure care, fund a standby trust fund in the final closure or post-closure care amount. The surety only becomes liable on the bond obligation if the principal (owner or operator) fails to fulfill this obligation. The surety must then place the required funds into the standby trust fund. (See 40 CFR 264.151(b)). For closure and post-closure care obligations, this means that the facility may fund the standby trust fund at its own pace, as long as it is fully funded before the beginning of closure or post-closure. A mechanism parallel to this financial guarantee bond for corrective action would require that the owner or operator fully fund a trust fund before undertaking corrective action. Since corrective action for known releases is a current obligation, there is no time to build up a trust fund, as there is for closure and post-closure care. Therefore, the financial guarantee bond would work as follows: The need for corrective action is established at a facility. The facility must then demonstrate financial assurance immediately. If the firm is using a financial guarantee bond, it would obtain the bond, paying the applicable fees, and immediately fully fund the trust fund before beginning the corrective action. We cannot anticipate any situation where such a surety bond would be used, given that the owners or operators could use the corrective action trust fund which may have lower fees associated with it, and which does not require full funding before the corrective action measures begin.

Therefore, we are not proposing use of the financial guarantee bond for assuring the costs of corrective action for known releases. Surety bonds guaranteeing performance, however, will be allowed. Comments are requested on whether and how a financial guarantee bond should be allowed as an acceptable instrument, and whether the current Subpart H performance bond is adequate for financial assurance for corrective action.

3. Insurance

EPA believes that it does not make sense to allow insurance as a mechanism for assuring that funds are available for corrective action for known releases. Such insurance would probably not be available; it is analogous to writing fire insurance for a burning building. The premiums would have to be greater than the actual cost of corrective action in order for the insurance company to profit. Therefore, it will always be more economical for the owner or operator to adopt another mechanism (e.g., trust fund). In addition, until recently EPA was aware of only one company that offered insurance for closure and post-closure care. This company recently stopped offering such insurance, leaving no insurance companies writing insurance for closure and post-closure care.

For these reasons, and in light of the publicized problems of the liability insurance market, the Agency believes it would be futile to allow insurance as a mechanism for financial assurance for corrective action for known releases. The Agency requests comments on whether this mechanism could ever be viable for financial assurance of known releases.

E. EPA Analysis

1. Trust Fund Options

The Agency evaluated the following trust fund options with the goal of assuring that sufficient funds will be available to pay for the corrective action: (a) Use of a fully-funded trust fund; (b) use of the existing Subpart H trust fund; (c) use of a modified Subpart H trust fund; (d) use of a modified Subpart H trust fund with an extended pay-in period of limited duration based on ability to pay; and (e) use of a modified Subpart H trust fund with an unlimited extension of the pay-in period based on ability to pay.

An overview of our analysis of these options, which are listed in decreasing order of stringency, is presented below. EPA encourages comments on the chosen option, the rejected options, the analysis of these options, and any other options that EPA did not address.

(a) *Option 1—Fully funded trust fund: Rejected.* This option would require a facility owner or operator to fund a trust fund fully upon completing the corrective action cost estimate. The required balance would equal the total costs of the corrective action. All other parts of this option are similar to the existing Subpart H rules; however, this option uses a one year pay-in period in all cases.

Although this option appears to be the most stringent in terms of providing financial assurance for completion of corrective action, it actually reduces the amount of financial assurance provided relative to the other options analyzed. This is because the dual burden of concurrently providing assurance for the entire amount of corrective action costs and paying the corrective action costs would increase the likelihood of bankruptcy. There are, therefore, fewer owners and operators who are able to afford the costs of corrective action.

(b) *Baseline—Option 2: Existing Subpart H Trust Fund: Rejected.* As an alternative to full and immediate funding of a trust fund, EPA considered adopting a pay-in period equivalent to that required for closure and post-closure care trust funds at permitted facilities. Under the existing Subpart H regulations, a firm with a permit must fully fund its trust fund within the remaining operating life of the facility or the term of the initial RCRA permit (a maximum of ten years), whichever is shorter.

Because corrective action costs are paid concurrently with trust fund payments, use of the existing trust fund formula for corrective action would be impractical. Unlike the closure and post-closure care trust funds, the required balance for the corrective action trust fund would decline during the pay-in period as the ongoing corrective action is paid for. This could result in the actual trust fund pay-in period (i.e., the time necessary to reach the required balance) being less than the build-up period allowed the owner or operator (as computed by the pay-in period formula). Furthermore, some corrective actions are likely to be of short duration and, if the existing trust fund formula is used, would be completed prior to the end of the scheduled trust fund pay-in period.

(c) *Option 3—Modified Subpart H Trust Fund: Chosen.* In this option, the required trust fund balance must equal the corrective action costs remaining after the end of the pay-in period. It also changes the pay-in period from the shorter of the remaining permit term or operating life, to the shorter of twenty years or one-half of the corrective action period. This option is chosen for today's proposal because it allows a pay-in period that reflects the dual burden of concurrently providing financial assurance and paying the costs of corrective action. It also provides a good balance between flexibility in setting trust fund schedules and assurance of corrective action. In addition, it performed slightly better under the evaluative criteria than did any other option.

For further discussion, see section II.D.1 of this preamble.

(d) *Option 4—Trust Fund with a Pay-in Period Extended Up to 30 Years: Rejected.* Option 4 is similar to option 3, but has a pay-in period of the shorter of 10 years or one-half the corrective action period with a possible extension based on ability to pay, and with a minimum required payment. If an owner or operator is unable to pay the baseline payment (corrective action costs after the pay-in period ends, less the amount currently in the trust fund, divided by the number of years left in the baseline pay-in period), he may apply for an extension to the pay-in period. A firm's ability-to-pay would be determined based on the following formula: Cash flow (i.e., net income plus depreciation, depletion, and amortization) minus one-tenth of total liabilities (CF–0.1(TL)). If the amount calculated is greater than or equal to the baseline payment, the owner or operator would not be eligible for an extenion. If the amount calculated according to this formula is less than the baseline payment, the owner or operator would be eligible for an extension.

The ability-to-pay formula used in the analysis is derived from an indicator (the cash flow to total liabilities ratio) used commonly by financial analysts as a bankruptcy predictor. It also is used in the Agency's financial test calculations, and is similar to the formula that the Agency uses in its enforcement actions (see e.g., Superfund Financial Assessment System Instruction Manual, May 25, 1982).

Under this approach, once it is determined that an owner or operator is eligible for the extended pay-in period, the owner or operator would determine whether the amount calculated by the ability-to-pay formula is sufficient to assure corrective action costs, i.e., whether it is equal to or greater than the minimum payment. EPA considered a minimum payment based on a pay-in period of thirty years or one-half the corrective action period, whichever is less.

A minimum required payment is designed to meet the requirements of the Congressional mandate that financial assurance be provided. Otherwise, an owner or operator could conceivably never make trust fund payments and provide no financial assurance—a possibility clearly at odds with the Congressional intent.

The Agency believes that the extended pay-in period would be used principally by small firms unable to use the financial test and with limited ability to make the baseline trust fund payments. However, EPA rejected this option because it might not be fair to firms not eligible for the extended pay-in period and out of concern that firms may be able to structure their financial statements or corporate organization to qualify for the extension.

(e) *Option 5—Trust Fund with an Extension and Unlimited Pay-in Period: Rejected.* EPA considered using a trust fund that allowed an extension to the pay-in period similar to option 4 above, but offered an indefinite pay-in period, based on the firm's ability-to-pay, to those firms unable to make required trust fund payments. This option was rejected as not providing sufficient financial assurance. Allowing firms an unlimited time to fund their trust funds could often result in situations where no payments at all were made into the trust fund or where the trust fund was perpetually underfunded. We believe that such outcomes are clearly at odds with the Congressional mandate to require "assurances of financial responsibility for completing corrective action." Without a limit on the length of the pay-in period, there would be no assurance that the corrective action would be completed. Consequently, this option has been rejected.

2. Quantitative Analysis

To assess the economic and financial impact of the regulatory options, the Agency used the Financial Assurance for Corrective Action (FACA) model, a large scale simulation model. For a detailed description of the FACA model, see the Background Document dated August 1986. For the quantitative analysis, all FACA options were evaluated on the basis of four criteria: Coverage, cost internalization, social cost, and impact on bankruptcy incidence. Criteria denominated in dollar terms were discounted at 3%. Discount rates of 0% and 10% were also used; for a summary of model results at these discount rates, see the Background Document describing model results, dated September 1986. The results of this analysis are summarized in a table at the end of this section.

Coverage is defined as the present value of dollars available for corrective action during a 100-year period, including costs paid by owners and operators, and costs paid out of trust funds. Today's proposed rule provides coverage roughly equal to that provided by options 4 and 5 (i.e., approximately $300 million greater coverage than would be provided by the existing Subpart H mechanisms).

Cost Internalization represents the percentage of each dollar of required corrective action that the typical owner or operator can expect to pay (in the form of corrective action and financial assurance costs). It is calculated by summing the after-tax cost of corrective action paid by owners and operators and the cost of maintaining financial assurance instruments, and dividing the sum by the total cost of all corrective actions. A full internalization of cost provides market incentives for economically efficient behavior. None of the options analyzed provides a cost internalization ratio that represents a full internalization, on average, of the costs of corrective action (i.e., 54% of the total cost of corrective action, assuming a 46% marginal tax rate). The proposed rule, however, does provide a cost internalization ratio superior to that of option 2 (the existing Subpart H mechanisms). Superior cost internalization ratios are also provided by options 4 and 5.

Social Cost is the dollar value of real resources diverted from other productive uses to the provision of financial assurance. The major social cost component of financial assurance is administrative fees associated with the trust fund. We presume that these fees represent an expenditure of real resources. All else being equal, the preferred option would have the lowest social cost of all the options. The proposed rule does impose the lowest social cost of all the regulatory options, its cost being roughly equal to that of the existing Subpart H mechanisms.

Bankruptcy incidence is defined as the number of expected bankruptcies of owners of hazardous waste TSD facilities associated with each regulatory option. The chart at the end of this section reports the number of bankruptcies expected over a twenty-five year period for each option in excess of those expected for option 2 (the existing Subpart H mechanisms). These bankruptcy figures are from a simulated population of 1,911 firms. Thus, the 28 incremental expected bankruptcies simulated in option 1 represent approximately 1.5% of the total population of firms used in the simulation. All else being equal, the preferred regulatory option would have the lowest bankruptcy incidence of all the options.

Limitations of the FACA Model. EPA excluded from the FACA model three factors that we expect may have a significant impact on the evaluation criteria. We believe that the omission of these factors, while not affecting all the trust fund options similarly, is not important enough to affect materially the performance of any option relative to that of the other options. Therefore, in order to eliminate any unnecessary costs of or complexities in the modeling effort, EPA did not consider explicitly the factors noted below.

In general, economic effects are not simulated. There is no provision for firms responding to the costs of corrective action or of financial assurance by passing some of these costs on to others (e.g., to consumers). A related omission concerns the simulated replacement of waste management capacity, and entry of new firms into the RCRA-regulated universe. Presumably, simulation of entry and capacity replacement would increase the aggregate cost of corrective action (and financial assurance), but it would not change significantly the relative performance of the options.

In addition to omitting economic effects, the FACA model simplifies the response of firms to costs that are beyond the firm's "ability to pay." EPA assumed that firms without the ability to pay the costs of corrective action and financial assurance declare bankruptcy. In reality, there are several steps that firms might take before declaring bankruptcy (e.g., selling assets, cutting payroll, discontinuing some operations, etc.). Furthermore, it is assumed implicitly in the FACA model that all bankruptcies are liquidations, and that the bankrupt firms no longer retain responsibility for completing corrective action. Thus the model almost certainly overstates the number of expected bankruptcies and the amount of corrective action cost not addressed by owners and operators.

