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Comment Response Document for Financial Test and Corporate Guarantee for Private Owners or Operators of Municipal Solid Waste Landfill Facilities
October 12, 1994 Proposed Rule (59 FR 51523)

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Preface

EPA has endeavored to provide ample opportunity to comment on its October 12, 1994 proposed rule. EPA held a 60-day public comment period on its proposed rule. 59 FR 51523. On September 27, 1996, EPA also published a Notice of Data Availability for a document inadvertently omitted from the docket, and provided additional opportunity to comment on the information. 61 FR 50787.

EPA received thirty comments (twenty-eight on the October 12, 1994 notice and two on the supplemental notice of data availability) on the proposed rule with the largest number of comments from insurance companies and sureties. The States of Texas, Nebraska, Michigan, and California also commented along with several corporations and associations. EPA has considered and responded to all significant comments in adopting its final rule. All public comments received are available in the public docket for this rulemaking.

The preamble to the final regulation contains the rationale for the regulation. This document supplements the preamble by providing additional analyses and background on the comments and EPA=s responses. In some instances a contractor to EPA prepared analyses which EPA independently reviewed and may have relied on in its decision making for this rulemaking. EPA identifies such documents in the preamble for the final rule, in this document analyzing public comments, and has placed them in the public docket for this rulemaking.

This document contains a compilation of the significant comments and EPA=s responses. The document is arranged according to the topics in the proposed rule. EPA has presented a verbatim excerpt of the public comments which address a particular issue, followed by EPA=s response to the comment. In some cases the response relies upon other information contained in a separate issue paper identified in the response. As noted, such issue papers or other documents relied upon by EPA are available in the public docket for this rulemaking. Each comment is identified by a number that was assigned by the docket. Comments identified by the letter L were received by mail and postmarked after the close of the comment period or delivered by other than the U S mail after the close of the comment period. While, as reflected in this document, EPA has endeavored to consider the late comments, EPA has no legal duty to consider untimely comments.

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I.A.1.a. Minimum Size Requirement

Overview of comments on this issue

Some commenters supported a substantial net worth requirement, noting that a substantial net worth acts as an indicator of a corporation's overall financial health, and the $10 million threshold allows for a financial cushion if actual costs exceed estimated costs. Some stated, however, that $10 million is insufficient due to the unpredictable nature of corrective actions.

Other commenters opposed the use of net worth as an indicator of financial soundness. Most of these comments stated that net worth is a bad indicator of liquidity and that company size is no guarantee of available funds. Commenters suggested requiring that some or all of the assets be liquid or readily available, and using fair market value of a company's equity capital rather than net worth.

Other commenters opposed the $10 million threshold, arguing that the $10 million threshold has a discriminatory effect on smaller businesses, the $10 million threshold is more appropriate for Subtitle C firms, and that setting the minimum size requirement at $10 million plus anticipated costs is not supported by the data and appears arbitrary.

Alternative suggestions included changing the numerator of the formula to subtract the lesser of $10 million or a chosen percentage of anticipated costs from net cash flow, adding funded liabilities (e.g., closure and post-closure trust funds) to the tangible net worth when calculating the size requirement, and taking into account other mitigation costs and pension liabilities in the minimum size requirement.

In evaluating comments on the impact of the net worth requirement, EPA acquired updated financial information on the municipal solid waste landfill facility (MSWLF) industry. This information allowed EPA to examine further the net worth requirements, and determine whether the financial ratios were appropriate. The additional analysis included firms with net worth lower than $10 million. This analysis relied upon financial information which EPA acquired from Dun and Bradstreet, bond ratings from Standard and Poor=s and Moody=s, and EPA cost estimates which had supported the proposal analysis, and on which EPA had received no comments. A full description of the data base and the analysis appears in the memoranda entitled ADescription of Data Used in the Analysis of Subtitles C and D Financial Tests,@ and AAnalysis of Subtitle D Financial Tests in Response to Public Comments@ which are available in the public docket for this rulemaking.

In analyzing these comments EPA considered several factors including the value of the obligations that could potentially be assured by the test, how these obligations are reflected in the firms= financial statements, the accuracy of the financial test at lower net worth levels, and the increase in costs that could be borne by the public if a firm that uses the financial test would go bankrupt and be unable to fulfill its obligations. Based upon analyses of these factors, EPA has decided to retain the $10 million in net worth requirement for the test being promulgated today.
Comments, together with Agency responses, are presented below.

US EPA ARCHIVE DOCUMENT

Asset Guarantee Insurance Company **00003**

Comment: The Proposal deems as sufficient corporate entities with net worths of $10 million in excess of their Subtitle D financial assurance obligations inclusive of closure, post-closure, and corrective action. Whereas the closure and post-closure costs might be reasonably estimated corrective action by definition emanates from specific events, often catastrophic, which can readily manifest at a site. Corrective actions in the multi-million dollar range should not be viewed as unprecedented. For an operator with multiple sites there is no assurance that the EPA contemplated net worth levels would be adequate for unanticipated corrective action costs.

Taking guidance from the financial markets as to sufficiency of net worth rather than from Subtitle C guidelines would indicate that net worths for the vast majority of the solid waste industry (with few exceptions) are, or would be, rated as speculative by the financial-rating agencies.

Response: The Agency disagrees with the commenter=s concerns regarding use of net worth as a component of the financial test and is today finalizing a test with a $10 million net worth requirement.

First, the Agency does not deem as sufficient corporate entities with net worth of $10 million in addition to their Subtitle D financial assurance obligations (in fact, the general requirement is for $10 million in <u>tangible</u> net worth plus the amount of closure, post-closure care, and corrective action obligations <u>plus any other obligations, including guarantees, covered by a financial test</u>). The Agency proposed this minimum net worth as an initial screen for corporations in demonstrating financial responsibility for the very large costs of closure, post-closure care, and corrective action. Firms with more than $10 million in net worth are less likely to go bankrupt than firms with less than $10 million in net worth, and the model supporting this rulemaking has a lower rate of misprediction for firms with more than $10 million in net worth. See Exhibit 1 of Issue Paper, Relevant Risk Factors to Consider in a Financial Test. In addition to meeting the net worth threshold, companies must meet other financial requirements (i.e., ratios test or bond rating standards, and the domestic asset requirement) to pass the financial test. If a firm which does not have investment grade bond ratings, it must demonstrate that it has a low debt to equity ratio (<1.5) or a high ratio of cash flow to liabilities (Cash Flow - $10 million / Total Liabilities > 0.1). These ratios are very strong in terms of their ability to screen out firms that will enter into bankruptcy.

Further, contrary to the commenter=s assertion, the Agency explicitly considered corrective action costs in its analysis. As is noted in the background document for the proposed rule (pp. 34-35), financial assurance for corrective action at MSWLFs is required only for known releases. The estimated number of MSWLFs likely to require corrective action, and the estimated cost of such corrective action, is dependent on a number of variables, including landfill size, design and construction, and the type of final cover. Although most MSWLFs are not expected to incur corrective action costs, such costs could be significant when required.

In considering these costs, the Agency did determine that for those MSWLFs that do require corrective action, the median cost of corrective action may exceed the combined costs of closure and

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post-closure care. This conclusion was based on data included in the RIA for the MSWLF technical criteria (56 FR 50978). On the other hand, most of the MSWLFs owned or operated by firms in the non-bankrupt firm sample tend to be newer landfills (relative to MSWLFs owned by local governments) designed and constructed in accordance with more stringent regulatory requirements. The closure cost estimates used in the Agency=s analysis assume that firms will install synthetic covers at closure, and post-closure care cost estimates reflect stringent monitoring requirements consistent with MSWLF technical criteria. Synthetic covers significantly reduce the probability of corrective action, and active post-closure site-monitoring reduces the likelihood that potential problems could go undetected for long enough to create substantial corrective action costs. The Agency therefore believes that these technical requirements should reduce both the likelihood and the likely magnitude of corrective action costs incurred by MSWLFs owned or operated by firms in this analysis.

Finally, the commenter questioned whether the net worth of operators with multiple sites would be sufficient to meet the costs of unanticipated corrective action and suggested that firms in the industry would be rated as speculative by financial rating agencies. The Agency disagrees with the commenter and notes that the two firms with the most landfills in the industry have net worths over $2 billion and over $5 billion. Furthermore, the bond ratings for these firms are both typically in the investment grade range, indicating that the financial rating agencies do not regard them as speculative.

The concern that the net worth minimum is inadequate for firms with multiple facilities overlooks the interrelationships between the net worth requirement and the other components of the test. For a firm to use the financial test, it can only assure an amount that is up to $10 million less than its net worth, unless it has already recognized all of its environmental obligations as liabilities. Firms with multiple landfills will have high levels of assets which must be matched by the sum of their liabilities and net worth. It is an axiom of accounting that assets minus liabilities equals net worth. An example will illustrate why a firm with more landfills and a correspondingly higher level of assets will also have a higher level of net worth than the $10 million minimum. Suppose a firm had multiple landfills such that it had $200 million in assets. For it to meet the liability to net worth (leverage) ratio of 1.5 under the financial test adopted in today=s rule, it would need liabilities of less than $120 million and a net worth of at least $80 million which is substantially in excess of the $10 million minimum.

If, on the other hand, the hypothetical firm with $200 million in assets attempted to pass the financial test with only $20 million in net worth and $180 million in liabilities through the profitability ratio alternative of the test, it would have to show substantial profitability to succeed. In the profitability ratio alternative of the test, the ratio of the sum of net income plus depreciation, depletion, and amortization, minus $10 million, to total liabilities must be greater than 0.10. With $180 million in liabilities, the hypothetical firm would have to have a cash flow (the sum of net income plus depreciation, depletion, and amortization) of more than $28 million, even after paying interest on a substantial debt. This amounts to over 140% of net worth, and would be difficult to achieve. Furthermore, the additive requirement restricts the amount that could be covered through the financial test. For firms that have not recognized all of their environmental obligations as liabilities, the additive requirement restricts the amount that can be covered to $10 million less than their net

US EPA ARCHIVE DOCUMENT

worth. In this particular example, the firm would be able to cover $10 million in environmental obligations which is much less than the $28 million in net income plus depreciation, depletion and amortization necessary to utilize the profitability ratio under the test. Like the leverage ratio, the profitability ratio of the test favors firms with relatively low debt ratios, and correspondingly high net worth ratios. Additional information on these points appears in Issue Paper, Recent Consolidation and Acquisitions in the Solid Waste Industry, which is available in the public docket.

The additive requirement (tangible net worth of $10 million plus the amount being assured), limits the amount of environmental obligations that a firm can assure when it has passed the financial test. EPA estimates that its test allows firms to cover 71.67% of their $7.055 billion in closure and post-closure obligations. The additive requirement means that these firms may need to provide a third party instrument for at least some of their obligations. When EPA estimated the availability of a comparable financial test without the additive requirement, but limiting the test to the amount of the firm=s net worth (Test 130-10), the analysis determined that such a test would have been available to cover 73.43% of obligations. (See the Appendix to Analysis of Subtitle D Financial Tests in Response to Public Comments.)

The final rule provides that a State Director may allow a firms that has recognized all of its environmental obligations as liabilities to use the financial test provided that it has at least $10 million in net worth and meets the other requirements of the financial test. For firms that recognize these obligations as liabilities, the ratio requirements become more demanding in terms of the net worth or cash flow necessary to pass the test. This occurs because each additional dollar of liabilities can require an additional two-thirds of a dollar in net worth (for a total of $ 1 2/3 in additional assets) in order to qualify for the net worth ratio, or an additional dime of cash flow to qualify for the profitability ratio. In the case of firms seeking to utilize the bond rating alternative, bond rating agencies are also concerned with the obligations of a firm in determining its senior unsecured debt rating. Thus, firms which have recorded large amounts of environmental obligations as liabilities will also have correspondingly large assets to meet the debt-equity ratio or to generate cash flow.

Frieh Insurance Corporation **00008**

Comment: Upon review of the proposed change, I find some logic in the concept and reasons for the suggestions regarding the Corporate Financial Test. It would allow, as of this date, the application of this test to gain relief from the other, approved, financial assurance mechanisms. Further review however presents significant collateral issues that may not produce the effect desired.
The proposed rule change provides a net worth requirement in addition to other methods of review. It should be noted that net worth is a standard of evaluation when reviewing corporate balance sheets. It should be also noted that the net worth normally is comprised of other than liquid assets. One of the stated objectives of the proposed rule change is the availability of sufficient assets in the event of the bankruptcy of the principal. In almost all cases, prior to a bankruptcy petition, all liquid assets are consumed. Further, any remaining assets, although stated fairly on the corporate balance sheet, typically do not provide the same values in liquidation. This could be especially true when the specter of pollution related matters surround a landfill closure. Simply put, the fixed or illiquid assets would probably have little or no value.

US EPA ARCHIVE DOCUMENT

The requirement of having a substantial net worth may not satisfy or temper any future capital demands.

The proposed rule change did not also address the possibility of having multiple MSWLF locations. If there are multiple locations, does the net worth of the company apply on a single basis to each or in the alternative, does each location demand a separate net worth value? If the [sic] a single, non-cumulative net worth approach is used, there is little or no reason for a corporate [sic] to address closure because it would not economically justify itself in the future.

Response: The Agency disagrees with the commenter=s concerns regarding the liquidity of assets included in the calculation of net worth. Net worth (or owner's equity) is a measure of what a firm is worth after it meets all its obligations towards creditors. If a RCRA firm enters bankruptcy proceedings and its assets are liquidated to pay off creditors, any environmental obligations the firm faces must be met out of its net worth. If such a firm has low net worth, it is likely to leave unfunded obligations. Further, a firm may have several intangible assets recorded on its financial statements, such as goodwill, that cannot be sold in the event of a liquidation. Therefore, the true measure of a firm's worth after it meets its obligations towards creditors is net worth less intangible assets, also known as tangible net worth. The current and proposed Subtitle C and D financial tests require firms to have over $10 million in tangible net worth in order to be eligible to use the test. This cutoff was established because, among other considerations, the Agency found that firms with less than $10 million in net worth are more likely to go bankrupt than those with net worth greater than $10 million and that the financial test has a substantially (over 50%) higher rate of misprediction when applied to firms with less than $10 million in net worth. See Exhibit 1 of Issue Paper, Relevant Risk Factors to Consider in a Financial Test. The preamble to the final rule contains additional explanation of EPA=s rationale for retaining the minimum tangible net worth requirement.

The net worth requirement generally requires that a company seeking to use the financial test must have a tangible net worth of $10 million plus the cost of environmental obligations being assured with a financial test. EPA adopted this additive requirement because multiples of a net worth requirement, for example the amount of obligations plus $10 million times the number of landfills assured, as suggested by the commenter, limit the availability of the test without a corresponding improvement in its ability to discriminate against firms that will enter bankruptcy.
Examples from alternative tests illustrate this point. One of the tests that EPA analyzed is identified as Test 149-10 in the report entitled AAnalysis of Subtitle D Financial Tests in Response to Public Comments.@ This alternative would allow a firm to assure environmental obligations up to one half of its net worth, if it had at least $10 million in net worth, had an investment grade rating, or had a liability to net worth ratio of less than 2 or a ratio of cash flow to net worth of greater than 0.1. These last two ratios are less demanding than the test that EPA is promulgating in final form and so should have the effect of reducing the private cost of the test since more firms should qualify at the less stringent ratios. However, instead the private cost of Test 149-10 is $54.4 million annually or 19% higher than the $45.6 million of the EPA=s final test. This higher cost results because firms that can qualify on the basis of their bond rating or financial ratios are able to cover less of their obligations with the financial test. An additional net worth requirement per landfill would similarly limit the amount that a firm can cover with the financial test, and have the effect of increasing private costs as was the case in Test 149-10.

US EPA ARCHIVE DOCUMENT

On the other side, the multiple net worth requirement does not correspondingly improve the ability of the test to discriminate between bankrupt and non-bankrupt firms. This was found in the analysis for the proposed changes to the Subtitle C financial test (56 FR 30207). This was affirmed by the review of how the financial test currently in place for Subtitle C treatment, storage and disposal facilities would operate when applied to privately owned or operated MSWLFs. This test has a Asix times multiple@that requires $6 in net worth for each $1 in obligations covered by a financial test. Denoted as A1982 Test-10" in Exhibit 6 of the report entitled AAnalysis of Subtitle D Financial Tests in Response to Public Comments,@the current Subtitle C test would have a private cost of $97 million when applied to privately owned or operated MSWLFs. This test=s ratio of misprediction to availability is also higher than the final test EPA adopted. In other words net worth requirements above those adopted in this rule can reduce the availability of the test without increasing its ability to screen out firms that will enter bankruptcy. Moreover, several commenters on RCRA financial responsibility proposals have stated that it is unlikely that all facilities owned by companies with many operations would have to close simultaneously.

See also response to comment 00003 in this section.

Browning-Ferris Industries **00010**

Comment: BFI strongly supports the 10 million dollar tangible net worth requirement in the proposed rule. BFI believes that it is essential that a corporate entity have a substantial net worth after accounting for the estimated costs of post-closure care and known corrective action costs. A substantial net worth acts as an indicator of a corporation's over-all financial health and also allows for a financial cushion if actual post-closure and corrective action costs exceed estimated costs.

BFI supports the Agency's proposal to require the inclusion of other types of environmental financial assurance obligations in the calculation of net worth. Clearly, this requirement provides a more realistic measure of a corporation's potential environmental liabilities.

Response: EPA=s final rule retains the requirement for a $10 million tangible net worth additive requirement. This regulation also requires the inclusion of other types of environmental financial assurance obligations when determining the $10 million tangible net worth additive requirement.

Environmental Compliance Services, Inc. **00011**

Comment: It is our belief that the proposed $10 million net worth requirement used as an initial screen for corporations in demonstrating financial responsibility for the cost of landfill closure, post-closure and corrective action is unnecessary. The underwriting of this class of business is almost purely financial. If the stronger, larger companies are allowed to waive the bond requirement, sureties will be left with the small financially weak companies. This would preclude most sureties from becoming involved in this already difficult product line. With little competition, the underwriting requirements will be very strict.

US EPA ARCHIVE DOCUMENT

Response: The Agency continues to believe that the $10 million in net worth requirement is an appropriate screen for the financial test. Agency analysis indicates that firms with more than $10 million in net worth are less likely to enter bankruptcy than firms with less than $10 million in net worth and that the financial test has a substantially (over 50%) higher rate of misprediction when applied to firms with less than $10 million in net worth. See Exhibit 1 of Issue Paper, Relevant Risk Factors to Consider in a Financial Test. The preamble to the final rule contains additional explanations of EPA=s rationale for retaining the minimum tangible net worth requirement.

The financial responsibility regulations provide that owners and operators of MSWLFs can use a variety of mechanisms to demonstrate financial assurance. In addition to sureties, trust funds, insurance or letters of credit are available as third party mechanisms. Therefore a decision by a sureties not to offer a mechanism should not preclude an owner or operator of a MSWLF from complying with the financial responsibility requirement using any of the other allowable third-party mechanisms.
The Agency believes that competition in the financial marketplace should ensure the availability of mechanisms for owners and operators of MSWLFs. The availability for MSWLFs mirror those in the hazardous waste regulations, and EPA=s experience in that program (which has had a financial test since 1982) is that owners and operators employ a variety of mechanisms (including surety bonds) to demonstrate financial responsibility. See also the preamble to the final rule which contains additional discussion of this issue.

The Solid Waste Association of North America **00013**

Comment: Selecting an amount of tangible net worth as a basis for determining whether or not an owner/operator is capable of assuring costs is flawed, as it relies on a summation of assets, none of which have to be liquid. It also creates an uneven playing field, as smaller owners and operators will likely not be able to use the corporate financial test. This forces smaller owners and operators to utilize alternate financial assurance mechanisms, which often require the allocation of "real dollars@, placing them at a competitive disadvantage with larger owners and operators.

The use of this financial assurance test will preclude many small companies from owning and operating MSWLFS, although they may in fact be capable of providing environmentally acceptable facilities. Meeting or failing to meet the financial components of this rule does not clearly indicate whether or not an owner/operator can provide for closure/post closure costs. Further, even if an owner/operator can meet the minimum size requirement, they still are not required to provide any segregated assets to guarantee closure/post closure costs.

Tangible net worth is a nebulous figure that can fluctuate dramatically. Basing any financial requirement on this measure can make it difficult for a firm to own or operate a MSWLF, as it may not be able to continually meet the financial component of the rule. The financial components do not take into account the variances in net worth that an owner/operator can experience. Hence, under this rule an owner/operator that falls short of the minimum size requirement in any year would be in

US EPA ARCHIVE DOCUMENT

danger of losing its site permit even if it could meet the requirement the year prior to and the year after the fluctuation.

Regarding net worth, SWANA=s policy on financial assurance states the following:

> ANet worth has a place in providing financial assurance. However, in crafting a financial assurance package, local government and regulatory agencies must assure that pledged tangible assets are protected from disappearance or devaluation during the period of closure and post closure requirements.@

Response: The Agency does not agree with the commenter that use of tangible net worth as one element of the financial test is flawed. The Agency proposed this minimum net worth as one initial screen for corporations in demonstrating financial responsibility for the very large costs of closure, post-closure care, and corrective action. Firms with more than $10 million in net worth are less likely to go bankrupt than firms with less than $10 million in net worth and the financial test has a substantially (over 50%) higher rate of misprediction when applied to firms with less than $10 million in net worth. See Exhibit 1 of Issue Paper, Relevant Risk Factors to Consider in a Financial Test. The preamble to the final rule contains additional explanations of EPA=s rationale for retaining the minimum tangible net worth requirement.

In addition to meeting the net worth threshold, companies must meet other financial requirements (i.e., ratios test or bond rating standards) to pass the financial test. While there is no requirement for a particular level of liquid assets, this is consistent with empirical findings that measures of liquidity are inferior predictors of bankruptcy compared with the ratios used in the financial test. (See Subtitle D Background Document.)

If a firm has already recognized all of its environmental obligations as liabilities, it could demonstrate less ability to cover them through the financial test than if it had not recognized them as liabilities. EPA received comments that the additive requirement would have an impact on small owners or operators and effectively required a higher coverage ratio for them. To address these concerns, and to assist smaller owners or operators who have already recognized their environmental obligations as liabilities, EPA is establishing a special provision. Under this provision, a firm that has recognized all of its MSWLF closure, post closure care, or corrective action liabilities under 40 CFR 258.71, 258.72 and 285.73, obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265 can utilize the financial test if it meets the other requirements of the test, receives the approval of the State Director, and still maintains a tangible net worth of at least $10 million plus the amount of any guarantees it has undertaken that have not been recognized as liabilities. See '258.74(e)(1)(ii)(B). This addition of any guarantees is necessary because EPA does not expect that a guarantee extended by a corporation will appear on that company=s financial statement until it is drawn upon and is recorded as a liability. The Agency believes that the additional flexibility allowed by this provision creates an incentives for owners or operators to fully recognize their environmental obligations in their audited financial statements.

US EPA ARCHIVE DOCUMENT

The Agency also disagrees with the commenter=s suggestion that the financial test will create an uneven playing field for smaller owners and operators unable to use the financial test. Overall, costs of providing third-party financial assurance are about 2 to 3 percent of a landfill=s total costs per ton. To put this figure in some additional perspective, profit margins in the industry have been reported to range up to 30% or a about twice that of collection companies. (See Wall Street Journal, AUSA Waste Agrees to Buy Sanifill in Stock Deal,@June 25, 1996). Competitive pressures already favor larger landfills and would continue to do so in the absence of this rule. These competitive pressures arise because other costs of developing and operating MSWLFs demonstrate large scale economies. EPA=s *Report to Congress on Flow Controls and Solid Waste* found that while a 100 TPD landfill had total costs of $144 per ton, a 750 TPD landfill faces costs of $48 per ton. As noted, costs of providing third-party financial assurance fall into the range of about 2 to 3 percent of a landfill=s total costs per ton. These relatively small percentages represent the maximum savings for an owner or operator who qualifies for the financial test. Several factors in addition to size, such as the age of the landfill, and proximity to competitive facilities can also affect landfill tipping fees which can vary substantially. Compared with the broad variation in tipping fees that exist in the industry, the competitive implications of the financial test appears unlikely to cause waste generators to shift to large regional landfills. (See ASubtitle C and D Corporate Financial Test Analysis, Issue Paper, Market Effects of the Financial Test.@)

Finally, the Agency does not agree with the commenter that the tangible net worth requirement will prevent small firms from owning and operating a MSWLF. The tangible net worth requirement is for the use of the financial test. Owners and operators who do not qualify for the financial test can use other mechanisms to demonstrate financial assurance. Further, as noted above, financial assurance costs are only a small fraction of the costs associated with owning or operating a MSWLF and it therefore seems very unlikely that these costs would prevent entry into the market.

