

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264 and 265

[FRL-3361-6]

Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Liability Coverage

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On August 21, 1985, the Environmental Protection Agency (EPA or the Agency) published a Notice of Proposed Rulemaking to amend the financial responsibility requirements concerning liability coverage for owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDFs) permitted under the Resource Conservation and Recovery Act (RCRA) (50 FR 33902). The proposal set forth several regulatory options, including the authorization of additional financial mechanisms for covering third-party liability requirements, under consideration by the Agency to provide relief for owners and operators who encounter difficulties in obtaining liability insurance. On July 11, 1986, EPA published an interim final rule allowing use of a corporate guarantee as an additional financial responsibility mechanism (51 FR 25350). This rule was issued in final form on November 18, 1987 (52 FR 44314).

EPA is today adopting other financial mechanisms for liability coverage for RCRA TSDFs. These mechanisms are letters of credit, surety bonds, trust funds, and guarantees provided by firms that are not the direct parent of the owner or operator. In addition, the Agency is clarifying the liability insurance requirements to ensure that other firms can purchase insurance for owners and operators of hazardous waste management facilities.

EFFECTIVE DATE: October 3, 1988.

ADDRESSES: The regulatory docket for this rulemaking is available for public inspection at Room S-212-E, U.S. EPA, 401 M Street, SW., Washington, DC 20460, from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The docket number is F-88-CGF1-FFFFF. The public must make an appointment to review docket materials by calling (202) 475-9327. The public may copy a maximum of 50 pages from any one regulatory docket at no cost. Additional copies cost \$0.20 per page.

FOR FURTHER INFORMATION CONTACT:

The RCRA Hotline, toll free, at (800) 424-9346 or, in Washington, DC, at (202) 382-3000. For technical information, contact Carlos M. Lago, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-4780.

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

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I. Authority

This regulation is being adopted under the authority of sections 2002(a), 3004, and 3005 of the Solid Waste Disposal Act; as amended by RCRA, as amended (42 U.S.C. 6912(a), 6924, and 6925).

II. Background

A. Current Liability Coverage Requirements

Section 3004(a)(6) of RCRA, as amended, requires EPA to establish financial responsibility standards for

owners and operators of hazardous waste management facilities as may be necessary or desirable to protect human health and the environment.

On April 16, 1982, EPA promulgated regulations requiring owners or operators to demonstrate liability coverage during the operating life of the facility for bodily injury and/or property damage to third parties resulting from accidental occurrences arising from facility operations (47 FR 16554). Under these regulations (40 CFR 264.147 and 265.147), an owner or operator of a hazardous waste treatment, storage, or disposal facility must demonstrate, on a per-firm basis, liability coverage for sudden accidental occurrences in the amount of \$1 million per occurrence and \$2 million annual aggregate, exclusive of legal defense costs. An owner or operator of a surface impoundment, landfill, or land treatment facility used to manage hazardous waste is also required to demonstrate, on a per-firm basis, liability coverage for nonsudden accidental occurrences in the amount of \$3 million per occurrence and \$6 million annual aggregate, exclusive of legal defense costs. (A "nonsudden accidental occurrence," as opposed to a "sudden accidental occurrence," is defined by 40 CFR 264.141 and 265.141 as an occurrence that takes place over time and involves continuous or repeated exposure.) "First-dollar" coverage is required; that is, the amount of any deductible must be covered by the insurer, who may have a right of reimbursement of the deductible amount from the insured.

The requirements for coverage of sudden accidental occurrences became effective on July 15, 1982. The requirements for nonsudden accidental occurrences were phased in gradually according to annual dollar sales or revenue figures of the owner or operator. January 16, 1985, was the final phase-in date.

Financial responsibility for third-party liability currently can be demonstrated by obtaining insurance, by passing a financial test, or by obtaining a corporate guarantee from a parent corporation that passes the financial test. The regulations (40 CFR 264.147(a)(3), 264.147(b)(3), 265.147(a)(3), and 265.147(b)(3)) also allow an owner or operator to meet the liability requirements through a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance.

B. August 21, 1985, Notice of Proposed Rulemaking

In 1984-1985, the availability of pollution liability insurance policies began to decline. A number of insurers who previously had offered coverage ceased to write pollution liability policies. Those still offering coverage raised their premiums substantially while reducing the coverage provided. As a consequence, some owners and operators of hazardous waste TSDFs began to experience difficulties in obtaining necessary coverage and/or paying the increased cost of such coverage.

In response to this situation, EPA took a number of steps, including issuing on August 21, 1985, a Notice of Proposed Rulemaking (NPRM) (50 FR 33902) requesting comment on five possible regulatory options as responses to the problem of reduced availability and increased cost of pollution liability insurance: (1) Maintain the existing requirements; (2) clarify the required scope of coverage and/or lower the required levels of coverage; (3) authorize other financial responsibility mechanisms; (4) authorize waivers; and (5) suspend or withdraw the liability coverage requirements.

EPA received numerous comments from four major categories of commenters on the August 21, 1985, NPRM: Owners and operators of hazardous waste TSDFs; members of the insurance industry; representatives of State and local governments; and members of the public at large. A majority of commenters encouraged the Agency to retain the existing coverage limits and encouraged the Agency not to suspend or withdraw the liability coverage requirements. Numerous commenters did, however, ask EPA to consider waivers in certain circumstances. Some commenters requested EPA to clarify the scope of coverage required or to lower the required limits of coverage, but many commenters urged EPA to authorize additional financial mechanisms that would provide an alternative to insurance. Commenters specifically mentioned mechanisms such as corporate guarantees, surety bonds, letters of credit, and trust funds for use for liability coverage. The commenters, however, did not discuss in detail any of these mechanisms.

Upon analysis of comments received, studies of the cost and availability of the instruments, analysis of the suitability of proposed financial instruments for liability coverage, and consultation with banks and State insurance commissioners, EPA has decided to

maintain the existing coverage requirements, while authorizing additional financial responsibility mechanisms for liability coverage. Sections III and V of this preamble discuss the mechanisms being authorized and existing approaches to waivers. The Agency's summary of and responses to comments urging it to change existing requirements on the scope and levels of coverage are provided in Section V of this preamble. Additionally, more specific discussion and response to comments is found in documents included in the docket for today's rule.

C. Rulemaking Authorizing the Corporate Guarantee

In response to the commenters on the August 21, 1985 NPRM who argued that EPA should authorize other financial instruments for liability coverage, EPA examined several additional mechanisms for liability coverage. Commenters particularly encouraged EPA to authorize a corporate guarantee for liability coverage, noting that such guarantees were already authorized as financial assurance mechanisms for closure and post-closure care (40 CFR 264.143(f), 264.145(f), 265.143(e), and 265.145(e)). In response, on July 11, 1986, the Agency issued an interim final rule revising 40 CFR 264.147, 264.151, and 265.147 to authorize, in addition to insurance and the financial test, the use of a corporate guarantee for liability coverage (51 FR 25350). The Agency subsequently made minor revisions to the rule authorizing the corporate guarantee for liability coverage, and finalized that rule on November 18, 1987 (52 FR 44314). As discussed in Section III of this preamble, today's rule further expands the availability of the guarantee by allowing firms that are not the direct corporate parent of the owner or operator to be the guarantor.

D. Justification for Today's Rule

The Agency believes that additional mechanisms for liability coverage are desirable in order to provide a broad set of options for owners or operators who must demonstrate liability coverage but who cannot use one of the existing mechanisms. Although commentary concerning the insurance industry in the Insurance Trade Press and in other sources suggests that underwriting losses in property-casualty insurance peaked around the end of 1985 and that the outlook for the future is more favorable,¹ the market for

Environmental Impairment Liability (EIL) insurance has remained constrained.² Accordingly, the Agency is seeking to ensure that as many alternative financial assurance mechanisms as possible are available to the regulated community, to reduce the problem created by the constrained insurance market.

Section 3010(b) of RCRA provides that regulations promulgated under Subtitle C of the statute and revisions to existing Subtitle C regulations generally take effect six months after promulgation. However, the period prior to the effective date may be shortened if the Administrator finds the regulated community does not need six months to come into compliance or for other good cause. As the regulation does not add any additional compliance requirements and a six-month period prior to implementation would be contrary to the interest of the regulated community and public by delaying the availability of other compliance mechanisms, the regulatory changes are being issued as a final rule effective 30 days after publication.

E. Key Provisions of Today's Rule

In today's rule, EPA authorizes owners or operators of hazardous waste TSDFs to use the following additional financial assurance mechanisms for liability coverage: A letter of credit; a surety bond assuring payment of liability claims; a fully-funded trust fund; and a guarantee provided by a firm that is not the direct parent of the owner or operator. The Agency is generally not revising the scope and levels of coverage required for third-party liabilities. However, today's rule includes amendments clarifying the liability coverage requirements to allow other firms to purchase insurance for owners and operators. Finally, EPA is specifying more clearly the aggregate amount of coverage that must be provided by financial responsibility mechanisms that offer combined coverage for sudden and nonsudden occurrences.

III. Additional Financial Responsibility Mechanisms Being Authorized for Liability Coverage

In determining which additional financial assurance mechanisms to

of Representatives on "Profitability of the Property/Casualty Insurance Industry," March 13, 1986.

² National Association of Insurance Commissioners, "Report of the NAIC Advisory Committee on Environmental Liability Insurance," September, 1986; and "Business Insurance," April 16, 1987, p. 58; May 4, 1987, p. 22; and May 11, 1987, p. 71.

¹ United States General Accounting Office, Statement by William J. Anderson before the House

approve for liability coverage, EPA reviewed the other financial assurance programs within EPA, other Federal agencies, and several States. The Agency first analyzed the financial mechanisms already approved for use for closure or post-closure care financial assurance since the regulated community could be expected to be familiar with them. Many of these mechanisms were mentioned by commenters on the August 21, 1985 NPRM as potentially useful. Other EPA financial assurance requirements or proposed requirements, such as the requirements for underground injection wells and underground storage tanks, were also reviewed to identify the mechanisms, if any, used in those programs for third-party liability coverage.

The Agency considered several characteristics of the mechanisms that could affect their suitability for the coverage of third-party liability claims, including (1) availability; (2) cost; (3) whether they are likely to be valid and enforceable contracts under special provisions of State law, such as laws regulating the business of insurance; and (4) whether they are capable of being set up in ways that do not require EPA to act as a "claims adjuster" or otherwise act to determine the merits of third-party liability claims brought against TSDf owners or operators.

On the basis of these analyses, EPA determined that letters of credit, surety bonds, guarantees, and trust funds provide adequate third-party liability coverage. The rationale for authorization of these instruments is described below in the discussion of each instrument.