Finally, it is assumed in the FACA model that the trust fund and the financial test are the only available financial assurance mechanisms, whereas we expect that some owners or operators will use letters of credit or surety bonds. Since all the options analyzed allow the use of letters of credit and surety bonds, the inclusion of these mechanisms in the simulation would have an almost identical effect on all the options. Letters of credit and surety bonds do not require that owners or operators set funds aside; thus they impose fewer costs than does a trust fund. By excluding these mechanisms from the simulation, we overstate both the cost of financial assurance to owners and operators and the incidence of bankruptcy, and we understate the degree to which owners and operators will "cover" the cost of corrective action.

These omissions should not affect substantially the performance of any option relative to that of the other options. By themselves, however, the results of individual options almost certainly underestimate total corrective action costs and the percentage of these costs paid by owners and operators. Thus, one should be cautious in interpreting the model results as an absolute estimate of expected corrective aciton costs and their effects on owners and operators. For a fuller discussion of model limitations, refer to the September 1986 Background Document.

TABLE 1.—SUMMARY OF RESULTS OF QUANTITATIVE ANALYSIS

Option	Total cleanup cost ($mill.)	Coverage ($mill.)	Cost internalization ratio	Social cost[1] ($mill.)	Bankruptcy incidence[2]
1. Upfront Trust Fund	14,830	10,598	0.45	10	28
2. Existing Subpart H	14,734	10,800	.45		
3. Modified Trust Fund	14,633	11,086	.46	(2)	(42)
4. Modified w/limited extension	14,635	11,091	.48	30	(42)
5. Modified w/unlimited extension	14,635	11,097	.48	40	(42)

TABLE 1.—SUMMARY OF RESULTS OF QUANTITATIVE ANALYSIS—Continued

Option	Total cleanup cost ($mill.)	Coverage ($mill.)	Cost internalization ratio	Social cost[1] ($mill.)	Bankruptcy incidence[2]
No financial assurance	14,630	10,927	.40	(138)	(57)

[1] Reported as the incremental social cost relative to the existing Subpart H financial assurance mechanisms (for closure and post-closure care) (i.e., option 2).
[2] Reported as changes in the expected number of bankruptcies during the first 25 years of the simulation, relative to the existing Subpart H mechanisms. The total number of firms in the simulation from which these expected bankruptcy figures are drawn is 1911.
Numbers in parentheses represent decreases rather than increases. Dollar figures are discounted at 3%.

TABLE 2.—TOTAL CORRECTIVE ACTION COSTS OBTAINED THROUGH USE OF DIFFERENT STATUTORY AUTHORITIES

Legal authority	Who pays?	Percent obtained through different authorities—	
		With today's proposal	Without any financial assurance requirement
Technical and financial permitting standards	Owners/operators of permitted facilities	44	42
RCRA and CERCLA enforcement	Owners/operators of non-permitted facilities	25	24
Federal and state superfunds plus unfunded portion.	Federal and state superfunds or unfunded	31	34
All authorities plus unfunded	All sources plus unfunded	100	100

These results were produced from the Financial Assurance for Corrective Action (FACA) Model. The results in this table are based on *undiscounted* dollar flows, thus they may differ slightly from the results one can infer from Table 1. See the September 1986 Background Document for a discussion of model results and limitations.

F. Sections 3004(a) and 3004(u) Authorities

Congress enacted the financial assurance requirement of section 3004(u) to correct the potential problem of EPA issuing RCRA permits to owners or operators who are financially incapable of completing any necessary corrective actions at their facility. Although the option chosen today provides a better balance between the costs and benefits of financial assurance than do the other options analyzed, EPA's analysis indicates that a substantial amount of required corrective actions at both permitted and unpermitted facilities will remain unaddressed by owners or operators. Congress designed section 3004(a) to correct this broader problem of unaddressed corrective actions at both permitted and unpermitted facilities. Under section 3004(a), EPA can develop regulations that will ensure that the maximum amount of corrective action costs are paid through a combination of the owner or operator's assets and financial assurance mechanisms.

The Agency has chosen to proceed at this time with section 3004(u) alone rather than to combine the sections 3004(u) and 3004(a) authorities to provide a more comprehensive financial responsibility regulation. By statue, the requirement for financial assurance of known releases under section 3004(u) became effective on November 8, 1984. Regions and States currently have the discretion to decide whether a facility's proposed financial assurance satisfies the statutory requirements. Without today's rule, the Regions and States would have the burden of reviewing every demonstration of financial assurance on a case-by-case basis. The result could be different applications of the requirement in different Regions and States. The Regions and States may use the existing Subpart H regulations for closure and post-closure care as guidelines. The existing regulations, however, are not designed to address financial assurance for corrective action, and are less suitable to such assurance than the rules proposed today, as discussed earlier in Section II.D.

The following sections discuss the differences between sections 3004(u) and 3004(a). Although EPA has decided to proceed with section 3004(u) alone, this proposal does not preclude an integrated rule at a later date.

Universe

Section 3004(u) is aimed at facilities with known releases both from regulated units and from other solid waste management units (SWMUs) at facilities whose permits were issued after November 8, 1984. It applies to releases to any medium (e.g., surface water, ground water, air, soils, and subsurface gas).

Section 3004(a) can be applied to the same universe as above, or that universe can expand to include interim status as well as permitted units. The expanded universe may be selectively regulated. For example, it may include: (a) Facilities or units with a high probability of release; (b) regulated units only; [3] or (c) facilities or units with releases to ground water only.

Timing and Amount of Financial Assurance

The Agency has interpreted section 3004(u) as allowing two alternatives on the timing and amount of financial assurance for continuing releases. First, we could require a demonstration of financial assurance after the corrective action measures and cost estimate have been specified in the permit. The advantage of this approach is that it would not require any facility to demonstrate financial responsibility unless and until a release had been characterized, and the corrective action costs were known. A disadvantage is that there is no possibility of building up a reserve funds after a release is detected but before financial assurance must be demonstrated. In other words, there is no lead time during which a facility sets aside money for corrective action before such costs are incurred.

The second, more complicated approach would require the facility to demonstrate financial assurance once it is determined that corrective action is necessary but before the corrective action measures and cost estimate are specified in the permit. This approach would require a determination of a reasonable minimum amount of corrective action costs which would be incurred in most situations. After the corrective action measures and cost estimate are specified in the permit, additional financial assurance would be required.

This second approach would assure corrective action costs at an earlier stage. However, it may not be possible to identify a "reasonable minimum amount" for most facilities. Such an amount might be a very small percentage of most corrective action costs, thereby providing little financial assurance. The Agency has chosen to propose the first approach, but solicits comments on both approaches.

The timing and amount of financial assurance can be the same under section 3004(a) as it is under section 3004(u), or it can be modified to allow a demonstration at an earlier time. There are many alteratives on timing that the Agency will analyze before promulgating a section 3004(a) rule. Among them are: A demonstration of financial assurance at the time of

[3] "Regulated units" include surface impoundments, waste piles, landfills, and land treatment units that received waste after July 26, 1982.

permitting but before a release is detected; a demonstration after a release is detected but before the corrective action measures and cost estimate are specified in the permit; different timing and amounts of assurance for different types of facilities; and assurance of the entire amount of an average corrective action cost before a release occurs, the rest to be assured when the exact amount is known. This earlier demonstration may result in more costs being assured by owners and operators. Some of these section 3004(a) issues were described in a **Federal Register** notice dated July 26, 1982 (see 47 FR 32279).

Advantages and Disadvantages of Combining the sections 3004(u) and 3004(a) Authorities

The advantage of promulgating a rule that combines the authorities of sections 3004(u) and 3004(a) is that an earlier demonstration of financial assurance for corrective action may increase the amount of corrective action costs paid by owners and operators. It may also assure financial responsibility for the entire corrective action period. There would be one comprehensive rule on financial assurance for corrective action, which may be more effective than today's section 3004(u) proposed rule. In addition, if the demonstration of financial assurance is made before actual corrective action expenditures are necessary, as allowed under section 3004(a), owners or operators using the trust fund mechanism can avoid the financial drain of "double payments" required under today's section 3004(u) proposed rule. However, because of all the variations allowed under the very broad section 3004(a) authority, the section 3004(a) analysis will take additional time to complete. The advantage of promulgating a section 3004(u) rule first is that it will provide the regulated community with guidance needed now to implement the current statutory requirement effectively.

The Agency requests comments on whether we should proceed with section 3004(u), or delay promulgation of a regulation until the analysis for section 3004(a) is done. The analysis may show that a combined regulation on sections 3004(u) and 3004(a) would be preferable. It may also show that no regulation at all under section 3004(a) is preferable.

III. Section-by-Section Analysis of Proposed Rule

As stated earlier, the regulations proposed today on financial assurance for corrective action are derived from the current Subpart H requirements for financial responsibility for closure and post-closure care. The sections that follow do not analyze anew those points of the proposed rule that are the same as corresponding sections in the existing Subpart H regulations. Instead, the analysis focuses on only the additions or modifications to the existing regulations made by the proposed rule. We are also proposing changes to Subpart F of Part 264 on ground water monitoring, and to Part 270 on permit requirements. The analysis is arranged in a section-by-section sequence for ease of reference.

A. Standards for Owners And Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities—Ground Water Protection Standards (Part 264, Subpart F)—Corrective Action for Solid Waste Management Units (§ 264.101)

Under existing § 264.101(b), corrective action for releases of hazardous waste or constituents must be specified in the permit, and when the corrective action cannot be completed prior to issuance of the permit, the permit must contain schedules of compliance for such correction action. In the proposed codification rule (51 FR 10714, March 28, 1986), the Agency proposed to add a new paragraph, § 264.101(c), whereby an owner or operator may be required to implement corrective action beyond the facility boundary, where necessary to protect human health and the environment. Today, the Agency is proposing to add a new paragraph, § 264.101(d). When corrective action measures are specified in the permit, the schedule of compliance must include a written statement that shows the expected full duration of the corrective action, and, for each year of the corrective action, a detailed description of the activities that will be performed during that year. The corrective action measures specified in the permit are the basis for the cost estimate and subsequent demonstration of financial assurance for corrective action.

B. Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities—Financial Requirements (Part 264, Subpart H)

EPA is proposing today that Subpart H be renumbered as follows:

Old section		New section
264.140	Applicability	264.140
264.141	Definitions	264.141
264.142	Cost estimate for closure	264.142
264.143	Financial assurance for closure	264.143
264.144	Cost estimate for post-closure care	264.144
264.145	Financial assurance for post-closure care	264.145
	Cost estimate for corrective action	264.146
	Financial assurance for corrective action	264.147
264.146	Use of a mechanism for financial assurance of both closure and post-closure care	264.149
264.147	Liability requirements	264.148
264.148	Incapacity of owners or operators, guarantors, or financial institutions	264.150
264.149	Use of State-required mechanisms	264.152
264.150	State assumption of responsibility	264.153
264.151	Wording of the instruments	264.151

1. Applicability (§ 264.140)

The Agency is proposing to amend § 264.140(a) to reflect the addition of financial assurance for corrective action to the Subpart H regulations. The Agency is also proposing that a new paragraph (c) be added, stating explicitly that the financial assurance requirements apply to owners or operators required to perform corrective action pursuant to the corrective action regulations in §§ 264.100 and/or 264.101. Section 264.100 requires corrective action for releases to ground water from regulated units, while § 264.101 requires corrective action for releases to any media of hazardous wastes or constituents from any SWMU (other than regulated units) at a RCRA facility seeking a permit, and for releases to media other than ground water from regulated units.

Existing paragraph (c), exempting State and Federal governments from financial responsibility requirements, would become paragraph (d).

By expanding the scope of the current Subpart H financial responsibility requirements, EPA believes that it is fulfilling the mandate of the Hazardous and Solid Waste Amendments (HSWA) of 1984, which directs the Agency to require financial assurance for corrective action for facilities that have a release and are seeking a RCRA permit.