The Agency does not agree that a firm=s net worth will fluctuate widely from year to year. As a consequence, absent a degradation in a firm=s financial strength, it is not likely that a firm will fail the test one year and pass it the next. Tangible net worth is an accounting term that equals the value of a firm=s tangible assets less the value of its liabilities. While it will vary with changes in a firm=s retained earnings, for profitable firms these changes should be positive (the net worth of a firm that does not issue stock in a particular year is equal to the net worth from the previous year plus its retained earnings). Unlike the valuation of a firm=s stock, tangible net worth does not tend to fluctuate dramatically for firms. In addition, should a firm fail to pass the financial test in a given year for any reason, it will not lose its permit as the commenter suggests. The regulations specifically require owners and operators in such cases to obtain an alternative third party mechanism.

Also see response to comments 00003 and 00008 in this section.

US EPA ARCHIVE DOCUMENT

Texas Natural Resource Conservation Commission **00018**

Comment: The TNRCC agrees with the EPA proposing to require firms to have a tangible net worth at least equal to the sum of all costs they seek to assure through a financial test plus $10,000,000. This will require a firm to disclose all of its environmental obligations assured by the test.

Response: EPA=s final rule retains the requirement that firms have a minimum tangible net worth of $10 million in addition to the other environmental costs assured through a financial test.

Duff & Phelps Capital Markets Co. **00019**

Comment: In this section, we address the appropriateness of using tangible net worth as a measure of size:

! The amount of a business's tangible net worth (book value of equity less goodwill and related intangible assets) will depend on specific accounting treatments of depreciation, accruals and other items which affect net earnings and net worth as defined by GAAP. Thus, two firms of the same size with similar market opportunities, risks and profitability may have very different tangible net worth. What is more, it has been our observation that firms of different size tend to use GAAP accounting's flexibility to fulfill different objectives. For instance, a small, privately-owned firm may wish to minimize earnings to minimize its income tax obligation; conversely, a large, publicly-traded firm may be more interested in maximizing its earnings reported to the investment community. Although these are perfectly reasonable and appropriate objectives for these firms given their size and other characteristics, the bottom line is GAAP accounting is used and interpreted differently by both firms. In summary, GAAP's flexibility in many areas of accounting will effect net earnings and tangible net worth of a business.

! Using tangible net worth to indicate size may also discourage businesses from making strategically sound landfill acquisitions, in order to keep goodwill and other intangible assets from representing too large a proportion of net worth. Ironically, this measure could actually prevent landfill businesses from increasing in size and realizing economies of scale through acquisition.

! Tangible net worth is a historical number that that does not capture the underlying economic value characteristics: expected risks, market conditions and future opportunities of the business. Tangible net worth defines where the business has been, as opposed to where it is headed. As most closure/post-closure and related costs are incurred in the future, it is the expectation of future ability to generate cash flow to meet these costs, rather than historical performance, which determines financial soundness. One very distortive implication is that a small, profitable business may fail the size test now, despite very favorable expectations for future growth and profitability. Alternatively, a large operator with a high tangible net worth based on good past performance may pass the test, despite a poor outlook for the business.

US EPA ARCHIVE DOCUMENT

We recommend that the fair market value of the company's equity capital be used as a measure of size. The fair market value of equity capital is the value of the business net of all senior obligations, including closure/post closure, potential remediation, corrective action, and other expected future costs, and debt. For a publicly traded business, this is simply the published price per share multiplied by the number of shares outstanding. For privately held firms, fair market value can be derived using either market multiples of comparable, publicly traded solid waste landfill businesses or a discounted cash flow analysis. In either case, using the fair market value of equity to indicate size eliminates the problems noted above - the methodology captures expected future financial performance arising from market conditions, strategic decisions to acquire, changes in operating policy, and other expectations. Furthermore, short of a material misrepresentation of the financial statements, fair market value is not manipulated by GAAP accounting.
Response: EPA is relying on the minimum tangible net worth requirement not to target firm size but to ensure that a firm, whatever its size, is financially sound and capable of covering the potentially substantial costs of closure, post-closure costs, and corrective action. The Agency disagrees with the commenter=s suggestion that tangible net worth is an inappropriate measure for a self-insurance program such as the financial test. While there is some flexibility in the application of Generally Accepted Accounting Principles (GAAP), these standards provide a consistent basis for comparing the financial status of firms. They also can apply to firms that are publicly traded as well as privately held firms. Also, the Agency notes that net worth is only one component of the financial test. Firms that meet the net worth requirements also must meet the ratio requirements or have an investment grade bond rating to qualify for the test.

Further, the Agency does not believe that using tangible net worth as a measure of financial viability will discourage businesses from making sound acquisitions in order to protect intangible assets from constituting too large a portion of net worth. Goodwill results when the price paid for the acquired firm is greater than the book value of the underlying assets. Since goodwill is an intangible asset, it is not counted as part of the tangible net worth of a firm. However, net worth increases with retained earnings and by the value of stock issued as part of the acquisition. A firm that acquires landfill operations without obtaining additional equity financing (i.e. issuing new stock) is increasing its debt load and becomes riskier financially.

The primary incentive of the regulations is to insure that debt levels are not excessive for firms which wish to use the financial test. Firms with high debt levels will not qualify for an investment grade bond rating. Similarly, the alternative ratio requirements (Total Liabilities/Net Worth of less than 1.5 or a ratio of Cash Flow - $10 Million/Total Liabilities greater than 0.10) explicitly discourage excessive debt.

EPA adopted a financial test based upon current accounting information because such a test has a calculable rate of misprediction based upon historical information. Any financial test involves a tradeoff between two different competing weaknesses. The first is that the test will be available to firms that should not qualify for a financial test. The second is that the test will not be available to firms that should qualify for a financial test. As measures of these types of risk, EPA calculated the public cost and availability for the various alternative tests. The public cost for the test represents the cost that could be imposed upon the public by firms that use the financial test, but enter

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bankruptcy. These costs for the test that EPA selected are very low. Furthermore, the test that EPA selected is available to cover over 71% of closure and post-closure obligations. Companies that have already accounted for their environmental obligations as liabilities, may be able to cover these obligations with a financial test without the $10 million additive requirement. If this practice is universal and firms receive approval from State Directors the financial test would be available to cover almost 82% of obligations. (See the results for Test 562-10a and Test 58-10 in Exhibit 6, Analysis of Subtitle D Financial Tests in Response to Public Comments.) EPA believes that its financial tests provide a high degree of availability while minimizing public costs.

The commenter suggests that the test=s tangible net worth requirement may screen out small profitable firms that have very favorable prospects for future growth and profitability. EPA notes that in certain circumstances these prospects may also not materialize. Indeed, projecting a firm=s growth and profitability would require considerable information and may still be quite speculative. In this final rulemaking EPA examined tests with lower tangible net worth requirements. For the reasons discussed in the preamble to the final rule, EPA decided not to eliminate this requirement. However, EPA=s regulations provide two other mechanisms for firms that do not qualify for EPA=s financial test. First, an owner or operator that has a substantial business relationship with another firm that qualifies for the financial test may be a recipient of a corporate guarantee. The corporate guarantee established in this rulemaking can allow owners or operators that do not qualify for the financial test on their own to be the recipient of a guarantee without using the mechanisms established in 40 CFR 258.74(a), (b), (c), or (d), and instead places the guarantor in the position of providing financial assurance should the owner or operator not fulfill its obligations. Second, under 40 CFR 258.74(i) the Director of an approved state program may approve an alternative financial assurance mechanism that meets the requirements of 40 CFR 258.74(1).

The commenter also noted the possibility that the financial test may be available to a firm that has substantial net worth based upon past performance, but a poor business outlook. This comment overlooks the other components of the financial test that increase its accuracy. In addition to the net worth, the financial test requires that the owner or operator have an investment grade bond rating from Standard & Poor=s or Moody=s, or pass one of two financial ratios. Analyses by both of these bond rating services substantiate that firms with investment grade ratings are unlikely to default on their obligations. Further, a comparison of the annual assurance risk of the financial test ratios and the bond rating requirement shows that both the ratios and the bond rating requirements provide low risks. (See issue Paper, Issue Relating to the Bond Rating Alternative of the Corporate Financial Test.) The financial test is an annual demonstration and is designed so that if a company does not pass it in a particular year, the firm has a very high likelihood of staying in business for at least three years. Should a company with a poor business outlook pass in a particular year, it would have to make a demonstration in the succeeding year that it still qualifies for the test. If the company does not then pass, it must to acquire an alternative mechanisms to comply with the regulations.

The Agency also disagrees with the commenter=s suggestion that the value of equity capital be used as an alternative measure of financial viability. The use of the fair market value of a publicly-traded company=s equity capital as a measure of viability suffers from several shortcomings which render it less desirable than the Agency=s approach. While the fair market value of a company=s equity can capture several important factors, it also can capture the effects of changes in interest rates which can

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have a dramatic effect on the price of equities. The value of a company=s stock reflects the discounted value of the expected dividend stream. (Principles of Corporate Finance, Richard Brealey and Stewart Myers, p 142). In other words, the price of a traded stock incorporates the market=s estimate of the future dividends and an interest rate. As interest rates rise, future dividends are more heavily discounted and the value of the stock declines. When interest rates fall, the opposite occurs. Discounting the expected value of the dividend stream depends upon the interest rate determined by the financial market. Interest rates can change with expectations of Federal Reserve policy, fiscal policy, inflationary pressures and international capital markets. Because of the many factors affecting interest rates, they can change frequently with a corresponding effect on the value of a firm=s stock. The result could be that firms would no longer qualify for the financial test because of a tightening of Federal Reserve monetary policy (or anticipation of a tightening) even though their basic credit worthiness was unchanged.

The estimation of fair market values for privately held firms also would be problematic for State agencies because selecting comparable publicly-traded firms would be difficult, as would be the prediction of the firm=s cash flows. While there are financial analysis techniques than can be used to predict a firm=s cash flows, EPA does not anticipate that States will commonly have the staff to undertake these kinds of financial and investment analyses. Moreover, the Agency notes that reported earnings are frequently more or less than analysts= predictions and that the market value of firms= stocks often changes when actual accounting reports appear. These changes imply that financial analysts can have a difficult time in predicting earnings which are a major component of cash flow.

EPA has information on the risk of bankruptcy by the net worth of firms. These data show that firms with lower net worth have higher rates of bankruptcy. While the commenter suggested using market values of equity as an alternative, the comment did not specify appropriate benchmarks or empirical studies demonstrating the superiority of market values of a company=s equity capital. Because of the difficulties associated with the commenter=s suggestions and the lack of data demonstrating its superiority, the Agency declines to accept the commenter=s recommendation and is finalizing the $10 million tangible net worth requirement in today=s rule.

Also see response to comments 00003 and 00008 in this section.

National Solid Wastes Management Association **00020**

Comment: The ISWD has specific problems with the minimum size requirement of $10 million plus anticipated costs. The additional requirement that firms have a minimum net worth equal to their anticipated closure, post-closure care and corrective action costs (the "anticipated costs") plus $10 million is not supported by facts contained in the October 12, 1994 Federal Register. If the analysis of bankruptcy statistics indicated that firms of greater than $10 million in assets were less likely to fail than smaller firms, setting the minimum size at $10 million would be reasonable, not at $10 million plus anticipated costs. This additive requirement appears arbitrary, because no sensitivity analysis is presented reflecting how this additive requirement relates to the actual environmental obligations which the proposed rule seeks to assure.

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The setting of the net worth requirement at the sums of all closure, post-closure care and corrective costs plus $10 million has a discriminatory, anticompetitive and punitive effect upon smaller, financially sound firms in the MSWLF industry. For example, if a firm has total anticipated environmental costs of $1 million, requiring it to provide net worth of $11 million, the anticipated costs plus the $10 million proposed minimum "cushion", such a firm would provide the public with a financial coverage ratio of 11:1. However, under the proposed rule, a firm with $10 million in anticipated costs and a $20 million net worth would also be acceptable risk although it would provide a financial coverage ratio of 2:1. In this example, the smaller firm would be considered the better financial risk. Even if the smaller firm had a net worth of $2 million, it would present the same degree of financial risk as the larger firm (a 2:1 coverage ratio); however, the proposed rule would bar this firm from utilizing the financial test.

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Response: The comment reflects a misunderstanding of the analysis. The rule allows coverage of obligations to net worth minus $10 million. Therefore, the test may be used to cover at least some of the firm=s Subtitle D closure and post-closure care obligations by any firm with greater than $10 million in net worth. Remaining obligations would need to be covered by a third-party mechanism. Thus the test finalized today provides greater flexibility to firms in complying with the requirements. Agency analysis of smaller companies demonstrated that many firms with smaller net worths nevertheless had closure and post-closure obligations greater than net worth or liabilities. Such firms appear not to recognize other obligations as liabilities and may be more likely to face bankruptcy. This is borne out by Agency analysis which indicates that the assurance risk for the financial test is 66 percent higher for firms with less than $10 million in net worth than for firms with greater than $10 million in net worth. (See Exhibit 1, Issue Paper, Relevant Risk Factors to Consider in a Financial Test.)

The Agency agrees with the commenter that in certain circumstances, requiring a $10 million additive requirement (i.e. $10 million plus the amount being assured) can put some firms at a disadvantage. If a firm has already recognized all of its environmental obligations as liabilities, it could demonstrate less ability to cover them through the financial test than if it had not recognized them as liabilities. EPA received comments that the additive requirement would have an impact on small owners or operators and effectively required a higher coverage ratio for them. To address these concerns, and to assist smaller owners or operators who have already recognized their environmental obligations as liabilities, EPA is establishing a special provision. Under this provision, a firm that has recognized all of its environmental obligations as financial liabilities can utilize the financial test if it meets the other requirements of the test, receives the approval of the State Director, and still maintains a tangible net worth of at least $10 million plus the amount of any guarantees it has undertaken that have not been recognized as liabilities. See '258.74(e)(1)(ii)(B). This addition of any guarantees is necessary because EPA does not expect that a guarantee extended by a corporation will appear on that company=s financial statement until it is drawn upon and is recorded as a liability. The Agency believes that the additional flexibility allowed by this provision creates an incentive for owners or operators to fully recognize their environmental obligations in their audited financial statements.

The preamble to the final rule contains additional discussion of EPA=s rationale for retaining the minimum tangible net worth requirement.

See response to comment 00003 above.

National Solid Waste Management Association **00020**

Comment: In arriving at a minimum size requirement, the Agency used "the alternative financial assurance tests identified in the Subtitle C analysis as the starting point for Subtitle D analysis", (59 FR 51529). The Agency also reasoned that "the same policy considerations discussed above for Subtitle C compel use of a $10 million net worth requirement for Subtitle D."

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This position offers consistency among the regulations; but, does not reflect the fundamentally lower risk and costs associated with non-hazardous waste disposal activities. Administrative ease and uniformity should be a secondary consideration that is accommodated only after the regulations are tailored to provide for appropriate environmental safety, competitive fairness, and the economic reality. Economic reality indicates lower anticipated costs for municipal solid waste landfills (MSWLFS) than for hazardous waste activities. A MSWLF poses much less risk to the environment. Therefore, the financial assurances required to enter and operate in this industry should be less than those required for hazardous activities. As a result, a $10 million threshold for entry into the industry is far more appropriate for Subtitle C firms than for firms operating in only the MSWLF industry. We suggest that EPA re-examine this value and determine whether a lower threshold is appropriate based on data from the MSW industry rather than the hazardous waste management industry.

Response: The Agency disagrees with the commenters that the risks posed by Subtitle D facilities are substantially lower than those posed Subtitle C facilities. The risks that the Agency seeks to mitigate through financial assurance requirements are the financial risks that an owner or operator might not be able to meet its closure and post-closure and corrective action obligations, leaving EPA or the State (and ultimately the general public) financially responsible. In developing the proposed financial test rule, EPA reviewed closure and post closure cost estimates for Subtitle D MSWLFs. Contrary to the commenter=s suggestion that Subtitle C costs would be substantially higher, this analysis found that some Subtitle C closure costs for treatment and storage units ($360,000) and incinerators ($1 ,000,000) averaged less than the closure cost for MSWLFs ($2,370,000 for a 75 ton per day landfill on up to $10,000,000 for a 750 ton per day MSWLF). These cost figures do not support a lower net worth requirement for owners or operators of MSWLFs.

EPA also disagrees with the commenter=s assertion that these regulations establish a financial threshold for entry into the industry. The financial assurance regulations established under 40 CFR 258.74 provide for several mechanism by which an owner or operator can establish financial assurance. The financial test provides an additional mechanism to demonstrate financial assurance. Moreover, the corporate guarantee regulations adopted in this final rulemaking allow another mechanism for firms that can obtain a guarantee to comply with the financial responsibility requirements.

National Solid Wastes Management Association **00020**

Comment: The requirements also state that a firm must have a tangible net worth at least equal to the sum of the current costs they seek to assure through a financial test plus $10 million. A definition of current costs as used in this section is not provided by the Agency. The ISWD suggests that current costs be defined as those costs needed to close and provide for post-closure care if the landfill closes the following year. Based on current landfill development methods, the expected costs for closure and postclosure care in the early years of operation are significantly smaller than at some future date. Only a small area of land will be developed in the early years and the costs associated with closure and post-closure care of the facility are minimal. At the end of each year, the facility

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would have to recalculate the amount required to close the facility in the following year and requalify under the test or obtain alternative financial assurance.

If a facility closes early because of the financial condition of the owner/operator, it is unlikely to remain closed because another company will purchase the permit and continue the operations. Allowing this change would assist firms that are in a growth period to qualify under the test since their net worth will increase over time.

Response: The Agency has determined that the commenter=s concern about the definition of Acurrent cost@ is out of the scope of this rulemaking. Language in existing '258.74 notes, AThe mechanisms used to demonstrate financial assurance under this section must ensure that the costs of closure, post-closure care and corrective action for known releases will be available whenever they are needed.@ The regulations covering cost estimates are found in existing ''258.71, 258.72, and 258.73. The estimates of the costs to be assured are independent of the mechanisms used to assure for them. These regulations regarding the costs to be assured have been place since October 1991 and are not the subject of this rule making.

Further, the Agency does not agree with the commenter that a facility that closes early is unlikely to remain closed. The comment presupposes that such a closure is not the result of a general municipal solid waste industry downturn, environmental concerns, or other factors. For example since the possibility of over expansion in the industry or reduced volumes of waste for disposal as a result of waste minimization or recycling could lead to reduced number of facilities, EPA cannot be assured that facilities will necessarily be purchased and reopened by another firm. As a consequence, the Agency has no reason to reconsider its definition of costs to be assured.

City of Santa Clarita, California **00021**

Comment: The City of Santa Clarita is also concerned about the Agency's reliance on data which appears not to have taken into consideration the effect of unexpected closures of landfills, the impetus within the last few years toward the construction of large scale landfills, and the trend toward expanded liability of owners and operators. The City is also concerned about the costs which are not taken into consideration in calculating the minimum size requirement, including costs associated with (a) the impact of a landfill on the wildlife of an area, (b) ongoing maintenance and corrective actions such as cleanup for water contamination and air pollution, and (c) natural disasters affecting the landfills, such as earthquakes. The City of Santa Clarita is located in Los Angeles County, California. The proposed Elsmere Canyon landfill is on a site of known seismic activity. The City sustained millions of dollars of damage in the recent January 1994 San Fernando quake. We frequently experience adverse air quality. The close proximity of the proposed landfill site to Los Angeles would affect the existing poor air quality of the Los Angeles basin. Any environmental impact statement concerning landfills required by NEPA and its state counterparts would almost certainly specify mitigation relating to air emission and impact on wildlife. Such mitigation costs should be taken into consideration in the analysis of the minimum size requirement. These costs and others such costs are not a part of the calculation because they are not required to be assured with a financial test.

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Additionally, the City of Santa Clarita is concerned that the Agency's proposed rule would allow certain pension liabilities to be ignored in determining whether a firm meets the minimum size requirement. Employees of a firm should not be put in a position of having their retirement jeopardized simply because a landfill's owner or operator lacks sufficient funds for closure, post-closure and corrective actions.

These are just a few of the expected and unexpected costs that an owner or operator should be financially able to cover, which are not addressed by the proposed rule, due to the fact that financial assurance tests are not needed to cover such costs. For these reasons, the tangible net worth requirement of at least the costs a company seeks to assure through use of a financial test plus $10 million is woefully inadequate given the increasing liability and escalating costs associated with the ownership and operation of landfills.

Response: The purpose of this regulation is to provide a financial test as an alternative mechanism for private owners and operators of municipal solid waste landfills to demonstrate financial responsibility for meeting minimum federal requirements. The federal financial assurance requirements, which were promulgated October 9, 1991 (56 FR 51029), are not the subject of this rule making. Those rules established minimum federal requirements, including costs that must be assured using a financial mechanism. For that reason, the costs which the commenter noted are beyond the scope of this federal rulemaking. At the same time, States can establish more stringent regulations .

With regard to the issue of pension liabilities, the Agency notes that the preamble to the rule contained a discussion of the accounting for other (i.e. non-pension) post-employment benefits. Pension liabilities are included in a firm=s liabilities and are not a part of net worth. In the discussion of non-pension post-employment benefits, the preamble addressed the fact that for SEC reporting purposes firms may account for these benefits in two manners. Firms choosing to use the financial test can use either method when they report these liabilities to EPA. The discussion clarified that since either method is allowable for SEC purposes, EPA will also allow either method. (See sections below for further discussion of comments on this issue.)

Since EPA does not require financial assurance for the costs which the commenter cites as necessitating a level of net worth greater than $10 million over the costs assured, the Agency sees no need to require higher net worths for the financial test being promulgated today. The $10 million net worth requirement is a cushion to ensure that if the owner or operator had to undertake the activities for which EPA requires financial assurance, the firm would still remain economically viable. This $10 million additive requirement reflects the lower bankruptcy rate for firms with over $10 million in net worth.

See also analysis of comments 00003 and 00020 in this section.

Land and Lakes Company **00024**

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Comment: 2) The proposed rule would allow the largest companies in the industry to use more "paper" promises such as corporate guarantees or unsecured balance sheet strength to provide assurance for closure, post closure and corrective care costs. The following comment criticizes this proposal for several reasons, most notably the fact that larger firms are not necessarily better financial risks. The dramatic growth of the largest waste firms through acquisitions has led to a great consolidation of risk in those firms. These larger firms also generally have hazardous waste operations and thus higher risk than many smaller MSWLF firms, If, as suggested herein, the rule were altered to allow the use of discounted costs only for those companies which provide cash or near-cash equivalents for future costs, the public should benefit from increased environmental safety without the anticompetitive effect of the proposed rules. Such a rule would create incentives for all firms to secure obligations regardless of size.

3) The proposed rule fails to appreciate the difference between Subtitle C hazardous waste facilities and Subtitle D municipal solid waste facilities. The Agency reports that it used "the alternative financial assurance tests identified in the Subtitle C analysis as the starting point for the Subtitle D analysis", (59 FR 51529). The Agency also concluded that Athe same policy considerations discussed above for Subtitle C compel use of a $10 million net worth requirement for Subtitle D", (59 FR 51529, fr 2).

While the Agency position offers consistency among the regulations, it does not reflect the fundamentally lower risk and costs associated with non-hazardous activities. Administrative convenience should be a secondary consideration that is accommodated only after the regulations are tailored to provide for appropriate environmental safety and competitive fairness. Economic reality indicates lower anticipated costs for MSWLFs than for hazardous waste activities. The MSWLF industry poses much less risk to the environment, therefore, the financial assurance required to enter and operate in the MSWLF industry should be less than that required for hazardous activities. While a $10 million threshold may be appropriate for entry into the Subtitle C industry, it is not appropriate for firms operating in only the MSWLF industry.

Response: The commenter suggested that the Agency establish rules allowing discounting of closure or post-closure costs only for firms which use cash or near-cash equivalents for future costs. When EPA promulgated the final rule establishing financial assurance mechanism for local governments owning and operating municipal solid waste landfills, it also promulgated a regulation allowing the discounting of costs (61 FR 60328). That rule established criteria for determining when discounting would be allowable based upon compliance, and assurances about the accuracy of the estimates of cost and years of remaining life. These criteria are important irrespective of the mechanism used to demonstrate financial assurance. A state director, may, however have additional criteria for allowing discounting.

See response to comment 00020 above for discussion of issues related to the relative criteria of Subtitle C and D facilities.

Land and Lakes Company **00024**

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Comment: The requirement that firms have minimum net worth equal to their anticipated closure, post-closure and corrective action costs (the "anticipated costs") plus $10 million is not supported by any facts reported in the October 12, 1994 Federal Register. Further, if the analysis of bankruptcy statistics performed by the Agency indicated that firms of greater than $10 million in assets were less likely to fail than smaller firms, it would be reasonable to set the minimum size at $10 million, not at $10 million plus anticipated costs.

2) Setting the net worth requirement at the sums of all closure, post-closure and corrective costs plus $10 million would have a discriminatory, anticompetitive and punitive effect upon smaller, financially sound firms in the MSWLF industry.

For example, if a firm has total anticipated environmental costs of $1 million, requiring it to provide net worth of $11 million, (the anticipated costs + the $10 million proposed minimum "cushion@), such a firm would provide the public with a financial coverage ratio of 11:1. However, under the proposed rule a firm with $10 million in anticipated costs and a $20 million net worth would also be acceptable risk although it would provide a financial coverage ratio of only 2:1. Provided that each firm secures its financial assurance with cash or near-cash equivalents, the smaller firm would be considered the better financial risk. Even if the smaller firm had a net worth of $2 million and it secured its anticipated costs with cash or near-cash equivalents, it would present the same degree of financial risk as the larger firm (a 2:1 coverage ratio), however, the proposed rule would bar this firm from the industry.