Other mechanisms suggested by the commenters on the August 1985 NPRM and analyzed by EPA included security interests, indemnity contracts, reserve funds, captive insurance pools, and government-supplied insurance or loan guarantees. As discussed in Section V of today's preamble, EPA has concluded that these instruments are inappropriate, with the exception of captive insurance pools and risk retention groups. Captive insurance pools and risk retention groups are authorized under the current regulations.

The financial mechanisms authorized in today's rulemaking, with the exception of the guarantee, are currently approved mechanisms for closure or post-closure care under 40 CFR Parts 264 and 265, Subpart H. (Performance bonds, which are authorized for use by owners or operators of permitted facilities for assurance for closure and post-closure care, are not included because they are not adaptable to liability coverage;

instead, an analogous mechanism, the payment bond, is allowed.) The requirements for these financial mechanisms parallel the requirements for financial mechanisms authorized for closure or post-closure care. However, some provisions of the mechanisms have been adjusted to address issues that arise only in the context of liability claims. Features of the mechanisms that differ include the designation of the beneficiary, exclusions for categories of damages and obligations, the claims-payment trigger, the certification of validity and enforceability, and cancellation provisions. These features are described more fully in Section IV of today's preamble.

A. Letter of Credit

Today's rule authorizes owners or operators of hazardous waste TSDfS to use letters of credit to satisfy the RCRA third-party liability coverage requirements (40 CFR 264.147(a)(3), 264.147(b)(3), 265.147(a)(3), and 265.147(b)(3)). Letters of credit are commitments by a financial institution (e.g., a bank), whose letter of credit operations are regulated and examined by a State or Federal agency, to provide funds if appropriate documents are presented. In general, letters of credit are instruments that can be adapted for various purposes.³ Banks contacted by EPA have indicated that they would consider issuing letters of credit for liability claims for their established customers. EPA believes that letters of credit may be more readily available to owners or operators than many other mechanisms, if the owner or operator has an established relationship with a qualifying financial institution and can provide adequate collateral.

1. Features of Mechanism. A letter of credit is a financial instrument under which an issuing institution (the issuer), generally a bank, undertakes to meet a monetary obligation of its customer (the account party) if the bank is presented with specified documents. The issuer, in return for a fee, becomes the primary obligor. A third party, the beneficiary, initiates payment by making a claim directly on the issuer. Thus, a letter of credit is an instrument that substitutes the issuer's superior credit for the account party's credit.

The instrument authorized in today's rule is an irrevocable stand-by letter of credit in which the third-party beneficiaries are any and all persons

who may be damaged by a hazardous waste release from the facility whose owner or operator has secured the letter of credit. The irrevocable nature of the instrument precludes its cancellation prior to the end of a required one-year term by the issuer or the owner or operator. After the one-year term, the letter of credit will automatically renew for another year unless, 120 days before the expiration date, the issuer notifies the owner or operator and the Regional Administrator of a decision not to renew the credit (40 CFR 264.151(k)).

2. Who May Provide A Letter of Credit. Today's rule provides that letters of credit for liability coverage must be provided by an authorized financial institution regulated by a Federal or State agency (40 CFR 264.147(h)(2) and 265.147(h)(2)). EPA has established these requirements, which parallel the requirements for letters of credit providing assurance for closure or post-closure care, to ensure the financial viability of the issuer of the letter of credit. The viability of the commercial banks and savings and loan institutions that may issue letters of credit is scrutinized by several oversight organizations, including the Federal Reserve, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Comptroller of the Currency, and State banking commissioners. These regulatory bodies attempt to ensure that regulated institutions take actions necessary to avoid bankruptcies. EPA concluded that it would be duplicative to establish additional requirements to ensure the solvency of bank and savings and loan institutions issuing letters of credit.

3. Validity of Letter of Credit Providing Liability Coverage. To ensure that letters of credit may be used to provide liability coverage, EPA reviewed the status of legal doctrines that might call into question the authority of a bank to issue a letter of credit for liability coverage, and concluded that no significant legal obstacles currently exist to such use of letters of credit. EPA believes that the proposed use of letters of credit in today's rule is analogous to the use of a letter of credit in situations that courts have approved. The Agency, therefore, concluded that use of a letter of credit for financial assurance for third-party liability coverage is both valid and enforceable.

B. Surety Bond

Today's rule authorizes owners and operators of hazardous waste TSDfS to use surety bonds to satisfy the RCRA

³ U.S. General Accounting Office, Staff Study, "Financial Services—Developments in the Financial Guarantee Industry," GAO/GGD-87-84, June 25, 1987, pp. 9-13, 17-18 discusses letters of credit as financial guarantees.

third-party liability requirements (40 CFR 264.147(a)(4), 264.147(b)(4), 265.147(a)(4), and 265.147(b)(4)). The adoption of surety bonds as an additional assurance mechanism for liability coverage was widely advocated by the commenters on the August 21, 1985, NPRM.

1. *Features of Mechanism.* Surety bonds represent agreements between three parties: The principal (i.e., the facility owner or operator); the obligee (i.e., third-party liability claimants) to whom the principal promises to complete a specific act; and the surety, who assures the obligee that the principal will fulfill its obligation and, if the principal fails, that the surety will fulfill the principal's obligation to the obligee. Thus, the surety bond authorized today guarantees that if the owner or operator fails to satisfy valid third-party claims, the surety will pay such claims. A surety company is entitled to reimbursement from the principal when it makes a payment under a bond.

There are two types of surety bonds: payment bonds and performance bonds. Payment bonds guarantee that the principal will pay a certain sum to identified parties under the conditions named in the bond, and if the principal fails to make the payment or payments, the surety will make the payment or payments. Performance bond guarantees that the principal will perform a certain act and, if the principal fails, that the surety will either perform the act for the principal or pay someone else to perform it. The surety bond provided in today's rule is a payment bond, because the obligation it guarantees is limited to the principal's payment of third-party liability claims to satisfy the Subtitle C liability requirements.

A surety company's liability under a payment bond is limited to the "penal sum," which is the amount of coverage guaranteed by the bond. The penal sum of the payment bond being authorized by today's rule has two parts, the per-occurrence limit and the annual aggregate limit (40 CFR 264.151(1)). If the payment bond covers claims resulting from both sudden accidental occurrences and nonsudden accidental occurrences, a separate penal sum will be identified for each type of coverage (i.e., such a bond would have four penal sums).

The payment bond authorized in today's rule will remain in effect unless and until the surety notifies the owner or operator and the Regional Administrator of proposed cancellation by certified mail. Cancellation will become effective 120 days from the

receipt of notification (40 CFR 264.151(1), conditions clause (7)).

2. *Who May Provide Surety Bonds.*

Today's rule requires that surety companies issuing payment bonds to assure liability coverage must be listed by the Department of Treasury in Treasury "Circular 570" as surety companies that may issue bonds to the Federal government (40 CFR 264.147(i)(2) and 265.147(i)(2)). This requirement parallels the closure and post-closure care financial assurance regulations and other financial assurance requirements involving surety bonds and assures that the surety company is subject to regulatory oversight by some government agency. To qualify for such a listing, surety companies must comply with the law and regulations of the Department of Treasury (as specified in sections 9304 and 9308 of Title 31 of the United States Code). The names of the companies meeting these Treasury requirements are published on July 1 of each year by the Department of the Treasury in "Circular 570; Surety Companies Acceptable on Federal Bonds."

3. *Validity of Surety Bond Providing Liability Coverage.* EPA has contacted several State insurance commissions to determine if States would view a surety bond for third-party liability coverage as subject to the State insurance laws. In a number of States, surety companies are already regulated by the State agency that is responsible for insurance. EPA found that in other States, the issue of whether the surety bond constitutes insurance may be examined on a case-by-case (i.e., facility-by-facility or bond-by-bond) basis. Many States may consider it necessary for the firm providing the surety bond to qualify under the State's surety or insurance laws as an insurer. To address this issue, the rule does not allow owners or operators to use a surety bond to demonstrate financial assurance unless the Attorneys General or Insurance Commissioners in the States in which the surety is incorporated and in which the facilities covered by the bond are located certify that the mechanism is valid and enforceable (40 CFR 264.147(i)(4) and 265.147(i)(4)). (See Section IV.C of this preamble for further discussion.)

C. *Guarantee*

Today's rule extends the use of guarantees for liability coverage to allow guarantees provided by firms that are not the direct parents of facility owners or operators (40 CFR 264.147(g)(1) and 265.147(g)(1)). The use of a parent corporate guarantee for liability coverage was authorized in an

interim final rule on July 11, 1986 (51 FR 5350) and promulgated as a final regulation on November 18, 1987 (52 FR 44314). Under this rule, liability coverage may be provided by parent firms that directly own at least 50 percent of the voting stock of a subsidiary firm. Several commenters on the interim final rule urged EPA to allow non-parent firms to provide guarantees. After analyzing the validity and enforceability of guarantee contracts by non-parent firms, the Agency is authorizing guarantees provided by corporate grandparents and by a corporate "sibling" firm (a firm whose parent corporation is also the parent corporation of the owner or operator). The Agency also is allowing guarantees by other related and unrelated firms, provided that such firms have a substantial business relationship with the owner or operator.

The guarantee in today's rule incorporates the features of the November 18, 1987 rule for parent guarantees with minor revisions necessary to address non-parent guarantees and to ensure consistency with the other instruments allowed by today's rule. Since today's rule incorporates the features of this earlier rule, an extensive discussion of the guarantee has not been included in this preamble. Only the distinctive features of the non-parent corporate guarantee, the definition of who may provide the guarantee, and the basis upon which EPA concluded that it would be a valid and enforceable mechanism are discussed below.

1. *Features of Mechanism.* The authorized guarantee is an instrument by which a firm promises to pay the liability obligations of the owner or operator is the owner or operator does not do so. The firm providing the guarantee (the guarantor) must submit proof that it passes the financial test requirements of §§ 264.147(f)(1) or 265.147(f)(1). If the guarantor subsequently becomes unable to pass the financial test, the owner or operator must obtain another financial assurance mechanism for liability coverage.

2. *Who May Provide Guarantees.*

Today's rule extends EPA's authorization of corporate guarantees beyond the previously allowed parent guarantee to include multi-tier guarantees by corporate grandparents, cross-stream guarantees by corporate siblings, and guarantees by firms with a "substantial business relationship" with the owner or operator. In general, today's rule authorizes three types of guarantees between corporations: (1) A guarantee by a parent corporation or

principal shareholder of a subsidiary (a "downstream" guarantee), (2) a guarantee by a sibling corporation (a "cross-stream" guarantee), and (3) a guarantee by a firm that has a "substantial business relationship" with the corporation that receives the guarantee (40 CFR 264.147(g)(1) and 265.147(g)(1)).