2. Definitions of Terms Used in this Subpart (§ 264.141)

The proposed rule adds two definitions to the existing list of terms in § 264.141. These additions are necessary to clarify the proposed financial assurance requirements for corrective action.

"Current Cost Estimate for Corrective Action": In the context of financial assurance for corrective action, the term refers to the total costs, in undiscounted current dollars summed over the duration of corrective action, of the remaining corrective action measures required in the permit or schedule of compliance in the permit. This term appears repeatedly throughout the proposed rule, particularly in those sections which describe procedures for establishing and maintaining instruments for demonstrating financial assurance.

"Required Corrective Action Trust Fund Balance": For the purpose of computing the annual trust fund payment, EPA considers it necessary to define an additional term. The "required corrective action trust fund balance" is defined as the sum of all corrective action costs to be incurred after the end of the trust fund pay/in period. When financial assurance is first provided, the "required corrective action trust fund balance" will differ from the "current cost estimate for corrective action" by the sum of the costs of all corrective action measures to be undertaken during the trust fund pay/in period. The amount being assured, therefore, is different when using the trust fund than for any other mechanism (during the trust fund pay-in period).

3. Financial Assurance for Closure and Post-Closure Care: Financial Test (§§ 264.143(f) and 264.145(f))

Today's proposed amendment to § 264.147(d) on the financial test for corrective action would require conforming changes in both §§ 264.143(f) and 264.145(f). Sections 264.143(f)(1)(i)(B) and 264.145(f)(1)(i)(B) now require that net working capital and tangible net worth be at least six times the sum of the current closure, post-closure, and plugging and abandonment cost estimates,[4] for the firm to pass the financial test. Sections 264.143(f)(1)(i)(D) and 264.145(f)(1)(i)(D) require that assets in the United States amount to at least 90% of total assets or at least six times the sum of the current closure, post-closure care, and plugging and abandonment cost estimates. With the addition of regulations for financial assurance for corrective action, these sections should include the cost estimate for corrective actions as well. A parallel change must be made also to §§ 264.143(f)(1)(ii)(B), 264.143(f)(1)(ii)(D), 264.145(f)(1)(ii)(B) and 264.145(f)(1)(ii)(D).

The proposed amendment also clarifies that only those closure, post-closure care, plugging and abandonment, and corrective action cost estimates for which the financial test is used need to be covered by these sections. We believe that the existing regulations are ambiguous and could be read to include all cost estimates, whether or not the finanical test is used. Therefore, we added the words "covered by the test" after the list of required cost estimates.

4. Cost estimate for corrective action (§ 264.146)

The proposed rule redesignates existing §264.146 as §264.149, and inserts in its place procedures for preparing, submitting, adjusting, and revising a cost estimate for corrective action.

There are two components of the contents for the cost estimate for corrective action: (1) a year-by-year current cost estimate or required corrective action in undiscounted current dollars; and (2) the sum of these year-by-year estimates of corrective action costs. This total is equivalent to the "current cost estimate for corrective action", as defined in proposed § 264.141(h). Similiar to the cost estimates for closure and post-closure care, the total correction action cost is necessary to determine the level of assurance that must be provided by an owner or operator.

Proposed §264.146 stipulates that third-party costs, as opposed to first-party costs, must be used to estimate yearly and total corrective action costs. Estimates based on first-party costs are those based on the cost to the owner or operator of supplying his own labor and equipment. Estimates based on third-party costs are those based on hiring contractor labor and renting equipment. The agency has specified using third-party costs for the development of the cost estimates for closure and post-closure case (see 40 CFR 264.142 and 264.144). EPA has discussed in the preamble to the May 2, 1986 final rule that the use of third-party, rather than first-party, costs is more consistent with the overall objective of financial assurance requirements to assure the cost of closure, post-closure care, and now, corrective action will be covered in the event that an owner or operator is not able to fulfill his obligations. (See 51 FR 16422, 16436.) In such an event, corrective action would have to be undertaken by a third-party. In addition, most corrective actions will probably be conducted by professionals (contractors) in this new technical area even if the owner or operator is able to conduct the activities himself.

Under the proposed rule, the date by which the cost estimate for corrective action must be prepared may be different for releases to ground water from regulated units than it would be for all other releases. Owners and operators of regulated units with releases to ground water identified at the time of permitting are required to submit the cost estimate for corrective action in the permit application. An owner or operator with any other type of release (from a regulated unit to any medium other than ground water, from regulated unit to ground water when the release was not identified until after permitting, or from any other SWMU other than a release to ground water from a regulated unit identified at the time of permitting) must submit a cost estimate for corrective action once the corrective action measures are specified in the permit. EPA's rationale for allowing the submission of the cost estimate for corrective action after the permit has been issued, in some cases, is that the owner or operator may not be able to gather the information needed to identify the appropriate corrective action as part of the permitting process or that the need for corrective action may not have been identified until after the permit has been issued. In such a situation, EPA or the authorized State would issue a permit that contained a schedule of compliance specifying the time frame and procedures by which the owner or operator must obtain the information necessary to determine the extent of corrective action needed. Section 3004(u) of RCRA specifically authorizes the use of schedules of compliance

EPA's proposed procedures for adjusting the cost estimate for corrective action and the required correction action trust fund balance are the same as the new Subpart H requirements promulgated on May 2, 1986 for adjusting the cost estimates for closure and post-closure care.

5. Financial Assurance for Corrective Action (§ 264.147)

The proposed § 264.147 establishes the available mechanisms for demonstrating financial assurance for the costs of completing corrective action at facilities seeking a permit, and the

[4] The plugging and abandonment cost estimate refers to underground injection wells. This was added to the regulation on May 2, 1986 (See 51 FR 16422, 16439).

timing and procedure for establishing proof of financial assurance for corrective action. Existing § 264.147 on liabiltiy insurance is redesignated intact as § 264.148.

The owner or operator must submit an originally signed duplicate to the Regional Administrator of the instrument or instruments offered for financial assurance for corrective action once the cost estimate has been completed.

Owners or operators who are responsible for performing corrective action are required to demonstrate financial assurance through one or more to the following available mechanisms: Trust fund, surety bond guaranteeing performance, letter of credit, financial test, and corporate guarantee. Section 264. 147 also would establish the conditions under which the use of multiple financial mechanisms is permitted, the rules for the use of one mechanism for multiple facilities, and the conditions under which an owner or operator is released from the requirements of this section. Finally, § 264.147 also establishes the requirement for a corrective action standby trust fund.

The Agency is proposing to establish the same framework for financial assurance for corrective action as is established for closure and post-closure care, with the following changes: Modifications to the trust fund mechanism; elimination of the surety bond guaranteeing payment into a trust fund as an allowable mechanism; and elimination of insurance as an allowable mechanism. The preamble to the April 7, 1982, regulations establishes the rational for this framework and describes the use of each individual mechanism (see 47 FR 15032). The remainder of this section describes each mechanism and explains the proposed departures from the existing Subpart H requirements.

(a) *Trust Fund.* Section 264.147(a) establishes the requirements for using a trust fund to provide financial assurance for corrective action. The proposed corrective action trust fund differs from the closure/post-closure care trust fund in the required balance, pay-in period, and payment calculations.

The rationale for these differences, as explained in detail in Section II.C of this preamble, is that use of the closure and post-closure-pay-in formula could force a significant number of firms into bankruptcy. The Agency proposes to ameliorate the potential bankruptcy problems through these modifications of the trust fund pay-in formula.

Proposed paragraph (a)(3)(i) of § 264.147 would establish the length of the pay-in period to be used to make payments into the corrective action trust fund. EPA is proposing that the length of the pay-in period be the shorter of one-half the corrective action period or 20 years.

The 20 year pay-in period is proposed as the corrective action trust fund pay-in period for corrective actions of long duration (40 years or more). Whenever the corrective action period is less than 40 years, the trust fund pay-in period is proposed to be one-half of the corrective action period, to guarantee that the trust fund will secure complete funding of remaining corrective action costs during a significant proportion (i.e., one-half) of the corrective action period. The Agency believes that a corrective action trust fund pay-in period longer than one-half the corrective action period would provide insufficient financial assurance of future costs.

Section 264.147(a)(3)(i) also requires that, at the end of the pay-in period, the corrective action trust fund balance must equal the remaining corrective action costs.

Section 264.147(a)(3)(ii) uses the required corrective action trust fund balance to establish the required payments into the corrective action trust fund. EPA believes that requiring trust fund payments to be based on the full amount of the current cost estimate for corrective action, when that estimate is different from the required corrective action trust fund balance, would cause several difficulties. First, given the concurrent nature of corrective action costs and trust fund build-up, the current cost estimate will decline during the pay-in period; this could lead to a fully funded trust fund prior to the end of the pay-in period. Second, the Agency's economic analysis shows that the use of the current corrective action cost estimate in the trust fund payment formula would increase the number of bankruptcies and the amount of corrective action that remains unfunded after firm bankruptcy. Therefore, the Agency is proposing to use the required corrective action trust fund balance in the payment formula.

The Agency analyzed various trust fund pay-in periods, in addition to extensions specifically for financially weak firms. The analysis showed that the twenty-year pay-in period for all firms has the best effect on ameliorating potential hardship on firms. It also has an advantage over an extension on a case-by-case basis for financially weak firms because it treats all firms equally. (See discussion of other pay-in periods in the Background Document on this regulation.)

Section 264.147(a)(4) permits the owner or operator to accelerate payments into the corrective action trust fund, as allowed in the closure and post-closure care trust fund regulations (see §§ 264.143(a)(4) and 264.145(a)(4)).

Section 264.147(a)(5) requires that, in the event an owner or operator establishes a corrective action trust fund after first having used other mechanisms, the first payment must equal the total of all payments that would have been made had the trust fund been used initially. In other words, he will have to make retroactive payments to the trust fund.

Section 264.147(a)(6) concerns changes in the required corrective action trust fund balance after the end of the pay-in period. Such changes could be triggered by an increase of the corrective action cost estimate, and would require additional trust fund payments by the owner or operator. It should be noted that the detection of a release from a second unit would not cause the cost estimate to increase: a separate cost estimate and required trust fund balance, if applicable, would be developed for the second unit.

Section 264.147(a)(7) allows the release of funds before the pay-in period ends, or thereafter, if the value of the trust fund is greater than the total amount of the current required corrective action trust fund balance. Funds can only be released if the Regional Administrator determines that the remaining costs of corrective action will not be greater than the current required trust fund balance.

Sections 264.147(a)(8) through 264.147(a)(11), which address substitution of alternative financial assurance, release of funds, reimbursement of expenditures, and termination of the trust, are analagous to the requirements for closure and post-closure care trust funds, as established in §§ 264.143 and 264.145.

(b) *Surety Bond Guaranteeing Performance.* Section 264.147(b) would establish requirements for demonstrating financial assurance for corrective action using a surety bond guaranteeing performance of the corrective action. The requirements follow those established in §§ 264.143(c) and 264.145(c) for a surety bond guaranteeing performance of closure and post-closure care.

We have eliminated the surety bond guaranteeing payment into a trust fund as a separate instrument for financial assurance for corrective action, as described in Section II.D.2. of this preamble.

(c) *Letter of Credit.* Section 264.147(c) would establish the letter of credit as an allowable mechanism for demonstrating

financial assurance for corrective action. These requirements are exactly the same as those in §§ 264.143(d) and 264.145(d) for closure and post-closure care.

(d) *Financial Test and Corporate Guarantee.* Section 264.147(d) would establish the requirement for demonstrating financial assurance for corrective action through the use of the financial test and corporate guarantee. These requirements are analogous to those required for the closure and post-closure care financial test and corporate guarantee.