This additive requirement appears arbitrary, especially since no sensitivity analysis is presented reflecting how this additive requirement relates to the actual environmental obligations which the proposed rule seeks to assure.

Response: The Agency disagrees with the commenter; Agency analysis of a minimum net worth requirement demonstrated that such a requirement lowered the misprediction rate of the financial test. As noted above and in Issue Paper, Relevant Risk Factors to Consider in a Financial Test, the assurance risk for the financial test is 1.067% for firms with less than $10 million in net worth compared with 0.233% to 0.644% for firms with more than $10 million in net worth. These results support the Agency=s belief that lowering the net worth requirement would decrease the accuracy of the financial test. In addition, a $10 million minimum net worth requirement ensures that the costs of closure and post-closure care and liability judgments, which could result in costs of millions of dollars, do not themselves cause bankruptcy in smaller firms. The results of the Agency=s preferred test, Test 562 (with its $10 million minimum net worth requirement and other financial test components) results in a test which is both highly available to firms (71.7 percent) and of low total public cost ($11.7 million annually).
See also the discussion of comments on the minimum tangible net worth requirement in the preamble of the final rule and the response to comments 00020 above.

Land and Lakes Company **00024**

Comment: 4) Alternative measures would provide better financial assurance for the public with less anticompetitive effect.

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The proposed minimum net worth requirement discriminates against smaller, financially sound companies effectively eliminating them from participation in the MSWLF market. This anticompetitive effect is not needed to protect the public interest in financial assurance for the anticipated costs.

A proposed rule that links financial assurance to total anticipated costs is preferable. Therefore, adoption of Test 130, would be preferable to the proposed rule. In the alternative, a test that would link financial assurance to anticipated costs plus a reasonable Acushion@ equal to some percentage of those costs would be more equitable and provide a more level playing field for firms in the MSWLF industry. A proposed rule requiring minimum net worth of the lesser of $10 million or say 25% cushion over the anticipated costs would be less anti-competitive and still provide the public with an increased degree of financial assurance. A proposed rule which uses total anticipated costs plus provides a percentage of those costs as a Acushion@ and secures those costs with cash or near-cash equivalents using a financially sound method such as discounting should theoretically provide adequate financial protection to the public.

5) Other financial tests offer better indications of risk than minimum net worth requirements.

Commonly recognized financial valuation methods such as the capital pricing model offer better indications of risk than minimum net worth requirements. These methods take into account the risk facing individual firms and compare that risk to the risk of other firms in the industry. While the administrative review of these financial models would be more time-consuming than for a minimum net worth requirement, standardized presentation formats could be created. The end result would be a more accurate presentation of firm risk, that is less anticompetitive than the barrier to entry caused by the mandatory imposition of minimum net worth requirements.

Response: The intention of the Agency=s test is not to discriminate against small firms. The minimum net worth requirement is a necessary component of the self insurance policy embodied in the financial test. As noted in the preamble to the proposed rule, it was found that firms with net worth in excess of $10 million were less likely to undergo bankruptcy than those with net worth below $10 million. An analysis conducted to develop the proposed financial test suggested that the minimum tangible net worth requirement lowers the misprediction rate of the test. (See response to comments 00020 and 00024 above.) The preamble to the final rule contains additional discussion in response to public comments explaining EPA=s rationale for retaining the minimum tangible net worth component of the financial test.

It is also inaccurate to state that this rule would bar smaller firms from the industry. The rule being finalized today allows firms additional flexibility in complying with their financial responsibility requirements by adding financial assurance mechanisms available to owners or operators of MSWLFs. Firms that do not meet the minimum net worth requirements may use any of the other financial mechanisms allowed, including the corporate guarantee included in this rulemaking. None of those mechanisms has a minimum net worth requirement. Thus, the commenter=s suggestion of securing discounted obligations with near cash equivalents already is available under the existing financial assurance rules. These regulations already provide for discounting under ' 258.75 and the

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use, for instance, of surety bonds or irrevocable letters of credit provide a high degree of assurance without the owner or operator having to earmark funds for closure.
However, the issue of the Agency using the lesser of two alternatives, a $10 million net worth or 25 percent over the sum of obligations, would not address the commenter=s point. In fact, such a Acushion@ might be even more expensive than the Agency=s alternative for a small firm, given the number of small firms with liabilities in excess of net worth, and would not address the Agency=s goal of ensuring that fulfilling environmental obligations will not bankrupt a firm. As noted in Exhibits 7 and 8 of the report Analysis of Subtitle D Financial Tests in Response to Public Comments, the median value of financial assurance obligations as a percentage of liabilities and net worth for firms with $1 to $10 million in net worth is 332% and 486% respectively. (EPA did not receive comments on the values of financial assurance obligations, which were updated for the analysis of the financial tests for inflation.) This means that the financial assurance obligations are substantially in excess of the amount of liabilities as reported in the Dun and Bradstreet financial information which EPA used to examine the financial test for owners and operators, including those with less than $10 million in net worth, and that the obligations are almost five times the value of these firms= net worth. Because the obligations are so much larger than the firms= reported liabilities and net worth, even if discounting would reduce these obligations by 40% overall, the obligations would still be almost three times (486% X (1-0.40)) the median company=s net worth. Thus, the commenter=s suggestion of requiring near cash equivalents for these amounts plus a 25% cushion would require near cash equivalents substantially in excess of their net worth.

However, EPA has recognized that if a firm has already recognized all of its environmental obligations as liabilities, it could demonstrate less ability to cover them through the financial test than if it had not recognized them as liabilities. EPA received comments that the additive requirement of Test 562 would have an impact on small owners or operators and effectively required a higher coverage ratio for them. To address these concerns, and to assist smaller owners or operators who have already recognized their environmental obligations as liabilities, EPA is establishing a special provision. Under this provision, a firm that has recognized all of its MSWLF closure, post closure care, or corrective action liabilities under 40 CFR 258.71, 258.72 and 285.73, obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265 can utilize the financial test if it meets the other requirements of the test, receives the approval of the State Director, and still maintains a tangible net worth of at least $10 million plus the amount of any guarantees it has undertaken that have not been recognized as liabilities. See ' 258.74(e)(1)(ii)(B). This addition of any guarantees is necessary because EPA does not expect that a guarantee extended by a corporation will appear on that company=s financial statement until it is drawn upon and is recorded as a liability. The Agency believes that the additional flexibility allowed by this provision creates an incentives for owners or operators to fully recognize their environmental obligations in their audited financial statements..

The third argument, that the capital asset pricing model (CAPM) offers a better indication of risk than a minimum net worth requirement, was analyzed by the Agency. If, as the commenter asserts, CAPM is a strong indicator of failure risk, then the factors affecting a firm=s beta should be consistent with the failure risks of a firm. In order to test this expectation, the Agency gathered

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Value Line data on betas and financial strength for a sample of firms. The sample includes four firms from the Subtitle D financial test analysis, other environmental companies identified by Value Line, and a random sample of other firms.[1] The scatter plot diagram included as Exhibit 2 in Issue Paper, ARelevant Risk Factors to Consider in a Financial Test,@ reveals no clear correlation between a company=s beta and its financial strength, as measured by Value Line. (see Issue Paper, Relevant Risk Factors to Consider in a Financial Test). Because there was no correlation, the Agency rejected the use of the capital asset pricing model.

Granger Companies, Inc. **00025**

Comment: This letter is in reference to the proposed Financial Assurance Mechanisms, specifically section 258.74(e)(1)(ii). This section defines the proposed Minimum Size Requirement. I request that the Agency specify that any funded liability, such as Closure/Post-Closure Trust Funds, or Act 9 Perpetual Care Funds, be added to Tangible Net Worth when calculating the Size Requirement. These are funds designated to pay for any closure/post-closure related costs, and are, for the purpose of this provision, part of an organization=s Net Worth, but may not be included on a company=s balance sheet.

If these funds are not included in the calculation, we believe that those who contribute to such funds are being penalized for committing substantial funds in advance. These funds are part of an organization=s ability to fund current and future closure costs, which is what this proposed amendment is attempting to measure.

Response: The financial test provides a mechanism that companies may use to demonstrate financial responsibility for closure, post-closure and, if necessary, corrective action obligations. The obligations covered by the financial test are those for which the company has not already provided financial assurance through a third party mechanism. Under the commenter=s suggestion, funds in a trust for closure costs not covered by the financial test would be added to tangible net worth. EPA has historically relied on generally accepted accounting principles (See, for example, 40 CFR 264.141(f))in determining accounting matters. In this instance as well, EPA believes it is appropriate to be guided by the application of generally accepted accounting principles to determine the assets, liabilities and resultant net worth of the company. If the application of generally accepted accounting principles determines that the trust funds are assets of the company, then they can be counted against the tangible net worth to the extent allowed by the recognition of the company=s liabilities.

Furthermore, the information on firms= financial statements which EPA used to assess the financial tests for the proposed and this rulemaking were based upon the application of generally accepted accounting principles. EPA used the information based upon generally accepted accounting principles to determine the public and private costs of the financial test. EPA does not have information on how a test would operate based upon some other system of financial measurement.

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[1] Value Line Investment Survey, Part 3: ratings and Reports, 1995.

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Therefore EPA has declined to specify particular additions to net worth for purposes of the financial test, but would generally interpret the tangible net worth requirement to be determined consistent with generally accepted accounting principles.

US EPA ARCHIVE DOCUMENT

I.A.1.b. Bond Rating/Financial Ratio Alternatives

Commenters were mixed on the issue of bond ratings. Some supported the bond rating alternative for its high degree of utility in predicting financial strength, and recommended that the alternative be based upon senior debt. Commenters opposed to the alternative stated that bond ratings were not reliable, did not ensure access to funds, and would be available to only a very few firms in the industry. One commenter suggested that bond ratings from other financial institutions also be allowed.

With regard to the ratio's requirements, one commenter questioned the absence of a liquidity ratio in the test, and another noted that the profitability ratio discriminated against smaller firms because $10 million is subtracted from a firm's net cash flow.

Comments together with Agency responses, are presented below.

Asset Guarantee Insurance Company **00003**

Comment: The proposed financial ratio test makes no provision for liquidity, neither profitability nor stipulation as to maximum leverage, address the cash and liquidity levels of the landfill companies. Net worth is not a proxy for cash. It is an accounting number resultant from the subtraction of real debt obligations from the asset base. Assets of landfill companies are the landfills themselves and various associated intangible assets. The assets of these companies are generally not flush with cash, hence net worth should not be confused with liquidity or the ability to monetize the closure, post-closure and corrective action costs.

The solid waste industry is currently undergoing a consolidation whereby those firms surviving the transition will need to continue to dedicate their capital resources to expansion. The acquisition of existing landfills and the development of new facilities results in a net consumption of cash and liquidity.

Response: The Agency does not agree with the commenter that a liquidity test would be an appropriate measure of a firm=s ability to meet closure, post-closure, and corrective action obligations. The financial test finalized today does not contain a liquidity measure because Agency analyses of alternative financial tests have shown that tests incorporating liquidity measures are not as good a predictor of bankruptcy as the tests which are being promulgated in this rule. When EPA examined liquidity ratios such as Current Assets/Current Liabilities and Net Working Capital/Total Assets, it found that the difference between their availability to viable firms and their misprediction by allowing firms that would enter bankruptcy to use the test was either very slight (6.9%) or negative (-29.1%). AA negative difference between A [Availability] and M [Misprediction] means that a higher percentage of obligations are covered by bankrupt firms than by non-bankrupt firms for a given measure. This reflects an inability of the measure to distinguish between bankrupt and non-bankrupt firms, and thus indicates that the measure is not as good a performer as those with a positive difference.@ (See p. 4-31, Background Document: Revisions to the Subtitle C Financial Test for Closure, Post-Closure care, and Liability Coverage.) In contrast, the cash flow and debt equity

US EPA ARCHIVE DOCUMENT

ratios incorporated in final rules showed positive differences of 54.1% and 37.1%, (See Chapter 4, Background Document: Revisions to the Subtitle C Financial Test for Closure, Post-Closure care, and Liability Coverage.) The Agency also does not favor the use of a liquidity measure because it appears that liquidity can be a misleading predictor of bankruptcy. This is because a firm in financial distress can liquidate its assets and appear more liquid even as potential creditors are less willing to advance credit. Under these circumstances a test incorporating liquidity could result in a misleading conclusion about the firm=s financial stability.

Finally, EPA recognizes that the solid waste industry has undergone a transition to greater consolidation, and that acquisitions have required cash outlays. The financial test finalized today incorporates firms= debt load into the determination of whether they qualify to use the financial test. Firms which have financed their acquisitions through high debt levels will not be able to pass three financial components of the financial test. First, firms with excessive debt levels will not receive investment grade bond ratings from the rating services. Second, firms with excessive debt levels will have liabilities which are too large to pass a liabilities/net worth ratio of less than 1.5. Third, excessive debt will require interest payments that will reduce cash flow while raising the denominator of the (Cash Flow - $10 million)/total liabilities ratio which must be greater than 0.1.

Browning-Ferris Industries **00010**

Comment: BFI strongly supports the use of bond ratings as set forth in the proposed rule. Bond ratings, while not infallible on their own, have a high degree of utility in predicting the financial health of a corporation. Moreover, bond rating information is widely available to both the public and regulating agencies. In addition, bond ratings are attractive to most corporations because they would not require special resources to develop. BFI supports the inclusion of the proposed financial ratios as alternatives to bond ratings, but believes that proposed bond ratings would be in the best interests of the regulating agencies and the regulated community. The more arcane financial ratios would require more resources both to develop on the part of the regulated community and to evaluate on the part of the regulating agencies.

BFI notes that in the proposed rule and preamble no distinction was made regarding the applicability of bond ratings relative to seniority of debt. BFI believes that the bond rating requirement should be based on senior debt since senior debt is a better indicator of overall corporate financial health. In addition, in many instances there may not be junior debt or bond ratings of junior debt.

Response: The Agency agrees that bond ratings are good predictors of bankruptcy and has retained them in the final rule. Further, the Agency agrees with the commenter=s point regarding overall nature of the debt used in the bond rating alternative. Under the proposed rule, the rating used would be for the last bond issued, irrespective of its seniority (the repayment priority the bond receives in the case of default) or whether or not it is secured. After further consideration, the Agency determined that the effect of this requirement could be that a recently issued secured bond would have a high rating that would not reflect the overall fiscal health of the owner or operator. Since the purpose of the financial test is to ensure the satisfaction of closure, post-closure care, or corrective

US EPA ARCHIVE DOCUMENT

action obligations, it would be inappropriate to base a judgment of the owner or operator=s financial health on secured debt (i.e. debt whose repayment can be ensured by a particular asset).

As a consequence, the Agency has decided to amend its original proposal, establishing a bond rating alternative for the financial test that requires the bond rating be for senior, unsecured debt. In the vast majority of cases, EPA expects that this change will not alter whether a firm will pass or not pass the financial test. Agency analysis of both Subtitle C and D firms utilizing the financial test found 439 with senior debt ratings by Standard and Poor=s, Moody=s, or both. While for 112 of these firms the most recent debt issue had a different rating than the firm=s senior debt rating, in only 6 instances did using the most recent debt rating affect whether the firm could pass the financial test.

The Solid Waste Management Association of North America 00013

Comment: Alternative 1: Bond ratings, while an indicator of an owner/operator's financial standing, do not guarantee that funds will be available for closure and post-closure. As evidenced by recent events involving highly rated entities, bond ratings are not infallible, and often times can fluctuate rapidly.

Response: EPA=s proposed financial test allowed use of bond ratings as an alternative in the financial test because EPA believes that these ratings reflect the rating agencies= evaluations of a firm=s financial management practices. Bond ratings reflect the expert opinion of bond rating services, which are organizations that have established credibility in the financial community for their assessments of firm financial conditions. An analysis of bond ratings showed that bond ratings have been a good indicator of firm defaults, and that few firms with investment grade ratings have in fact gone bankrupt.

In support of this rulemaking, EPA investigated the default rates on bonds and found annual assurance risks for bonds rated as investment grade by Standard and Poor=s, and Moody=s of zero to 0.465 percent and zero to 0.352 percent respectively. (See Issue Paper, Issues Related to the Bond Rating Alternative of the Corporate Financial Test.) Comparatively, EPA found that Subtitle C and D firms with net worth over $10 million had annual assurance risks ranging from 0.233 percent to 0.644 percent. These low percentages demonstrate that bond ratings are reliable indicators of financial health. Consequently, EPA incorporated a bond rating component in the Subtitle D test, similar to financial tests under 40 CFR 264 and 265 for hazardous waste permitted facilities, petroleum tanks under 40 CFR 280, UIC facilities under 40 CFR 144, and PCB commercial storage facilities under 40 CFR 761. The Agency also notes that the recently promulgated financial test final rule for local governments which own or operate municipal solid waste landfills (61 FR 60328) also includes a bond rating alternative.

Because bond rating organizations regularly re-evaluate the financial soundness of the firms, bond ratings change with the financial circumstances of the firm. These changes in ratings are widely available through financial news sources and the Internet and so would be available to a State more quickly than the update based upon annual financial statements. EPA considers this re-evaluation of the firm=s financial outlook another advantage of the bond rating alternative which, combined with

US EPA ARCHIVE DOCUMENT

the low default rate on investment grade bonds, supports the use of bond ratings in the financial test. Thus, EPA believes that bond ratings together with the other elements of the financial test are sound, reliable predictors of an owner or operator=s financial viability.

Rating agencies can revise the ratings of bonds up or down for several reasons which will be of interest to investors because of the effect on the price of the bonds. (Higher grade bonds demand a higher price than lower rated bonds.) In this process, rating agencies frequently will place an issue on a Awatch list@ to signify that its rating may change. However, most of these changes will be within a ratings category (e.g. A to A-) or from one investment grade rating to another (BBB to A) and be inconsequential for purposes of the financial test. Studies from rating agencies demonstrate that the vast majority of entities with investment grade ratings retain them. For example, Standard & Poor=s reports that from 1981 to 1996 an average of 93.87% of entities with investments grade ratings at the beginning of the year had an investment grade rating at the end of the year. (See Table 9 of ARatings Performance 1996, Stability and Transition,@ Standard & Poor=s, February 1997.) These data, and similar results from Moody=s (See Exhibit 6 of AMoody=s Rating Migration and Credit Quality Correlation, 1920-1996,@ Moody=s, July 1997), do not substantiate the commenter=s claim that ratings often times can fluctuate rapidly. (These studies do, however, provide additional substantiation for EPA=s use of the rating on the firm=s senior unsecured debt as it is these ratings that form the basis for default rate studies by Standard & Poor=s, and Moody=s.) For the financial test, a change in rating only matters if it moves a firm from investment grade to speculative. The test does not distinguish between investment grade ratings. Therefore, while bond ratings do fluctuate, the minor fluctuations do not reflect a substantial change in a firm=s financial condition and will not often affect a firm=s ability to use the financial test.

Texas Natural Resource Conservation Commission **00018**

Comment: The agency agrees with the bond rating option of the financial test but disagrees with the ratio alternative to the bond rating. First, it is highly unlikely that only one ratio can determine the financial health of a firm. The agency recommends at least 3 or more ratios be used to determine a firm's changes in cash flow, revenues and expenditures, and equity. The 3 ratio requirement will make it consistent with the 3 ratios required in the local government test and other agency programs.

Response: The ratios which EPA selected were shown in the analysis supporting the proposal and the re-analysis performed in evaluating public comments to do very well at allowing firms to qualify for the test while distinguishing between firms which will and will not go bankrupt. These ratios can also be taken from a single year=s financial information reducing the cost of compliance to the owner or operator and the monitoring burden for the State.

To design a test as recommended by this commenter would involve a substantial degree of complexity, and with the variables cited (changes in cash flow, and revenue and expenditures) could also have a degree of redundancy. For example, measuring changes in cash flow could discriminate against a firm which previously had an exceptionally profitable year, but had only normal profitability in the most recent year. This would occur because the change in cash flow would be negative, even though the profitability was still acceptable. Measurements of changes in revenues and expenditures will incorporate much of the information in changes in cash flow and so may yield little additional information. Further, the variables that the commenter suggests do not directly include measures of debt, which the Agency=s research found are crucial in the prediction of

US EPA ARCHIVE DOCUMENT

bankruptcy. (See pp. 4-25 - 4-32 of ABackground Document, Revisions to the Subtitle C Financial Test for Closure, Post-closure Care and Liability Coverage.@) While the current Subtitle C financial test incorporates three ratios, the proposed changes to the Subtitle C test involve the same ratios used in this test for corporate owners and operators of MSWLFs.

National Solid Wastes Management Association **00020**

Comment: The proposed corporate financial test only allows a current bond rating to be issued from either Standards and Poor's or Moody's. This requirement limits the use of the bond rating component of the test to large publicly traded corporations or some large privately held companies (i.e., possibly only four existing companies can meet this rating). The ISWD suggests that EPA allow the use of other established financial institutions' bond ratings in meeting this requirement. These institutions typically work with privately held companies and may know the industry-better. We suggest that both Duff & Phelps, which has offices in Chicago and New York, and Fitch, with offices in New York, be included as acceptable financial rating firms for the purpose of establishing a bond rating.

Response: Both Standard & Poor=s, and Moody=s publish information on how often bonds with various ratings have defaulted. This information confirms that bonds with investment grade ratings from these rating agencies have low default rates. The default rate information allows EPA to determine the risk associated with accepting particular bond ratings and to compare the default rates of bonds with various ratings given by the rating agencies. While Duff & Phelps and Fitch also provide bond ratings, they do not publish information on default rates by bond rating and so EPA is unable to assess the default rate for bonds rated by Duff & Phelps and Fitch. When EPA promulgated the financial test for Subtitle C facilities on April 7, 1982 (47 FR 15036), it limited the use of bond ratings to the services that could provide information on the performance of their bond ratings over time. Today=s rule is consistent with that policy.

Long after the close of the public comment period and as this rule was undergoing Agency review, EPA received information from Fitch Investor Services about default rates. EPA has requested additional and clarifying information about Fitch=s default rates to help it evaluate this issue. EPA decided not to delay the promulgation of this rule while it is reviewing this issue. Instead, EPA intends to consider this information and other information it obtains on the accuracy of bond ratings by services other than Standard & Poor=s, and Moody=s in the forthcoming promulgation of changes to the Subtitle C financial test. A copy of the information from Fitch and EPA=s follow-up correspondence is available in the public docket for the rulemaking proposing revisions to the Subtitle C financial test. (56 FR 30201)

City of Santa Clarita, California **00021**

Comment: The Agency's proposed rule suggests that the minimum size requirement combined with a recent "investment grade rating" would give comfort that the firm will be able to meet its closure, post-closure and corrective action obligations and not go into bankruptcy. The City of Santa Clarita

US EPA ARCHIVE DOCUMENT

does not feel that the measure of any bond rating would be sufficient to predict financial security of owners and operators of landfills for the following reasons. A "recent" investment grade rating (particularly Bbb or BBB) of a firm does not guarantee or mean that such firm is safe from bankruptcy or is financially sound. The proposed rule does not explain the time frame in determining if a rating is sufficiently recent to be effective. Ratings are assigned at a specific point in time and there is no assurance that such rating will continue or is even accurate for the purposes this proposed rule seeks to achieve. For example, the County of Orange was recently downgraded from an "AA" and AAa@ to well below investment grade in a single day because of the announcement of its losses in its investment fund and its filing for bankruptcy. This is not an isolated incident. The City of Santa Clarita in concerned that ratings are given undue influence without the proper safeguards. The assignment of the rating in view of the goals this proposed rule seeks to achieve, the timing of the assignment of the rating, and the designation of the rating at above investment grade should be considered as modification to the proposed rule.

Response: The Agency does not agree with the commenter that no bond rating sufficiently predicts the financial strength of landfill owners and operators. EPA reviewed the accuracy of bond ratings and their underlying default risk (see Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test). That analysis found that, overall, bonds with investment grade ratings (BBB or Baa or As) have default rates of 0.126 percent for Moody=s and 0.175 percent for Standard & Poor=s. The default rates are based on defaults within three years following the ratings.

EPA also examined the differences in default rates by investment rating. As would be expected, annual default rates were higher for the lowest investment grade (Baa for Moody=s of 0.352 percent and BBB for Standard & Poor=s of 0.465 percent). However, even for these ratings there has been less than a one-half of one percent risk that the bonds would default within three years. This default rate is comparable with the rates estimated for the financial test. This three year time span is important as EPA chose it as a time period that would ensure that an owner or operator which could no longer qualify for the financial test could obtain alternative mechanisms. (The financial responsibility regulations require that an owner or operator who no longer passes the financial test obtain an alternative mechanism in 90 days.) The Agency further notes that the bond rating alternative offers States a means for more frequent monitoring of firms financial strength. Since Standard and Poor=s and Moody=s continually review their ratings, a downgrade could indicate a condition for which a state would wish additional information under 258.74(e)(vi). This contrasts with the annual Asnapshot@ nature of the other financial test components.