A simple single-tier downstream guarantee is one where the direct parent corporation guarantees the obligation of its subsidiary. A multi-tier downstream guarantee (consisting of three tiers of ownership, for example) is a guarantee by which the corporate grandparent or great grandparent (i.e., the ultimate owner of the subsidiary) provides a guarantee for the subsidiary. A cross-stream guarantee is a guarantee between sibling corporations, e.g., a "brother" subsidiary's guarantee of a "sister" subsidiary where the siblings are owned by the same parent. Both of these categories of guarantees have been tested in legal actions and are considered strong and binding legal obligations although analyses of guarantees between siblings typically assume that some economic relationship exists between the two corporations aside from the guarantee.

If the guarantee is being provided by a corporate grandparent or sibling, the guarantor must provide the guarantee to the owner or operator directly, irrespective of the number of intervening levels of ownership that exist in the corporate structure (40 CFR 264.147(g)(1) and 265.147(g)(1)). For example, a corporate grandparent would provide a guarantee for the owner or operator's firm directly, not through the corporate parent.

Today's rule also authorizes unrelated firms and other related firms, aside from parents and siblings, that have a "substantial business relationship" with the owner or operator of a hazardous waste facility to provide guarantees (40 CFR 264.147(g) and 265.147(g)). In authorizing guarantees by these other related and unrelated firms, EPA sought to ensure that a valid and enforceable contract was created. To this end, the Agency is requiring these firms to demonstrate a substantial business relationship with the owner or operator to ensure that the guarantee is a valid contract. Under fundamental principles of contract law, contracts must be supported by "consideration." Consideration is generally defined as a legal detriment that has been bargained for and exchanged for the promise. The general principle underlying the concept of consideration is that the law will not enforce gratuitous promises.

The issue of consideration arises in the context of all guarantees; however, parent and sibling firms authorized to issue guarantees under today's rule can demonstrate consideration by the inherent benefits or detriments that accrue to the guarantor firm by virtue of its corporate relationship with the owner or operator. As noted above, courts have generally recognized that guarantees offered by a parent or sibling corporation are valid and enforceable. EPA believes that other related and unrelated firms should be able to demonstrate sufficient consideration for the contract if they have a substantial business relationship with the owner or operator.

The Agency's review of legal literature indicated that a sufficiently close business relationship between two firms could be comparable to the shared economic interests that typify the relationship between corporate siblings and between a parent and its subsidiary. Because it is these mutual economic interests that underlie the validity and enforceability of downstream and cross-stream guarantees, the existence of such interests between other types of firms should enable guarantees between these firms also to be valid and enforceable. No single legal definition exists of what constitutes a business relationship between two firms that would justify upholding a guarantee between them. Furthermore, such a determination would depend upon the application of the laws of the States of the involved parties. Thus, in defining the underlying business relationship that produces an acceptable guarantee, the Agency provides a broad framework for analyzing business relationships while acknowledging the primary role of State law.

In today's rule, EPA is defining substantial business relationship to mean "the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A 'substantial business relationship' must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator" (40 CFR 264.141(h)). A guarantee contract, by itself, would be inadequate to demonstrate a substantial business relationship between two parties. However, an existing contract to supply goods or services, separate from

the guarantee contract, could supply evidence of such a relationship. An example of such an arrangement might be a contract for hazardous waste disposal between a generator and a disposal facility. Evidence demonstrating such a substantial business relationship is required to be provided in the letter from the Chief Financial Officer of the guarantor.

In addition to demonstrating the existence of a substantial business relationship, these other related and unrelated guarantors must describe the value that they received in consideration for the guarantee contract. In some cases, preexisting business relationships, no matter how substantial, will be insufficient by themselves to demonstrate consideration because they will not have been bargained for to induce the promise in the guarantee contract. For this reason, these guarantors must also describe the consideration for the contract in the letter from their Chief Financial Officer.

EPA considered as a preliminary matter whether corporate guarantees would be regulated as insurance contracts under States' insurance laws. EPA was concerned that guarantors could subject themselves to States' insurance laws through the issuance of guarantees. This issue has arisen in other of the Agency's financial responsibility rulemakings, including the proposed financial responsibility requirements for underground storage tanks containing petroleum (52 FR 12786, April 17, 1987). A discussion of the applicability of State insurance laws to various mechanisms, including corporate guarantees, is contained in the docket for that rulemaking, in the "Supporting Document for Proposed Underground Storage Tanks Containing Petroleum—Financial Responsibility Requirements." That discussion indicates that States' insurance statutes and regulatory bodies have varying ways of describing their jurisdiction over guarantees, oftentimes dependent on the precise circumstances surrounding the transaction. Thus, the Agency cannot state with any certainty whether any particular guarantee would subject the guarantor to a State's insurance laws. Therefore, the responsibility rests on owners and operators to obtain guarantees that are valid and enforceable and on prospective guarantors to ascertain and comply with the State laws they would subject themselves to if they were to provide guarantees. As discussed in Section IV.C of today's preamble, the first responsibility cited is accomplished

by requiring a certification from the Attorney General or Insurance Commissioner of the State in which the guarantor is incorporated and of each State in which a facility covered by the guarantee is located.

3. *Validity of Non-Parent Guarantee Providing Liability Coverage.* Some commenters questioned whether non-parent guarantees would provide assurance equivalent to that provided by a parent guarantee. The Agency concluded that adequate assurance will be provided by these "intercorporate" guarantees. Intercorporate guarantees are a common means of assuring a lender that its loan will be repaid. In particular, "cross-stream" guarantees, which are from a "brother" subsidiary to a "sister" subsidiary where both firms are owned by the same corporate parent, are a typical business practice. Normally, collection of funds assured by intercorporate guarantees is a comparatively simple matter of contract enforcement.

In unusual circumstances, such as the situation where the guarantor declares bankruptcy, efforts could be made to avoid the guaranteed obligation. Certain provisions of the Federal bankruptcy code (11 U.S.C.A. 544(b) and 548(a)(2)) allow avoidance of obligations that deplete the debtor's assets to the detriment of its creditors. If, while the guarantor was involved in bankruptcy proceedings, a liability claim was presented to it for payment, a question could arise over whether bankruptcy laws would enable it to avoid satisfying the claim because the payment would deplete its assets to the detriment of its creditors. Under section 548(a)(2) of the Federal bankruptcy code, a trustee in bankruptcy may avoid payments made to any party within a year before the debtor filed bankruptcy if (1) the debtor was insolvent at that time and (2) the debtor did not receive "reasonably equivalent value" in return for the transfer. Section 544(b) essentially enables similar actions to be pursued under applicable State laws.

Intercorporate guarantees, however, should not be vulnerable to such actions if the owner or operator receives reasonably equivalent value in return for the guarantee. In effect, this reasonably equivalent value serves as consideration supporting the guarantee contract, similar to the guarantor having a "substantial business relationship" with the owner or operator. According to most authorities, there is no difficulty in finding reasonably equivalent value in downstream guarantees, where the guarantor is higher in the corporate hierarchy (e.g., a direct or higher-tier

parent) than the subsidiary receiving the guarantee. The subsidiary relationship of a firm to its direct or higher-tier parent is almost always considered a benefit to that parent. In cross-stream guarantees from one subsidiary of a parent to another subsidiary of that same parent, demonstrating reasonably equivalent value is more difficult because the subsidiary to which the guarantee is given is not an asset of the other subsidiary serving as the guarantor. In order to obviate any question about reasonably equivalent value in cross-stream guarantees, therefore, the Agency is requiring a cross-stream guarantor to describe in the Chief Financial Officer's Letter (§ 264.151(g)) the value of the consideration that accrued to it from the guarantee.

The Agency has also concluded that adequate assurance that obligations will not be avoided in the event of bankruptcy will be provided by guarantees made by other related firms (i.e., not corporate siblings or parents) and unrelated firms which demonstrate a substantial business relationship with the owner or operator. As with intercorporate guarantees, collection of funds in most cases will merely be a matter of contract enforcement. In the event of bankruptcy of the guarantor, however, it is particularly important that the guarantee be written so as to demonstrate clearly that the guarantor has received reasonably equivalent value in consideration for the guarantee. As discussed above, the Agency is requiring these guarantors to describe in the Chief Financial Officer's Letter (§ 264.151(g)) both the nature of the substantial business relationship and the value derived from the guarantee.

D. Trust Fund

Today's rule authorizes owners or operators of hazardous waste facilities to use trust funds to demonstrate financial responsibility for third-party liability coverage (40 CFR 264.147(a)(5), 264.147(b)(5), 265.147(a)(5), and 265.147(b)(5)), if assets sufficient to cover the full amount of the assurance to be provided by the trust fund are placed in the fund before it becomes effective (i.e., the trust must be fully funded "up-front") (40 CFR 264.147(j)(3) and 265.147(j)(3)). Several comments received on the August 21, 1985 NPRM supported the use of trust funds to demonstrate financial responsibility for third-party liability coverage.

1. *Features of Mechanism.* A trust fund is an arrangement in which a separate legal entity, the trust, is created to hold property or funds for the benefit of another. At least three parties are

necessary under trust agreements: the grantor, who establishes and funds the trust; the trustee, who has a fiduciary responsibility over the property placed in the trust by the grantor; and the beneficiary, the person (or group of people) for whom the arrangement is made. The most significant feature of a trust fund is the shift of legal ownership of the property in the trust from the grantor to the trustee when the trust is established and funded.

The trust document or trust agreement determines the allocation of rights, duties, and responsibilities among the parties to any trust. The trustee, in return for a fee, has a fiduciary responsibility to manage the fund according to the rules specified in the agreement. This agreement also defines the limits of a trustee's liability. In addition, a trust agreement states the manner in which payments are made into and out of the trust, as well as the grounds upon which the trust can be terminated.

2. *Validity of Trust Fund for Liability Coverage.* A trust used as a financial assurance mechanism should have a fund balance equal to the amount of coverage being demonstrated. The trust agreement may allow a pay-in period during which the grantor makes payments of specified amounts into the trust until the trust is fully funded. The length of the pay-in period typically is designed such that the trust fund balance equals the required amount of coverage before funds are needed for the assured activity. Because liability coverage may be needed immediately, the trust in today's rule must be fully paid up at the time it is relied upon for financial assurance. The trust also may not be cancelled unless and until an alternate financial assurance mechanism is in place. A fully funded trust provides a high degree of assurance because funds, up to the required amount of coverage, are set aside specifically for the purpose of liability coverage.

To ensure that the full amount of coverage is available each year in which owner or operator must provide financial assurance, the Agency is requiring both that the trust fund be fully funded immediately and, in addition, if a liability claim is paid out of the trust fund balance, the owner or operator is required to refinance the trust annually up to the amount of the required coverage on or before the anniversary date of the establishment of the fund to satisfy the annual aggregate requirement of §§ 264.147 and 265.147.

Although some owners and operators may conclude that the cost of funding a

trust as the sole financial assurance mechanism is prohibitive, they may find it desirable to use a trust fund in combination with one or more other mechanisms. For example, owners and operators who purchase insurance policies that do not provide the full amount of aggregate coverage might use trust funds to demonstrate financial responsibility for the amounts of the aggregate not covered by the insurance policy.