(e) *Use of Multiple Financial Mechanisms.* Section 264.147(e) would allow the use of multiple mechanisms for meeting the requirements of financial assurance for corrective action. As in the case of financial assurance for closure and post-closure care, the financial test or corporate guarantee cannot be combined with other mechanisms to provide assurance at any single facility. EPA believes that if an owner or operator cannot pass the financial test for the full amount of the sum of the applicable current cost estimates for corrective action, closure, and/or post-closure care, then its financial condition is not strong enough to provide financial assurance without a secured instrument, and other mechanisms should be offered in its place. Likewise, the Agency believes that if a corporate parent cannot pass the financial test for the full amount of the sum of current cost estimates for corrective action, closure, and post-closure care, then its financial position is insufficient to demonstrate financial assurance through the use of a corporate guarantee, and other mechanisms should be offered in its place. If financial assurance is demonstrated using multiple financial mechanisms other than the financial test or corporate guarantee, the combined sum of the assurance provided by each mechanism must equal the current corrective action cost estimate. Note that the trust fund may be used as one of the multiple mechanisms, in which case the required trust fund balance is not the remaining corrective action costs at the end of the pay-in period, but the difference between the current corrective action cost estimate and the amount assured by other mechanisms.

(f) *Use of One Mechanism for Multiple Facilities.* Proposed § 264.147(f) would allow the use of a single financial mechanism for multiple facilities in one or more EPA regions. If a trust fund is used to assure the costs of corrective action, a separate cost estimate and trust fund balance will be required for each separate release. One trust fund instrument may be used, as long as funds are clearly identified for each release. The Agency solicits comments on the logistics of using one trust fund for separate releases or whether it is preferable for a firm to have a separate trust fund for each release.

(g) *Release from the Requirements of this Section.* Proposed § 264.147(g) establishes the procedures for releasing the owner or operator from the requirement of providing financial assurance for corrective action. These procedures are exactly the same as those established in §§ 264.143(i) and 264.145(i) for closure and post-closure care. Permit expiration does *not* release the owner or operator from financial assurance requirements.

6. Liability Requirements (§ 264.148)

Section 264.147 on liability requirements remains intact but is proposed to be redesignated as § 264.148.

7. Use of a Mechanism for Multiple Financial Responsibilities (§ 264.149)

Section 264.149 on the use of State-required mechanisms is redesignated as § 264.152. Proposed § 264.149 provides for the use of a single mechanism to meet the requirements for financial responsibility for closure, post-closure care, liability coverage, and/or corrective action that meet the specifications in §§ 264.143, 264.145, 264.147 and/or 264.148, as applicable. This section would replace former § 264.146 and amend that section by adding liability coverage and corrective action to the list of financial responsibility requirements that may be covered by a single mechanism. The addition of liability coverage is merely to correct an oversight in the existing regulations which allow liability coverage to be combined with other assurances in a single mechanism, but omitted liability coverage from this section. For liability coverage, however, the only currently allowable mechanisms are insurance, the financial test, and the corporate guarantee. For corrective action, insurance and surety bonds guaranteeing payment may not be used.

EPA believes that satisfying multiple requirements for financial responsibility for closure, post-closure care, liability coverage, and corrective action through a single mechanism could decrease the costs of administering the financial responsibility requirements without decreasing the level of financial assurance provided, as long as the funds provided through a single mechanism equal the sum that would be available through separate mechanisms for each requirement.

8. Incapacity of Owners or Operators, Guarantors, or Financial Institutions (§ 264.150)

The Agency is proposing to redesignate § 264.148 as § 264.150, and to amend the section to add a reference in paragraph (a) to the guarantor of a corporate guarantee used to assure corrective action costs (§ 264.147(d)), who must notify the Regional Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11, if he is named as debtor.

EPA is also proposing to add a reference to the new § 264.147 in paragraph (b) and change the reference to the redesignated § 264.147 to § 264.148. Owners or operators who meet the financial assurance requirements for corrective action by obtaining a trust fund, surety bond, or letter of credit, must establish other financial assurance in the event of bankruptcy of the trustee or issuing financial institution.

9. Wording of the Instruments (§ 264.151)

The Agency is proposing in § 264.151 to amend the financial instruments currently authorized for demonstrating financial assurance for closure and post-closure care coverage, to allow their use for financial assurance for corrective action. To avoid unnecessary confusion caused by having to amend the regulatory citations in all instruments currently existing for closure and post-closure care, the Agency has revised the order of the sections in 40 CFR Subpart H to retain § 264.151 as the section providing the wording of the financial assurance instruments.

In § 264.151, the Agency is proposing to amend the regulatory language introducing the instruments in each paragraph of the section to allow use of the instrument to provide financial assurance for corrective action (except for insurance and surety bonds guaranteeing payment into a trust fund, which are not allowed as mechanisms to assure the costs of corrective action).

In addition to minor wording changes to adapt the instruments for corrective action, the Agency is proposing amendments to the text of the trust fund form to include special concepts and modes of operation of the trust fund that are designed to accommodate its use as a mechanism for providing financial assurance for corrective action. In section 2 of the trust agreement, the Agency is proposing to amend the text to refer to the cost estimate for

corrective action and current required corrective action trust fund balance.

The Agency is proposing several changes to the wording of the surety bond guaranteeing performance. Language is being added to § 264.151(c) to ensure that the obligation established by the performance bond changes with amendments to the approved corrective measures.

10. Use of State-Required Mechanisms (§ 264.152)

The Agency is proposing to redesignate the current § 264.149 as § 264.152. In addition, the section would be amended to allow the owner or operator of a facility to meet the financial assurance requirements for corrective action through the use of State mechanisms in the same manner that is currently authorized for closure, post-closure care, and liability requirements.

11. State Assumption of Responsibility (§ 264.153)

The Agency is proposing to redesignate the current § 264.150 as § 264.153 and amend it by adding references to corrective action, thereby allowing a State to assume legal responsibility for an owner's or operator's compliance with the corrective action requirements or to assure that funds will be available from State sources to meet those requirements. In addition, the Agency is proposing to amend § 264.153 to provide that if the State either assumes legal responsibility for an owner's or operator's compliance with the corrective action requirements or assures that funds will be available for corrective action, the owner or operator will be in compliance with the requirements of proposed § 264.147.

C. EPA Administered Permit Programs: The Hazardous Waste Permit Program (Part 270)

1. Contents of Part B: General Requirements (§ 270.14)

The Agency is proposing to add a new paragraph (d)(4) to § 270.14. Recently, in the proposed codification rule, the Agency proposed to amend §270.14(c) and add a new § 270.14(d). (51 FR 10713, March 28, 1986.) That proposal would require owners and operators of SWMUs at facilities seeking a RCRA permit to provide two types of information: (1) Descriptive information on the unit itself (e.g., location, dimensions, type of unit, etc.); and (2) all available information pertaining to any release from the unit. It also would require that the owner or operator conduct sampling and analysis where the State Director ascertains it is necessary to complete preliminary site investigation. Today's proposal states that if corrective action measures are specified prior to permit issuance, then the owner and operator must submit an estimate of the corrective action costs, and a demonstration of financial assurance for completion of the corrective action.

2. Major Modification Or Revocation and Reissuance of Permits (§ 270.41)

Section 270.41 currently establishes a detailed list of changes that require a modification to a permit. The Agency is proposing to amend § 270.41(a)(2) to add a specific reference to the completion of a program of information gathering concerning a release from a SWMU at a facility seeking a permit. Under certain circumstances, sufficient information may not be available at the time of permitting to allow the permit to include a complete program of corrective action under § 264.101 or a cost estimate or demonstration of financial responsibility. Alternatively, a release may be discovered after a permit is issued. In those cases the permit should be modified upon completion of information gathering, to include the specific corrective action measures, the cost estimate and a demonstration of financial assurance. The proposed amendment specifies that when the Regional Administrator or the State Director receives the information developed in the information-gathering program, he may then modify the permit to specify corrective action measures.

The Agency is also proposing to revise the regulatory references in § 270.41(a)(5)(iii) to § 264.147 to reflect the proposed renumbering of the liability requirements in § 264.148.

IV. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization). Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

Today's rule, when finalized, will be promulgated pursuant to section 3004(u) of RCRA, a provision added by HSWA. Therefore, it would be added to Table 1 in § 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and that take effect in all States, regardless of their authorization status. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1, as discussed in the following section of this preamble.

B. Effect on State Authorization

As noted above, EPA will implement today's rule, when finalized, in authorized States until they modify their programs to adopt this rule and the modification is approved by EPA. Because the rule will be promulgated pursuant to HSWA, a State submitting a program modification may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantially equivalent or equivalent to EPA's. The procedures and schedule for State program modifications under section 3006(b) are described in 40 CFR 271.21. The same procedures should be followed for section 3006(g)(2).

Applying § 271.21(e)(2), States that have final authorization must modify their programs within a year of promulgation of EPA's regulations if only regulatory changes are necessary (two years, if a statutory change is necessary). These deadlines can be

extended in exceptional cases (40 CFR 271.21(e)(3)).

In the event that the "cluster" rule becomes final as proposed (50 FR 489–504, January 6, 1986), the States will have a longer time to be authorized to implement the financial assurance for corrective action requirements. EPA has proposed a one-time multi-year cluster to encompass the HSWA regulatory provisions that take effect between the date of enactment (November 8, 1984) and June 30, 1987. States would be required to adopt these HSWA provisions by July 1, 1988, if only *regulatory* changes are needed, on July 1, 1989. for any specific HSWA provisions that necessitated State *statutory* changes.

States with authorized RCRA programs may already have requirements similar to those in today's rule. These State regulations have not been assessed against Federal regulations being proposed today to determine whether they meet the test for authorization. Thus, a State is not authorized to implement these requirements in lieu of EPA until the State program modification is approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA may be able to defer to the States in their efforts to implement their programs, rather than take separate actions under Federal authority.

States that submit official applications for final authorization less than 12 months after promulgation of EPA's regulations may be approved without including standards equivalent to those promulgated. However, once authorized, a State must modify its program to include standards substantially equivalent or equivalent to EPA's within the time periods discussed above.

It should be noted that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. This is a result of section 3009 of RCRA, which allows States to impose standards in addition to those in the Federal program. Section 3004(u) of RCRA broadens the scope of the RCRA program. Since these regulations propose to implement section 3004(u), the standards proposed today would broaden the scope of the Federal program. Therefore, authorized States will be required to modify their programs to adopt requirements equivalent to these proposed regulations, if they are promulgated in final form.

V. Executive Order 12291

Executive Order 12291 requires each Federal agency to determine if a regulation is a "major" rule as defined by the Order, and to prepare and consider a Regulatory Impact Analysis (RIA) in connection with every 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, 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 or domestic or export markets.

Today's proposed regulations have been submitted to the Office of Management and Budget for review as required by Executive Order 12291.

These proposed regulations are not major. In fact, they may actually reduce the cost of financial responsibility by providing an option that will be less expensive than using the existing closure and post-closure financial assurance requirements in the corrective action context. Even if compared with a baseline that does not include a financial assurance requirement, these regulations would not meet the criteria set out above for defining a major rule. Relative to such a "no financial assurance" baseline, the costs associated with these regulations are estimated to be $10 to $20 million annually, much less than the required $100 million per year. In addition, we do not expect significant cost or price increases, nor any other significant adverse effect.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et. seq.) requires each Federal Agency to prepare a Regulatory Flexibililty Analysis (RFA) when it promulgates a proposed or final rule. The purpose of the RFA is to describe the effects the regulations will have on small entities (small businesses, small government jurisdictions, and small organizations) and examine alternatives that may reduce these effects.

The effects of these regulations on small entities were examined in our model results. Most of the trust fund options we analyzed had a beneficial impact on small firms, as compared to the status quo (i.e., use of the existing regulations on financial assurance for closure and post-closure care, for corrective action). The Agency certifies that compared to the status quo, today's proposal will have a beneficial effect on small firms. This effect will be addressed further when this proposal is promulgated in final form.