While the County of Orange received a downgrade of its rating, the events occurred in a municipality and not to a corporation. This rulemaking involves a financial test for corporate owners and operators of municipal solid waste landfills, not municipalities such as Orange County, California. EPA promulgated the municipal financial test November 27, 1996. In addition, the Agency notes that while the financial test is very good at minimizing public and private costs, there is a small misprediction rate. The test was designed to minimize public and private costs by minimizing the misprediction rate of the test (i.e., the number of bankrupt firms that will pass) while maximizing availability. Thus, any one anecdotal case is insufficient to refute the Agency=s analysis. Further, States that disagree with EPA=s financial test may decline to adopt it or may adopt an alternative, more stringent test.

US EPA ARCHIVE DOCUMENT

EPA has improved the bond rating alternative by adopting the use of the rating on senior unsecured debt rather than on the most recent bond rating. This ensures that a company does not qualify for the bond rating alternative on the basis of a secured bond. This change in response to a comment provides additional assurance that an owner or operator who uses the bond rating alternative to cover its financial obligations will not be doing so on a rating that may not reflect the underlying financial strength of the firm.

Land and Lakes Company **00024**

Comment: The profitability test which requires that the ratio of net cash flow (NCF) minus $10 million over total liabilities exceed .10 should be rejected because of its anticompetitive effects. For the same reasons cited above in opposition to the minimum net worth requirement standard, this amount appears arbitrary and without statistical justification. Like the $10 million additive requirement in the minimum net worth standard, the $10 million figure in this formula would eliminate smaller, financially sound companies from the MSWLF industry. For example, a firm with NCF of $10 million and $5 million in total liabilities would generally be thought to be a highly liquid, low leverage firm, yet it would fail the profitability test. Land and Lakes would recommend that the numerator of the formula be changed to subtract the lesser of $10 million or a chosen percentage of anticipated costs from NCF.

Response: The Agency disagrees with the commenter=s categorization of the process by which the Agency determined its profitability ratio, which was neither arbitrary nor without statistical justification. In developing the test finalized today, the Agency analyzed a number of other tests with different ratios. One test (76) included a profitability ratio of cash flows over total liabilities (with no subtraction from cash flow), while another (112) included a profitability ratio of cash flow minus $5 million to total liabilities. These tests approximate the suggestion of the commenter. Analysis of these specific tests, however, demonstrated that they did not perform better than the Agency=s alternative. Both tests had significantly higher public costs than the Agency selected alternative ($18.1 million and $14.5 million as compared with $11.7 million). Both tests also had higher misprediction rates (36.35 percent and 32.84 percent compared with 25.92 percent).

See also response to comments 00003 and 00020 in this section.

Land and Lakes Company **00024**

Comment: As of this date, only three firms in the industry would meet the bonding requirement proposed in ' 258.74 (e)(1)(A). At the very least, a provision which has such limited application should raise the question of undue influence by special interest groups.

Under this proposed rule ' 258.74 (e)(1)(A), firms having certain bond ratings would not be required to incur the expenses of preparing special financial reporting or undergo increased regulatory review which would be required of private, unrated or lower rated firms. This is a further anticompetitive

US EPA ARCHIVE DOCUMENT

advantage for the larger firms. In addition, under the proposed rule ' 258.74(g), larger firms can entirely avoid the costs of obtaining third party assurances. This fact is recognized by the Agency in its discussion of proposed ' 258.74(g) that would accept corporate guarantees from an affiliate in lieu of operator or owner compliance with the financial assurance requirements: Aa guarantee is an attractive compliance option for owners and operators, especially those affiliated with larger corporations because guarantees are generally much less expensive than third-party mechanisms.@ (59 FR 51526).

Thus, because the costs of compliance with the proposed rule will be lower for larger firms than for smaller firms, the proposed rule creates a significant competitive advantage for the larger firms. As noted in the General Comments section of this letter, these barriers to entry will lead to decreased competition, increased acquisitions by the larger firms thus further concentration of environmental risk, and as competition decreases, prices should be expected to rise.

Response: The bond rating alternative proposed in the financial test has broad applicability across Agency programs. The Agency=s financial responsibility regulations have allowed the use of an investment grade bond rating since the promulgation of the Subtitle C financial test in 1982. EPA has long employed the bond rating option in a number of different programs because it is reliable and efficient, not because of any undue influence. Similar provisions appear in the financial responsibility regulations covering owners or operators of underground injection wells, underground storage tanks, PCB incinerators, and local governments owning or operating municipal solid waste landfills. Agency analyses indicate that bond ratings provide a reliable measure of firm financial strength. (See Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test.) As a consequence, the Agency has determined that it is appropriate to allow this alternative for corporate owners or operators of MSWLFs similar to its policies of allowing it elsewhere. Further, the financial test does not represent a barrier to entry or impede continual competition in the landfill market. It is one of many available mechanisms for complying with the existing requirement for financial assurance which represents a small percentage of landfill costs. The Agency investigated how the financial test would change the relative competitiveness of large versus small operations. (see Issue Paper, Market Effects of the Financial Test). The principal findings of that investigation were that even if a large landfill were to use a third-party financial assurance mechanism rather than the financial test, it still would face lower costs per ton than a smaller landfill. For both small or large landfills, however, third-party financial assurance costs constitute only two to three percent of total costs. This is not significant when compared with reported profit margins for landfill operators of up to 30 percent. AWhile collection companies tend to show profit margins of about 15%, landfill operators can ring up twice that,@ analysts said. (Wall Street Journal, AUSA Waste Agrees to Buy Sanifill in Stock Deal,@ June 25, 1996.) Also, in the context of a host of other factors affecting tipping fees, including location, fixed costs, and pricing strategies, financial assurance costs are not likely to play a key role in competition within the MSWLF industry. In particular, costs to transport waste to a larger facility may more than off-set potentially lower tipping fees that the larger landfill might charge as a result of using the financial test to demonstrate financial assurance.

The commenter has missed the larger goal of the Agency=s financial test. The Agency seeks to ensure full recognition of environmental obligations by the responsible firms while simultaneously

US EPA ARCHIVE DOCUMENT

lowering the costs to those firms of assuring such compliance. These costs are not discrete costs which are segmented by a firm=s size but are instead flexible scales which allow internalization of assurance costs up to the level deemed appropriate by the Agency=s financial test. Only the dollar amount in excess of the financial test needs to be ensured by a third-party mechanism. Agency analysis demonstrates that an accurate but lower cost regulation is being promulgated today than is currently in effect. Faced with the choice of whether to allow regulatory flexibility, EPA believes that establishing a financial test to lower compliance costs is reasonable, even if every firm in the industry may not qualify.

The preamble to the final rule contains additional discussion of these issues in response to public comments including addressing the availability of the bond rating alternative.

William R. Lambert **L0003**

Comment: The proposed ' 258.74(e)(1)(i)(A) will allow the owner/operator the opportunity to refrain from posting financial assurance if its debt securities carry an investment grade rating as determined by Moody's or Standard & Poor=s. While both of these services are leaders in their fields, using their rating to allow an owner/operator to satisfy their financial assurance requirement without accumulating funds or obtaining a surety bond or insurance policy again violates the purpose of the financial assurance requirement. AThe purpose of the financial assurance requirements of the MSWLF criteria was to ensure that adequate funds will be readily available to cover costs of closure, postclosure care, and corrective action associated with MSWLFs.@

Using the Moody=s or Standard & Poor=s rating presents three serious shortcomings. First, it uses current financial strength to predict decades in the future. Second, it relies on the assumption that an investment grade rating on a bond that may be only a fraction of the amount of financial assurance needed by the owner/operator is an indication that the owner/operator can meet the much larger financial needs many years in the future. Third, neither Moody=s nor Standard & Poor=s have any obligation to pay money to the State or U.S. EPA in the event the owner/operator is unable to satisfy its obligations. Both an insurance company and surety company back up their decisions with cash.

The only safe way to obtain the needed financial assurance is to require an insurance policy or surety bond to meet the financial assurance requirements. Although the use of a trust fund does not provide adequate protection in the early years of operation, the use of a trust fund does allow for monies to be set aside for the specific use of closure and postclosure care costs. All of the other alternatives make the assumption that current conditions will not change over many decades and that if they do change, the owner/operator will still be able to acquire alternative financial assurances. If either of these assumptions prove to be false, the states will have major MSWLF closure and postclosure care costs with which they must contend.

Response: The Agency considered the commenter=s concerns regarding the use of bond ratings as an alternative for a financial test, but remains convinced that bond ratings provide an adequate measure of firm financial strength. The Agency analyzed the default rates on bonds which had originally received investment grade ratings, and examined the default rates for bonds that currently have an

US EPA ARCHIVE DOCUMENT

investment grade rating. (See Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test). This review shows that over a twenty-year period, bonds rated as investment grade originally made prompt payment of the principal and interest (i.e. they were not in default) in over 93 percent of the cases. When looking at the default rate on bonds over a shorter period the default rate is much lower (4 percent over a thirteen year period). This is particularly relevant to the financial test which requires an annual update.

The commenter also noted that the rating on a bond could represent the rating on a debt that is less than the amount of closure obligation. The Agency recognizes that as proposed an owner or operator could issue a small and even collateralized bond that would allow it to pass the financial test since the proposed test only relied on the rating of the last bond issued. For the final rule the Agency has amended the standard to require financial test users to have an investment grade rating on the firm=s senior unsecured debt. The tangible net worth requirement and the domestic asset requirement provide further assurance that a rating on a particular aspect of a firm=s finances does not present a misleading picture of the firm=s financial health. The tangible net worth requirement provides that a firm may only assure costs that are $10 million less than its net worth (unless the State Director has approved a higher amount because the firm has fully recognized its obligations as liabilities). The domestic asset requirements ensures that a firm using the financial test has domestic assets at least equal to the amount being assured. Both of these requirements address the commenter=s concern that the amounts measured by the financial tests are less than the amounts being assured.

Third, the commenter noted that neither Moody=s nor Standard and Poor=s would be financially liable if an owner or operator were to go bankrupt, implying that this lack of financial responsibility makes their rating decision-suspect. Again, the Agency does not find the commenter=s argument persuasive. As noted in the Issue Paper on Bond Ratings (Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test), bond ratings have been reliable predictors of default for several years. In addition, the future demand for rating services depends upon their continued ability to provide investors information on the quality of bonds and to facilitate operation of the bond markets. Thus, the Agency believes that they have a financial incentive to continue to ensure accurate ratings.

The Agency does not agree with the commenter that the only safe financial assurance can be provided by an insurance policy on surety bonds. The Agency conducted analyses specifically evaluating the relative assurance risks posed by all of the mechanisms available for use by owners and operators of MSWLFs. (See Issue Paper, Assessment of Financial Assurance Risk of Subtitle C and D Corporate Financial Test and Third-Party Financial Assurance Mechanisms.) The analysis concluded that, despite some variation in assurance risks, all of the mechanisms provided acceptable and substantially equivalent degrees of financial assurance. Finally, if a firm receives a downgrading to a speculative rating (and the company cannot pass one of the two test ratios), then the company must obtain alternate financial assurance under the final rules.

See also response to comment 00013 in this section.

US EPA ARCHIVE DOCUMENT

I.A.1.c. Domestic Asset Requirement

Comments on the proposed domestic asset requirement equal to the obligations covered by the financial test were mixed. Those favoring the proposed Subtitle D requirement agreed that comparing the amount of domestic assets to the financial assurance obligations provides a better measure of a firm's ability to pay. Opponents of the proposal cited concerns about reduced access to adequate funds in the event of bankruptcy.

Commenters' suggestions included retaining the current six times multiple requirement, requiring a set level of domestic assets (e.g., equal to the minimum size requirement) or selecting an alternative multiple requirement tied to overall environmental obligations.

Comments, along with the Agency=s responses, are presented below.

Browning-Ferris Industries **00010**

Comment: BFI strongly supports the proposed domestic asset requirement and believes that it is a major improvement over the plainly arbitrary domestic asset ratio set forth in the current Subtitle C financial assurance rules. The domestic asset ratio arbitrarily and needlessly, penalizes large U.S. based corporations with significant foreign assets.

To illustrate the penalizing effect of the domestic asset ratio, consider the case of two companies with exactly equivalent levels of domestic assets with the exception that one of the companies has significant foreign assets while the other does not. The company without foreign assets would be unfettered in its capacity to provide financial assurance by the domestic asset ratio, whereas the company with foreign assets would have its capacity to assure diminished by the ratio even though its company would have overall greater financial resources.

The domestic asset ratio does not really provide a useful measure of a corporation=s ability to Amake good@ on its financial assurance obligations. What matters more is the relative size of a corporation=s domestic assets to its financial assurance obligations. A ratio or multiplier that makes this comparison more directly would provide a more meaningful and fairer measure.

While BFI understands the Agency=s concern regarding the difficulties of pursuing foreign assets, it does not believe that the magnitude of the issue warrants a ratio or multiplier approach given the balance of the other requirements as proposed. BFI can discern no justification, either in theory or in practice, for the existing Subtitle C Aninety percent domestic asset@ requirement. The use of a similar mandate in the Part 258 regulations would lead to significant, and wholly improper, reduction in the average level of financial responsibility obligations that multi-national firms can self-assure. The proposed approach is both fair and consistent with the recognized ability of creditors in the United States to attach a foreign assets of a multi-national firms. Thus, BFI urges the Agency to adopt as final the proposed domestic asset requirement for municipal solid waste landfills and amend the Subtitle C financial assurance rules accordingly.

US EPA ARCHIVE DOCUMENT

Response: The Agency notes the commenter=s agreement with its proposed domestic assets requirement and has determined to promulgate the domestic asset requirement as proposed for the Subtitle D rule. While the Agency also proposed changes to the Subtitle C requirement in the October 12, 1994 proposal, the Agency is not promulgating those changes at this time. The Agency expects to take final action on those changes when it promulgates a final rule amending changes to the financial test for Subtitle C treatment, storage, and disposal facilities.

The Solid Waste Association of North America 00013

Comment: SWANA agrees with the Agency's judgment in requiring that some portion of the assets be domestic. However, we have major concerns that, from our interpretation of the rule, none of these assets must be liquid. While we understand and agree that fixed assets do have value, the perceived value of these assets often times does not match the realistic market value. Also, the liquidation of these assets does not occur instantaneously, and may in fact take considerable time. Thus, although an owner/operator is able to meet all three financial components under this rule, there is no assurance that the owner or operator would have enough liquid assets available to pay for closure/post closure costs. Therefore, SWANA feels that the Agency must require that some or all of the assets be liquid and readily accessible.

Response: The Agency analyzed how a liquid asset requirement as part of the domestic asset requirement would affect the financial test. This analysis found that several Subtitle D firms have liquid assets that are less than their closure and post-closure costs. Thus, a liquid asset requirement could reduce the availability of the financial test. As noted above (response to comment 00003 in the Bond Rating/Financial Ratio Alternatives section), liquid assets are not good predictors of bankruptcy and may in fact be misleading indicators of a firm=s continued viability. Therefore this requirement would not increase the accuracy of the test, but would have the disadvantage of reducing its availability.

The Agency also notes that the impact of a domestic assets requirement is linked to the likelihood of recovery of funds from a firm in bankruptcy. Most firms declare bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. (See Issue Paper, Domestic Assets Requirement.) Under Chapter 11, a firm seeks temporary protection from its creditors so that it can reorganize its finances. If a firm comes out of Chapter 11 reorganization, it is once again viable and capable of meeting its obligations. The bankrupt firm sample that was used to conduct the financial test analysis included a large number of Chapter 11 bankruptcies. The estimated 20 percent recovery rate from bankrupt firms used in the 1991 analysis reflects in large part the number of firms expected to successfully emerge from Chapter 11 bankruptcies and honor their financial assurance obligations. To the extent that firms with considerable portions of their assets outside of the U.S. file for chapter 11 bankruptcy, the estimate of public costs should not be significantly underestimated. Even if a firm filed for bankruptcy liquidation under Chapter 7 of the U.S. bankruptcy code,[2] the U.S. assets requirement

[2] Under Chapter 7, a firm's assets are liquidated and the proceeds are used to pay creditors' claims. The firm then ceases to operate.

US EPA ARCHIVE DOCUMENT

would have a significant impact on the recovery rate for financial assurance obligations only in those instances in which bankrupt firms have a relatively small percentage of their total assets located in the United States. Therefore, the Agency believes that its proposed domestic assets requirement is sufficiently protective, and is finalizing that requirement in today=s rule.

Texas Natural Resource Conservation Commission 00018

Comment: TNRCC agrees that a domestic assets requirement is needed. However, it disagrees in allowing the amount of U.S. assets to be reduced because it lowers the collateral margin of assets required. A firm should either have a set dollar limit of assets in the U.S. or have assets in the U.S. of at least six times or greater to the sum of all its environmental obligations assured by the test.

Response: The Agency disagrees with the commenter for several reasons. First, the purpose of the domestic assets requirement is to increase the likelihood of recovery in the event of bankruptcy. Given that the financial test EPA has adopted for private owners or operators of MSWLFs performs better at predicting bankruptcy than previous Agency tests, the need to rely on the domestic assets requirement should be reduced. Second, the Agency believes that the likelihood that an owner and operator in bankruptcy will not ultimately meet its obligations is small. (See response to comment 00013 above.) Consequently, the reduction in public costs associated with a more stringent domestic assets requirement is likely to be very small. In contrast, the increase in private costs caused by limiting the availability of the test may be significant. Further, RCRA allows States that disagree with EPA=s final rule to adopt an alternative, more stringent domestic asset requirement.

National Solid Wastes Management Association 00020

Comment: The Association supports the decision to limit the domestic asset requirement to an amount at least equal to the sum of current closure, post-closure care, and corrective action (if needed) cost estimates and any other environmental obligation under this section. This requirement provides the Agency with access to the appropriate amount of assets in the event of a default and recognizes that assets not held onshore are more available than in the past. Also, we believe that this requirement is not only appropriate for Subtitle D but should be extended to Subtitle C facilities.

Response: See response to comment 00010 in this section.

US EPA ARCHIVE DOCUMENT

City of Santa Clarita, California **00021**

Comment: The City of Santa Clarita concurs with the concept that there should be a domestic asset requirement. Assets held outside the United States will be more difficult to reach should a firm file bankruptcy. However, the City feels that a firm using the financial test should have assets in the United States which equal the minimum size requirement and not just the sum of the costs they seek to assure through the financial test. The Agency has not justified nor given any reason why the "collectable" assets of a firm should be less than the total minimum size requirement. If the Agency requires a certain level through its tangible net worth test to purportedly cover the costs of closure, post-closure and corrective action, such amount should be available for collection given the difficulty in predicting such actual costs discussed in this letter and the movement of the United States in the direction of a more global economy.

Response: The proposed $10 million net worth requirement was included in the rule because firms with less than $10 million in net worth are more likely to enter bankruptcy than larger firms and the test is more accurate when applied to firms with more than $10 million in net worth. It therefore functions as a screen, preventing these firms which are most likely to fail from using the financial test. The domestic asset requirement is not a bankruptcy predictor, but rather was established to ensure that sufficient U.S. assets would be available for recovery in the event of bankruptcy. Agency analyses suggest that recovering domestic assets at a level higher than an amount equal to a firm=s financial obligation will not significantly increase the amount of dollars recovered in bankruptcy, but would significantly reduce the availability of the test. (see Issue Paper, Domestic Assets Requirement) Consequently, the Agency has decided to maintain the proposed domestic asset requirement in the final rule. Additionally, as noted, RCRA allows States that disagree with EPA=s final rule to adopt an alternative, more stringent domestic asset requirement.

See also response to comment 00013 in this section.

California Integrated Waste Management Board **00023**

Comment: The Environmental Protection Agency (Agency) is proposing to modify the domestic asset requirement of the current Subtitle C financial test and proposes the same modification for the Subtitle D financial test. Current Subtitle C regulations require corporations using the financial test to have assets:

1. Located in the U.S. amounting to at least 90% of total assets; or

2. Equal to at least six times the sum of costs assured through the financial test.

The current requirement assures access to funds in case of bankruptcy. The Agency is proposing to lessen this requirement by allowing an operator to have assets in the U.S. at least equal to the sum of all environmental obligations being assured by a financial test. The Agency is also proposing to eliminate the alternative of domestic assets equal to at least six times the sum of costs assured

US EPA ARCHIVE DOCUMENT

through the financial test. The reason given for the proposed revisions is that the current domestic asset requirement Aunnecessarily limits the use of the test."

The Agency's proposal provides less assurance and is contrary to the argument for the domestic asset requirement, assuring access to funds in case of a firm's bankruptcy. An operator using the financial test is not required to maintain a fund designating monies for closure and postclosure maintenance costs. Assets are not protected or inviolate from other creditors. Consequently, public and private creditors alike are vying for the same lesser amount of U.S. assets. The only thing this revision does is ensures all creditors will have access to fewer assets in the event of a firm's bankruptcy.

A firm must have substantial assets available in the U.S., making funds accessible to environmental agencies and other creditors in the event of bankruptcy. Accessibility to all potential creditors is hindered when most of a firm's assets are located outside the U.S.

The Agency, being a federal entity, has more leverage than a State in accessing offshore assets. The proposal as presented puts individual States at a disadvantage and compromises the financial assurance requirements of each State.

The proposal to reduce the domestic asset requirement to zero is precipitous. If the Agency wishes to revise the current domestic asset requirement to make the test a viable mechanism for more firms, we recommend considering lowering the percentage of assets located in the U.S. (i.e., from 90% to 75% or 50%). This would still ensure accessibility of a significant amount of assets to creditors.

Federal and state regulations provide an array of mechanisms specifically designed to provide a comfortable level of assurance to the regulating agency. Each mechanism is distinct and each operator has the option of choosing the mechanism most appropriate for his/her operation. An operator failing to meet the minimum qualifications for securing a mechanism, is no reason to dilute the requirements of that mechanism, especially when other options are available.

In light of the obvious deficiencies in this proposal, we recommend the Agency maintain the current domestic asset requirement in Subtitle C, and use the current Subtitle C requirement for the proposed Subtitle D financial test.

Response: The Agency does not agree that the proposed domestic asset requirement results in a financial test that provides less assurance that a MSWLF=s obligations will be met. The financial test adopted by the Agency has a lower ratio of misprediction to availability than the current Subtitle C financial test. The test is better than the current Subtitle C test at allowing firms to cover their obligations while at the same time ensuring that these firms do not enter bankruptcy. This means that fewer firms that eventually enter bankruptcy will be able to utilize the financial test than with the current Subtitle C test. In promulgating this test the Agency was able to provide a test that could do a better job of distinguishing between bankrupt and non-bankrupt firms.

The commenter also suggested that the Federal government has a higher position in bankruptcy proceedings than a State would. It is true that federal tax claims and federal fines have higher standing over ordinary claims in bankruptcy proceedings. A particular State may believe that its

US EPA ARCHIVE DOCUMENT

ordinary claims would not have at least equal standing with claims by the federal government or other entities and so would not be accorded the same treatment under bankruptcy. In this instance a State may adodpt a more stringent requirement.

The Agency also disagrees with the commenter=s recommendation that it select a lower percentage (e.g. 50 or 75 percent) rather than require domestic assets equal to a firm=s Subtitle D obligations. The 90 percent requirement was based on accounting conventions, not on bankruptcy requirements. Thus, even if the Agency were determined to set a minimum percentage requirement for domestic assets, it would have no obvious basis for selecting 50 or 75 percent, as recommended by the commenter. Finally, as noted, states may adopt alternative, more stringent alternatives to EPA=s test.

Land and Lakes Company **00024**

Comment: e) If the $10 million additive requirement is retained (although this letter argues against this), then the domestic asset requirement should also have a $10 million Acushion@. The Agency cites access to assets in the event of bankruptcy as the reason for the domestic asset requirement. If the net worth and profitability additive requirements of $10 million are retained in the final rule, internal consistency of both in drafting and in the reduction of bankruptcy risk rationale would argue for imposing a $10 million cushion in the domestic asset requirement as well.

Response: See response to SWANA 00013, Santa Clarita 00021, and TNRCC 00018 above

Waste Management, Inc. **L0001**

Comment: We endorse the decision to limit the domestic asset requirement to an amount at least equal to the sum of all the environmental obligations assured by a financial test. We believe the requirement provides the agency with access to appropriate assets in the event of a default and, at the same time, recognizes that the world is shrinking. We believe that the change is appropriate for both Subtitle D and Subtitle C facilities.

Response: See response to comment 00010 above.

US EPA ARCHIVE DOCUMENT

I.A.2. Recordkeeping and Reporting

The Agency received only two comments on the proposed recordkeeping and reporting requirements. One commenter supported the proposal. One State noted that it does not follow the self implementing aspect of the test in its rules, but instead requires that all financial records be submitted to the State for review.

The Solid Waste Association of North America **00013**

Comment: SWANA agrees with the recordkeeping and reporting requirements as set forth.

Response: Comment noted.