E. Purchase of Insurance by Other Firms

Under the current liability requirements, proof of adequate insurance coverage can be provided by either a certificate of insurance or an endorsement. A certificate of insurance is a statement obtained from the insurer certifying that it has issued insurance as represented in the certificate. The certificate is not a part of the policy, but can be used to demonstrate the existence of the policy. An endorsement is a form attached to the policy that describes the original terms of the policy and any amendments to those terms. An endorsement is a part of the policy and also evidences that insurance has been issued as described in the endorsement.

The Agency is today making minor revisions to the insurance certificate and endorsement to clarify that other firms may purchase insurance on behalf of owners or operators and to ensure that EPA receives proper notice of actions affecting the policy, such as attempted cancellation, where the policy has been purchased by another firm. These changes are reflected in paragraphs 2(d) of the "Hazardous Waste Facility Liability Endorsement" and of the "Hazardous Waste Facility Certificate of Liability Insurance" in §§ 264.151(i) and 264.151(j), respectively.

Currently, 40 CFR 264.147(a) and 265.147(a) require that an owner or operator must "have and maintain" coverage for bodily injury and property damage to third parties resulting from operation of a hazardous waste management facility. These regulations do not state explicitly that a party other than the owner or operator may purchase or obtain the necessary insurance coverage on behalf of the owner or operator. To clarify in the regulations that such insurance may be purchased by a third party, however, requires only that the language of the notice of cancellation provision in these insurance policies be amended.

To ensure that the cancellation provision in the Endorsement and Certificate covers a situation in which another company has purchased a policy for the owner or operator, the Agency has modified the language of the

cancellation provision of both the Certificate and Endorsement to state explicitly that another firm providing insurance for an owner or operator must notify the Regional Administrator and the owner or operator by certified mail 60 days before insurance is cancelled (40 CFR 264.151(i)(2)(d) and 264.151(j)(2)(d)). In addition, the revised cancellation provision also states that another firm providing insurance for an owner or operator must notify EPA in writing (1) whenever claims are made against the firm or the owner or operator for third-party damages and (2) before any changes are made in the policy. The Agency is concerned that reductions in the level of coverage available to the owner or operator, due to claims made against the firm providing the insurance or changes in the insurance policy by the firm providing the insurance, otherwise may not be reported to EPA.

F. Allowable Combinations of Mechanisms

The Agency will allow an owner or operator to demonstrate the required liability coverage through the use of combinations of financial assurance mechanisms (40 CFR 264.147(a)(6), 264.147(b)(6), 265.147(a)(6), and 265.147(b)(6)). Owners or operators may use any combination of insurance, the financial test, the corporate guarantee, a letter of credit, a surety bond, and a trust fund. In allowing combinations of instruments, EPA is extending the general approach of Subtitle C liability coverage requirements. An owner or operator can use its own financial strength to cover some costs and another financial assurance mechanism to cover the remainder, provided that in combining the mechanism assets are not double-counted. To prevent double-counting, combinations of the corporate guarantee and financial test are allowed only if the financial statement of the guarantor and the owner or operator are not consolidated (40 CFR 264.147(a)(6), 264.147(b)(6), 265.147(a)(6), and 265.147(b)(6)). In a consolidated financial statement, the assets and liabilities of a subsidiary are included in the parent company's financial statement. If the financial statements of the guarantor were consolidated with the statement of the owner or operator, the owner or operator could count its own assets once for the financial test and they could be counted again in the corporate financial statement which is used to support the corporate guarantee. Such double-counting of assets would negate the value of the financial test by overestimating the assets of the guarantor.

Today's rule includes a provision requiring owners and operators to specify which of several combined instruments should be drawn upon first in the event of a claim by designating instruments as "primary" or "excess" coverage. Under closure and post-closure care financial assurance rules, priorities may be established by the Regional Administrator either by selecting one instrument and drawing upon it, or by drawing upon all instruments simultaneously and then drawing funds from the standby trust without regard to their source (see 40 CFR 264.143, 264.145, 265.143, and 265.145). The Agency considered giving the Regional Administrator similar authority in today's rule. However, the Agency is seeking in this rule to minimize the role of the Regional Administrator in payment of claims. Consequently, under today's rule the Regional Administrator does not establish the order in which financial assurance mechanisms are drawn upon in cases when owners or operators use more than one mechanism to satisfy the liability coverage requirements.

The Agency also considered the option of establishing standardized priorities for drawing upon mechanisms. This option was not adopted, however, because the Agency believes that priorities can better be established on a case-by-case basis.

While rejecting these two approaches, EPA believes that establishing priorities is necessary to avoid delays in the payment of claims and to define clearly the extent of coverage. For example, priority arrangements are often specified when insurance is combined with another mechanism. Insurers typically include language within policies limiting their obligations in the event that other coverage exists and preventing the "stacking" of policies except in the case of designated "primary" and "excess" coverage. Such language generally specifies that the coverage provided is "primary" (meaning that it is to be drawn upon first) and that if other coverage exists, payment of claims will be shared, or that payment will be made after the other coverage is exhausted up to the liability limits of the policy.

Today's rule requires an owner or operator to specify which of several mechanisms that are being used in combination to satisfy the coverage requirements should be drawn upon first in the event of a claim. The actual determination of priority is, however, left with the owner or operator and may involve negotiation with the providers of the assurance mechanism.

To facilitate the establishment of priorities, the financial assurance instruments adopted in today's rule include language specifying whether the coverage is primary or excess. In addition, the guarantee under § 264.151(h)(2) has been amended to indicate whether it provides primary or excess coverage.

IV. Special Provisions of Additional Mechanisms

This section discusses several special provisions that are common to several of the additional mechanisms for liability coverage authorized by today's rule, and that differ from requirements for closure and post-closure financial assurance.

A. Beneficiaries

In contrast to the mechanisms authorized or proposed under Subtitle C for closure and post-closure care and corrective action, the liability coverage mechanisms authorized today do not name EPA as their beneficiary. In today's rule, the issuer of the mechanism assumes the obligation to satisfy third-party liability claims for personal injury or property damage arising from operation of the facilities covered by the mechanism if the owner or operator does not do so.

Third parties, and not EPA, are designated beneficiaries to ensure that the third parties are paid directly for liability claims without involvement by EPA. The issuer of the mechanism must honor all valid certified claims or judgments upon the mechanism up to the limit of the amount covered.

B. Payment Trigger

To ensure that only valid claims are paid, the mechanisms specify that before making payment the issuer must receive either (a) a certificate of valid claim signed by the third-party claimants and by the owner or operator, or (b) a final court judgment. This provision allows for the resolution of third-party claims without the involvement in the dispute of either the issuer of the mechanism or EPA. Each of the mechanisms authorized today contains a provision that incorporates the payment trigger requirements, including the "certificate of valid claim" (40 CFR 264.151(h)(2), section 13; 264.151(k), clause 2; 264.151(1), condition (4); and 264.151(m), section (4)).

The purpose of this payment trigger is to avoid placing either the provider of the mechanism or the Regional Administrator in the position of deciding the merits of disputes between the owner or operator and the third-party claimant. The payment trigger is also set

up so that claims do not have to be litigated for a final judgment. The certification is designed to allow an owner or operator to settle a claim with a third party without conceding liability in a document accessible by the public, which could be used against the owner or operator in future claims.

The requirement to submit the signed and notarized certification assures that the parties have either agreed that the claim is valid and in the correct amount or they have settled any disputes related to the validity or amount of the claim before coming to the provider for payment. The procedure is designed to reduce administrative burdens and to allow efficient payment of valid claims. The Agency does not expect the requirement to submit a signed and notarized certification of claim to place undue burdens on owners or operators or third-party claimants.

Alternatively, if the owner or operator and the third-party claimant cannot agree on the validity and amount of the claim, a final judgment by a court must be submitted by the third-party claimant, indicating that the claim should be paid. Whether payment of a judgment shall be made is a matter of applicable State law and shall be determined by the laws of the jurisdiction in which the action was brought.

Unlike the requirements for closure and post-closure care and corrective action, EPA is not requiring the establishment of a standby trust for mechanisms issued for liability coverage. A standby trust is necessary when funds are payable to EPA, because by law monies paid to the Federal government must be deposited in the United States Treasury. Because the mechanisms will pay third parties directly, a standby trust is not necessary for liability coverage.

C. Certification of Validity and Enforceability

The surety bond and guarantee authorized in today's rule may be subject to the insurance laws and regulations of certain States. To ensure that these instruments are valid and enforceable, EPA has contacted several State insurance commissions to ask how they would view these mechanisms for liability coverage. The results of those contacts are described in the docket for this rulemaking.

Most of the State commissions contacted said they would probably require a firm providing a surety bond to qualify as an insurer under State insurance laws unless the firm was related to the owner or operator in a corporate structure or it was providing

the bond incident to its business relationship with the owner or operator. Two factors may influence the State's determination: whether a premium is charged and whether the firm would make such bonds available to the general public. To be certain that any bonds used as financial assurance mechanisms will be valid and enforceable, the Agency will not approve a surety bond for liability coverage unless the Attorneys General or Insurance Commissioners of the State in which the surety is incorporated, and of each State in which a facility covered by the bond is located, submits a written statement that a surety bond written and executed as required is a legally valid and enforceable obligation (40 CFR 264.147(i)(4) and 265.147(i)(4)). The certification by each State is required only once, and need not be obtained on a case-by-case basis by the owner or operator; instead it is provided to EPA or to a State agency. Accepting certifications provided to a State agency may be necessary in some circumstances even if EPA is administering the financial assurance requirements, because in many States officials such as the Attorney General will not issue opinions except to State agencies.

Guarantees for liability coverage also may come within the jurisdiction of a State's insurance laws and regulations. Accordingly, EPA is requiring that the guarantee may be used to fulfill liability coverage requirements only if the Attorney General or Insurance Commissioner of the State in which the guarantor is incorporated, and of each State in which a facility covered by the guarantee is located, submits a written statement that a guarantee written and executed as required is a legally valid and enforceable obligation (40 CFR 264.147(g)(2) and 265.147(g)(2)). The corporate guarantee rule provides a parallel requirement for this guarantee. To date, EPA has received evidence from 28 States that the parent guarantee would be acceptable.

D. Cancellation

Today's rule includes cancellation procedures for the authorized mechanisms. These procedures vary somewhat depending on the instrument. For the surety bond and guarantee provided by an unrelated firm, cancellation is allowed 120 days following notification by certified mail to the owner or operator and to the Regional Administrator(s) of the Region(s) in which the affected facilities are located (40 CFR 264.151(h)(2) and 264.151(1)). The Agency believes that

120 days is sufficient time for an owner or operator to locate a new financial assurance mechanism, and that any more stringent requirement, such as one requiring an in-place alternative prior to cancellation, would limit the availability of these mechanisms and would require extensive involvement of the Agency in the claims process.