VII. Supporting Documents

Supporting documents available for this proposed rule include summary of the model results, dated August 15, 1986. In addition, there are other **Federal Register** notices on financial assurance, and background documents which were prepared for other financial assurance regulations available: The May 2, 1986 final regulations on closure, post-closure care and financial responsibility, 51 FR 16433; the March 19, 1985 proposed regulations, 50 FR 11068; the July 26, 1982 interim final land disposal regulations, 47 FR 32274; the April 7, 1982 final rules on financial assurance for closure and post-closure care, 47 FR 15032; the January 12, 1981 interim final rules, 46 FR 2802; and the May 19, 1980 proposed regulations, 45 FR 33260. Supporting materials discussing the most significant issues raised by the amendments proposed today have also been prepared.

All of these supporting materials are available for review in the EPA public docket, Room S–212–E, Waterside Mall, 401 M Street, SW., Washington, DC 20460.

VIII. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs of OMB, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements.

List of Subjects

40 CFR Part 264

Hazardous waste, Insurance, Packaging and containers, Corrective action, Reporting and recordkeeping requirements, Security measures, Surety bonds, Water supply.

40 CFR Part 270

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian

lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Lee M. Thomas,

Administrator.

October 7, 1986.

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

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

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

Authority: Secs. 1006, 2002(a), 3004 and 3005 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

2. It is proposed that Subpart H of the table of contents for Part 264 is revised to read as follows:

* * * * *

Subpart H—Financial Requirements

Sec.

* * * * *

3. It is proposed that 40 CFR 264.101 is amended by adding paragraph (d) to read as follows:

§ 264.101 Corrective action for solid waste management units.

* * * * *

(d) When corrective action measures are specified in the permit, the schedule of compliance will include a written statement that shows the full duration of the corrective action, and, for each year of the corrective action, a detailed description of the activities that will be performed during that year. A cost estimate of the corrective action costs required under paragraphs (b) and (c) must be submitted. The cost estimate must be in accordance with the requirements of § 264.146. Financial assurance must be demonstrated in accordance with the requirements of § 264.147.

4. It is proposed that 40 CFR 264.140 be amended by revising paragraph (a), redesignating existing paragraph (c) as paragraph (d) and revising it, and adding a new paragraph (c) to read as follows:

§ 264.140 Applicability.

(a) The requirements of §§ 264.142, 264.143, and 264.148 through 264.153 apply to owners and operators of all hazardous waste facilities, except as provided otherwise in this section or in § 264.1

* * * * *

(c) The requirements of §§ 264.146 and 264.147 apply only to owners and operators required to perform corrective action pursuant to §§ 264.100 and/or 264.101, as applicable.

(d) States and the Federal government are exempt from the requirements of this subpart.

5. It is proposed that § 264.141 be amended by adding paragraph (h) as follows:

§ 264.141 Definitions of terms as used in this subpart.

* * * * *

(h) The following terms are used in the regulations for financial assurance for corrective action. These 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.

"Current cost estimate for corrective action" means the most recent of the estimates prepared in accordance with § 264.146.

"Required corrective action trust fund balance" means the sum of all costs of performing corrective action, as itemized in the cost estimate for corrective action, for each year that corrective action must be performed *after* the end of the trust fund pay-in period.

6. It is proposed that § 264.143 be amended by revising paragraphs (f)(1)(i)(B), (f)(1)(i)(D), (f)(1)(ii)(B), and (f)(1)(ii)(D) as follows:

§ 264.143 Financial assurance for closure.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(B) Net working capital and tangible net worth each at least six times the sum of the current closure and/or post-closure care, and/or corrective action and/or plugging and abandonment cost estimates covered by the test; and

* * * * *

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure, and/or post-closure care and/or corrective action, and/or plugging and abandonment cost estimates covered by the test.

(ii) * * *

(B) Tangible net worth at least six times the sum of the current closure, and/or post-closure care and/or corrective action, and/or plugging and abandonment cost estimates covered by the test.

* * * * *

(D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current closure, and/or post-closure care and/or corrective action, and/or plugging and abandonment cost estimates covered by the test.

* * * * *

7. It is proposed that § 264.145 be amended by revising paragraphs (f)(1)(i)(B), (f)(1)(i)(D), (f)(1)(ii)(B), and (f)(1)(ii)(D) as follows:

§ 264.145 Financial assurance for post-closure.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(B) Net working capital and tangible net worth each at least six times the sum of the current closure, and/or post-closure care, and/or corrective action and/or plugging and abandonment cost estimates covered by the test; and

* * * * *

(D) Assets in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current closure, and/or post-closure care and/or corrective action, and/or plugging and abandonment cost estimates covered by the test.

(ii) * * *

(B) Tangible net worth at least six times the sum of the current closure, and/or post-closure care and/or corrective action, and/or plugging and

abandonment cost estimates covered by the test.

* * * * *

(D) Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the current closure and/or post-closure care and/or corrective action and/or plugging and abandonment cost estimates, covered by the test.

* * * * *

§§ 264.149 and 264.146 [Redesignated]

8. It is proposed that existing 40 CFR 264.149 be redesignated as § 264.152; existing § 264.146 be redesignated as § 264.149, and that a new § 264.146 be added to read as follows:

§ 264.146 Cost estimate for corrective action.

(a) *Contents of estimate.* The owner or operator of a facility required to undertake corrective action must have a detailed written estimate in current dollars of the cost of performing corrective action at the facility in accordance with the requirements of §§ 264.100 and/or 264.101, as applicable. The cost estimate for corrective action must equal the cost of completing the corrective action, and must be based on the corrective action measures specified in the permit. The cost estimate for corrective action is equal to the sum of the yearly corrective action costs. The owner or operator must provide both the estimated corrective action cost for each year of the corrective action period and the sum of the estimated yearly corrective action costs. The cost estimate for corrective action must be based on the costs to the owner or operator of hiring a third party to perform corrective action at the facility in accordance with the specified corrective action measures. A third party is a party who is neither a parent nor a subsidiary of the owner or operator (see definition of "parent corporation" in § 264.141(d)).

(1) The closure cost estimate may not incorporate any salvage value that may be realized by the sale of hazardous wastes, facility structures or equipment, land or other facility assets at the time of partial or final closures.

(2) The owner or operator may not incorporate a zero cost for hazardous waste that might have economic value.

(b) *Preparation and submission.* The owner or operator of a facility at which corrective action is required to be performed under § 264.100 for a release identified at the time a permit application is submitted, must submit a cost estimate for corrective action to the Regional Administrator in the permit application. The owner or operator of a facility at which corrective action is required to be performed under § 264.100 for a release not identified at the time of permitting must submit a cost estimate for corrective action at the time the corrective action measures are specified in the permit. The owner or operator of a facility at which a corrective action is required to be performed under § 264.101 must submit a cost estimate for corrective action to the Regional Administrator in the permit application, or if the relevant information is unavailable at the time of permit issuance or if the release is detected after the permit has been issued, at the time the corrective action measures are specified in the permit.

(c) *Adjustment for inflation.* The owner or operator must adjust the cost estimate for corrective action, including the estimates of the yearly corrective action cost for each year of the corrective action, and the required corrective action trust fund balance, if applicable, for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with § 264.147. For owners and operators using the financial test or corporate guarantee, the cost estimate for corrective action must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Regional Administrator, as specified in § 264.147(d)(3). The adjustment for inflation may be made by recalculating the maximum costs of corrective action in current dollars or by using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its *Survey of Current Business*, as specified in paragraphs (c)(1) and (c)(2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) *First adjustment using inflation factor.* The first adjustment is made by multiplying the current cost estimate for corrective action by the inflation factor. The result is the adjusted cost estimate for corrective action.

(2) *Subsequent adjustments using inflation factor.* Subsequent adjustments are made by multiplying the current cost estimate for corrective action by the latest inflation factor.

(d) *Adjustments for other changes.* The owner or operator must revise the cost estimate for corrective action and the required corrective action trust fund balance, if applicable, no later than 30 days after the Regional Administrator has approved a request to modify the specified corrective action measures if the change in the measures increases the cost or expected duration of corrective action. This revision must reflect any changes in the total number of years required to perform the corrective action and any changes in the estimated costs for each year of the corrective action. The revised corrective action cost estimate must be adjusted for inflation as specified in § 264.146(c).

9. It is proposed that existing 40 CFR 264.150 be redesignated as § 264.153, and that existing § 264.148 be redesignated as § 264.150 and be revised to read as follows:

§ 264.150 Incapacity of owners or operators, guarantors, or financial institutions.

(a) An owner or operator must notify the Regional Administrator by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A guarantor of a corporate guarantee as specified in §§ 264.143(f), 264.145(f), or 264.147(d) must make such a notification if he is named as debtor, as required under the terms of the corporate guarantee (§ 264.151(h)).

(b) An owner or operator who fulfills the requirements of §§ 264.143, 264.145, 264.147, or 264.148 by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must establish other financial assurance within 60 days after such an event.

10. It is proposed that newly redesignated § 264.149 be revised to read as follows:

§ 264.149 Use of a mechanism for multiple financial responsibilities.

An owner or operator may satisfy the requirements for financial assurance for closure, post-closure care, liability coverage, and corrective action singly or for any combination of those activities, for one or more facilities by using a trust fund, surety bond, letter of credit, insurance, financial test, or corporate guarantee that meets the specifications for the mechanisms in §§ 264.143, 264.145, 264.147 and/or 264.148, as applicable. The amount of funds

available through the mechansim must be no less than the sum of funds that would be available if a separate mechansim had been established and maintained for financial assurance of closure, post-closure care, liability coverage, and corrective action, as applicable. Insurance and surety bonds guaranteeing payment may not be used to provide financial assurance for corrective action. Only the financial test, corporate guarantee, and insurance may be used for liability coverage.

§ 264.148 [Redesignated from § 264.147]

11. It is proposed that existing 40 CFR 264.147 be redesignated as § 264.148 and that a new § 264.147 be added to read as follows:

§ 264.147 Financial assurance for corrective action.

An owner or operator of a facility at which corrective action is required to be performed pursuant to §§ 264.100 and/or 264.101, as applicable, must establish financial assurance for the completion of the corrective action. The owner or operator must choose from the financial mechanisms specified in paragraphs (a) through (d) of this section. The owner or operator must submit to the Regional Administrator an originally signed duplicate of the applicable instrument at the time he submits the cost estimate for corrective action to the Regional Administrator.

(a) *Corrective action trust fund.* (1) An owner or operator may satisfy the requirements of this section by establishing a corrective action trust fund which conforms to the requirements of this paragraph. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(2) *Wording of trust agreement.* The wording of the trust agreement must be identical to the wording specified in § 264.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgement (for example, see § 264.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current required corrective action trust fund balance covered by the agreement, as required by § 264.146(d).

(3) *Payments into the trust fund.*—(i) *Pay-in period.* The pay-in period is the time period during which the owner or operator must make payments into the corrective action trust fund. At the end of the pay-in period, the trust fund balance must equal the required corrective action trust fund balance, as defined in § 264.141(h). The length of the pay-in period shall be the shorter of the following: (A) 20 years from the time when the corrective action measures are specified in the permit; or (B) one-half of the estimated duration of the corrective action period, as indicated by the specified corrective action measures. If a revision to the corrective action measures includes a change in the estimated duration of the corrective action, the pay-in period shall be adjusted accordingly.

(ii) *Calculation of payments.* The initial payment is due 30 days after the date when the originally signed duplicate of the trust agreement is submitted to the Regional Administrator. Except as provided in § 264.147(d), the first payment must be in a sum at least equal to the required corrective action trust fund balance divided by the number of years in the pay-in period, as provided in § 264.147(a)(3)(i). Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

$$\text{Next payment} = \frac{RB-CV}{Y}$$

where RB is the most recent estimate of the required corrective action trust fund balance; CV is the current value of the trust fund; and Y is the most recent estimate of the number of years remaining in the pay-in period as determined in accordance with paragraph (a)(3)(i) of this section.