Texas Natural Resource Conservation Commission **00018**

Comment: The TNRCC does not follow the self-implementing requirement of the test but instead requires that all original financial assurance documents be submitted directly to the Executive Director of the TNRCC. This process allows states to better manage the financial assurance requirements and determine that the owner or operator is in compliance with the requirements.

Response: The Agency notes the commenter=s concern but is maintaining the self implementing aspect of the rule by requiring the owner or operator to place documentation of compliance in the facility operating record. The final regulation also requires initial notification of the State Director (' 258.74(e)(2)(ii)) that the necessary items are in the operating record, and subsequent notification if the owner or operator no longer meets the requirements of the test (' 258.74(e)(2)(v)). This does not prevent any State from adopting requirements that documentation be submitted to the State for review. Subtitle D requirements are intended to be implemented primarily by States under permitting systems developed at the State level. A more stringent State reporting or recordkeeping requirement is therefore not precluded under Federal law.

US EPA ARCHIVE DOCUMENT

I.A.2.a. Chief Financial Officer (CFO) Letter

Commenters supported the proposed requirements for the chief financial officer letter; two commenters however, noted that the preamble referenced a "worksheet or similar demonstration" of financial data, which is not included in the regulatory language. These commenters recommended removing the worksheet reference from the preamble to avoid any ambiguity.

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC agrees that a chief financial officer letter should be required to demonstrate that the firm has complied with all of the requirements of the test.

Response: Comment noted.

National Solid Wastes Management Association **00020**

Comment: The last sentence in the first paragraph under subsection (2) (a) Chief Financial Officer (CFO) Letter states that the "Agency expects that this evidence will include a worksheet or similar demonstration showing that the firm's annual financial data meet the specific measures required by the test." Section 258.74 (e) (2) (ii) of the rule, however, does not include this requirement. We suggest that the use of the terms "worksheet and similar demonstration" be removed from the preamble because they will lead to confusion when implemented in the states. Our experience shows that such language leads to litigation.

Response: The commenter is correct that the language in the preamble for the proposal did not match that of the proposed rule; in the final rule the preamble does not include a reference to a worksheet or similar demonstration. The final regulatory language requires that the letter signed by the owner or operator=s chief financial officer provide evidence demonstrating that the firm meets the bond rating or financial ratio requirements, the tangible net worth requirement, and the domestic asset requirement. However, in the proposed regulation, 40 CFR 258.74(e)(i)(2)(A)(2) required that the Chief Financial Officer=s letter AProvide evidence that the firm meets the conditions of paragraph (e)(1)(i) or paragraph (e)(1)(ii) of this section.@ This statement included an inaccurate citation. The final rule corrects this and includes the requirement that the CFO letter include evidence that the owner/operator meets the requirement of the financial test.

US EPA ARCHIVE DOCUMENT

Waste Management, Inc. **L0001**

Comment: The last sentence in paragraph A, in the middle column of 59 FR 51525, states that the Agency "expects that this evidence will include a worksheet or similar demonstration showing that the firm's annual financial data meets the specific measures required by the test.@ The section of the rule referenced (Section 258.74(e)(2)(ii)) includes no references to Aworksheets.@ While we appreciate the Agency's willingness to establish standards which are more performance oriented than prescriptive, the use of the words Aworksheet or similar demonstration" leaves too much to the imagination of the individuals who review such documents on a daily basis. Our experience is that such ambiguities breed litigation, and we would recommend that you stick with the language of the rule.

Response: See response to 00020 above.

US EPA ARCHIVE DOCUMENT

I.A.2.b. Accountant=s Opinion

All the comments on the proposed accountant's opinion requirement addressed concerns about the acceptability of different types of opinions. Some commenters were concerned about the lack of criteria or procedures for approved States to follow when evaluating qualified opinions. These commenters stated that either the States should be given more standard procedures to follow or that qualified opinions should not be acceptable. Others noted that the terms "adverse opinion," "disclaimer of opinion," and "qualification of opinion," as used by the accounting industry, may not be directly applicable to the Agency's objectives and suggested that all financial opinions should be accepted unless they depart from generally accepted accounting principles.

Browning-Ferris Industries **00010**

Comment: In general, BFI believes that the Agency has proposed reasonable and effective requirements for substantiating financial assurance capacity on a timely basis - with one important exception. BFI is concerned about the lack of criteria and procedures for considering "qualified" financial opinions in a state with an approved program.

Lacking either criteria or procedures to govern decisions on qualified opinions is unfair to both the submitter of a qualified opinion and to a third party who may be affected by the outcome of a decision. This is especially important because a decision on a qualified opinion may confer a financial advantage upon a party that may result in an uneven playing field for its competitors. To assure consistent and fair deliberations over qualified opinions, BFI believes that the Agency should develop appropriate criteria and procedures for considering qualified opinions. In addition, the Agency should require that states wishing to consider qualified opinions formally apply to do so and either adopt by reference the Agency's criteria and procedures or present their own criteria and procedures that are consistent with and as stringent as the Agency' s. Alternatively, if the Agency cannot develop the criteria and procedures in a timely manner then BFI believes that it is probably better to drop the notion of allowing the consideration of qualified opinions altogether.

Response: The Agency has considered the comment and determined that it is not necessary to develop additional criteria for States to use in evaluating qualified opinions. This requirement is similar to provisions in the Subtitle C financial test for owners and operators of hazardous waste treatment, storage, and disposal facilities. (See for example 40 CFR 264.143(f)(8)). The Subtitle D program is intended primarily to be implemented by the States, and the Agency has provided authority to the State directors to accept documents that may or may not reflect a significant problem with the firm=s financial statement.

As noted in the response to comments section of the preamble to the final rule, the proposal and final rule provide that to be eligible to use the financial test, the owner or operator=s financial statements must generally receive an unqualified opinion. However, the rule also allows the State Director the discretion of allowing a firm on a case-by-case basis to use the financial test if it has received a qualified opinion. The final rule provides that an adverse opinion, disclaimer of opinion, or other qualified opinion will generally be cause for disallowance. See ' 258.74(e)(2)(i)(B). However, this

US EPA ARCHIVE DOCUMENT

provision of the rule further provides that the Director may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Director determines that the matters which form the basis for the qualification are insufficient to warrant a disallowance of the test. Part III of the preamble also explains that an unqualified opinion (i.e. a Aclean opinion@) from the accountant demonstrates that the firm has prepared its financial statements in accordance with generally accepted accounting principles. The Agency believes that, consistent with these standards, this is an appropriate area for a State Director to exercise judgment and does not see a need at this time to provide further national guidance on how to consider submissions which do not have unqualified opinions. A state that determines that reviewing financial statements that have received a qualified opinion would constitute an unreasonable resource burden would not have to adopt that provision of the rule. However, EPA will consider providing additional guidance if state implementation issues or other circumstances so warrant.

The Agency notes that a primary requirement in the regulations is to disallow the use of a financial test when the financial statement carries an adverse opinion, disclaimer of opinion, or other qualified opinion. The Agency expects that the vast majority of firms seeking to use the financial test will have financial statements without qualified opinions. Thus, cases requiring review of qualified opinions should be rare. As noted in the regulation, the State Director is permitted (Amay@), but is not required to Aevaluate qualified opinions on a case by case basis.@

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC strongly recommends that the Agency only allow unqualified opinions from the independent certified public accountant to be used with the financial test. Allowing qualified opinions to be reviewed by each State Director places too much financial analyses burden on the states.

Response: See response to 00010 above.

National Solid Wastes Management Association **00020**

Comment: This section uses the terms Aadverse opinion,@ Adisclaimer of opinion,@ and Aqualification of opinion.@ These terms are used by the accounting industry; however, their use in a financial statement is not necessarily reason for disallowance. For example, an accounting firm makes comments relating to the acquisition of divestiture of assets, the entry into new lines of business, a change in accounting practices, etc. We suggest that the Agency rewrite the section so that a state director will accept all financial opinions unless they depart from generally acceptable accounting standards.

Response: The Agency believes requiring the use of Aqualified opinions@ in unwise for several reasons. First, there is a risk associated with allowing firms with qualified opinions to use the financial test because the data in their financial statements that they use to pass the test may not accurately reflect their financial strength. Second, because the overwhelming majority of opinions

US EPA ARCHIVE DOCUMENT

are unqualified, allowing State directors to evaluate qualified opinions would benefit very few firms. Finally, States would incur administrative costs to evaluate qualified opinions. EPA believes it is reasonable to give states discretion to but not require them to generally review and accept qualified opinions. Where exceptions may be warranted, the firm with a qualified opinion may bring it to the attention of the state.

Land and Lakes Company **00024**

Comment: b) Many accounting firms add "explanatory comments@to financial statements. These comments do not indicate a departure from generally accepted accounting principles, however, they may, for example, make comments relating to the acquisition or divestiture of assets, the entry into new lines of business, a change in accounting practices, etc. It is urged that the proposed rule '258.74(3)(2) (iii) be clarified to indicate that an unqualified Aclean@opinion is an auditor's opinion which does not disclose a departure from generally accepted accounting principles.

Response: The financial test requires that a firm using the financial test obtain a Aclean@opinion from an independent certified public accountant. A clean opinion indicates that, in the auditor=s opinion, the financial statements (on which the financial test is based) were performed according to GAAP. A clean opinion will usually state that the financial statements present fairly, in all material respects, the financial position of the firm. Any additional qualifying statements may suggest that there are problems with financial statements. Such problems could undermine the accuracy of the financial test.

US EPA ARCHIVE DOCUMENT

I.A.2.c. Special Report from the Independent Certified Public Accountant

One commenter requests that the Agency clarify what information in the CFO letter is derived from the audited financial statements and must be reported on by the independent CPA. Also, the commenter asserts that neither an "examination" nor a "review," both of which connote a specific engagement level under professional standards, would be appropriate to achieve a comparison of financial data in the CFO letter to the audited financial statements. The commenter suggests that rather than requiring an "examination" or "review," the Agency require the CPA to perform an agreed-upon procedures engagement under AICPA attestation standards.

Other commenters recommended that the special report be required regardless of whether or not the financial data are taken directly from data submitted to the SEC to reduce the administrative burden on the States of reviewing the data.

American Institute of Certified Public Accountants **00009**

Comment:

Provide for Agreed-Upon Procedures Engagement Under AICPA Attestation Standards

The term "examination" used in section (e)(2)(i)(B)(2) connotes a specific engagement level under professional standards in which the independent CPA performs the procedures he/she believes are necessary to express an opinion - or if circumstances warrant, disclaims an opinion - on management's written assertion. Also, the phrase "no matters came to his [the auditor's] attention which caused him to believe that the data in the chief financial officer's letter should be adjusted" connotes "negative assurance," which is provided in a review-level engagement under professional standards. Neither an "examination" nor "review@level engagement would be appropriate to achieve the desired procedure sought by the Agency - that is - a comparison of financial data in the CFO letter to the audited financial statements. We recommend the CPA perform an agreed-upon procedures engagement under the applicable AICPA standards. In an agreed-upon procedures engagement, the CPA practitioner would report his or her findings based on the procedures performed. We believe that an agreed-upon procedures engagement would provide a consistent level of testing by all independent CPAs, and it would minimize any misunderstanding of the required scope of testing. The attachment to this letter provides suggested revised language to section 258.74(e)(2)(i)(c), including suggested procedures that the auditor would perform.

ATTACHMENT

EPA Proposed Rule - Financial Assurance Mechanisms

Following is suggested revised language for section 258.74(e)(2)(i)(c):

(C) If the chief financial officer's (CFO) letter providing evidence of financial assurance includes financial data to satisfy the financial test in paragraphs (e)(1)(i)(B) or (C)

US EPA ARCHIVE DOCUMENT

or paragraph (e)(1)(ii), the CFO letter shall be accompanied by a report of an independent certified public accountant (CPA) based on an agreed-upon procedures engagement in accordance with standards issued by the American Institute of Certified Public Accountants. The independent CPA shall perform the following procedures, as applicable:

1) Compare the amounts used to calculate the applicable ratio included in the CFO letter relating to evidence of satisfying the financial test in paragraph (e)(1)(i)(B) or (C) with the corresponding amounts in the company's most recent audited annual financial statements and note that such amounts are in agreement [or describe differences], and recompute the applicable financial data included in the CFO letter.

2) Recompute tangible net worth (as defined in EPA regulations) included in the CFO letter and compare such amounts used to compute tangible net worth to amounts in the financial statements referred to in procedure 1.

Response: The Agency has considered the commenter=s suggestion and agrees that the Anegative assurance requirement@ proposed does not reflect the intent of the Agency in promulgating requirements for special auditor=s reports. As a consequence, EPA has revised the language in 258.74(e)(2)(i)(C) to eliminate the requirement for a Anegative assurance@ finding, and has instead provided that the CPA=s statement should be based upon an agreed upon procedures engagement.

American Institute of Certified Public Accountants **00009**

Comment:

<u>Clarify What Information in the CFO Letter is "Derived From" "The Audited Financial Statements" and Must be Reported on by the Independent CPA</u>

Section 258.74(e)(2)(i)(A) requires the owner or operator to place a letter signed by its CFO in the facility's operating record that:

1) lists all the current cost estimates covered by a financial test, and

2) provides evidence that the firm meets the conditions of either paragraph (e)(1)(i) or paragraph (e)(1)(ii).

Paragraph (e)(1)(i) requires the owner or operator to satisfy one of the following three conditions:

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

US EPA ARCHIVE DOCUMENT

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

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

Paragraph (e)(1)(ii) requires the owner or operator to have tangible net worth greater than the sum of the current closure, post-closure care, corrective action cost estimates and any other environmental obligations covered by a financial test (as defined) plus $10 million.

Further, section 258.74(e)(2)(i)(C) states the following:

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

1) He has compared the data in the chief financial officer's letter derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

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

The financial data required by paragraphs (e)(1)(ii) and (e)(2)(i)(A)(1) relative to current corrective cost estimates and "other environmental obligations," and the financial data required by paragraph (e)(1)(i)(A) relative to the current bond rating, are generally not included in, nor can be "derived" from, audited financial statements prepared in conformity with generally accepted accounting principles (GAAP). Accordingly, independent CPAs cannot report on such financial data based on "a comparison to audited financial statements." We would be pleased to discuss with EPA representatives other procedures that independent CPAs may perform under professional standards with respect to that financial data if the EPA wishes. The final rule should clarify that the independent CPA's report should cover only the amounts used to compute the financial data (ratios) in the CFO letter submitted to meet the conditions in paragraph (e)(1)(i)(B) or (C), or the tangible net worth amount in paragraph (e)(1)(ii), as applicable.

The Background section of the proposed rule notes that the EPA does not believe the separate Aspecial report" from the independent CPA is needed where the CFO "simply takes figures directly from the audited financial statement." It is not clear what this means in the context of the financial data (ratios) required by sections (e)(1)(i)(B) and (C). Such ratios are not Ataken directly from" audited financial statements; however the amounts used to compute such ratios-total liabilities; net worth; net income; depreciation; depletion, and amortization - may be separately reported in audited financial statements. The final rule should clarify what EPA means by "financial data" in the CFO

US EPA ARCHIVE DOCUMENT

letter that are "different from" data in the audited financial statements. Also, does the EPA require that the CFO letter include the amounts used to calculate the ratios?

Response: The Agency has considered the commenter=s concern and has revised the language in 258.74(e)(2)(i)(C) to clarify that the requirement for a report from the independent certified public accountant is required only when the Chief Financial Officer=s letter includes financial data showing that the firm satisfies the ratio test in '258.74(e)(1)(i)(B) or '258.74(e)(1)(i)(C) and these data differ from the data in the audited financial statements or any other audited financial statement or data filed with the SEC. The CPA is not asked to attest to the bond rating of the financial test user.

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC recommends that submittal of a special report be a requirement of the test whether or not the financial test figures were taken directly from the statements provided to the Securities and Exchange Commission (SEC). The special report is an assurance to the states that the independent CPA has reviewed the specified numbers on the financial test and further that it agrees with them thus eliminating a line by line item review of these numbers. Again, EPA is placing added burden on the states if it chooses to eliminate the special report in those cases where statements are provided to the SEC.

Response: The Agency has considered the commenter=s concern and decided that in cases where the data in the CFO=s letter are taken directly from the financial reports, significant benefit is not derived from the provision of a special report by the CPA. EPA believes that a special report from the CPA is necessary only when the numbers in the CFO=s letter cannot be directly verified with the audited financial statements. In cases where these data can be directly verified, the Agency sees little additional benefit in requiring an independent CPA to confirm that the numbers have been correctly transcribed.

In addition, the negligible benefit from an accountant=s certification when the data are taken directly from the financial statements may be less than the commenter inferred based upon the proposed language. AICPA=s auditing standards no longer allow certified public accountants to render a negative assurance such as Ano matter came to his attention that the data should be adjusted.@ Therefore any reassurance that a state may have felt from such a statement for reports using the same data as in the audited financial statements would no longer be available. As a consequence of this change in accounting practice, the final regulation instead requires a positive demonstration of how the data differ. Additionally, the state may establish more stringent alternatives to EPA=s financial test including additional documentation from independent certified public accountants.

National Solid Wastes Management Association **00020**

Comment: This section of the rule requires that if the CFO's letter includes "financial data that are different from data in the audited financial statements referred to in paragraph (e)(2)(i)(B) of this section or any other audited financial statement or data filed with the SEC" a special report is

US EPA ARCHIVE DOCUMENT

required from the owner/operator's independent certified public accountant. The preamble on page 59 FR 51525 (first full paragraph on the right) only includes financial statements provided to the SEC. The same language used in the rule should be added to the preamble since not all firms would be filing financial statements with the SEC. This change will eliminate any confusion that arises when the regulations are implemented.

Response: The Agency agrees with the commenter=s concerns and has made appropriate revisions.

US EPA ARCHIVE DOCUMENT

I.A.2.d. Annual Updates and Placement of Financial Test Documentation

One State opposed the self-implementing aspect of the test and recommended that original documentation and annual updates be submitted directly to the State Director for review. Some commenters contended that the 90-day period for submitting annual updated financial information is insufficient, due to the time required to complete audits and suggested at least a 120-day period.

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC does not agree with the self-implementing aspect of this comment and recommends that the owner or operator be required to submit original documentation and annual updates directly to the State Director.

Response: The Agency has considered the comment and notes that the requirement that the facility maintain the evidence of financial responsibility in the operating record is consistent with the requirements for the cost estimates (See 40 CFR 258.71, 258.72 and 258.73), and the closure plan (40 CFR 258.60) which also are required to be maintained in the operating record, but do not have to be submitted to the State Director. Since these plans and estimates underlie the financial test, it seems inconsistent to require annual submissions of the financial test. Further, the Agency notes that the requirement is consistent with the self-implementing nature of the federal Subtitle D criteria. The final regulation does, however, requires initial notification of the State Director (§ 258.74(e)(2)(ii)) that the necessary items are in the operating record, and subsequent notification if the owner or operator no longer meets the requirements of the test (§ 258.74(e)(2)(v)). Finally, the Agency notes that a State may have more stringent requirements which could include the requirement that documentation be submitted to the State.

National Solid Wastes Management Association **00020**

Comment: Under this section, owners/operators are required to update financial information and place it in the operating record within 90 days following the close of the owner/operator's fiscal year. The time required for an audit to be performed at most privately held firms is longer than 90 days since they are not typically considered major accounts. Accordingly, we suggest that the time be increased to at least 120 days and that the state director of an approved state have the ability to adjust this time limitation based on the circumstances of the facility.

Response: The Agency has considered the comment and determined that particularly for firms whose fiscal year ends on December 31, complying with a 90-day requirement can be difficult as this is a peak work load period for accounting firms. However, the 90-day period is consistent with the current Subtitle C financial test regulation, and limits the amount of time that an owner/operator would be without a financial assurance mechanism if the firm failed the financial test. Rather than uniformly increasing the reporting period to 120 days as suggested by the commenter, the Agency is instead allowing State Directors the flexibility of providing up to an additional 45 days for owners and operators who do not have complete financial statements. The Agency expects that this flexibility will not generally be necessary for corporations which must report to the Securities and

US EPA ARCHIVE DOCUMENT

Exchange Commission. Also, it should generally be unnecessary for companies whose fiscal year ends at a time that does not coincide with the peak work load for accounting firms.

Land and Lakes Company **00024**

Comment: d) The provision under ' 258.74(3)(2) which requires updated financial information within 90 days of the close of a firm's fiscal year is too restrictive, especially for private firms. It is common practice in the accounting field to complete the audits of private firms after public firm audits are complete. To complete the reports within 90 days of fiscal year end, (which is a calendar year for almost all corporations), would create a scheduling problem for auditors of private firms who give priority to public firms that must comply with Securities and Exchange Commission quarterly filing deadlines. A minimum of 120 days should be allowed for private films.

Response: See response to 00020 above.

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I.A.2.e. Alternate Financial Assurance

One commenter recommended that to avoid unnecessary financial risk to the State, owners or operators or guarantors who no longer pass the financial test be required to obtain alternative financial assurance within 30 days rather than the proposed 120 days. Another commenter recommended that the proposed rule grant an approved state the flexibility to increase the time needed to obtain alternative assurance beyond 120 days.

Texas Natural Resource Conservation Commission **00018**

Comment: In order to eliminate the financial risk to the state, TNRCC recommends that the number of days that a firm has for obtaining alternate financial assurance when it can no longer meet financial test requirements be reduced from the proposed 120 days to 30 days. This would limit the exposure to only 30 days versus possibly a year or longer under the current proposed requirement and it would make firms monitor their ability to continue using the test at least on a monthly basis.

Secondly, we recommend to require a guarantor to provide alternate financial assurance 30 days after the guarantor discovers that it no longer meets the terms of the financial test. This will limit the exposure to only 30 days versus possibly a year or longer under the current proposed requirement.

Response: The Agency has considered the commenter=s concern and has determined that it would not be practical to reduce the time allowed for obtaining alternate assurance from 120 to 30 days. Specifically, the Agency is concerned that such a change could effectively require an owner or operator whose audited financial statements are not available within a month of the close of their fiscal year to secure an alternative mechanism before having audited financial statements. Since many companies will not have audited financial statements within 30 days, many companies using the financial test could be required to obtain a short-term third-party mechanism while awaiting the results of their audits. Such as outcome would negate at least some of the cost savings associated with using the financial test.

Under the commenter=s suggestion, a guarantor would have thirty days once it discovers that it no longer meets the financial test to provide an alternative mechanism. Under the proposed regulation, the owner or operator would have been required to provide financial assurance within 90 days of the close of the guarantor=s fiscal year if the guarantor no longer passes the financial test. If a guarantor no longer met the requirements of the financial test by, for example, losing an investment grade bond rating, the language in the proposal could have delayed when the owner or operator, or the guarantor, would have had to provide an alternative mechanism. In the rulemaking for the financial test for local governments who own or operate MSWLFs (61 FR 60328), the Agency faced similar issues. Today=s rule adopts language consistent with the guarantee provision in the local government rule to reduce this potential delay. EPA has made this adjustment by essentially removing the words Afollowing the close of the guarantor=s fiscal year@ in the proposal language. This clarifies that if a guarantor no longer meets the criteria of the financial test in the middle of a fiscal year, it would only have a total of 120 days to correct the problem. In the case of a guarantor whose year-end financial statement shows that the firm no longer meets the criteria of the financial test, the owner or operator

US EPA ARCHIVE DOCUMENT

would have 90 days from the close of the guarantor=s fiscal year to obtain an alternative mechanism, and if the owner or operator does not obtain an alternative, then the guarantor must provide an alternative mechanism within the next 30 days.

However, while the commenter suggested a 30 day deadline for the guarantor to secure an alternative instrument, EPA believes that this is an overly aggressive deadline to establish as a general rule. Thus, EPA has retained the requirement that the owner or operator secure an instrument within 90 days, and if the owner or operator fails to do so, then the guarantor must secure an alternative instrument within 120 days. The 90 day deadline is consistent with the reporting deadlines of the rule for firms using the financial test mechanism, and the overall 120 day deadline for the guarantor is consistent with the 120 day deadline for an owner or operator who has failed the financial test to obtain an alternative mechanism. Additionally, under RCRA a State may adopt a requirement that is more stringent than the federal requirement.

National Solid Wastes Management Association **00020**

Comment: This section specifies a time limit for having alternative financial assurance in place if the owner/operator can no longer meet the financial test requirements. We suggest that a state director in an approved state be able to increase this limit at his/her discretion in a similar manner to other sections of the Subtitle D criteria. This will encourage states to adopt these requirements so that flexibility can be added to a state program.

Response: The Agency is not providing regulatory language providing an extension if an owner or operator can no longer meet the financial test requirements. The financial assurance requirements are an integral component of the MSWLF program, and the Agency believes that it is important for firms that no longer can meet the financial test to provide alternative mechanisms quickly. These final regulations provide substantial flexibility to State Directors and this flexibility and the cost savings of the regulations provide incentives for States to adopt these regulations. In addition, the existing financial assurance regulation already provide flexibility to State Directors under 40 CFR 258.74(i) to allow the use of alternative financial assurance mechanisms that meet the requirements of 40 CFR 258.74(l).