The cancellation provisions for guarantees provided by some guarantors related to the owner or operator (i.e., corporate parents, siblings, or grand parents) require the guarantor to continue to provide the guarantee until an alternate mechanism is in place (40 CFR 264.151(h)(2)). This more stringent requirement is currently required for the corporate parent guarantee and is today being extended to guarantees provided by some of the other firms that are related to the owner or operator.

The distinctions in the cancellation provisions are based on the nature of the relationship between the provider of assurance and the owner or operator. EPA believes that a corporate parent or some of the other related corporations, due to their close relationship with the owner or operator, will have a continuing interest in the financial condition of the owner or operator and therefore should bear more responsibility for continued financial assurance than a less related or completely unrelated firm. When guarantees are provided by guarantors closely related to the owner or operator, permitting cancellation only when an alternative has been approved ensures that coverage for liability costs will be continuously available. Similarly, because the owner or operator provides a trust fund directly, it is not allowed to cancel that mechanism until another form of financial assurance has become effective. EPA is not promulgating a similarly stringent cancellation requirement for providers of insurance, surety bonds, or guarantees by less related and unrelated firms, because it believes that third-party providers would not provide coverage if they were unable to cancel that coverage, with reasonable notice, at some later date.

Today's rule does not amend the current provisions (40 CFR 264.151 (i) and (j)) allowing an insurer to cancel an insurance policy 60 days after the notice of cancellation is received by the Regional Administrator. Insurance providers argued that not allowing cancellation until at least 120 days after notice is given exposes them to considerable risk when the insured fails to pay the premium for the final period of coverage. In consideration of this concern, the Agency is maintaining the

current 60-day requirement for insurance policies.

E. Exclusions

The mechanisms in today's rule contain a provision that they do not apply to certain categories of damages or obligations (see 40 CFR 264.151(h)(2), paragraph (4); 264.151(k); 264.151(l), conditions clause (l); and 264.151(m), section 3). These exclusions are patterned on existing standard exclusions found in insurance coverage (see, for example, the Insurance Services Office pollution liability coverage form CG 00 39 11 85). They are intended to ensure that the coverage is not exhausted by the payment of claims that are covered by other compensation systems or that are otherwise not intended to be included within the scope of coverage.

The Agency did not adopt all the standard Commercial General Liability (CGL) and Environmental Impairment Liability (EIL) exclusions, but included only those exclusions it considered relevant to the financial assurance mechanisms for liability. EPA has also recently issued guidance on the acceptability of site-specific pollution exclusion within insurance policies. This guidance memorandum is applicable only to insurance policies.

Exclusion (a), for bodily injury or property damage for which the owner or operator is obligated to pay damages by reason of the assumption of liability in a contract or agreement, is intended to exclude liabilities assumed by contract that do not involve the hazardous waste treatment, storage, and disposal facility or facilities of the owner or operator. It does not exclude settlements or other agreements to pay damages in connection with accidental occurrences resulting in bodily injury or property damage caused by hazardous waste.

Exclusion (b), for obligations under workers' compensation, disability benefits, or unemployment compensation law or similar law, is intended to ensure that liability coverage is available for non-employee third parties and does not duplicate coverage provided under these other programs or forms of assurance.

Exclusion (c), for bodily injury to the employees, or the immediate family of employees, of the owner or operator, is also intended to ensure that coverage is available for "third parties" and does not duplicate coverage provided under other forms of assurance.

Exclusion (d), for bodily injury or property damage arising out of the ownership or use of any aircraft, motor vehicle, or watercraft, is to prevent use of an authorized financial assurance

mechanism for routine accidents that are not directly related to management of hazardous waste.

Exclusion (e), for property damage to property owned, occupied, rented, or in the care, custody, or control of the owner or operator, is intended to ensure that coverage will be available to compensate third parties, and not the owner or operator, for property damage as a result of activities at TSDFs.

V. Other Issues Presented in the Notice of Proposed Rulemaking

In the August 21, 1985, NPRM, EPA suggested several additional approaches that could be taken to promote compliance with the financial responsibility requirements. Alternatives, other than authorizing additional financial assurance mechanisms, included the suspension or withdrawal of the liability coverage requirements, clarification of the scope of coverage, revision of the required levels of coverage, or authorization of waivers. Numerous comments were received on these alternatives. After considering these comments, the Agency has decided to retain the liability coverage requirements at their present levels, to maintain the present scope of coverage, and to reject the option of generic waivers. This section discusses briefly the comments received on these alternatives in response to the NPRM and explains the reasons why EPA is not adopting them. A more complete discussion of these comments is included within the docket accompanying today's rule.

A. Maintain, Suspend, or Withdraw Existing Liability Coverage Requirements

The Agency received comments from State governments and the public that generally argued in favor of maintaining the requirements. Supporters of the existing requirements argued that the insurance market for EIL coverage would not recover without such requirements; that maintaining the requirement would increase public confidence in hazardous waste facilities and decrease opposition to siting and permitting such facilities; and that low-risk owners and operators were able to obtain coverage. Commenters from State and local governments in particular argued that suspension or withdrawal of the liability coverage requirements would severely damage the chances for an eventual solution to the problem of insurance availability, that suspension would not be acceptable to the public and would undermine the strength of programs to regulate hazardous waste

management, and that liability coverage is necessary to protect human health and environment. Facilities that are unable to obtain such coverage, in these commenters' opinion should not continue in operation.

In contrast, a number of firms in the regulated community argued that EPA should not maintain the existing liability coverage requirements, but rather should suspend or withdraw the requirements, because of the difficulty many firms faced in obtaining insurance. Commenters also argued that the liability coverage requirements could be suspended or withdrawn because they were redundant with permitting conditions and that EPA should concentrate on achieving risk control rather than post-loss compensation. They also pointed out that even if the liability coverage requirements were abolished, third parties harmed by hazardous waste management activities could still sue the owner or operator for damages. Finally, commenters argued that the constraints on insurance availability made a short-term suspension necessary, even if the requirements for liability coverage were later reinstituted.

After considering these comments and suggestions made in response to other questions in the NPRM, EPA has concluded that the current liability coverage requirements should be maintained. The Agency believes that the requirements are an important component of the RCRA management system and are necessary to protect human health and the environment. Further, Congress in the Hazardous and Solid Waste Amendments of 1984 (HSWA) has stressed the importance of satisfying all financial assurance requirements, including liability coverage. Finally, by authorizing the use of additional financial mechanisms for liability coverage, the Agency believes that the problems of insurance availability cited by some commenters as reasons to suspend or withdraw the rule should become less important in the future.

B. Revise Scope and Levels of Coverage

A number of issues were considered by EPA in connection with the scope and levels of coverage. They included coverage levels, distinction between sudden and nonsudden coverage, exclusion of legal defense costs, and deductibles. Each is discussed in this section.

1. Coverage Levels. EPA established the sudden accidental and nonsudden accidental liability coverage requirements in 1982 at \$1 million per occurrence and \$3 million per

occurrence, respectively, on the basis of the Agency's investigation of existing third-party damage cases. To account for the possibility that the same firm might experience more than one claim in a year, the Agency also established annual aggregate coverage requirements at twice those amounts, or \$2 million and \$6 million, respectively.

In July 1986, EPA again reviewed third-party damage claims, awards, and settlements for sudden and nonsudden accidental occurrences involving hazardous chemicals as well as hazardous waste to determine whether the required levels of coverage are adequate. Data were limited, however, for several reasons, including the fact that few cases have been litigated to completion. Thus, available data were generally data on amounts claimed, rather than amounts recovered in awards or settlements. Because final awards and settlements often differ significantly from initial claims, it is difficult to draw conclusions based on this data. In addition, commenters did not supply any additional information indicating that the currently required coverage levels should be changed. The Agency concluded, in light of the limited data, that it had insufficient basis to change the requirements at this time.

2. Distinction Between Sudden and Nonsudden Coverage. 40 CFR 264.147(a) and 265.147(a) require all owners or operators of hazardous waste facilities to have "sudden accidental" coverage. Owners and operators of surface impoundments, landfills, or land treatment facilities used to manage hazardous wastes also are required to have "nonsudden accidental" coverage (40 CFR 264.147(b) and 265.147(b)).

A number of commenters on the August 21, 1985, NPRM suggested that the Agency no longer distinguish between sudden and nonsudden accidental coverage. They argued that nonsudden coverage was difficult to obtain, and that insurers were beginning to issue combined policies for sudden and nonsudden coverage. (A more complete discussion of comments on this point is provided in documents accompanying today's rulemaking.)

EPA has decided to maintain the distinction between sudden and nonsudden coverage. The Agency believes that maintaining distinct coverage requirements is still appropriate. Further, the insurance industry continues to write policies that distinguish between sudden and nonsudden events. EPA recognizes, however, that in some cases, courts have interpreted coverage for sudden events broadly to include damage from a gradual release occurring over long

periods of time. As a result, some insurers do not distinguish between sudden and nonsudden events, but offer "combined coverage": coverage for both sudden and nonsudden events on the same policy with single aggregate and per-occurrence limits. Today's rule includes a change to the coverage requirements citation specifying that the Agency will accept "combined coverage" policies, but to provide equivalent levels of coverage, the limits must be at least \$4 million per-occurrence (\$1 million sudden plus \$3 million nonsudden) and \$8 million annual aggregate (\$2 million sudden plus \$6 million nonsudden).

3. Exclusion of Legal Defense Costs from Policy Limits. Currently, Subpart H requires an owner or operator of a TSDF to maintain liability coverage for sudden and nonsudden accidental occurrences at specified levels, exclusive of legal defense costs (40 CFR 264.147 (a) and (b) and 265.147 (a) and (b)). The Agency decided to exclude legal defense costs for two reasons: (1) The insurance industry standard for CGL policies excluded legal defense costs from the coverage, and (2) legal defense costs could absorb a major portion of the required coverage, leaving an inadequate amount to cover actual damages. The Agency continues to believe that these reasons remain valid and do not affect the availability of insurance.

In its August 21, 1985 NPRM the Agency requested comment on whether, in an effort to increase the availability of EIL coverage for TSDFs, legal defense costs should be included in coverage limits. A number of commenters supported including legal defense costs. They argued that the EIL coverage currently available to TSDFs is written to include defense costs within policy limits. The Agency contacted insurance companies known to provide EIL coverage to ask whether their EIL policies included or excluded legal defense costs. Although some companies stated that defense costs are included in the coverage limits, others said that defense costs were excluded, or that the policy could be written to conform to the RCRA requirements; that is, policies could be written to exclude legal defense costs. Furthermore, current industry practice, including the present industry standard form for this type of insurance, still excludes defense costs from the coverage limits. In addition, while recently there have been attempts by insurers to limit defense cost exposure by including at least some defense costs within policy limits, the trend appears to be toward some other

method of limiting costs outside of policy limits.