(4) *Acceleration of payments.* The owner or operator may accelerate payments into the trust fund or may deposit the full amount of the current required corrective action trust fund balance at the time the fund is established. In any event, the owner or operator must maintain the value of the fund at no less than the value the fund would have had if annual payments were made as specified in paragraph (a)(3) of this section.

(5) *Alternate mechanisms.* If the owner or operator establishes a corrective action trust fund after having used one or more alternate mechanisms specified in this section, the first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of this paragraph.

(6) *Change in required corrective action trust fund balance after pay-in period ends.* Whenever the required corrective action trust fund balance changes after the pay-in period is completed, the owner or operator must compare the new required balance with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the new required balance, the owner or operator, within 60 days after the change in the required balance, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the required balance, or obtain other financial assurance as specified in this section to cover the difference.

(7) *Trust fund greater than required trust fund balance.* If at any time during the pay-in period, or thereafter, the value of the trust fund is greater than the total amount of the current required corrective action trust fund balance, the owner or operator may submit a written request to the Regional Administrator for release of the amount in excess of the current required corrective action trust fund balance. The Regional Administrator may release all or part of the amount in excess of the current required correct action trust fund balance if he determines that the remaining cost of corrective action will not be greater than the current required corrective action trust fund balance. If the Regional Administrator does not release funds in excess of the current required corrective action trust fund balance, he will provide the owner or operator with a detailed written statement of reasons.

(8) *Substitution of other financial assurance.* If an owner or operator substitutes other financial assurance as specified in this section for the trust fund, he may submit a written request to the Regional Administrator for release of the amount in excess of the current required corrective action trust fund balance covered by the trust fund.

(9) *Release of funds.* Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a) (7) or (8) of this section, the Regional Administrator will instruct the trustee to release to the owner or operator such funds as the Regional Administrator specifies in writing.

(10) *Reimbursement.* After the end of the pay-in period, an owner or operator or any other person authorized to perform corrective action may request reimbursement for corrective action expenditures by submitting itemized bills to the Regional Administrator. Within 60 days after receiving bills for corrective action activities, the Regional Administrator will determine whether the corrective action expenditures are in accordance with the specified corrective

action measures or otherwise justified, and if so, he will instruct the trustee to make reimbursement in such amounts as the Regional Administrator specifies in writing. In the event an owner or operator does not complete the required corrective action and a third party undertakes corrective action, the third party may request and obtain reimbursement for corrective action expenditures in the same manner as an owner or operator, except that such a third party may request and obtain reimbursement for corrective action expenditures before the end of the pay-in period. If the Regional Administrator has reason to believe that the remaining cost of corrective action will be significantly greater than the value of the trust fund, he may withhold reimbursement of such amounts as he deems prudent until he determines, in accordance with § 264.147(g), that the owner or operator is no longer required to maintain financial assurance for corrective action. If the Regional Administrator does not instruct the trustee to make such reimbursements, he will provide the owner or operator with a detailed written statement of reasons.

(11) *Termination of trust fund.* The Regional Administrator will agree to termination of the trust when: (i) An owner or operator substitutes alternate financial assurance as specified in this section; (ii) the Regional Administrator releases the owner or operator from the requirement of this section in accordance with § 264.147(g); or (iii) at the end of the corrective action period, if the owner or operator does not complete the required corrective action during the corrective action period and funds remain in the trust fund after completion of corrective action by a third party.

(b) *Surety bond guaranteeing performance of corrective action.* (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Regional Administrator. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in the most recently published Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in § 264.151(c).

(3) The owner or operator who sues a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust must meet the requirements specified in § 264.147(a), except that:

(i) An originally signed duplicate of the standby trust agreement must be submitted to the Regional Adminsitrator with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 264.147(a);

(B) Updating of Schedule A of the trust agreement (see § 264.151(a)) to show current cost estimate for corrective action or the current required corrective action trust fund balance;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Perform corrective action in accordance with the corrective action measures specified in the permit, as amended, and other applicable requirements of the permit for the facility whenever required to do so; or

(ii) Provide alternate financial assurance as specified in this section, and obtain the Regional Administrator's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a final administrative determination pursuant to section 3008 of RCRA that the owner or operator has failed to perform corrective action in accordance with the specified corrective action measures and other applicable permit requirements, as amended, when required to do so, under the terms of the bond the surety will perform corrective action as guaranteed by the bond or will deposit the amount of the penal sum into the standby trust fund.

(6) The penal sum of the bond must be in an amount at least equal to the current cost estimate for corrective action.

(7) Whenever the current cost estimate for corrective action increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current cost estimate for corrective action and submit written evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section.

(8) During the time in which corrective action must be performed, the Regional Administrator may approve a decrease in the penal sum of the owner or operator demonstrates to the Regional Administrator that the amount exceeds the cost of remaining corrective action measures.

(9) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Regional Administrator. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Regional Administrator, as evidenced by the return receipts.

(10) The owner or operator may cancel the bond if the Regional Administrator has given prior written consent. The Regional Administrator will provide such written consent when:

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

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 264.147(g).

(11) Under the terms of the bond, the surety agrees to be bound notwithstanding amendments to the specified corrective action measures or schedule of compliance in the permit or to other plans, permits, applicable laws, statutes, rules and regulations and agrees that no such amendment will alleviate the surety's obligation on the bond.

(12) The surety will not be liable for deficiencies in the performance of corrective action by the owner or operator after the Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 264.147(g).

(c) *Corrective action letter of credit.* (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in § 264.151(d).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also etablish a standby trust fund. Under the

terms of the letter of credit, all amounts paid pursuant to a draft by the Regional Administrator will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Regional Administrator. This standby trust fund must meet the requirements of the trust fund specified in § 264.147(q), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Regional Administrator with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in § 264.147(a);

(B) Updating of Schedule A of the trust agreement (see § 264.151(a)) to show the current cost estimate for corrective action or the current required corrective action trust fund balance;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the EPA Identification Number, name, and address of the facility, and the amount of funds assured by the letter of credit for corrective action at the facility.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Regional Administrator by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Regional Administrator have received the notice of cancellation, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current cost estimate for corrective action, except as provided in § 264.147(e).

(7) Whenever the current cost estimate for corrective action increases to an amount greater than the amount of the credit, the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current cost estimate for corrective action and submit evidence of such increase to the Regional Administrator, or obtain other financial assurance as specified in this section to cover the increase.

(8) During the period of corrective action, the Regional Administrator may approve a decrease in the amount of the letter of credit if the owner or operator demonstrates in writing to the Regional Administrator that the amont exceeds the cost of remaining corrective action activities.

(9) Following a final administrative determination pursuant to section 3008 of RCRA that the owner or operator has failed to perform corrective action in accordance with the specified corrective action measures and other permit requirements, as amended; when required to do so, the Regional Administrator may draw on the letter of credit.

(10) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Regional Administrator will draw on the letter of credit. The Regional Administrator may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension, the Regional Administrator will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Regional Administrator.

(11) The Regional Administrator will return the letter of credit to the issuing institution for termination when:

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

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 264.147(g);

(d) *Financial test and corporate guarantee for corrective action.* (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 either paragraph (d)(1)(i) or (d)(1)(ii) of this section:

(i) The owner or operator must have:

(A) Two of the following three ratios: A ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current cost estimates for closure, and/or post-closure care, and/or corrective action, and/or plugging and abandonment, covered by the test; and

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

(D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current cost estimates for closure, and/or post-closure care, and/or corrective action, and/or plugging and abandonment, covered by the 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 at least six times the sum of the current cost estimates for closure, and/or post-closure care, and/or corrective action, and/or plugging and abandonment, covered by the test; and

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

(D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current cost estimates for closure, and/or post-closure care, and/or corrective action, and/or plugging and abandonment, covered by the test.

(2) The terms current closure, post-closure, and corrective action cost estimates as used in paragraph (d)(1) of this section refer to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner's or operator's chief financial officer (§ 264.151(f) or § 264.151(g) as applicable). The term plugging and abandonment as used in paragraph (d)(1) of this section refers to the cost estimates required to be shown in paragraphs 1–4 of the letter from the owner's or operator's chief financial officer (§ 144.70(f) of this title).

(3) To demonstrate that he meets this test, the owner or operator must submit the following 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(f) or § 264.151(g), as applicable; and

(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; and

(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) As a result of the comparison, 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 facility at which corrective action is required to be performed under § 264.100 and/or § 264.101 must submit the items specified in paragraph (d)(3) of this section to the Regional Administrator once the corrective action measures and cost estimate are specified in the permit.

(5) After the initial submission of items specified in paragraph (d)(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 (d)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (d)(1) of this section, he must send notice to the Regional Administrator of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail 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 requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Regional Administrator may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (d)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (d)(3) of this section. If the Regional Administrator finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (d)(1)(i) or (d)(1)(ii) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) 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 (d)(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 alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) The owner or operator is no longer required to submit the items specified in paragraph (d)(3) of this section when:

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

(ii) The Regional Administrator releases the owner or operator from the requirements of this section in accordance with § 264.147(g).

(10) An owner or operator may meet the requirements of this section by obtaining a written guarantee, hereafter referred to as "corporate guarantee." The guarantor must be the parent corporation, as defined in § 264.141, of the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (d)(1) through (d)(8) of this section and must comply with the terms of the corporate guarantee. The wording of the corporate guarantee must be identical to the wording specified in § 264.151(h). The corporate guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (d)(3) of this section. The terms of the corporate guarantee must provide that:

(i) If the owner or operator fails to perform and complete corrective action at a facility covered by the corporate guarantee in accordance with the approved corrective action measures specified in the permit and other permit requirements, as amended, whenever required to do so, the guarantor will do so or establish a trust fund for such facility as specified in § 264.147(a) in the name of the owner or operator.

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

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Regional Administrator within 90 days after receipt by both the owner or operator and the Regional Administrator of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(e) *Use of multiple financial mechanisms.* An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds and letters of credit. The mechanisms must be as specified in paragraphs (a) and (c), respectively, of this section, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current cost estimate for corrective action. If the corrective action trust fund is combined with the letter or credit, the required corrective action trust fund balance shall be the amount of the difference between the amount assured by the letter of credit and the cost estimate for corrective action. A single standby trust fund may be established for two or more mechanisms. The Regional Administrator may use multiple mechanisms to provide for corrective action at the facility.

(f) *Use of a financial mechanism for multiple facilities.* An owner or operator may use any financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Regional Administrator must include a list showing for each facility, the EPA Identification Number, name, address, and the amount of funds for corrective action assured by the mechanism. If the facilities covered by the mechanism are in more than one Region, identical evidence of financial assurance must be submitted to and maintained by the Regional Administrator of each such Region. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. A separate cost estimate and trust fund balance will be required for each separate release. However, one trust fund may be used providing funds are clearly identified for each release. In directing funds available through the mechanism for corrective action at any of the facilities covered by the

mechanism, the Regional Administrator may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism. If the owner or operator uses the corrective action trust fund to provide financial assurance for more than one facility, the owner or operator must develop a separate required corrective action trust fund balance and pay-in period for each release at each facility. In addition, he must develop a separate trust fund balance for each new and separate release. However, he may establish one trust fund mechanism to secure the funds.

(g) *Release of the owner or operator from the requirements of this section.* Within 60 days after receiving certification from the owner or operator and an independent registered professional engineer that corrective action has been completed in accordance with the corrective action measures specified in the permit, the Regional Administrator will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for corrective action at the particular facility, unless the Regional Administrator has reason to believe that any aspect of the corrective action has not been completed in accordance with the specified corrective action measures. The Regional Administrator shall provide the owner or operator with a detailed written statement of any reason to believe that corrective action has not been completed in accordance with the specified corrective action measures.