US EPA ARCHIVE DOCUMENT

I.A.2.f. Current Financial Test Documentation

A commenter suggested that either the Agency define the criteria a State Director should use to determine if there was "reasonable belief" that the owner or operator no longer met the financial test, or delete the requirements on the grounds the Subtitle D facilities pose less of a threat to human health and the environment that Subtitle C facilities. Commenters also noted that the regulations did not clearly specify whether independently audited financial statements would be required; since it would take an owner or operator between 90 and 120 days to provide current, audited financial information, the commenters suggested allowing unaudited internal financial statements to satisfy this requirement.

Texas Natural Resource Conservation Commission **00018**

Comment: f. Current financial test documentation. TNRCC agrees with this comment.

Response: Comment noted.

National Solid Wastes Management Association **00020**

Comment: The section, as well as the preamble, allows the director of an approved state to require an owner/operator to submit "current financial test documentation" based on his "reasonable belief the owner or operator no longer meets the requirements" of paragraph (e)(2). The term "reasonable belief" is not defined and could be interpreted by reasonable people in markedly different ways. This can only lead to added expense on behalf of the facility owner/operator. We suggest that the Agency either:

> 1) Delete this requirement since it is not in the Subtitle C rules and Subtitle D facilities are less a threat to human health and the environment than Subtitle C facilities, or
>
> 2) Define of "reasonable belief" and include specific examples so that unwarranted actions are not taken against facilities.

Additionally, the phrase "current financial test documentation" is not defined. If the Agency expects an owner/operator to perform another full audit, the cost of this audit must be borne by the facility. Furthermore, this additional audit will not provide much useful information, since the audit will take approximately 90 to 120 days to complete and be too late to be of value. We suggest that the Agency allow the use of internal financial statements based on the most recent unaudited quarterly financial statement. These statements should be provided on a quarterly basis to allow the state director to monitor and track the financial health of the firm and take appropriate actions as necessary.

Response: The Agency continues to believe that it is necessary to provide for State Directors to request additional information based upon a reasonable belief that the owner or operator may no

US EPA ARCHIVE DOCUMENT

longer meet the requirements of the financial test. The financial test is a Asnap shot@ look at a company=s financial condition, and while annual submissions in most cases will be adequate for monitoring a company=s financial strength, in rare cases unusual occurrences may cause a firm=s financial condition to deteriorate rapidly. In such cases, a State Director should be able to request additional information. As noted in the preamble to the proposed rule, the State Director may wish to request additional information in the event of a large liability judgment. It also would be reasonable to request additional information upon hearing of the reported downgrading of a firm=s bonds, which would suggest that the firm could no longer qualify for the financial test by virtue of the bond rating alternative. While both of these occurrences can be appropriate circumstances for such a request, EPA does not consider this an exhaustive list, nor does it think that it is appropriate to prepare a potentially incomplete list of all the circumstances; instead the final rule continues to use the criteria of Areasonable belief.@

The commenter also asserts that this requirement should be deleted as it is not in the Subtitle C rules and Subtitle D facilities present less of a threat to human health and the environment. In fact, this requirement appears in the Subtitle C regulations promulgated April 7, 1982 (47 FR 15032) for both closure and post-closure obligations financial tests (See for example 264.143(f) (7)). EPA reiterates that it considers it important that in the financial tests for both the hazardous and the municipal waste programs that the State Director ensure that firms qualifying for the financial test continue to demonstrate financial viability.

Finally, the commenter suggests that EPA allow the owner or operator to submit internal financial statements based upon the most recently unaudited quarterly financial statements in response to request for additional information. The proposed rule would have required the owner operator Ato provide current financial test documentation as specified in paragraph (e)(2) of this section.@ Upon review of this proposed requirement, the Agency has determined that this may have been interpreted as merely the transmission to the State Director of the types of documentation an owner or operator must maintain at a facility. To clarify the regulations, the Agency agrees with the commenter that audited financial statements may not always be necessary in such cases. The final rule modifies this requirement to specify that the State Director may require that documentation or additional information. This leaves to the State Director the discretion to require the appropriate level of information including an examination or other form of engagement by the certified public accountant as warranted by the circumstances.

Land and Lakes Company **00024**

Comment: c) Under proposed '258.74(e)(2)(vi), a state Director may request current financial test documentation in the event the Director has a reasonable belief that the financial condition of the owner or operator has seriously deteriorated. As it is currently worded, the financial documentation which would be submitted for this sort of interim request would have to meet the annual submission requirements. This would result in the requirement that audited financial data be submitted in the middle of the normal, annual audit cycle. Submission of audited data for an interim period is extremely difficult and costly. The delay in preparing audited data would also defeat the supposed

US EPA ARCHIVE DOCUMENT

purpose of providing some Aearly warning@ to the Director. The rule should be clarified to allow submission of unaudited data for interim requests.

Response: See response to comment 00020 of this section.

US EPA ARCHIVE DOCUMENT

I.B. Corporate Guarantee

Commenters favoring the guarantee noted that financial assurance likely will be provided frequently by related corporate entities. One commenter expressed concern that if an owner or operator is using a guarantee and the guarantor is no longer able to meet the requirements of the financial test, neither the owner or operator nor the guarantor are likely to be able to obtain an alternative mechanism. Commenters raised a number of other issues related to the specific conditions of the guarantee. For example, one commenter was concerned whether the $10 million minimum net worth requirement would be sufficient for a guarantor guaranteeing multiple landfills. Comments were also raised regarding the substantial business relationship. Some contended it was too restrictive and should be available to any entity willing to provide a guarantee, while others noted the administrative burden on states required to review the terms of the business relationship.

Frieh Insurance Corporation **00008**

Comment: The section of the proposed rule change regarding guarantors provides a confusing approach in the search for security. It would probably provide the basis of a defensive lawsuit in the future (at closure time) if the subject corporation=s guarantor failed or was unwilling to meet its stated obligations.

Response: The Agency disagrees with the commenter=s claim that the proposed rule change is confusing or ineffective. The guarantee mechanisms in this regulation are modeled after those available for closure and post-closure costs in the Subtitle C regulations. In establishing those regulations, the Agency conducted analyses to establish the condition under which a guarantee would be considered a valued contract. As a result of that analysis, the Agency determined that guarantees structured in a manner consistent with the financial responsibility requirements would be valid and enforceable (See 53 FR 33942). Therefore the Agency believes that the guarantee language is sound. Moreover, because the guarantor must annually demonstrate its ability to pass the financial test and if it does not pass, must provide an alternate mechanism, EPA does not consider the risk of the guarantor=s failure to be unacceptable.

Browning Ferris Industries **00010**

Comment: BFI supports the concept and specific language that the Agency has proposed to construct a corporate guarantee mechanism. The ability to access a corporate guarantee mechanism is essential since most financial assurance is likely to be supplied by a related corporate entity.

Response: Comment noted.

The Solid Waste Association of America **00013**

US EPA ARCHIVE DOCUMENT

Comment: 258.74(e)(l): A The guarantor must meet the requirements for owners or operators in paragraph (e) of this section...@ Does this statement allow a parent, grandparent or sibling corporation to use the same $10 million dollar base guarantee for multiple facilities?

For example, let's assume that a large national firm (Firm X) owns 20 landfills and it wishes to act as guarantor for all 20 of these landfills. Let's assume for this example $1 million dollars per landfill in closure and post closure costs. Does Firm X have to show (1) tangible net worth of $30 million dollars [$10 million + (20 landfills x $1 million/landfill) <u>OR</u> does Firm X have to show (2) tangible net worth of $220 million dollars [(20 landfills x $10 million/landfill) + (20 landfills x $1 million/landfill)?

If the former (1) is true we feel that the Agency must reevaluate this section. The number of facilities being guaranteed drives up the associated liability. A single pledge of $10 million dollars will not provide the necessary guarantee.

258.74(e)(3)(iii): AIf a guarantee is canceled, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance..." AIf the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days...@

SWANA feels that this section provides a very circular situation. For example, a parent, grandparent, or sibling corporation (Firm A) provides financial assurance guarantees for its affiliates Firm X, Y and Z. Firm A decides to cancel its guarantees. Assumptions: (1) Firm A was providing financial assurance guarantees to Firms X, Y and Z because Firms X, Y and Z either could not or did not want to do it themselves; and (2) Firm A is canceling its guarantees because it no longer has the financial strength to support those guarantees. According to the rule as written, if Firms X, Y and Z cannot provide alternate financial assurance within 90 days, Firm A must provide alternate financial assurance for them. What logic is there to think that Firm A can now, or would want to, provide financial assurance for Firms X, Y and Z when it canceled the guarantees 90 days prior?

258.74(e)(4): AIf a corporate guarantor no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must within 90 days following the close of the guarantor=s fiscal year, obtain alternate financial assurance ...@ AIf the owner or operator fails to provide alternate financial assurance within to 90-day period, the guarantor must provide that alternate assurance within 120 days...@

SWANA is concerned that if an owner or operator is using the corporate financial test as its financial assurance mechanism, and fails to meet the minimum requirements of this mechanism, the owner or operator will have a difficult time finding an alternate mechanism. SWANA believes that the corporate financial test requires the least amount of Areal dollars@ of all the available mechanisms. Failure to meet these requirements may signal serious financial concerns for not only the guarantor, but for all the affiliates that were guaranteed under its umbrella.

Response: The Agency has considered the commenter=s concerns and is responding to them as follows. First, with regard to the commenter=s concern about the amount of the guarantee that would

US EPA ARCHIVE DOCUMENT

be required for an owner or operator with multiple facilities, the Agency does not agree with the commenter that a single pledge of $10 million in addition to financial assurance obligations will not provide the necessary guarantee. The $10 million additive net worth requirement was established as a bankruptcy screen and to ensure that an owner or operator=s subtitle D financial assurance obligations would not push an owner or operator (or in this case, the owner or operator=s guarantor) into bankruptcy. The $10 million net worth additive acts as an effective screen because the Agency=s analyses demonstrates that businesses with more than $10 million in net worth are less likely to go bankrupt than firms with less than $10 million in net worth. But more importantly, for the commenter=s concern, the $10 million additive requirement acts as a Acushion,@ and helps to ensure that should the guarantor be forced to meet all of an owner or operator=s financial assurance obligations simultaneously, the owner guarantor would have $10 million in net worth remaining. Since the $10 million is additive (i.e., in addition to total financial assurance obligations), the Agency believes that it provides sufficient protection. The Agency therefore sees no basis for tying the amount of the $10 million net worth requirement to the number of facilities being assured.

Second, the commenter suggests that it is unreasonable to expect a guarantor to provide alternate insurance in the event that it cancels its guarantee. The Agency disagrees. The guarantor is acting as a third party providing assurance. EPA expects that a guarantor will carefully consider its responsibilities before entering the guarantee. There may be business reasons for a guarantor to want to stop extending the guarantee other than failure to meet the financial test. The language of the regulation makes clear that a guarantee can be a substantial and enduring obligation for the guarantor.

Finally, the commenter raises concerns about the time allowed owners/operators to obtain alternate financial responsibility if the guarantor is no longer qualified. The Agency does not agree with the commenter that an owner/operator necessarily will be unable to obtain alternate assurance simply because its corporate guarantor no longer qualifies. Many owner/operators that cannot pass the financial test are able to secure alternate mechanisms, and the Agency=s experience in the Subtitle C program is that firms which have qualified for the financial test and then no longer qualify for it are able to obtain alternative instruments to demonstrate financial assurance.

Texas Natural Resource Conservation Commission 00018

Comment: Under the proposed rule there are three types of qualified guarantors allowed. TNRCC recommends not allowing a firm with a "substantial business relationship" to serve as a guarantor because each relationship would have to be annually quantified to determine whether or not the relationship is substantial. If this option is allowed by EPA, then each state will have to make the determination based on its Attorney General=s opinion of its ability to enforce against a guarantor who has a "substantial business relationship" with the owner or operator.

Secondly, we recommend to require a guarantor to provide alternate financial assurance 30 days after the guarantor discovers that it no longer meets the terms of the financial test. This will limit the exposure to only 30 days versus possibly a year or longer under the current proposed requirement.

US EPA ARCHIVE DOCUMENT

Response: The Agency disagrees with the commenter=s suggestion of not allowing a firm with a Asubstantial business relationship@ to serve as guarantor on the basis of the need for States to verify that relationship. The Agency expanded the definition of corporate guarantor under the Subtitle C requirements to include a guarantee provided by an unrelated firm, provided that firm has a Asubstantial business relationship@ with the owner/operator. (See 53 FR 33938) The purpose of the expanded definition was to broaden the options an owner or operator would have for complying with financial assurance requirements. The requirement for a Asubstantial business relationship@ was included to ensure that the guarantee constituted a valid and enforceable contract under applicable State law. In promulgating this provision, the Agency recognized that its use will require a review of the business relationship between the guarantor and the owner or operator. As the Agency noted in 53 FR 33942, ANo single 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.@ While EPA anticipates that many States will want to adopt the full range of options in the regulations, EPA recognizes that States can also be more stringent than federal regulations. States may therefore elect not to allow a guarantee provided by a firm with a substantial business relationship.

Under the commenter=s suggestion, a guarantor would have thirty days once it discovers that it no longer meets the financial test to provide an alternative mechanism. Under the proposed regulation, the owner or operator must provide financial assurance within 90 days of the close of the guarantor=s fiscal year if the guarantor no longer passes the financial test. If a guarantor no longer met the requirements of the financial test by, for example, losing an investment grade bond rating, the language in the proposal could have delayed when the owner or operator, or the guarantor, would have had to provide an alternative mechanism. In the rulemaking for the financial test for local governments who own or operate MSWLFs (61 FR 60328), the Agency faced similar issues. Today=s rule adopts language consistent with the guarantee provision in the local government rule to reduce this potential delay. EPA has made this adjustment by essentially removing the words Afollowing the close of the guarantor=s fiscal year@ in the proposal language. This clarifies that if a guarantor no longer meets the criteria of the financial test in the middle of a fiscal year, it would only have a total of 120 days to correct the problem. In the case of a guarantor whose year-end financial statement shows that the firm no longer meets the criteria of the financial test, the owner or operator would have 90 days from the close of the guarantor=s fiscal year to obtain an alternative mechanism, and if the owner or operator does not obtain an alternative, then the guarantor must provide an alternative mechanism within the next 30 days.

However, while the commenter suggested a 30 day deadline for the guarantor to secure an alternative instrument, EPA believes that this is an overly aggressive deadline to establish as a general rule. Thus, EPA has retained the requirement that the owner or operator secure an instrument within 90 days, and if the owner or operator fails to do so, then the guarantor must secure an alternative instrument within 120 days. The 90 day deadline is consistent with the reporting deadlines of the rule for firms using the financial test mechanism, and the overall 120 day deadline for the guarantor is consistent with the 120 day deadline for an owner or operator who has failed the financial test to obtain an alternative mechanism.

US EPA ARCHIVE DOCUMENT

EPA notes that RCRA allows a state to have more stringent requirements than under EPA=s regulations.

National Solid Wastes Management Association **00020**

Comment: This section states that the guarantor must be the direct or higher-tier parent corporation, a firm whose parent corporation is also the parent corporation of the facility, or a firm with a "substantial business relationship." The ISWD believes that the last option is too restrictive and should be broadened to include any company that is willing to take on these financial obligations on behalf of the owner/operator. Broadening the scope still affords the state or EPA a legal means to ensure that the financial obligations are covered without restricting the owners/operators flexibility. We believe that this option will be used infrequently but should be included nonetheless.

Response: The Agency has considered the commenter=s suggestion, but declines to allow any firm willing to undertake the financial obligations of a guarantee to do so because broadening the availability of the corporate guarantee to firms which do not have a substantial business relationship could affect the validity and enforceability of the guarantee. The corporate guarantee being finalized in today=s rule is the same in scope as the corporate guarantee for liability coverage under Subtitle C that was promulgated in September 1988. In the preamble to that rulemaking, Subtitle C (53 FR 33942), EPA addressed whether a broader availability would be appropriate. The Agency at that time determined that a substantial business relationship was necessary to ensure that the guarantee would be a valid and enforceable contract and to prevent guarantors from becoming subject to State regulation as insurers. Moreover, the preamble noted AA guarantee contract, by itself, would be inadequate to demonstrate a substantial business relationship between two parties.@ Consequently, the Agency believes that it is inappropriate to broaden the guarantee as suggested by the commenter.

Land and Lakes Company **00024**

Comment: Under the proposed rule 258.74(e)(1)(A), firms having certain bond ratings would not be required to incur the expenses of preparing special financial reporting or undergo increased regulatory review which would be required of private, unrated or lower rated firms. This is a further anticompetitive advantage for the larger firms. In addition, under the proposed rule 258.74(g), larger firms can entirely avoid the costs of obtaining third party assurances. This fact is recognized by the Agency in its discussion of proposed 258.74(g) that would accept corporate guarantees from an affiliate in lieu of operator or owner compliance with the financial assurance requirements: Aa guarantee is an attractive compliance option for owners and operators, especially those affiliated with larger corporations because guarantees are generally much less expensive that other third-party mechanisms.@(59 FR 51526)

Thus, because the costs of compliance with the proposed rule will be lower for larger firms that for smaller firms, the proposed rule creates a significant competitive advantage for the larger firms. As noted in the General Comments section of this letter, these barriers to entry will lead to decreased

US EPA ARCHIVE DOCUMENT

competition, increased acquisitions by the larger firms thus further concentration of environmental risk, and as competition decreases, prices should be expected to rise.

Response: The financial test and corporate guarantee do not represent a barrier to entry or impede continual competition in the landfill market. They are two of many available mechanisms for complying with the existing requirement for financial assurance which represents a small percentage of landfill costs. The Agency investigated how the financial test would change the relative competitiveness of large versus small operations. (see Issue Paper, Market Effects of the Financial Test). The effect of a guarantee would be similar because their costs may not be dramatically different. The principal findings of that investigation were that even if a large landfill were to use a third-party financial assurance mechanism rather than the financial test, it still would face lower costs per ton than a smaller landfill. For both small or large landfills, however, third-party financial assurance costs constitute only two to three percent of total costs. This is not significant when compared with reported profit margins for landfill operators of up to 30 percent. AWhile collection companies tend to show profit margins of about 15%, landfill operators can ring up twice that,@ analysts said. (Wall Street Journal, AUSA Waste Agrees to Buy Sanifill in Stock Deal,@June 25, 1996.) Also, in the context of a host of other factors affecting tipping fees, including location, fixed costs, and pricing strategies, financial assurance costs are not likely to play a key role in competition within the MSWLF industry. In particular, costs to transport waste to a larger facility may more than off-set potentially lower tipping fees that the larger landfill might charge as a result of using the financial test to demonstrate financial assurance. (See Issue Paper, Market Effects of the Financial Test.)

EPA notes that some municipal waste firms no longer exist independently, or have decided to sell their operations to other firms. For example, Allied Waste Industries has acquired the solid waste operations of Laidlaw, and USA Waste Services has acquired the operations of Mid-American Waste Systems, Sanifill, and United Waste Systems. These sales, and others occurred between the proposal and final promulgation of this rule. This consolidation has occurred in the absence of a corporate financial test and guarantee, and indicates that factors beyond this rule are influencing the number of competitors in the industry.

US EPA ARCHIVE DOCUMENT

I.C. Calculation of Obligations

The Agency received only one comment on this section which was in support of the proposed requirement.

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC agrees with this requirement

Response: Comment noted.

US EPA ARCHIVE DOCUMENT

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

Some of the comments applied to the proposed amendment to the Subtitle C requirements. The Agency also is revising the Subtitle C financial test. The comments addressing Subtitle C test issues, including the comments addressing the proposed revision to the domestic asset requirement for the Subtitle C corporate financial test will be evaluated and addressed in the comment response document for that separate rulemaking. This document addresses comments on EPA=s Subtitle D financial test, consistent with the scope of the final rule.

Browning-Ferris Industries **00010**

Comment: BFI strongly supports the proposed domestic asset requirement and believes that it is a major improvement over the plainly arbitrary domestic asset ratio set forth in the current subtitle C financial assurance rules. The domestic asset ratio arbitrarily, and needlessly, penalizes large U.S. based corporation with significant foreign assets.

To illustrate the penalizing effect of the domestic asset ratio, consider the case of two companies with exactly equivalent levels of domestic assets with the. exception that one of the companies also has significant foreign assets while the other does not. The company without foreign assets would be unfettered in its capacity to provide financial assurance by the domestic asset ratio, whereas the company with foreign assets would have its capacity to assure diminished by the ratio even though this company would have overall greater financial resources.

The domestic asset ratio does not really provide a useful measure of a corporations ability to "make good" on its financial assurance obligations. What matters more is the relative size of a corporations domestic assets to its financial assurance obligations. A ratio or multiplier that makes this comparison more directly would provide a more meaningful and fairer measure.

While BFI understands the Agency's concern regarding the difficulties of pursuing foreign assets, it does not believe that the magnitude of the issue warrants a ratio or multiplier approach given the balance of the other requirements as proposed. BFI can discern no justification, either in theory or in practice, for the existing subtitle C "ninety percent domestic asset" requirement. The use of a similar mandate in the Part 258 regulations would lead to significant, and wholly improper, reduction in the average level of financial responsibility obligations that multi-national firms can self-assure. The proposed approach is both fair and consistent with the recognized ability of creditors in the United States to attach a foreign assets of multi-national firms. Thus, BFI urges the Agency to adopt as final the proposed domestic asset requirement for municipal solid waste landfills and amend the subtitle C financial assurance rules accordingly.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

Safety-Kleen Corporation **00015**

US EPA ARCHIVE DOCUMENT

Comment: Safety-Kleen supports this proposed change to the financial assurance regulations.

In the past, Safety-Kleen has used the financial test to provide financial assurance for some, but not all of our TSD facilities. Use of the financial test was limited by the requirements of the test (more than 10% of Safety-Kleen's assets are located outside the U.S., and the-domestic assets did not exceed 6 times the company-wide financial assurance cost estimates). Those financial assurance requirements not covered under the corporate financial test were covered using other financial assurance mechanisms (e.g., letters of credit, surety bonds, etc.).

The proposed revision to the financial assurance rules will allow Safety-Kleen to utilize the corporate financial test mechanism for more of our domestic TSD facilities. This provides Safety-Kleen with much needed flexibility in obtaining financial assurance for closure activities, without changing the amount of financial assurance provided, nor the security of those moneys.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

Chemical Manufacturers Association **00017**

Comment: The Agency proposes to modify the financial assurance requirements imposed on owners and operators of interim status and permitted land based units managing hazardous wastes under Subtitle C of RCRA. Specifically the proposal would change the criterion for meeting the domestic assets test so that it is consistent with those requirements proposed for municipal solid waste landfills.

The present Subtitle C language defines minimum domestic asset requirements for those firms electing to assure financial responsibility using the financial test or corporate guarantee mechanisms offered under the rules. In general, the requirement can be paraphrased as follows:

> That the firm have assets in the United States amounting to at least 90% of total assets or at least six times the sum of the financial obligations assured. *See* 40 CFR 264.143/145/147 and 40 CFR 265.143/145/147.

The financial obligations that must be covered include the total of 1) closure, 2) post-closure, 3) liability requirements, and 4) defined corrective action commitments related to land-based TSDFs and solid waste management units.

Under the revised language of this proposal, the minimum domestic assets requirement would be changed to:

US EPA ARCHIVE DOCUMENT

> Assets located in the United States amounting to at least the sum of all obligations covered by a financial test. 59 FR 51536

In effect, the ratio is being reduced from a six-to-one requirement to a one-to-one requirement.

CMA supports this direction on the part of the Agency. As the analysis by the Agency makes quite clear, the cash flow and net worth attributes are more indicative of the financial strength of an organization and its likely ability to avoid bankruptcy

CMA notes that the proposed rule apparently discontinues the presently allowed alternative of a domestic assets test, which is a demonstration that a company=s assets in the United States amount to at least 90 percent of its total assets. The impact of removing this alternative is not discussed. CMA does not have data that demonstrate the degree to which owners and operators are currently using the domestic assets test, but believes that it is a useful element of the present rules. EPA should not eliminate it as an allowable alternative without a further discussion of its utility and a review of the potential impacts.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

Texas Natural Resource Conservation Commission **00018**

Comment: TNRCC does not agree that the Subtitle C domestic asset requirement be reduced to the amount of U.S. assets equal to the sum of all environmental obligations since the value of assets are greatly reduced in a bankruptcy situation. This reduction has a big impact on the amount of available financial assurance required for closure, post-closure and compliance and place the state at greater financial risk.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

National Solid Wastes Management Association **00020**

Comment: The Association supports the decision to limit the domestic asset requirement to an amount at least equal to the sum of current closure, post-closure care, and corrective action (if needed) cost estimates and any other environmental obligation under this section. This requirement provides EPA with access to the appropriate amount of assets in the event of a default and recognizes that assets not held onshore are more available than in the past. Also, we believe that this requirement is not only appropriate for Subtitle D but should be extended to Subtitle C facilities.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

US EPA ARCHIVE DOCUMENT

John Phillip Taylor **00022**

Comment: I also support the proposed change to the domestic asset requirement for the Subtitle C Corporate Financial Test; however, I find no significance to the proposal. Currently, under US and Illinois rules, corporations must have assets of six times covered costs or 90 percent of total assets in the US. Corporations that barely meet the assets requirement of at least six times covered costs and have just 90 percent of their assets in the US could theoretically qualify with as little as 5.4 times covered assets in the US. The proposed rule would require all firms to meet the six times requirement.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

California Integrated Waste Management Board **00023**

Comment: The Environmental Protection Agency (Agency) is proposing to modify the domestic asset requirement of the current Subtitle C financial test and proposes the same modification for the subtitle D financial test. Current subtitle C regulations require corporations using the financial test to have assets:

1. Located in the U.S. amounting to at least 90% of total assets; or

2. Equal to at least six times the sum of costs assured through the financial test.

The current requirement assures access to funds in case of bankruptcy. The Agency is proposing to lessen this requirement by allowing an operator to have assets in the U.S. at least equal to the sum of all environmental obligations being assured by a financial test. The Agency is also proposing to eliminate the alternative of domestic assets equal to at least six times the sum of costs assured through the financial test. The reason given for the proposed revisions is that the current domestic asset requirement "unnecessarily limits the use of the test."