The second reason commenters presented for changing the RCRA requirements to include legal defense costs was that the assurance of the availability of defense costs is an important element of claims litigation and further that there were insufficient RCRA claims data to warrant requiring coverage excluding legal defense costs.

The Agency continues to believe that it is important for the full amount of liability coverage to be available to cover claims against owners or operators of TSDFs. The Agency decided on the current coverage levels after a thorough investigation of reported third-party damage cases from hazardous waste accidents and these levels do not account for legal defense costs. Because the size of legal defense costs in this area is somewhat uncertain, the most secure method of ensuring that sufficient funds will be available to cover actual damages is to retain the requirement that defense costs be excluded.

Other commenters stated that including legal defense costs should be permissible, as long as the full amount of RCRA liability coverage was available to claimants. EPA agrees. If the total coverage includes the full amount required for third-party liability plus additional coverage earmarked for legal defense costs, the policy would be acceptable under current regulations. Thus, for example, a policy would provide acceptable assurance for a surface impoundment if the total coverage was \$5 million per occurrence and \$10 million annual aggregate if legal defense costs covered under the policy were limited to a maximum of \$1 million per occurrence and \$2 million annual aggregate. A \$5 million per occurrence, \$8 million annual aggregate policy without an earmarked limit on legal defense costs would not provide adequate assurance.

4. Deductibles. A number of commenters argued that EPA should not require "first-dollar" coverage for liability costs. If deductibles were allowed, according to these commenters, insurance coverage might be easier to obtain or be less costly.

Although the insurer must provide first-dollar coverage, EPA notes that the regulations do not prevent insurers from requiring reimbursement from owners or operators for first-dollar expenditures. The owner or operator can agree in the insurance contract that the insurer will be reimbursed for these expenditures. The regulations do not, however, allow self-insurance retention. Policies cannot require the owner or operator to cover

first-dollar expenditures. Such self-insurance is available to an owner or operator under the regulations only if it can pass the requirements established in the financial test for liability coverage.

EPA contacted a number of insurers to determine whether self-insurance retention could help to alleviate problems of insurance availability and affordability. In general, however, their responses indicated that current problems with EIL insurance are related to other factors, such as difficulty in predicting the size of the risk being covered, and that deductibles would not significantly enhance insurance availability. Therefore, the Agency is retaining the current first-dollar coverage requirement.

C. Mechanisms Considered But Not Adopted

1. Security interests. Security interests are a special procedure, authorized under State law following a pattern established by the Uniform Commercial Code, for creating collateral to serve as a support for the repayment of loans or other financial obligations. Security interests were considered but rejected for liability coverage because of the complicated legal requirements that have to be satisfied to ensure that they provide effective financial assurance. For example, security interests ordinarily must be perfected by filing papers with appropriate agencies in each jurisdiction where collateral exists, and these filings must be kept up to date. EPA would be required to verify that proper filings had occurred. In addition, the Agency would also have to determine that the collateral underlying the agreement had been valued properly. If not, the proceeds from sale of the collateral might fail to supply the amounts required to satisfy valid claims. Finally, the need to satisfy specific legal processes prior to liquidation of collateral could delay payment of valid third-party claims. Because of these problems, EPA has decided not to adopt security interests at this time.

2. Indemnity contracts. Indemnity contracts are legally binding commitments by a third party or "indemnitor" to pay a debt or obligation of another party. The duty of the indemnitor generally is to repay the primary debtor after it has satisfied the debt or obligation. The Agency was not willing to adopt such a mechanism because of the administrative difficulties and lengthy time needed to enforce such contracts.

An indemnity contract also may be established in which the indemnitor agrees to assume the obligation even if the primary debtor does not pay. Such a

contract, however, so closely resembles a guarantee that EPA determined that in effect no additional financial assurance option would be added to the regulations by inclusion of the indemnity. Therefore the Agency has not added an indemnity contract to the set of options authorized in today's rule.

3. Reserve funds. As a temporary measure pending the growth of the insurance market, some commenters suggested that owners or operators set aside the equivalent of insurance premiums in a reserve fund. Such a mechanism could function in a manner similar to trusts, if control over the fund were given to an independent fiduciary agent. Alternatively, however, some commenters suggested that the reserve fund be only a separate bookkeeping entity under the control of the owner or operator. EPA believes that neither approach would ensure that the reserve would contain sufficient funds when required to satisfy claims. Liability coverage funds may be needed at any time after implementation of the mechanism. Because a reserve fund based on the estimated equivalent of insurance premiums, rather than the amounts equal to the required coverage levels, would accumulate slowly, it would be unlikely to contain adequate funds to satisfy liability claims, especially in the early years.

In addition, EPA is convinced that a reserve fund that is not under the control of an independent trustee but instead remains under the control of the TSDF owner or operator will not provide satisfactory financial assurance. No independent third party would administer the reserve fund, including assessing its value and controlling payments from the fund. The Agency determined, therefore, not to authorize the use of reserves. Today's rule authorizes a fully funded trust fund, for owners and operators who want to use a similar mechanism.

4. Federal Insurance or Loan Guarantees. Some commenters pointed to other financial assurance programs utilizing Federal insurance or loan guarantees as possible models for EPA. Establishment of insurance or loan guarantees requires specific statutory authority that has not been granted to the Agency. Further, EPA does not believe that as an agency whose primary mandate is protection of human health and the environment, it currently possesses the expertise or resources to administer either an insurance or a loan guarantee program. Such programs or approaches would require the Agency to assess financial characteristics of owners or operators, and to make

decisions concerning the validity of claims, when those assessments and decisions can be made more accurately and efficiently by existing institutions that provide financial assurance.

5. Captive Insurance Pools and Risk Retention Groups. EPA believes it is unnecessary in today's rulemaking explicitly to authorize the use of captive insurance pools and risk retention groups. Such instruments are already authorized as forms of insurance. If the policies offered by a pool or risk retention group satisfy EPA requirements, such policies provide acceptable financial assurance.

D. Authorize Waivers

A number of commenters, particularly those from industry, supported granting temporary waivers on a case-by-case basis if a firm can demonstrate that it has made a "good faith effort" to obtain the required liability insurance. However, the Agency believes that the authorization of additional mechanisms, existing enforcement policies, the somewhat improved insurance market for TSDFs and the increased potential of insurance offered by risk retention groups, provide a better solution than simply waiving the liability coverage requirements. Also, existing regulations enable Regional Administrators to grant variances (§§ 264.147(c) and 265.147(c)) or adjustments (§ 264.147(d) and 265.147(d)) to the required liability coverage amounts, if this is justified by the degree and duration of risk associated with a TSDF. The Agency believes that justifiable modifications in the amount of coverage needed are more consistent with the objectives of the liability coverage requirements than would be relieving owners or operators of these requirements entirely, solely because they made a "good faith" effort to obtain coverage.

VI. Consistency With Other Existing and Proposed Financial Assurance Requirements

EPA currently allows owners or operators of hazardous waste TSDFs to use the mechanisms being approved in today's rule, including trust funds, letters of credit, surety bonds, and corporate guarantee contracts, to provide financial assurance for the costs of closure and post-closure care (40 CFR 264.143, 264.145, 264.151, 265.143, and 265.145), and has proposed their use for corrective action (51 FR 37854, October 24, 1986). As described above, certain features of the assurance mechanisms are different because of the differences between these programs and liability coverage.

In addition, EPA has proposed financial assurance rules applicable to owners and operators of underground storage tanks (USTs) containing petroleum under sections 9003 (c) and (d) of RCRA as amended by HSWA (RCRA Subtitle I), and by the Superfund Amendments and Reauthorization Act of 1986 (SARA) (52 FR 12662, April 17, 1987). The proposed rule would establish requirements for demonstrating financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank containing petroleum. As in today's rule, under the UST proposal, owners and operators of underground storage tanks containing petroleum would be allowed to use letters of credit, surety bonds, and expanded guarantees to demonstrate financial responsibility for the costs of corrective action and third-party liability claims (52 FR 12786, 12844, April 17, 1987).

VII. Technical Correction to 40 CFR 264.151(b)

The May 2, 1986 rule amending the closure, post-closure care, and financial assurance regulations mistakenly omitted a portion of the required language for the financial guarantee bond found in 40 CFR 264.151(b) (see 51 FR 16422, 16450). Today's rule makes a technical correction to the regulation to restore the required wording of the bond.

VIII. Effective Date

This regulation is being published as a final rule, effective in 30 days.

Section 3010(b) of RCRA provides that EPA's hazardous waste regulations and revisions thereto generally take effect six months after their promulgations. The purpose of this requirement is to allow sufficient time for the regulated community to comply with major new regulatory requirements. The statute allows for a shorter period prior to the effective date, if (i) the Administrator finds that the regulated community does not need six months to come into compliance; (ii) the regulation responds to an emergency situation, or (iii) other good cause. The Agency believes that since the regulation does not add any compliance requirements, but rather expands the number of mechanisms owners or operators may use to come into compliance, a six-month period prior to the effective date is unnecessary.

Today's amendment adopts additional mechanisms for complying with third-

party liability coverage requirements and thus makes it easier for some owners and operators to act in accordance with the RCRA liability coverage regulations. An effective date six months after promulgation for the amendment promulgated today would substantially delay the implementation of the regulations and would be contrary to the interest of the regulated community and the public. Accordingly, the Agency believes that it makes little sense to delay needed relief to owners or operators by an additional five months.

IX. 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 RCRA sections 3008, 7003, and 3013, although authorized States have primary enforcement responsibility.

Prior to 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 a State where 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 non-authorized 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 requirements and prohibitions apply in authorized States in the interim.

B. Effect of Rule on State Authorizations

Today's rule promulgates standards that will not be effective in authorized States since the requirements are not being imposed pursuant to HSWA.

Thus, the requirements will be applicable only in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State law.

In general, 40 CFR 271.21(e)(2) requires that States that have final authorization to modify their programs to reflect Federal program changes and subsequently submit the modifications to EPA for approval. It should be noted, however, 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. Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program. 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 (see 40 CFR 271.1(i)). The standards promulgated today are less stringent than or reduce the scope of the existing Federal requirements. Therefore, authorized States will not be required to modify their programs to adopt requirements equivalent or substantially equivalent to the provisions listed above. If the State does modify its program, EPA must approve the modification for the State requirements to become Subtitle C RCRA requirements. States should follow the deadlines of 40 CFR 271.21(e)(2) if they desire to adopt this less stringent requirement.

X. Executive Order 12291

Under Executive Order 12291 (section 3(b)) the Agency must judge whether a regulation is major and thus subject to the requirement of a Regulatory Impact Analysis. The notice published today is not major because the rule will not result in an effect on the economy of \$100 million or more, will not result in increased costs or prices, will not have significant adverse effects on competition, employment, investment, productivity, and innovation, and will not significantly disrupt domestic or export markets. Therefore, the Agency has not prepared a Regulatory Impact Analysis under the Executive Order.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order No. 12291.