12. In section 264.151 paragraphs (a), (c), (d), (f), (g), and (h) are revised to read as follows:

§ 264.151 Wording of the instruments.

(a)(1) A trust agreement for a trust fund, as specified in § 264.143(a) or § 264.145(a) or § 264.147(a) or § 265.143(a) or § 265.145(a) 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:

Trust Agreement

Trust agreement, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of State] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "Incorporated in the State of _____" or "a national bank"], the "Trustee."

Whereas, the United States Environmental Protection Agency, "EPA," an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available to complete [closure and/or post-closure care and/or corrective action] at the facility.

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein.

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions

As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Facilities and Cost Estimates or Required Trust Fund Balance

This Agreement pertains to the facilities and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current cost estimate(s) for closure and/or post-closure care and/or corrective action and the current required corrective action trust fund balance, or portion thereof, if applicable, for which financial assurance is demonstrated by this Agreement.]

Section 3. Establishment of Fund

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of EPA. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liability of the Grantor established by EPA.

Section 4. Payment for Closure and/or Post-Closure Care and/or Corrective Action

The Trustee shall make payments from the Fund as the EPA Regional Administrator shall direct, in writing, to provide for the payment of the costs of [closure and/or post-closure care and/or action] at the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the EPA Regional Administrator from the Fund for [closure and/or post closure care and/or corrective action] expenditures in such amounts as the EPA Regional Administrator shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the EPA Regional Administrator specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

Section 6. Trustee Management

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in wroting to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depositary even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificate issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnished to the Grantor and to the appropriate EPA Regional Administrator a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the the Trustee within 90 days after the statement has been furnished to the Grantor and the EPA Regional Administrator shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor, the EPA Regional Administrator, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the EPA Regional Administrator to the Trustee shall be in writing, signed by the EPA Regional Administrators of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or EPA hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or EPA, except as provided for herein.

Section 15. Notice of Nonpayment

The Trustee shall notify the Grantor and the appropriate EPA Regional Administrator, by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement

This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate EPA Regional Administrator, or by the Trustee and the appropriate EPA Regional Administrator if the Grantor ceases to exist.

Section 17. Irrevocability and Termination

Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the EPA Regional Administrator, or by the Trustee and the EPA Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 18. Immunity and Indemnification

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA Regional Administrator issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law

This Agreement shall be administered, construed, and enforced according to the laws of the State of [insert name of State].

Section 20. Interpretation

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 264.151(a)(1) as such regulations were constituted on the date first above written.

[Signature of Grantor]
[Title]
Attest:
[Title]
[Seal]
[Signature of Trustee]
Attest:
[Title]
[Seal]

(2) The following is an example of the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §§ 264.143(a), 264.145(a), 264.147(a), 265.143(a), and 265.145(a) of this chapter. State requirements may differ on the proper content of this acknowledgment.

State of ———————————

County of ———————————

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

* * * * *

(c) A surety bond guaranteeing performance of [closure and/or post-closure care and/or corrective action], as specified in §§ 264.143(c) and/or 264.145(c) and/or 264.147(b), must be worded as follows except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Performance Bond

Date bond executed: ———————————

Effective date: ———————————

Principal: [legal name and business address of owner or operator] Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

State of incorporation: ———————————

Surety(ies): [name(s) and business address(es)]

EPA Identification Number, name, address, and [closure and/or post-closure care and/or corrective action] amount for each facility guaranteed by this bond [indicate closure, post-closure, and/or corrective action amounts separately]:

Total penal sum of bond: $ ———————————

Surety's bond number: ———————————

Know All Persons by These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the U.S. Environmental Protetion Agency (hereinafter called EPA), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the Resource Conservation and Recovery Act as amended (RCRA), to have a permit in order to own or operate each hazardous waste management facility identified above, and

Whereas said Principal is required to provide financial assurance for [closure and/or post-closure care and/or corrective action] as a condition of the permit, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of this obligation are such that if the Principal shall faithfully perform [closure and/or post-closure care and/or corrective action], whenever required to do so, of each facility for which this bond guarantees [closure and/or post-closure care and/or corrective action], in accordance with the [closure plan and/or post-closure care and/or specified corrective action measures] and other requirements of the permit as such plan and permit may be amended, pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended.

Or, if the Principal shall provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264, and obtain the EPA Regional Administrator's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the EPA Regional Administrator(s) from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by an EPA Regional Administrator that the Principal has been found in violation of the [closure and/or post-closure care and/or corrective action] requirements of 40 CFR Part 264, for a facility for which this bond guarantees performance of [closure and/or post-closure care and/or corrective action], the Surety(ies) shall either perform [closure and/or post-closure care and/or corrective action] in accordance with the [closure plan and/or post-closure care plan and/or specified corrective action measures] and other permit requirements or place the [closure and/or post-closure care and/or the corrective action] amount guaranteed for the facility into the standby trust fund as directed by the EPA Regional Administrator.

Upon notification by an EPA Regional Administrator that the Principal has failed to provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264 and obtain written approval of such assurance from the EPA Regional Administrator(s) during the 90 days following receipt by both the Principal and the EPA Regional Administrator(s) of a notice of cancellation of the bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the EPA Regional Administrator.

The Surety(ies) hereby agrees to be bound by amendments to [closure and/or post-closure and/or corrective action] plans, permits, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the EPA Regional Administrator(s), as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the EPA Regional Administrator(s) of the EPA Region(s) in which the bonded facility(ies) is (are) located.

[The following paragraph must be included in the corrective action performance bond, but is an *optional* rider that may be included but is not required in the case of the closure and/or postclosure care performance bond.]

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new [closure and/or post-closure and/or corrective action] amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the EPA Regional Administrator(s).

In Witness Whereof, the Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 264.151(c) as such regulations were constituted on the date this bond was executed.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate seal]

Corporate Surety(ies)]

[Name and address]

State of incorporation: ———

Liability limit: $———

[Signature(s)]

[Name(s) and title[s)]

[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $———

(d) A letter of credit, as specified in § 264.143(d) or § 264.145(d) or § 264.147(c) or § 265.143(c) or § 265.145(c) of this chapter, as

applicable, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

Regional Administrator(s)
Region(s) _____
U.S. Environmental Protection Agency

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of [owner's or operator's name and address] up to the aggregate amount of [in words] U.S. dollars $_____, available upon presentation [insert, if more than one Regional Administrator is a beneficiary, "by any one of you"] of

(1) Your sight draft, bearing reference to this letter of credit No. _____, and

(2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of the Resource Conservation and Recovery Act of 1976 as amended."

This letter of credit is effectve as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least 1 year] on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and [owner' or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unusued portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and [owner' or operator's name], as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner's or operator's name] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 264.151(d) as such regulations were constituted on the date shown immediately below. [Signature(s) and title(s) of official(s) of issuing institution] [Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

(e) A certificate of insurance, as specified in § 264.143(e) or § 264.145(e) or § 264.143(d) or § 265.145(d) of this chapter, as applicable, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certificate of Insurance For Closure or Post-Closure Care

Name and Address of Insurer (herein called the "Insurer"): _____
Name and Address of Insured (herein called the "Insured"): _____
Facilities Covered: [List for each facility: The EPA Identification Number, name, address, and the amount of insurance for closure and/or the amount for post-closure care (these amounts for all facilities covered must total the face amount shown below).]
Face Amount: _____
Policy Number: _____
Effective Date: _____

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified about to provide financial assurance for [insert "closure" or "closure and post-closure care" or "post-closure care"] for the facilities identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 40 CFR 264.143(e), 264.145(e), 265.143(d), and 265.145(d), as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the EPA Regional Administrator(s) of the U.S. Environmental Protection Agency, the Insurer agrees to furnish to the EPA Regional Administrator(s) a duplicate original of the policy listed above, including the endorsements thereon.

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

[Authorized signature for Insurer]
[Name of person signing]
[Title of person signing]
Signature of witness or notary: _____
[Date]

* * * * *

(f) A letter from the chief financial officer, as specified in § 264.143(f), 264.145(f), 264.147(d), 265.143(e), or § 265.145(e), 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

[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 [name and address of firm]. This letter is in support of this firm's use of the financial test to demonstrate financial assurance, as specified in Subpart H of 40 CFR Parts 264 and 265.

[Fill out the following four paragraphs regarding facilities and associated cost estimates. If your firm has 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 care and/or corrective action cost estimates.

1. This firm is the owner or operator of the following facilities for which financial assurance for [closure and/or post-closure care and/or corrective action] is demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current [closure and/or post-closure care and/or corrective action] cost estimates covered by the test are shown for each facility:

2. This firm guarantees, through the corporate guarantee specified in Subpart H of 40 CFR Parts 264 and 265, [closure and/or post-closure care and/or corrective action] at the following facilities owned or operated by subsidiaries of this firm. The current cost estimates for [closure and/or post-closure care and/or corrective action] so guaranteed are shown for each facility: _____

3. In States where EPA is not administering the financial requirement of Subpart H of 40 CFR Parts 264 or 265, this firm, as owner or operator or guarantor, is demonstrating financial assurance for [closure and/or post-closure care and/or corrective action] at the following facilities through the use of a test equivalent to the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current [closure and/or post-closure care and/or corrective action] costs estimates covered by such a test are shown for each facility: _____

4. This firm is the owner or operator of the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, and/or corrective action, 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 care and/or corrective action] costs estimates not covered by such financial assurance are shown for each facility: _____

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

Fill in Alternative I if the criteria of paragraph (f)(1)(i) of § 264.143 or § 264.145 or of paragraph (d)(1)(i) of § 264.147, or paragraph (e)(1)(i) of 265.143 or § 265.145 of this chapter are used. Fill in Alternative II if the criteria of paragraph (f)(1)(ii) of § 264.143 or § 264.145 or of paragraph (d)(1)(ii) of § 264.174, § 265.143, § 265.145 or § 265.147 of this chapter are used.

Alternative I

(1) Sum of current closure, post-closure care, and corrective action cost estimates [total of all cost estimates shown in the four paragraphs above]: _____ $_____

* (2) Total liabilities [if any portion of the closure, post-closure care or corrective action cost estimates is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4] _____

* (3) Tangible net worth: _____

* (4) Net worth: _____

* (5) Current assets: _____

* (6) Current liabilities: _____
* (7) Net working capital (line 5 minus line 6) _____
* (8) The sum of net income plus depreciation, depletion, and amortization _____.
* (9) Total assets in U.S. (required only if less than 90% of firm's assets are located in the U.S.) _____

	Yes	No
(10) Is line 3 at least $10 million?		
(11) Is line 3 at least 6 times line 1?		
(12) Is line 7 at least 6 times line 1?		
* (13) Are at least 90 percent of firm's assets located in the U.S.? If not, complete line 14?		
(14) Is line 9 at least 6 times line 1?		
(15) Is line 2 divided by line 4 less than 2.0?		
(16) Is line 8 divided by line 2 greater than 0.1?		
(17) Is line 5 divided by line 6 greater than 1.5?		

Alternative II

(1) Sum of current closure, post-closure care, and corrective action cost estimates [total of all cost estimates shown in the four paragraphs above]: _____
(2) Current bond rating of most recent issuance of this firm and name of rating service: _____
(3) Date of insurance of bond: _____
(4) Date of maturity of bond: _____
(5) Tangible net worth [if any portion of the closure, post-closure care or corrective action cost estimate is included in "total liabilities" on your firm's financial statements, you may add the amount of that portion to this line]: $_____.
* (6) Total assets in U.S. (required only if less than 90 percent of firm's 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 percent of firm's assets located in the U.S.? If not, complete line 10		
(10) Is line 6 at least 6 times line 1?		