The Agency's proposal provides less assurance and is contrary to the argument for the domestic asset requirement, assuring access to funds in case of a firm's bankruptcy. An operator using the financial test is not required to maintain a fund designating monies for closure and postclosure maintenance costs. Assets are not protected or inviolate from other creditors. Consequently, public and private creditors alike are vying for the same lesser amount of U.S. assets. The only thing this revision does is ensures all creditors will have access to fewer assets in the event of a firm's bankruptcy.

A firm must have substantial assets available in the U.S., making funds accessible to environmental agencies and other creditors in the event of bankruptcy. Accessibility to all potential creditors is hindered when most of a firm's assets are located outside the U.S.

US EPA ARCHIVE DOCUMENT

The Agency, being a federal entity, has more leverage than a State in accessing offshore assets. The proposal as presented puts individual States at a disadvantage and compromises the financial assurance requirements of each State.

The proposal to reduce the domestic asset requirement to zero is precipitous. If the Agency wishes to revise the current domestic asset requirement to make the test a viable mechanism for more firms, we recommend considering lowering the percentage of assets located in the U.S. (i.e., from 90% to 75% or 50%). This would still ensure accessibility of a significant amount of assets creditors.

Federal and state regulations provide an array of mechanisms specifically designed to provide a comfortable level of assurance to the regulating agency. Each mechanism is distinct and each operator has the option of choosing the mechanism most appropriate for his/her operation. An operator failing to meet the minimum qualifications for securing a mechanism, is no reason to dilute the requirements of that mechanism, especially when other options are available.

In light of the obvious deficiencies in this proposal, we recommend the Agency maintain the current domestic asset requirement in subtitle C, and use the current subtitle C requirement for the proposed subtitle D financial test.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

Waste Management, Inc. **L0001**

Comment: We endorse the decision to limit the domestic asset requirement to an amount at least equal to the sum of all the environmental obligation assured by a financial test. We believe the requirement provides the agency with access to appropriate assets in the event of a default and, at the same time, recognizes that the world is shrieking. We believe that the change is appropriate for both Subtitle D and Subtitle C facilities.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

Waste Management, Inc. **L0001**

Comment: The proposed changes to Parts 264 and 265 of 40 CFR require assets located in the United States of a guarantor to at least the sum of all obligations covered by a financial test. However, the proposal does correspondingly not eliminate the Asix times@tangible net worth requirements. The proposed financial test for Subtitle D facilities does not require Atangible net worth at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.@(See, for example, 40 CFR 264.143(f)(1)(i)(B).) There is no discussion in the preamble to the rule justifying the distinction. Given that the agency has in part based the rationale underlying the proposal for Subtitle D on the agency's desire to maintain

US EPA ARCHIVE DOCUMENT

consistency among programs, it makes sense to eliminate the six times tangible net worth requirement in the Subtitle C rules. Support for that result flows from this rulemaking which specifically relies on the universe of owners and operators of Subtitle C facilities to evaluate the Subtitle D test. We strongly urge the agency amend Subtitle C to eliminate the six times tangible net worth as part of the financial test for Subtitle C facilities.

Response: Agency response to this comment will be included in the responses to comments on the Subtitle C financial test rule.

US EPA ARCHIVE DOCUMENT

III.A.1 Minimum Net Worth Requirement

No comments that address this section were received.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

III.A.2 Develop and Analyze Alternative Financial Test

One commenter questions the adequacy of the model developed by the Agency to evaluate sets of alternative financial measures designed to discriminate between viable and bankrupt firms. The commenter contended that the ratios used by the Agency may not be adequate discriminators for all firms in the industry, because the industry is not homogeneous. Moreover, according to the commenter, even if the model is appropriate, it would have a finite confidence level thus leaving some level of obligations unfunded.

Asset Guarantee Insurance Company **00003**

Comment: Underpinning the Proposal is an extension of a model developed by the Agency for the hazardous waste industry. It is argued that if a financial test or ratio has historically been able to discriminate between two populations (i.e., bankrupt and non-bankrupt) then these ratios can be employed prospectively to assure solvency and Subtitle X compliance.

Discriminant analysis has effectively been employed in consumer credit where the members of the population are reasonably homogeneous as to the probability of default and magnitude of financial loss. In the world of corporate credits neither the academic professionals nor the business community has developed a sufficient predictor discriminant function.

The two ratios, leverage and profitability, are presumed by the Agency to be sufficient discriminators for all firms in the environmental industry regardless of their operating history, complexity, or size. The industry is not homogeneous either as to credit risk or as to the magnitude of their Subtitle D obligations.

Even when discriminant models are appropriate, their statistical attributes may render them as adequate predictors within a finite confidence interval (e.g. 90% or 95%). Should the Agency's ratio tests be effective at these levels, then the government and the taxpayer would be left with unsatisfied financial obligations for the residual (10% or 5%) of qualifying exempt firms.

To the extent the Agency believes the proposed set of financial ratios or other combination of ratios to be fail-safe bankruptcy discriminators, then the Agency might consider providing financial consulting services to other federal agencies charged with policing financial risks.

Response: The Agency recognizes that it cannot establish a financial test that will perfectly discriminate between firms that are financially viable and should be allowed to self-insure, and those firms that will become bankrupt and should therefore be excluded. Rather, EPA is seeking a combination of requirements that will minimize the risk of bankruptcy while minimizing the cost to the public and private sectors. In response to questions about the validity of the financial test EPA reviewed the accuracy of the financial test with updated financial information for firms owning or operating MSWLFs. EPA also obtained additional information about the characteristics of firms which have entered bankruptcy. EPA then re-analyzed its test and compared it with twenty-eight others which included a test that had been recommended by the National Solid Waste Management

Association, and the test that is currently used for owners and operators of Subtitle C treatment, storage and disposal facilities. (See the report in the docket entitled Analysis of Subtitle D Financial Tests in Response to Public Comments.) The only two alternatives with lower public costs than EPA=s test were to use the test that is currently used in Subtitle C or to allow no test. The current Subtitle C test had lower public costs because it would cover less than one-fourth of the obligations. (The model estimates public costs partially on the basis of costs covered by the test. This means that tests that are not very available show low public costs). The current Subtitle C test=s ratio of misprediction to availability is lower than the test that EPA adopted for MSWLFs. This means that it does a poorer job at screening out bankrupt firms from among the firms that qualify. This finding is consistent with analysis supporting proposed changes to the Subtitle C test that showed that the current test is not the best available. (See the preamble to the proposed revisions to the Subtitle C financial test, 56 FR 30201.) The lower public cost for the alternative of no test results from the assumption that if a firm utilizes a third party instrument, then the third party will always be able to meet its obligations.

EPA disagrees with the notion that the business community cannot provide sufficient mechanisms for determining whether a firm will default on its obligations. As noted in the response to comments on the bond rating alternative, both Moody=s and Standard & Poor=s have established records demonstrating the accuracy of their bond rating processes. EPA=s financial test recognizes the differences in MSWLF companies= credit risk and obligations by including the amount of financial liabilities and these obligations as factors in its financial test. The test ratios discriminate against excessive debt and establish financial criteria which a company must pass to use the financial test. The net worth requirements limits the amount of obligations that a firms can assure with the financial test if it has not already recognize these obligations as liabilities. EPA=s analysis shows that its test has an accuracy that is comparable to that for investment grade bond ratings. Annual assurance risk for investment grade bond ratings ranged from zero to 0.465% versus 0.233% to 0.644% for the financial ratios. See Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test. .

Agency analysis indicates its test is highly available to firms (71.7 percent) and that its misprediction rate is low (25.9 percent). The public cost of the Agency preferred alternative ($11.7 million) is less than 0.16 percent of estimated total private financial assurance obligations ($7.0 billion). The test that EPA is adopting in this rule was first proposed for Subtitle C firms because of its good performance. The same test was analyzed with others and proposed for owners and operators of MSWLFs because of its performance. In response to public comments on the proposed rulemaking EPA again reviewed the accuracy of this test and determined that it is the best in terms of availability while minimizing public costs. Based upon the fact that this test has demonstrated its accuracy on three different occasions with different sets of financial data, EPA has a high degree of confidence in its test.

US EPA ARCHIVE DOCUMENT

III.A.3 Select a Financial Test for a Proposal

No comments that address this section were received

US EPA ARCHIVE DOCUMENT

III.B.1 Firm Samples

Several commenters questioned the Agency's use of the Subtitle C bankrupt firm sample for the Subtitle D analysis. These commenters suggested that the Agency could have identified a bankrupt Subtitle D firm sample through state permitting agencies or trade associations.

National Solid Wastes Management Association 00020

Comment: The second paragraph under subsection (B) (1) Firm samples (59 51529) states that "the Agency could not identify bankruptcies at MSWLF firms" because they have not been subject to federal regulatory requirements. While this may be true, every state has a permitting program for landfills and a quick review of the state's permitting files would have revealed the names of firms in the MSWLF industry. Additionally, searches of trade associations and the trade press may have revealed historical names of firms in the industry. EPA's reasoning does not appear to be valid.

Response: The Agency disagrees with the commenter. The names of bankrupt firms is insufficient information for EPA to use in its analysis. The use of the firm sample was to estimate the misprediction rate for any prospective financial test. In estimating the misprediction rate, EPA analyzed how well a particular test could distinguish between bankrupt and non-bankrupt companies up to three years in the future. This effort required EPA to obtain three years worth of financial information for firms which entered bankruptcy. The Agency determined that the most efficient way to acquire this information was to access it from the bankrupt firm sample used in the Subtitle C analysis. While State files could have the names of firms in the MSWLF industry, it is unlikely that they would have three years of financial information that EPA used in determining the accuracy of the model.

The Subtitle C bankrupt firm sample was considered the best bankrupt firm data for the Subtitle D analysis for a number of additional reasons. First, owning and operating MSWLF=s entails a capital-intensive, long-term investment in engineering and construction for industrial activity, similar to the industrial activities of many firms in the Subtitle C universe. Second, firms in the MSWLF industry, like firms in the Subtitle C universe, are subject to stringent environmental regulations and associated compliance costs. Third, there were no readily available data for a bankrupt firm sample that might be more representative of the types of firms engaged in regulated MSWLF management today and no commenter produced equally robust alternative data.

Instead, EPA requested additional information from Dun and Bradstreet on firms that had entered bankruptcy including a request for firms in the two digit SIC code that includes MSWLF firms. For MSWLF firms no recent failures were available with three prior years of financial data. However, this data request did provide information on 20 firms with less than $10 million in net worth prior to failure and three years of complete financial data. These data supplemented the information EPA had previously acquired as a bankrupt firm sample, and allowed EPA to analyze the potential impact of a lower net worth requirement.

US EPA ARCHIVE DOCUMENT

Land and Lakes Company **00024**

Comment: Also, the firm sample used to determine this Acut-off@ failed to include any MSWLF firms. Indeed, the Agency reports that its bankrupt firm sample consisted solely of 31 hazardous waste firms, (59 FR 51529). The Agency states that this firm sample was necessary because Athe Agency could not identify bankruptcies of MSWLF firms@, (59 FR 51529). While the Agency itself may not collect such information, it should be available from the States with federal bankruptcy lists. The Agency=s stated lack of MSWLF bankruptcy risk statistics does not appear to be valid.

Response: See response to comment 00020 immediately above.

Waste Management, Inc. **L00001**

Comment: The agency's statement, at 59 FR 51529, that Athe agency could not identify bankruptcies of municipal solid waste landfills for purposes of evaluating the financial test@ rings hollow. Virtually every state has permitting programs for municipal solid waste landfills and a quick review of the states permitting files would have revealed the names of the firms in the municipal solid waste landfill industry. Further, a stroll over to the National Solid Waste Management Association would have revealed historical names of firms in the business.

Response: See response to comment 00020 above.

US EPA ARCHIVE DOCUMENT

III.B.2 Cost Estimates

No comments addressing this section were submitted.

US EPA ARCHIVE DOCUMENT

III.B.3 Results of Evaluation of Candidate Financial Test for Closure and Post-Closure Care

Two commenters disagreed with the Agency's selection of Test 562 over Test 130, which is identical to Test 562 except that it does not include the $10 million additive to the minimum net worth requirement. The commenters argued that business failures have many causes totally unrelated to environmental obligations and that the additive requirement provides no additional protection, that the proposed test unfairly discriminates against financially sound smaller firms simply because they operate fewer landfills, and that Subtitle D firms pose lower risks than Subtitle C firms, warranting the use of a different test.

National Solid Wastes Management Association **00020**

Comment: Additionally, we believe the Agency wrongly rejected Test 130 from consideration. The Agency reports that it studied many alternative tests of financial assurance. Two tests tied as the lowest cost tests that still provided a minimum net worth requirement related to the size of the obligation to be assured. The two tests were Test 130 and Test 562 (59 FR 51530). The Agency selected and proposed the use of Test 562 even though the total costs of Test 562 (including the allocation between public and private costs) were exactly the same as Test 130. Test 562 uses the leverage test or profitability test, and requires a minimum net worth of $10 million plus the amount of anticipated costs. Test 130 also uses the leverage test or profitability test, but requires a minimum net worth of at least the amount of anticipated costs.

The Agency provides three reasons for selecting Test 562 over Test 130. "First, the Agency believes that requiring a $10 million minimum net worth requirement in addition to net worth equal to the firm's assured costs protects against environmental obligations themselves causing bankruptcy" (59 FR 51530). Business failures have many causes. A firm operating in the MSWLF market could fail for reasons totally unrelated to its environmental obligations.

"Second, there was no difference in the availability of Test 130 and Test 562, so there was no compelling reason to select Test 130. This argument cuts both ways; there is no compelling reason to select the proposed Test 562 over Test 130. Further, the Agency "concluded that a lower minimum net worth requirement would not significantly increase the availability of the subtitle D corporate financial test" because in its original sample of 16 non-bankrupt firms, three smaller firms were excluded from the sample because they "owned only 12 MSWLFS, which were less than half the size of the landfills owned and operated by larger firms." This reasoning is extremely anticompetitive. The fact that fewer facilities are operated by smaller firms is obvious, yet it is not a reason for excluding smaller firms which can provide security for environmental obligations from utilizing the test.

"Finally, selection of Test 562, which is identical to the corporate financial test proposed for Subtitle C follows the Agency's policy of maintaining consistency among programs wherever possible." While administrative ease and internal consistency are laudable goals, we believe these concerns should be secondary to the goals of increased environmental protection and matching economic reality. Many firms in the MSWLF industry are smaller, private firms which do not have the same

US EPA ARCHIVE DOCUMENT

risk level as firms engaging in Subtitle C activities. For reasons cited previously, Subtitle D firms are fundamentally different than Subtitle C firms. For many, the decision to operate only Subtitle D facilities reflects a conscious business decision to avoid the higher risks associated with hazardous operations even though those operations produce higher revenues. Grouping these less risky firms with Subtitle C firms for the sake of administrative convenience is a mistake, especially when the result is reduced competition.

Alternative measures could provide better financial assurance for the public with less anticompetitive effects. The proposed minimum size requirement discriminates against smaller, financially sound companies effectively eliminating them from participation in the MSWLF market. This anticompetitive effect is not needed to protect the public interest in financial assurance for the anticipated costs. A proposed rule that links financial assurance to total anticipated costs is preferable. Therefore, adoption of Test 130 would be preferable to the proposed rule.

Response: The Agency focused on the set of low-cost tests that included multiple or additive requirements. As noted above, the requirements in tests 130 and 562 are identical except that test 130 has a multiple requirement and test 562 has an additive requirement. The Agency favors the additive requirement for two reasons. First, by precluding a firm from double-counting its net worth toward both the minimum net worth requirement and a multiple requirement, an additive requirement provides an additional cushion of resources that a firm must have in order to use the financial test. Second, to the extent that a firm has just over $10 million in net worth, the additive approach ensures that such a firm will not, as a result of realized environmental obligations, reduce their net worth to a level that significantly increases the likelihood of insolvency. Therefore, the additive requirement protects against the risk of environmental obligations causing bankruptcy for firms that use the financial test. For this reason, the Agency believes that a test which includes the additive provision meets its policy objectives better than a test with a multiple requirement.

As part of its analysis of the comments, the Agency obtained additional information on the ownership of MSWLFs. The Agency collected updated financial information from Dun and Bradstreet on the firms owning or operating these facilities, which assisted in securing financial information on smaller companies in the industry and their financial characteristics. EPA also secured additional information from Dun and Bradstreet for its sample of bankrupt firms. EPA then replicated its earlier analysis of the availability and misprediction of the tests using these new sources of information. This analysis and its results are contained in the report entitled Analysis of Subtitle D Financial Test in Response to Public Comment. This additional information allowed EPA to re-examine the relative merits of tests 562-10 versus 130-10.

In its new analysis, the Agency found that Test 130 had higher public costs than test 562. Whereas in the analysis supporting the proposal the Agency found no difference in the public costs of the test, the updated analysis did find an increase in public costs. Selection of Test 562 allows Agency to utilize a test that does a better job of minimizing public cost. As noted by the commenter, business failures can have many causes beyond environmental obligations. However, in the event of a business failure, a firm that had used Test 130 rather than Test 562 would have up to $10 million more in environmental obligations that were not covered by a third-party mechanism. This leads to the higher calculated public costs for Test 130. Since these public costs are the costs to the public

US EPA ARCHIVE DOCUMENT

sector of paying for financial assurance obligations for firms that pass the test and later go bankrupt without fulfilling their obligations, an increase in public costs represents a departure from the Agency=s Apolluters pay@ philosophy. Higher public costs in this instance would mean that costs that should have been borne by the owner or operator (or the landfill=s customers) were transferred to society in general.

While Test 562 has higher private costs than Test 130, this largely reflects the fact that under Test 130 a firm qualifying to utilize the financial test can assure a higher level of obligations. This is because Test 130 does not have the $10 million additive requirement of Test 562. The higher private cost of Test 130 reflects the fact that firms that would qualify for the financial test can cover less of their obligations with Test 130 than with Test 562.

In its analysis for the promulgation of the financial test rule in light of public comments, the Agency also looked at smaller operators. This examination found that nine of the twelve firms with net worth between $5 and $10 million had calculated financial assurance obligations higher than their net worth. Eight of the nine also had liabilities reported through Dun and Bradstreet that were lower than their financial assurance obligations. These liabilities could be understated which could also reflect an overstatement of the firms= net worth and implies that these obligations indeed could trigger bankruptcy. Therefore it is appropriate to keep the $10 million additive for the amount of net worth that can cover a given level of obligation.

With the two tests the commenter notes, the amount of obligations that can be covered differs. Under Test 562, a firm must have a minimum net worth of $10 million but it can cover obligations that are $10 million less than its net worth. For example, a firm with $100 million could opt to internally cover up to $90 million in environmental obligations. Under Test 130, the Agency also required a minimum net worth of $10 million, but allowed coverage of obligations up to the amount of the minimum net worth. If, for example, a firm that meets the other requirements of the tests had a net worth of $12 million and obligations of $6 million, under Test 562 the firm could cover $2 million in obligations with the financial test, and would have to use alternative mechanisms for the $4 million remainder. Under Test 130, the firm could cover the entire $6 million in obligations. Both tests are linked to the amount of obligations being assured, and both have the same eligibility requirements. The difference is in the additive requirement in Test 562.

Finally, the commenter asserts that liability associated with Subtitle D firms is lower that associated with Subtitle C firms and that this difference supports the use of a different financial test under Subtitle D. The Agency does not agree that this distinction, if it exists, has any bearing on the financial test. EPA is concerned with the risk associated with environmental obligations such as closure which can be financial risks for a State (and eventually the general public). The costs of closure and post-closure care can be much higher for Subtitle D firms than for Subtitle C operations. Many Subtitle C operations involve storage or treatment facilities which have no post-closure obligation if closing with no waste in place. Using a statistical technique known as regression analysis the Agency estimated closure costs for these operations as averaging $360,000 based upon data obtained from the State of Texas. For hazardous waste land disposal facilities, EPA estimated average closure costs of $4 million, and post-closure costs of $1 million for a total of $5 million. In its analysis of closure and post-closure costs for municipal solid waste landfills in the Background

US EPA ARCHIVE DOCUMENT

Document for the proposal (p.31), costs range from $8.1 million (for a 375 ton per day landfill) up to $24.0 million for a 1500 ton per day landfill. These costs were updated for inflation for the Analysis of Subtitle D Financial Tests in Response to Public comments. The higher costs for Subtitle D facilities reflects their generally larger size than the cost for Subtitle C facilities. These higher Subtitle D costs represent a potentially larger financial risk to the public if the owner or operator is unable to pay the costs of closure and post-closure care.

The preamble to the final rule contains additional explanation of EPA=s rationale regarding this issue.

Land and Lakes Company **00024**

Comment: The Agency reports that it studied many potential tests of financial assurance. Among the tests that provided for a minimum net worth requirement related to the size of the obligation to be assured, two tests tied as the lowest cost test. The two tests were Test 130 and Test 562, (59 FR 51530). The Agency proposed use of Test 562. The total costs of Test 562, (including the allocation between public and private costs), were exactly the same as Test 130, yet the Agency selected Test 562 for the proposed rule. Test 562 uses the leverage test or profitability test and requires a minimum net worth of $10 million plus the amount of anticipated costs. Test 130 also uses the leverage or profitability tests, but requires a minimum net worth of at least the amount of anticipated costs.

The Agency gave three reasons for selecting Test 562 over Test 130. The following paragraphs recite these reasons and offer criticism of the Agency's reasoning:

A) First, the Agency believes that a $10 million minimum net worth requirement in addition to net worth equal to the firm's assured costs protects against environmental obligations themselves causing bankruptcy. (59 FR 51530).

Criticism: Business failures have many causes. A firm operating in the MSWLF market could fail for reasons totally unrelated to its environmental obligations leaving the public without financial assurance for anticipated costs. Unless the financial obligations are secured, the public is left with the same lack of financial assurance as if the environmental obligations themselves caused bankruptcy. Secured environmental obligations should offer better protection for the public than allowing unsecured obligations and reliance on the size of a firm's net worth. A smaller firm that is willing to secure its obligations would provide equal or greater financial assurance than a larger firm which merely uses its paper promises for financial assurance.

In fact, larger firms in the environmental industry may present greater risks to the public safety than smaller firms due to the tremendous amount of raw consolidation that has occurred in the industry. The larger firms acquire <u>numerous</u> companies each and every year. As a result, the nation's environmental risk is becoming increasingly among the few largest firms. The two largest firms alone represent about 30% of the industry. These largest firms carry the consolidated risk of ownership and/or operation of over 100 landfills each. Generally, these larger firms are also the most involved in the hazardous waste industry which has much greater risk than the MSWLF

US EPA ARCHIVE DOCUMENT

industry. Due in part to aggressive acquisitions plans, these companies are generally more highly leveraged[3] than smaller firms. High debt to net worth ratios generally contribute to bankruptcy risk. Despite the concentration of risk in these firms, these companies are the ones that benefit from the eased financial assurance requirements provided by the proposed rule.

Also, due to the pace of acquisitions among the industry giants, (the largest firms have acquired over 100 firms annually), these firms have consolidated significant off-balance sheet risk. Many of the nation's older MSWLFs and CERCLA clean-up sites are now owned by the industry giants. Potential liability for these sites will not appear on financial statements until the liability is quantified. Therefore, reliance on balance sheet figures without seeking actual security for obligations may be just as great a risk for large firms as for smaller firms.

The proposed rule favors these larger, more highly leveraged firms with concentrated environmental risk because it allows the larger firms to use mere "paper@ assurance in the form of balance sheet size and corporate guarantees. This creates a competitive advantage for the larger firms by reducing their cost to provide financial assurance, reducing their regulatory compliance reporting and supervision, and freeing up financial assets for alternative uses such as acquisitions and lobbying. Yet, although the Agency cites statistics showing that firms of less than $10 million in net worth fail more often than larger firms, large firms also fail and the cost to society of the failure of public firms is much greater than for small firm failures. The public costs of failure of a small firm which provides security for its financial obligations would be minimal versus any public company failure.