XI. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), Federal agencies must, in developing regulations, analyze their impact on small entities (small businesses, small

government jurisdictions, and small organizations). This rule relaxes the existing financial assurance requirements and thus reduces costs associated with compliance. Accordingly, I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

XII. Supporting Documents

Supporting documents available for this interim final rule include comments on the August 21, 1985 Proposed Rule, summary of the comments on the July 11, 1986 Interim Final Rule, and background documents on the financial test for liability coverage. In addition, background documents prepared for previous financial assurance regulations, as well as documents prepared for this rulemaking, are also available as are letters received from State Attorneys General concerning the corporate guarantee for liability.

All of these supporting materials are available for review in the EPA public docket (RCRA docket #F-88-CGF1-FFFFF), Room S-212, Waterside Mall, 401 M Street, SW., Washington, DC 20460.

List of Subjects

40 CFR Part 264

Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds.

40 CFR Part 265

Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds.

Date: August 19, 1988.

Lee M. Thomas,
Administrator.

For the reasons set out in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended as set forth below.

40 CFR Part 264 is amended as follows:

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

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

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

2. In § 264.141, new paragraph (h) is added to read as follows:

§ 264.141 Definitions of terms as used in this subpart.

* * * * *

(h) "Substantial business relationship" means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A "substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.

3. In § 264.147, paragraph (h) is redesignated as paragraph (k); paragraphs (a) introductory text, (a)(2), (a)(3), (b) introductory text, (b)(2), (b)(3), (b)(4), (g) heading and (g)(1) introductory text are revised, and by removing and reserving paragraph (g)(1)(ii); paragraphs (g)(2)(i) and (g)(2)(ii) are amended by removing "corporate;" and new paragraphs (a)(4), (a)(5), (a)(6), (a)(7), (b)(5), (b)(6), (b)(7), (h), (i), and (j) are added, to read as follows:

§ 264.147 Liability requirements.

(a) *Coverage for sudden accidental occurrences.* An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraphs (a) (1), (2), (3), (4), (5), or (6) of this section:

* * * * *

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

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days (i) whenever a claim for bodily injury or property damages caused by the operation of a hazardous waste treatment, storage, or disposal facility is made against the owner or operator or an instrument providing financial assurance for liability coverage under this section and (ii) whenever the amount of financial assurance for liability coverage under this section provided by a financial instrument authorized by paragraphs (a)(1) through (a)(6) of this section is reduced.

(b) *Coverage for nonsudden accidental occurrences.* An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate

coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence and \$8 million annual aggregate. This liability coverage may be demonstrated as specified in paragraphs (b) (1), (2), (3), (4), (5), or (6), of this section:

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

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amount required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days (i) whenever a claim for bodily injury or property damages caused by the operation of a hazardous waste treatment, storage, or disposal facility is made against the owner or operator or an instrument providing financial assurance for liability coverage under this section and (ii) whenever the amount of financial

assurance for liability coverage under this section provided by a financial instrument authorized by paragraphs (a)(1) through (a)(6) of this section is reduced.

* * * * *

(g) *Guarantee for liability coverage.* (1) Subject to paragraph (g)(2) of this section, an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "guarantee." The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (f)(6) of this section. The wording of the guarantee must be identical to the wording specified in § 264.151(h)(2) of this part. A certified copy of the guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

* * * * *

(h) *Letter of credit for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter or credit that conforms to the requirements of this paragraph and submitting a copy of the letter of credit to the Regional Administrator.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(3) The wording of the letter of credit must be identical to the wording specified in § 264.151(k) of this part.

(i) *Surety bond for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond that conforms to the requirements of this paragraph and submitting a copy of the bond to the Regional Administrator.

(2) The surety company issuing the bond must be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the surety bond must be identical to the wording specified in § 264.151(1) of this part.

(4) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (i) the State in which the surety is incorporated, and (ii) each State in which a facility covered by the surety bond is located have submitted a written statement to EPA that a surety bond executed as described in this section and § 264.151(1) of this part is a legally valid and enforceable obligation in that State.

(j) *Trust fund for liability coverage.* (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator.

(2) 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.

(3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this paragraph, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust fund must be identical to the wording specified in § 264.151(m) of this part.

§ 264.151 [Amended]

4. In § 264.151 paragraph (b) is amended by adding the following text to

the end of the "Financial Guarantee Bond" to read as follows:

(b) * * *

Financial Guarantee Bond

* * * * *

Or, if the Principal shall provide alternate financial assurance, as specified in Subpart H of 40 CFR Part 264 or 265, as applicable, 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 failed to perform as guaranteed by this 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 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 Principal 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 is an optional rider that may be included but is not required.]

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 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 Financial Guarantee 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(b) 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: \$ _____

5. In § 264.151, paragraph (g) is revised to read as follows:

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

Letter From Chief Financial Officer

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

[Fill out the following paragraphs regarding facilities and liability coverage. 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, and address.]

The firm identified above is the owner or operator of the following facilities for which liability coverage for [insert "sudden" or "nonsudden" or "both sudden and nonsudden"] accidental occurrences is being demonstrated through the financial test specified in Subpart H of 40 CFR Parts 264 and 265: _____

The firm identified above guarantees, through the guarantee specified in Subpart H or 40 CFR Parts 264 and 265, liability coverage for [insert "sudden" or "nonsudden" or "both sudden and nonsudden"] accidental occurrences at the following facilities owned or operated by the following: _____. The firm identified above is [insert one or more: (1) The direct or higher-tier parent corporation of the owner or operator; (2) owned by the same parent corporation as the parent corporation of the owner or operator, and receiving the following value in consideration of this guarantee _____. or (3) engaged in the following substantial business relationship with the owner or operator _____. and receiving the following value in consideration

of this guarantee _____.] [Attach a written description of the business relationship or a copy of the contract establishing such relationship to this letter.]

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

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

2. The firm identified above guarantees, through the guarantee specified in Subpart H of 40 CFR Parts 264 and 265, the closure and post-closure care or liability coverage of the following facilities owned or operated by the guaranteed party. The current cost estimates for the closure or post-closure care so guaranteed are shown for each facility: _____

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

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under 40 CFR Part 144. The current closure cost estimates as required by 40 CFR 144.62 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 part A if you are using the financial test to demonstrate coverage *only* for the liability requirements.]

Part A. Liability Coverage for Accidental Occurrences

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

ALTERNATIVE I

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

ALTERNATIVE II

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

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

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

[Fill in Alternative I if the criteria of paragraphs (f)(1)(i) of § 264.143 or § 264.145

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

ALTERNATIVE I

1. Sum of current closure and post-closure cost estimates (total of *all* cost estimates listed above). \$.....
2. Amount of annual aggregate liability coverage to be demonstrated. \$.....
3. Sum of lines 1 and 2..... \$.....
- *4. Total liabilities (if any portion of your closure or post-closure cost estimates is included in your total liabilities, you may deduct that portion from this line and add that amount to lines 5 and 6). \$.....
- *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.). \$.....
12. Is line 5 at least \$10 million? Yes No
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 and post-closure cost estimates (total of *all* cost estimates listed above). \$.....

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

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

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

6. Section 264.151(h)(2) is amended by revising the heading for the "Corporate Guarantee for Liability Coverage" to read "Guarantee for Liability Coverage" and by removing "corporate" from paragraph (h)(2); and by removing paragraph 12 of the "Guarantee for Liability Coverage"; redesignating paragraphs 4 through 11 as paragraphs 5 through 12, adding new paragraphs 4, 13 and 14; and revising paragraph 10; to read as follows:

(h) * * *
(2) * * *

Guarantee for Liability Coverage
* * * * *

4. Such obligation does not apply to any of the following:

(a) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption

of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert owner or operator] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert owner or operator]. This exclusion applies:

(A) Whether [insert owner or operator] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert owner or operator];

(2) Premises that are sold, given away or abandoned by [insert owner or operator] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert owner or operator];

(4) Personal property in the care, custody or control of [insert owner or operator];

(5) That particular part of real property on which [insert owner or operator] or any contractors or subcontractors working directly or indirectly on behalf of [insert owner or operator] are performing operations, if the property damage arises out of these operations.

10. [Insert the following language if the guarantor is (a) a direct or higher-tier corporate parent, or (b) a firm whose parent corporation is also the parent corporation of the owner or operator]:

Guarantor may terminate 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], provided that this guarantee may not be terminated unless and until [the owner or operator] obtains, and the EPA Regional Administrator(s) approve(s), alternate liability coverage complying with 40 CFR 264.147 and/or 265.147.

[Insert the following language if the guarantor is a firm qualifying as a guarantor due to its "substantial business relationship" with the owner or operator]:

Guarantor may terminate this guarantee 120 days following receipt of notification, through certified mail, by the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is(are) located and by [the owner or operator].

13. The Guarantor shall satisfy a third-party liability claim only on receipt of one of the following documents:

(a) Certification from the Principal and the third-party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert Principal] and [insert name and address of third-party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Principal's] hazardous waste treatment, storage, or disposal facility should be paid in the amount of \$[].

[Signatures]

Principal

(Notary) Date

[Signatures]

Claimant(s)

(Notary) Date

(b) A valid final court order establishing a judgment against the Principal for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Principal's facility or group of facilities.

14. In the event of combination of this guarantee with another mechanism to meet liability requirements, this guarantee will be considered [insert "primary" or "excess"] coverage.

I hereby certify that the wording of the guarantee is identical to the wording specified in 40 CFR 264.151(h)(2) as such regulations were constituted on the date shown immediately below.

Effective date: _____

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness of notary: _____

7. In § 264.151(i), paragraph 2.(d) of the "Hazardous Waste Facility Liability Endorsement" is revised to read as follows:

* * * * *
(i) * * *

Hazardous Waste Facility Liability Endorsement
* * * * *

(2) * * *

(d) Cancellation of this endorsement, whether by the Insurer, the insured, a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the hazardous waste management facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is(are) located.

8. In § 264.151(j), paragraph 2.(d) of the "Hazardous Waste Facility Certificate of Liability Insurance" is revised to read as follows:

(j) * * *

Hazardous Waste Facility Certificate of Liability Insurance

(2) * * *

(d) Cancellation of the insurance, whether by the insurer, the insured, a parent corporation providing insurance coverage for its subsidiary, or by a firm having an insurable interest in and obtaining liability insurance on behalf of the owner or operator of the hazardous waste management facility, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the Regional Administrator(s) of the EPA Region(s) in which the facility(ies) is(are) located.