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

[Signature]
[Name]
[Title]
[Date]

(g) A letter from the chief financial officer, as specified in § 264.148(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 and/or to demonstrate both liability coverage and assurance of closure and/or post-closure care and/or corrective action].

[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 and/or corrective action," 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 liability and closure and/or post-closure care and/or corrective action, fill in the following four paragraphs regarding facilities and associated closure and/or post-closure and/or corrective action cost estimates (or the required corrective action trust fund balance, if applicable). 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 care and/or corrective action cost estimates (or the required corrrective action trust fund balance if applicable). Identify each cost estimate as to whether it is for closure or post-closure care or corrective action.]

1. The firm identified above owns or operates the following facilities for which financial assurance for closure and/or post-closure care and/or corrective action is demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure care and/or corrective action cost estimates [or the required corrective action trust fund balance, if applicable] covered by the test are shown for each facility: _____.

2. The firm identified above guarantees, through the corporate guarantee specified in Subpart H of 40 CFR Parts 264 and 265, the closure and/or post-closure care and/or corrective action at the following facilities owned or operated by its subsidiaries. The current cost estimates for closure and/or post-closure care and/or corrective action, [or the required corrective action trust fund balance, if applicable], 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 closure or post-closure care or corrective action at the following facilities through the use of a test equivalent to the financial test specified in Subpart H of 40 CFR Parts 264 and 265. The current closure and/or post-closure care and/or corrective action cost estimates, [or the required corrective action trust fund balance, if applicable], covered by such a test are shown for each facility: _____.

4. The firm 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, or corrective action, 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 Part 264 or 265 or equivalent to State mechanisms. The current closure and/or post-closure and/or corrective action cost estimates, [or the required corrective action trust fund balance, if applicable], 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)(l)(i) of § 264.147 or § 265.147 are used. Fill in Alternative II if the criteria of paragraph (f)(l)(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?		

	Yes	No
*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 (including use in conjunction with the corporate guarantee) to demonstrate assurance of both liability *and* closure and/or post-closure care and/or corrective action.]

Part B. Closure and/or Post-Closure Care and/or Corrective Action and Liability Coverage

[Fill in Alternative I if the criteria of paragraphs (f)(l)(i) of § 264.143 or § 264.145, or (d)(l)(i) of § 264.147 and paragraph (f)(l)(i) of § 264.148 are used, or if the criteria of paragraph (e)(l)(i) of § 265.143 or § 265.145 and (f)(l)(i) of § 265.147 are used. Fill in Alternative II if the criteria of paragraphs (f)(l)(ii) of § 264.143 or §264.145, or paragraph (d)(l)(ii) of § 264.147 and paragraph (f)(l)(ii) of § 264.148 are used or if the criteria of paragraphs (e)(l)(ii) of § 265.143 or § 265.145 and (f)(l)(ii) of § 265.147 are used.]

Alternative I

1. Sum of current closure, post-closure and corrective action 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, post-closure care or corrective action 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. $
*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 of current closure, post-closure care, and corrective action 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, post-closure care of corrective action 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] _____

(h)(1) A corporate guarantee, as specified in § 264.143(f) or § 264.145(f) or § 264.147(d) or § 265.143(e) § 265.145(e) 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:

Corporate Guarantee for Closure, and/or Post-Closure Care and/or Corrective Action

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of the State of [insert name of State], herein referred to as guarantor, to the United States Environmental Protection Agency (EPA), obligee, on behalf of our subsidiary [owner or operator] of [business address].

Recitals

(1) Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 264.143(f), 264.145(f), 264.147(d), 265.143(e), and 265.145(e).

(2) [Owner or operator] owns or operates the following hazardous waste management facility(ies) covered by this guarantee. [List for each facility: EPA Identification Number, name, and address. Indicate for each whether guarantee is for closure and/or post-closure care and/or corrective action.]

(3) "Closure plans" and "post-closure plans" as used below refer to the plans maintained as required by Subpart G of 40 CFR Parts 264 and 265 for the closure and post-closure care of facilities as identified above.

(4) For value received from [owner or operator], guarantor guarantees to EPA that in the event that [owner or operator] fails to perform [insert closure and/or post-closure care and/or corrective action] at the above facility(ies) in accordance with the closure, post-closure care, or corrective action measures specified in the permit and other permit or interim status requirements whenever required to do so, the guarantor shall do so or fund the standby trust fund in the name of [owner or operator] in the amount of the current closure and/or post-

closure care and/or corrective action cost estimates as specified in Subpart H of 40 CFR parts 264 and 265.

(5) Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator] that he intends to provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264 or 265, as applicable, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless [owner or operator] has done so.

(6) The guarantor agrees to notify the EPA Regional Administrator by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.

(7) Guarantor agrees that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor of closure and/or post-closure care and/or corrective action, he shall establish alternate financial assurance as specified in Subpart H of 40 CFR Part 264 or 265, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.

(8) Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: Amendment or modification of the closure plan, post-closure care plan, or specified corrective action measures; amendment or modification of the permit; the extension or reduction of the time of performance of closure, post-closure care, or corrective action; or any other modification or alteration of an obligation of the owner or operator pursuant to 40 CFR Part 264 or 265.

(9) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial assurance requirements of Subpart H of 40 CFR Parts 264 and 265 for the above-listed facilities, except that guarantor may cancel this guarantee by sending notice by certified mail to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator] such cancellation to become effective no earlier than 120 days after receipt of such notice by both EPA and [owner or operator], as evidenced by the return receipts.

(10) Guarantor agrees that if [owner or operator] fails to provide alternate financial assurance as specified in Subpart H of 40 CFR Part 264 or 265, as applicable, and obtain written approval of such assurance from the EPA Regional Administrator(s) within 90 days after a notice of cancellation by the guarantor is received by an EPA Regional Administrator from guarantor, guarantor shall provide such alternate financial assurance in the name of [owner or operator].

(11) Guarantor expressly waives notice of acceptance of this guarantee by the EPA or by [owner or operator]. Guarantor also expressly waives notice of amendments or modifications of the closure and/or post-closure plan and of amendments or modifications of the facility permit(s).

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR 264.151(h) as such regulations were constituted on the date first above written.

Effective date: _____

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary: _____

(2) A corporate guarantee, as specified in § 264.148(g) or 265.147(g) 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:

* * * * *

13. It is proposed that § 264.152 be revised to read as follows:

§ 264.152 Use of State-required mechanisms.

(a) For a facility located in a State where EPA is administering the requirements of this subpart but where the State has hazardous waste regulations that include requirements for financial assurance of closure, post-closure care, corrective action, or liability coverage, an owner or operator may use the State-required financial mechanism to meet the requirements of §§ 264.143, 264.145, 264.147, or § 264.148 if the Regional Administrator determines that the State mechanisms are at least equivalent to the financial mechanisms specified in this subpart. The Regional Administrator will evaluate the equivalency of the mechanisms principally in terms of (1) certainty of the availability of funds to complete the required closure, or post-closure care activities, or corrective action, or liability coverage, and (2) the amount of funds that will be made available. The Regional Administrator may also consider other factors as he deems appropriate. The owner or operator must submit to the Regional Administrator evidence of the establishment of the mechanism together with a letter requesting that the State-required mechanism be considered acceptable for meeting the requirements of this subpart. The submission must include the following information: The facility's EPA Identification Number, name, and address, and the amount of funds for closure, or post-closure care, or corrective action, or liability coverage, assured by the mechanism. The Regional Administrator will notify the owner or operator of his determination regarding the mechanism's acceptability in lieu of financial mechanisms specified in this subpart. The Regional Administrator may require the owner or operator to submit additional information as is deemed necessary to make this determination. Pending this determination, the owner or operator will be deemed to be in compliance with the requirements of §§ 264.143, 264.145, 264.147, or § 264.148, as applicable.

(b) If a State-required mechanism is found acceptable as specified in paragraph (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this subpart by increasing the funds available through the State-required mechanism or using additional financial mechanisms as specified in this subpart. The amount of funds available through the State and Federal mechanisms must at least equal the amount required by this subpart.

14. It is proposed that § 264.153 be revised to read as follows:

§ 264.153 State assumption of responsibility.

(a) If a State either assumes legal responsibility for an owner's or operator's compliance with the closure, and/or post-closure care, and/or corrective action, and/or liability requirements of this Part or assures that funds will be available from State sources to cover those requirements, the owner or operator will be in compliance with the requirements of §§ 264.143, 264.145, 264.147, and/or § 264.148, as applicable, if the Regional Administrator determines that the State's assumption of responsibility is at least equivalent to the financial mechanisms specified in this supbart. The Regional Administrator will evaluate the eqiuvalency of State guarantees principally in terms of (1) certainty of the availability of funds for the required closure, or post-closure care, or corrective action activities, or liability coverage and (2) the amount of funds that will be made available. The Regional Administrator may also consider other factors as he deems appropriate.

The owner of operator must submit to the Regional Administrator a letter from the State describing the nature of the State's assumption of responsibility together with a letter from the owner or operator requesting that the State's assumption of responsibility be considered acceptable for meeting the requirements of this subpart. The letter from the State must include, or have attached to it, the following information: The facility's EPA Identification

Number, name, and address, and the amount of funds for closure, or post-closure care, or corrective action, or liability coverage that are guaranteed by the State. The Regional Administrator will notify the owner or operator of his determination regarding the acceptability of the State's guarantee in lieu of financial mechanisms specified in this subpart. The Regional Administrator may require the owner or operator to submit additional information as is deemed necessary to make this determination. Pending this determination, the owner of operator will be deemed to be in compliance with the requirements of §§ 264.143, 264.145, 264.147, or § 264.148, as applicable.

(b) If a State's assumption of responsibility is found acceptable as specified in paragraph (a) of this section except for the amount of funds available, the owner or operator may satisfy the requirements of this subpart by use of both the State's assurance and additional financial mechanisms as specified in this subpart. The amount of funds available through the State and Federal mechanisms must at least equal the amount required by this subpart.

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

15. The authority citation for Part 270 continues to read as follows:

Authority: Secs. 1006, 2002, 3005, 3007, 3019, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912, 6925, 6927, 6939 and 6974).

16. In §270.14, new paragraph (d)(4) is added to read as follows:

§ 270.14 Contents of Part B: General requirements.

* * * * *

(d) * * *

(4) If corrective action measures are specified prior to or at the time of permit issuance, then the following additional information is required:

(i) An estimate of the corrective action costs satisfying the requirements of §264.146(b); and

(ii) A demonstration of financial assurance for completion of the corrective action, as required by §264.147.

Subpart D—Changes to Permits

17. In § 270.41, paragraph (a) is amended by revising paragraphs (a)(2) and (a) (5) (iii) and by adding new paragraphs (a) (5) (ix) and (a) (5) (x) to read as follows:

§270.41 Major modification or revocation and reissuance of permits.

(a) * * *

(2) *Information.* The Director has received information. A permit may be modified during its term for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. Where the permit includes a program of information gathering, the Director may modify the permit based on the information so gathered to specify a program of corrective action measures under §264.101, cost estimate fulfilling the requirements of §264.146, and a demonstration of financial assurance for corrective action, as required by §264.147.

(5) * * *

(iii) When the permittee has filed a request under §264.148(a) for a variance to the level of financial responsibility for liability coverage or when the Director demonstrates under §264.148(d) that an upward adjustment of the level of financial responsibility is required.

* * * * *

(ix) To include requirements for corrective action pursuant to §264.101 at a facility that were not previously included in the facility's permit.

(x) To release an owner or operator from a requirement to perform corrective action under §264.147(g).

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

18. The authority citation for Part 271 continues to read as follows:

Authority: Sec. 1006, 2002(a), and 3006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6926).

19. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Date	Title of regulation
• • • • •	
[insert date of publication]	Financial Assurance for Corrective Action—Known Releases.
• • • • •	

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