9. In § 264.151, a new paragraph (k) is added to read as follows:

(k) A letter of credit, as specified in § 264.147(h) or § 265.147(h) 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:

Irrevocable Standby Letter of Credit

Name and Address of Issuing Institution
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 the favor of any and all third-party liability claimants, at the request and for the account of [owner's or operator's name and address] for third-party liability awards or settlements up to [in words] U.S. dollars \$_____ per occurrence and the annual aggregate amount of [in words] U.S. dollars \$_____, for sudden accidental occurrences and/or for third-party liability awards or settlements up to the amount of [in words] U.S. dollars \$_____ per occurrence, and the annual aggregate amount of [in words] U.S. dollars \$_____, for nonsudden accidental occurrences available upon presentation of a sight draft, bearing reference to this letter of credit No. _____, and (1) a signed certificate reading as follows:

Certification of Valid Claim

The undersigned, as parties [insert principal] and [insert name and address of third-party claimants], hereby certify that the claim of bodily injury [and/or] property damage caused by a [sudden or nonsudden] accidental occurrence arising from operations of [principal's] hazardous waste treatment, storage, or disposal facility should be paid in the amount of \$_____. We hereby certify that the claim does not apply to any of the following:

(a) Bodily injury or property damage for which [insert principal] is obligated to pay

damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert principal] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert principal] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert principal] arising from, and in the course of, employment by [insert principal]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert principal].

This exclusion applies:

(A) Whether [insert principal] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert principal];

(2) Premises that are sold, given away or abandoned by [insert principal] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert principal];

(4) Personal property in the care, custody or control of [insert principal];

(5) That particular part of real property on which [insert principal] or any contractors or subcontractors working directly or indirectly on behalf of [insert principal] are performing operations, if the property damage arises out of these operations.

[Signatures]

Principal

[Signatures]

Claimant(s)

or (2) a valid final court order establishing a judgment against the principal for bodily injury or property damage caused by a sudden or nonsudden accidental occurrence arising from operation of the principal's facility or group of facilities.

This letter of credit is effective as of [date] and shall expire on [date at least one year later], but such expiration date shall be automatically extended for a period of [at least one year] on [date] and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify you, the USEPA Regional Administrator for Region [Region #], and [owner's or operator's name] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date.

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.

In the event that this letter of credit is used in combination with another mechanism for liability coverage, this letter of credit shall be

considered [insert "primary" or "excess"] coverage.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 264.151(k) 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"].

10. In § 264.151, a new paragraph (1) is added to read as follows:

(1) A surety bond, as specified in § 264.147(h) or § 265.147(h) 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:

Payment Bond

Surety Bond No. [Insert number]

Parties [Insert name and address of owner or operator], Principal, incorporated in [Insert State of incorporation] of [Insert city and State of principal place of business] and [Insert name and address of surety company(ies)], Surety Company(ies), of [Insert surety(ies) place of business].

EPA Identification Number, name, and address for each facility guaranteed by this bond: _____

	Sudden accidental occurrences	Nonsudden accidental occurrences
Penal Sum Per Occurrence.	[insert amount]..	[insert amount]
Annual Aggregate.	[insert amount]..	[insert amount]

Purpose: This is an agreement between the Surety(ies) and the Principal under which the Surety(ies), its(their) successors and assignees, agree to be responsible for the payment of claims against the Principal for bodily injury and/or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental occurrences arising from operations of the facility or group of facilities in the sums prescribed herein; subject to the governing provisions and the following conditions.

Governing Provisions:

(1) Section 3004 of the Resource Conservation and Recovery Act of 1976, as amended.

(2) Rules and regulations of the U.S. Environmental Protection Agency (EPA), particularly 40 CFR ["§ 264.147" or "§ 265.147"] (if applicable).

(3) Rules and regulations of the governing State agency (if applicable) [insert citation].

Conditions:

(1) The Principal is subject to the applicable governing provisions that require the Principal to have and maintain liability

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, hereinafter the "Fund," for the benefit of any and all third parties injured or damaged by [sudden and/or nonsudden] accidental occurrences arising from operation of the facility(ies) covered by this guarantee, in the amounts of _____ [up to \$1 million] per occurrence and _____ [up to \$2 million] annual aggregate for sudden accidental occurrences and _____ [up to \$3 million] per occurrence and _____ [up to \$6 million] annual aggregate for nonsudden occurrences, except that the Fund is not established for the benefit of third parties for the following:

(a) Bodily injury or property damage for which [insert Grantor] is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that [insert Grantor] would be obligated to pay in the absence of the contract or agreement.

(b) Any obligation of [insert Grantor] under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(c) Bodily injury to:

(1) An employee of [insert Grantor] arising from, and in the course of, employment by [insert Grantor]; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of, or arising from, and in the course of employment by [insert Grantor].

This exclusion applies:

(A) Whether [insert Grantor] may be liable as an employer or in any other capacity; and

(B) To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs (1) and (2).

(d) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(e) Property damage to:

(1) Any property owned, rented, or occupied by [insert Grantor];

(2) Premises that are sold, given away or abandoned by [insert Grantor] if the property damage arises out of any part of those premises;

(3) Property loaned to [insert Grantor];

(4) Personal property in the care, custody or control of [insert Grantor];

(5) That particular part of real property on which [insert Grantor] or any contractors or subcontractors working directly or indirectly on behalf of [insert Grantor] are performing operations, if the property damage arises out of these operations.

In the event of combination with another mechanism for liability coverage, the fund shall be considered [insert "primary" or "excess"] coverage.

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 liabilities of the Grantor established by EPA.

Section 4. Payment for Bodily Injury or Property Damage. The Trustee shall satisfy a third party liability claim by making payments from the Fund only upon receipt of one of the following documents:

(a) Certification from the Grantor and the third party claimant(s) that the liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as parties [insert Grantor] and [insert name and address of third party claimant(s)], hereby certify that the claim of bodily injury and/or property damage caused by a [sudden or nonsudden] accidental occurrence arising from operating [Grantor's] hazardous waste treatment, storage, or disposal facility should be paid in the amount of \$[].

[Signatures]

Grantor

[Signatures]

Claimant(s)

(b) A valid final court order establishing a judgment against the Grantor for bodily injury or property damage caused by sudden or nonsudden accidental occurrences arising from the operation of the Grantor's facility or group of facilities.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing 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 circumstance 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 U.S.C. 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 U.S.C. 81a-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 depository 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 certificates 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 Valuations. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish 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 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 question 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 a 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 amendments 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. If a payment for bodily injury or property damage is made under Section 4 of this trust, the Trustee shall notify the Grantor of such payment and the amount(s) thereof within five (5) working days. The Grantor shall, on or before the anniversary date of the establishment of the Fund following such notice, either make payments to the Trustee in amounts sufficient to cause the trust to return to its value immediately prior to the payment of claims under Section 4, or shall provide written proof to the Trustee that other financial assurance for liability coverage has been obtained equalling the amount necessary to return the trust to its value prior to the payment of claims. If the Grantor does not either make payments to the Trustee or provide the Trustee with such proof, the Trustee shall within 10 working days after the anniversary date of the establishment of the Fund provide a written notice of nonpayment to the EPA Regional Administrator.

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.

The Regional Administrator will agree to termination of the Trust when the owner or operator substitutes alternate financial assurance as specified in this section.

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 [enter 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(m) 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 acknowledgement which must accompany the trust agreement for a trust fund as specified in §§ 264.147(j) or 265.147(j) of this chapter. State requirements may differ on the proper content of this acknowledgement.

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]

40 CFR Part 265 is amended as follows:

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

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

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

2. In § 265.141, new paragraph (h) is added to read as follows:

§ 264.141 Definitions of terms as used in this subpart.

* * * * *

(h) "Substantial business relationship" means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A "substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the applicable EPA Regional Administrator.

3. In § 265.147, paragraph (h) is redesignated as paragraph (k); paragraphs (a) introductory text, (a)(2), (a)(3), (b) introductory text, (b)(2), (b)(3), (b)(4) and (g) heading and (g)(1) introductory text are revised, and by removing and reserving paragraph (g)(1)(ii); paragraphs (g)(2)(i) and (g)(2)(ii) are amended by removing "corporate;" and new paragraphs (a)(4), (a)(5), (a)(6), (a)(7), (b)(5), (b)(6), (b)(7), (h), (i), and (j) are added, to read as follows:

§ 265.147 Liability requirements.

(a) *Coverage for sudden accidental occurrences.* An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraphs (a) (1), (2), (3), (4), (5), or (6) of this section:

- * * * * *
- (2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in paragraph (g) of this section.
- (3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.
- (4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability

coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days (i) whenever a claim for bodily injury or property damages caused by the operation of a hazardous waste treatment, storage, or disposal facility is made against the owner or operator or an instrument providing financial assurance for liability coverage under this section and (ii) whenever the amount of financial assurance for liability coverage under this section provided by a financial instrument authorized by paragraphs (a)(1) through (a)(6) of this section is reduced.

(b) *Coverage for nonsudden accidental occurrences.* An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least \$3 million per occurrence with an annual aggregate of at least \$6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and

combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence and \$8 million annual aggregate. This liability coverage may be demonstrated as specified in paragraph (b) (1), (2), (3), (4), (5), or (6) of this section:

* * * * *

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

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Regional Administrator in writing within 30 days (i) whenever a claim for bodily injury or property damages caused by the operation of a hazardous waste treatment, storage, or disposal facility is made against the owner or operator or an instrument providing financial assurance for liability coverage under this section and (ii)

whenever the amount of financial assurance for liability coverage under this section provided by a financial instrument authorized by paragraphs (a)(1) through (a)(6) of this section is reduced.

* * * * *

(g) Guarantee for liability coverage.

(1) Subject to paragraph (g)(2) of this section, an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "guarantee." The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (f)(6) of this section. The wording of the guarantee must be identical to the wording specified in § 264.151(h)(2) of this chapter. A certified copy of the guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

* * * * *

(h) Letter of credit for liability

coverage. (1) An owner or operator may

satisfy the requirements of this section by obtaining an irrevocable standby letter of credit that conforms to the requirements of this paragraph and submitting a copy of the letter of credit to the Regional Administrator.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(3) The wording of the letter of credit must be identical to the wording specified in § 264.151(k) of this chapter.

(i) Surety bond for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond that conforms to the requirements of this paragraph and submitting a copy of the bond to the Regional Administrator.

(2) The surety company issuing the bond must be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the surety bond must be identical to the wording specified in § 264.151(1) of this chapter.

(4) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (i) the State in which the surety is incorporated, and (ii) each State in which a facility covered by the surety bond is located have submitted a written statement to EPA that a surety bond executed as described in this section and § 264.151(1) of this chapter is a legally valid and enforceable obligation in that State.

(j) Trust fund for liability coverage. (1)

An owner or operator may satisfy the requirements of this section by

establishing a trust fund that conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Regional Administrator.

(2) 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.

(3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the Fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this paragraph, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust fund must be identical to the wording specified in § 264.151(m) of this part.

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