B) ASecond, there was no difference in the availability of Test 130 and Test 562, so there was no compelling reason to select Test 130." (59 FR 51530).

Criticism: This argument cuts both ways. There is no compelling reason to select the proposed Test 562 over Test 130.

Further, the Agency Aconcluded that a lower minimum net worth requirement would not significantly increase the availability of the subtitle D corporate financial test@ (59 FR 51529, in 2) because in its original sample of 16 non-bankrupt firms, three smaller firms were excluded from the sample because they Aowned only 12 MSWLFS, which were less than half the size of the landfills owned and operated by larger firms. This reasoning is extremely anticompetitive. The fact that fewer facilities are operated by smaller firms is obvious, yet it is not a reason for excluding smaller firms which can provide security for environmental obligations from the industry.

C) AFinally, selection of Test 562, which is identical to the corporate financial test proposed for subtitle C follows the Agency=s policy of maintaining consistency among programs wherever possible.@ (59 FR 51530)

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[3] The leverage ratios (total liabilities over tangible net worth) for several major companies as of the date of their 1993 annual reports were as follows: WMX, 6.36; Allied Waste Industries, 4.11; Chambers Development Co., 2.53; Browning Ferris Industries, 2.24; Laidlaw 1.87; Mid American Waste Systems, Inc. 1.36; and Western Waste, 1.01. The proposed rule would require a maximum ratio of 1.5.

US EPA ARCHIVE DOCUMENT

While administrative ease and internal consistency are laudable goals, they should be secondary to the goal of increasing environmental protection in an economically sound manner. Many firms in the MSWLF industry are smaller, private firms which do not have the same risk level as firms engaging in subtitle C activities. For the reasons cited above, subtitle D firms are fundamentally different and fundamentally less risky than firms with subtitle C firms. For many, the decision to operate only subtitle D facilities reflects a conscious business decision to avoid the higher risks associated with hazardous operations even though those operations produce higher revenues. It is a mistake to group these less risky firms with subtitle C firms for the sake of administrative convenience, especially when the result is reduced competition.

Response: The Agency disagrees with the commenter that large firms present a greater financial risk due to consolidation in the industry. EPA tasked a contractor to examine the issue in Issue Paper, Recent Consolidation and Acquisition Within the Solid Waste Industry. That analysis concluded that while large firms have rapidly expanded, this consolidation of environmental liabilities does not necessarily indicate an increase in financial risk. This conclusion was supported by discussions with industry analysts.

In addition the commenter asserts that larger firms with high debt to net worth ratios will have a higher risk of bankruptcy and benefit from the financial test. The Agency agrees that firms with high debt ratios have greater risk and considers high debt ratios to be indicators of financial weakness. Therefore, to qualify to cover <u>any</u> of its obligations under the financial test, a firm must either have an investment grade bond rating on its senior unsecured debt, a ratio of (Cash Flow - $10 Million) to liabilities of greater than 0.1, or a ratio of liabilities to net worth of less than 1.5. All of these are conservative requirements. If a firm fails to meet the financial ratio or bond rating requirements, it is ineligible to use the financial test, irrespective of its net worth. If firms want to use the financial test to avoid the costs of third-party mechanisms, the financial test should discourage high debt levels (leverage).

The comment asserts that potential liability for clean ups will not appear on balance sheets until these liabilities have been quantified. On October 10, 1996, the American Institute of Certified Public Accountants has issued a Statement of Position on Environmental Remediation Liabilities. This statement of position provides that Aenvironmental remediation liabilities should be accrued when the criteria of Financial Accounting Standards Board (FASB) Statement of Financial Accounting Standards No. 5 *Accounting for Contingencies*, are met and it includes benchmarks to aid in the determination of when environmental remediation liabilities should be recognized in accordance with FASB Statement No. 5.@ The SOP also provides guidance on measurement of environmental remediation liabilities. This SOP should provide greater consistency in the recognition and measurement of environmental remediation liabilities.

EPA is interested in having more uniformity in the reporting of financial assurance obligations. EPA is concerned that the absence of a minimum net worth requirement may have the undesirable effect of favoring firms that do not record their environmental obligations as liabilities. The provision of the rule that requires a firm to have at least $10 million in tangible net worth over the amount of environmental obligations being covered ensures that firms that have not recognized their obligations as liabilities will still have adequate net worth to fulfill their obligations.

US EPA ARCHIVE DOCUMENT

If a firm has already recognized all of its environmental obligations as liabilities, it could demonstrate less ability to cover them through the financial test than if it had not recognized them as liabilities. EPA received comments that the additive requirement would have an impact on small owners or operators and effectively required a higher coverage ratio for them. To address these concerns, and to assist smaller owners or operators who have already recognized their environmental obligations as liabilities, EPA is establishing a special provision. Under this provision, a firm that has recognized all of its MSWLF closure, post closure care, or corrective action liabilities under 40 CFR 258.71, 258.72 and 285.73, obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265 can utilize the financial test if it meets the other requirements of the test, receives the approval of the State Director, and still maintains a tangible net worth of at least $10 million plus the amount of any guarantees it has undertaken that have not been recognized as liabilities. See ' 258.74(e)(1)(ii)(B). This addition of any guarantees is necessary because EPA does not expect that a guarantee extended by a corporation will appear on that company=s financial statement until it is drawn upon and is recorded as a liability. The Agency believes that the additional flexibility allowed by this provision creates an incentives for owners or operators to fully recognize their environmental obligations in their audited financial statements.

See also response to comment 00020 above.

US EPA ARCHIVE DOCUMENT

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

No comments addressing this section were submitted.

US EPA ARCHIVE DOCUMENT

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

One commenter requested that the final rule explicitly state that companies may use the delayed recognition method of accounting for postretirement benefits, notwithstanding whether they use the immediate recognition method for external financial reporting. Another commenter expressed concerns that the rule would allow certain pension liabilities to be ignored in determining whether a firm meets the minimum net worth requirements.

American Institute of Certified Public Accountants **00009**

Comment: Final Rule Should Clarify How Owners and Operators May Apply FASB 106 to Satisfy the Financial Test and Whether Other Differences in Accounting are Permitted

We understand from reading the Background section of the proposed rule that the EPA is intending to address concerns raised by members of the regulated community that the use of the immediate recognition method of accounting for postretirement benefits (OPEB) in accordance with FASB Statement No. 106, *Employers=Accounting for Postretirement Benefits Other Than Pensions,* adversely impacts their ability to pass the EPA's corporate financial test for their environmental obligations. The EPA proposes to allow companies to use the delayed recognition method to meet the EPA's financial assurance test notwithstanding whether they use the immediate recognition method for external financial reporting. The final rule should include this interpretation of how the financial assurance test may be satisfied.

Also, because section 258.74(e)(2)(i)(C) is written more broadly than dealing solely with the OPEB recognition method issue discussed above - that is, it covers *all* financial data in the CFO letter that are different from the audited financial statements EPA should clarify whether any other amounts used to compute financial data in the CFO letter may be different from the corresponding amounts in the audited financial statements.

Response: The Agency has considered the commenter=s concern regarding recognition of post-retirement benefits (OPEB). In the preamble to the proposed rule, the Agency explicitly states that it does not require owners and operators using the financial test to demonstrate that they use the same accounting methods for OPEB obligations for both their financial test submissions and SEC submissions (59 FR 51525). The Agency reiterates this point in the preamble to the final rule. The Agency sees no reason to incorporate this into the regulations themselves. Similar requirements are applicable for Subtitle C facilities; guidance has been sufficient to address these issues to date.

Similarly, the Agency sees no reason to provide clarification regarding the handling of other financial data that may be different from data in the audited financial statements. The agency wishes to maintain State flexibility in addressing these issues. Additionally, EPA can issue national guidance if specific issues arise that warrant national policy.

City of Santa Clarita, California **00021**

US EPA ARCHIVE DOCUMENT

Comment: Additionally, the City of Santa Clarita in concerned that the Agency=s proposed rule that would allow certain pension liabilities to be ignored in determining whether a firm meets the minimum size requirement. Employees of a firm should not be put in a position of having their retirement jeopardized simply because a landfill=s owner or operator lacks sufficient funds for foreclosure, post-closure and corrective actions.

Response: The Agency believes the commenter has mischaracterized the Agency=s position on FASB 106 as Aignoring@ post-retirement obligations. In the preamble to the proposed rule, the Agency noted that the Securities and Exchange Commission (SEC) allows firms to account for their Apost retirement benefits other than pensions@ using either an immediate recognition method or a delayed recognition method. The preamble noted that since the SEC allows either method of recognition, the Agency would allow a firm to use one method for reporting to the SEC and another for reporting for purposes of the financial test. In other words, as firms must report their obligations in one of two methods, the Agency will, for purposes of its regulations, allow either method. In its financial responsibility regulations the Agency has a history of deferring to generally accepted accounting practice in its regulations. For example, in the Subtitle C regulations at 40 CFR 264.141(f) the Agency notes that while it provides definitions for various terms, that these definitions are not meant to conflict with generally accepted accounting practices. Thus, allowing either recognition method for post-retirement obligations other than pensions is consistent with current Agency policy and practice.

See also response to comment 00021 in Section I.A.1.a.

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III.B.6 Domestic Asset Requirement

Comments addressing this issue are included in Section 1.A.1.c of this document

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IV.A Discussion of National Solid Waste Management Association Petition

One commenter stated that NSWMA's petition and the Agency's analysis of it did not appear in the docket until December 1, 1994, and therefore the Agency should allow another 60 days for comment on this portion of the rulemaking.

National Solid Wastes Management Association **00020**

Comment: The Agency addresses NSWMA's rulemaking petition submitted on February 16, 1990. That petition requested that the Agency review a broad range of issues involving financial assurance under both Subtitles C and D. The October 12, 1994 *Federal Register* notice states that the NSWMA's petition (which contains the accompanying report) and the Agency's analysis of the request are contained in the docket. The docket did not have this information until December 1, 1994. This is insufficient time to obtain the information and adequately address the issues. We suggest that the Agency not close the comment period on this portion of the rulemaking for at least another 60 days.

Response: On September 27, 1996, EPA published a Notice of Data Availability in the Federal Register (61FR 50787). In that notice the Agency provided an additional 30 days for the public to submit comments on the missing document. The missing document was entitled AEvaluation of the Meridian Report on Financial Assurance,@ (October 4, 1989, 14 pages). The Agency received two comments as a result of this notice. These comments are addressed in the section which follows.

IV.B. Comments on the Notice of Data Availability

Laidlaw Environmental Services, Inc. **FTMA00001**

Comment: The following correspondence serves as comments from Laidlaw Environmental Services, Inc. on the Agency=s proposed changes to the financial assurance mechanisms as published in the September 27, 1996 Federal Register.

1. <u>Specify that the final balance of a trust fund used to demonstrate financial assurance for corrective action be sufficient to cover the costs of corrective action remaining at the end of the pay-in period.</u> - AThe proposed financial assurance requirements for Subtitle D did not include specific mechanisms that could be used by owners and operators to demonstrate financial assurance. Rather, it was intended that the States would determine the mechanisms and the terms of the mechanisms that would provide sufficient evidence of financial responsibility.@

   <u>Laidlaw Response:</u>
   Laidlaw does not believe that each state should determine which mechanism(s) and the terms of the mechanism that an owner or operator should be able to use, but that the owner or

operator should be allowed to use one or any combination of the following historically approved mechanisms: standby trust agreement, surety bond, letter of credit, insurance, or the financial test and corporate guarantees for closure, post closure, and/or corrective action. If the facility selects the type of mechanism to be used for financial assurance, human health and the environment is no less protected than if the state chose the mechanism. Further, allowing one state to disapprove a valid mechanism gives an advantage to owner/operators in another state which allows a selection from the full list of options. Standardized options will help to keep the playing field level.

Response: EPA=s existing regulations establish financial assurance requirements for closure, post-closure care, and corrective action, and establish a variety of mechanisms that States may allow to meet these requirements. The subject of this rulemaking is the establishment of an additional mechanism, not the establishment of the basic financial assurance requirements or the fundamental statutorily-prescribed cooperative federalism model to implement Subtitle D requirements. Indeed, a Congressional objective of RCRA is to establish a viable Federal-State partnership for purposes of implementing the law. See, for example, RCRA 1003(a)(7). The Subtitle D program is intended to be a state implemented program. The Agency has therefore left it to the state to determine what financial mechanism they will allow and specific details regarding those mechanisms.

Texas Natural Resource Conservation Commission **FTMA00002**

Comment: TNRCC is not in support of the Meridian Test and generally supports the evaluation performed by ICF Incorporated. TNRCC wants to express it=s concerns about the following aspects of the Meridian Test.

$ Cap the period for which financial assurance for post-closure care and corrective action would be required at 10 years. The assured funds would be intended to cover the final ten years of a 30 year post-closure care period. This approach assumes that a permittee would be in operation or existence during the first 20 years of a 30 year post-closure or corrective action period. TNRCC believes that this is an unsound assumption since there are too many unknowns which impact the financial condition of a business operation. The Meridian Test approach exposes the taxpayer to unnecessary financial liability.

$ Assume a three percent real interest rate when preparing cost estimates rather than the zero percent real interest rate assumed during development of Subtitle C requirements. The post-closure and corrective action cost estimates should be discounted to present value by a three percent real interest rate. Actual application of closure proves that estimates are usually under funded to begin with so to further discount these estimates creates more financial exposure to taxpayers. Additionally, present values cannot be reliably calculated because landfill closure dates are difficult to predict.

US EPA ARCHIVE DOCUMENT

- $ Amend requirements for financial assurance for contingent events to allow firms to combine coverages within and across programs. This is an irrelevant issue because Subtitle D regulations do not require liability demonstrations.

- $ Amend financial assurance requirements for closure and post-closure care by allowing owners and operators of multiple facilities to demonstrate for less than the total costs of closure and post-closure care of all facilities. TNRCC has implemented a plan which allows a permittee the option to demonstrate for the area of a landfill that is in use, therefore, eliminating a financial assurance demonstration on land that is not receiving waste but is included in the permit as part of the planned operation. TNRCC believes this option allows all owners and operators an opportunity to reduce the financial assurance amount and does not discriminate in favor of owners and operators of multiple facilities.

Response: The Agency agrees with the concerns of the commenter on the Meridian Test. EPA notes, however, that under existing 40 CFR 258.75 a State Director may allow of closure, post-closure, and corrective action costs for MSWLFs up to the rate of return for essentially risk free investments, net of inflation under certain conditions. EPA believes that the requirements in this provision provide adequate protection while providing for discounting. However, implementation of these requirements are within the discretion of the State Director and in any event RCRA allows a State to have requirements that are more stringent the federal regulations.

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IV.C. The Meridian Test

Commenters questioned the validity of the Agency's evaluation of the Meridian Test.

National Solid Wastes Management Association **00020**

Comment: Additionally, EPA' s contractor that evaluated the NSWMA petition (including the Meridian report) dated its evaluation October 4, 1989, approximately six months prior to formal Submission to the Agency. This evaluation may not be valid since it was not based on our final submission. The report does not contain any calculations to support the contractor's evaluation making it difficult to comment on the work. This lack of information supports our request that the Agency hold open the comment period on this portion of the rule for at least 60 days after all information and supporting data are contained in the docket and available for public review.

Finally, it appears that the Agency used the same contractor, ICF Incorporated, to evaluate the NSWMA petition and to develop the Subtitle C corporate financial tests on which this proposal is based. Because of the vested interest in its own work product, the Agency should have evaluated the NSWMA petition with an independent contractor. This would have provided a fairer evaluation of the petition. We suggest that the Agency consider having an independent contractor evaluate our report prior to reaching any conclusions.

Response: The Agency has reviewed the date of the report in question and determined the following. The Meridian Report entitled AFinal Report, Financial Assurance for Waste Management Firms,@and which is included in the Subtitle C Docket was dated August 9, 1989. This report had been prepared by Meridian Corporation for the National Solid Waste Management Association. EPA received additional copies of this analysis in comments on the July 1, 1991 Subtitle C proposal from the National Solid Waste Management Association, Waste Management, Incorporated, and Browning Ferris Industries. These copies carried the August 9, 1989 date as well. The analysis prepared for EPA by its contractor was dated October 4, 1989, approximately two months after the date of the Meridian report. Had there been a change in the report EPA would have expected that the comments received on the Subtitle C proposal would have noted an updated version. Additionally, EPA placed the Meridian report (which was included in public comments on the proposed and referenced changes to the Subtitle C financial test), and the analysis performed for EPA in the public docket for this rulemaking action, published a notice of data availability in the Federal Register and provided opportunity for public comment on the information. EPA did not receive public comments indicating a discrepancy in the information.

The October 4, 1989 analysis of the Meridian test noted that it used the same methodology as was used in evaluating alternative candidate financial test for the proposed changes to the Subtitle C financial test. The preamble to the proposal for this rule (59 FR 51527) discusses the steps the Agency had followed in the development of the proposed Subtitle C financial test and directs the reader to the background document for the proposed changes to the Subtitle C financial test, and to the docket for that rulemaking (No. F-91-RCFP-FFFFF). The background document in the docket provides detailed information about the analyses.

US EPA ARCHIVE DOCUMENT

In reviewing the different financial tests for promulgation, EPA investigated the public and private costs of various alternative specifications for the financial test. One of the alternatives was the financial test suggested by Meridian Corporation in a report prepared for the National Solid Waste Management Association. That report found that the test proposed by EPA (562-10a) had both lower total costs and lower public costs than the Meridian Test. (see Meridian Research, Inc., ΑFinancial Assurance for Waste Management Firms.@) This means that while the Meridian test would be readily available to firms in the Subtitle D industry, it also would be worse in terms of identifying firms which would be expected to go bankrupt after passing the test. The fact that the tests which EPA had included in the preamble to the proposed rule performed better than the Meridian Test in terms of total cost and public cost formed the basis for EPA=s decision not to select the Meridian test for promulgation. EPA believes that an evaluation of the Meridian test with all the other tests using updated financial information constitutes a fair assessment of its utility. EPA exercised its own independent judgment in reviewing the Meridian test, alternative tests, and the analyses performed by ICF Incorporated. Further, EPA has no basis for doubting the objectivity of its contractor or the reliability of its analysis. Please also see the response to the following comment for Waste Management, Inc..

Waste Management, Inc. L0001

Comment: At 59 FR 51531, U.S. EPA addresses the rulemaking petition submitted to the Agency by NSWMA on February 16, 1990. That rulemaking petition requested that the Agency review a broad range of issues involving financial assurance under both Subtitles C and D of the Resource Conservation and Recovery Act and related sections of the Toxic Substances Control Act. We have several comments on the agency's response to the NSWMA petition.

First, accompanying the NSWMA petition was a report by Meridian Corporation which supported many of the changes requested by NSWMA in its petition. In the October 12, l994 Federal Register notice, U.S. EPA indicates that the agency's analysis of the Meridian Corporation report is contained in the docket. EPA=s analysis of the Meridian report was not in the docket and was not made available to this commenter until December 1, 1994. We question whether the few days left in the comment period are adequate to address the issues in the agency's response to the Meridian report.

Secondly, we found it odd that the U.S. EPA contractor hired to evaluate the Meridian report dated its evaluation October 4, 1989 - approximately six months before the Meridian Corporation report was submitted to the agency by NSWMA. Also, marking the difficulty of studying U.S. EPA=s contractor=s evaluation of the Meridian Corporation report is the absence of any calculations in the docket. For example, on page 11 of ICF Incorporated=s evaluation of the Meridian Corporation report is the statement, ΑAfter A and M were calculated for the Meridian alternatives, we calculated the public and private cost for each test, defined as follows:....@ The calculations do not appear in the docket. Some of the results of the calculations do appear in the docket, but the docket does not contain sufficient information for the regulated community to be able to reproduce the agency's calculations. Hence, we question whether this rulemaking notice is adequate for purposes of allowing meaningful comment.

US EPA ARCHIVE DOCUMENT

Finally, it appears that U.S. EPA relied on ICF Incorporated to write the rules for C facilities which are relied upon extensively in this D rulemaking. In light of ICF=s vested interest in its own work product, EPA could have more fairly evaluated the NSWMA petition with an independent contractor.

Response: Regarding the commenter=s first point, on November 27, 1996 EPA published a Notice of Data Availability with a 30 day comment period on analysis of the Meridian report. See Response to Comment 00020 in Section IV.A. above.

The commenter=s second point is on the timing of the assessment of the Meridian Report performed by EPA contractor. The Meridian Report is dated August 9, 1989. The analysis performed by EPA=s contractor was dated approximately two month thereafter and expressly refers to the report given to EPA by NSWMA. EPA believes the assessment of the Meridian Report is sound and reliable. EPA also notes that NSWMA informed EPA on several occasions that the Meridian analysis was being performed, prior to its completion.

As the evaluation notes, the contractor used the same methodology to evaluate the Meridian test as had been used to evaluate other alternative financial tests for EPA. This methodology was included in the Background document for the Subtitle C financial test which was included in that rulemaking docket. Further, the docket for the financial test for private owners and operators of MSWLFs directs readers seeking additional information to other financial responsibility rulemaking dockets, including the proposed revisions to the Subtitle C financial test. EPA did not receive comments on the background document for the proposed Subtitle C revisions that this docket does not provide sufficient information for commenters to reproduce the calculations.

See response to comment 00020 in this section.

US EPA ARCHIVE DOCUMENT

IV.C. Discounting Costs

EPA adopted a final rule on discounting costs in conjunction with the November 27, 1996 final financial test for local government owners and operators of MSWLFs. (EPA had initially requested public comment on discounting of costs in the December 27, 1993 proposal for the local government financial test). The November 27, 1996 final rule on discounting allows State Directors to approve discounted closure, post-closure, and/or corrective action cost estimates under certain conditions and applies to all qualifying owners and operators of MSWLFs.

US EPA ARCHIVE DOCUMENT

VIII. Economic and Regulatory Impact

Asset Guarantee Insurance Company **00002**

Comment: The self insurance financial test described in the Agency's October 12 proposal is potentially damaging to the public and the insurance industry. The expected outcome of the two-tiered test:

> minimum $10 million net worth in excess of Subtitle D closure, post-closure and corrective action obligations, and satisfaction of either a leverage or profitability test,

will result in a broad exemption from the requirement by owners and operators of municipal solid waste landfill facilities to post financially strong instruments to safeguard the public interest.

The exemption from third party financial assurance implicit in the EPA proposal encompasses not only the universe of investment grade landfill owner-operators, but also organizations whose obligations would be unrateable in the financial markets. Financial institutions with professional staffs at times have difficulty satisfactorily structuring financial obligations of investment grade credit obligators. Non-investment grade companies are clearly not without risk. Reducing financial adequacy to a simplistic ratio definition makes a mockery of Subtitle D. We therefore do not understand why the Agency would propose a rule which necessarily exposes the public to significant financial risk.

Furthermore, to the extent that the Subtitle D financial assurance obligations are bondable or insurable, the proposed rule which exempts both investment grade and non-investment grade entities from insurance or banding, leaves only the highest risk owners and operators for the private sector financial assurance providers. NO surety or insurance company would be interested in making a market when only the highest risk, (i.e. uninsurable) organizations are available for coverage.

By exempting the vast majority of credit worthy owners and operators from the requirement to post a third party financial mechanism, the EPA proposal has the effect of precluding professional insurance organizations from providing any level of participation. In summary, the proposed rule thereby places the federal government and the public in the role of credit provider.

Response: In constructing the financial test EPA wanted to develop a test that would allow both firms with investment grade ratings on their bonds and also firms that do not have such ratings to qualify. As noted in the analyses supporting the rule, the risk associated with firms meeting the ratio criteria and those meeting the bond rating alternative are comparable. Under the final rule the annual public costs associated with the rule amount to less than 0.2% of the cost assured.

In the Subtitle C hazardous waste regulations requiring financial assurance, EPA has allowed both a financial test and corporate guarantee as well as third party mechanisms such as surety bonds, insurance and trust funds since 1982. In that program, owners and operators use the full range of

US EPA ARCHIVE DOCUMENT

instruments to provide financial assurance. EPA believes that the various mechanisms provide a high degree of assurance while minimizing the cost of firms providing financial assurance.

EPA also notes that after the promulgation of this regulation, there will be a number of owners and operators which will not be able to use the financial test. While EPA estimates that approximately 72 owners or operators will be able to utilize the financial test to cover at least a portion of their financial assurance obligations, there are also about 121 owners or operators who will continue to rely upon third party mechanisms to demonstrate financial assurance. Overall, EPA estimates that the value of financial assurance obligations that will not be covered by a financial test total about $1.85 billion (exclusive of the obligations of municipal governments that will need third party coverage). The private cost of the financial test, $45.6 million annually, represents the amount which EPA estimates private owners or operators will pay for third party financial assurance instruments. EPA believes that given the size of the market, third party providers of financial assurance will make individual business decisions on whether or not they will enter this market, and that this rule does not have Athe effect of precluding professional insurance organizations from providing any level of participation.@ Therefore, the Agency disagrees with the commenter=s concerns. The preamble to the final rule and response to comments above regarding the adequacy of EPA=s financial test further address this commenter=s concerns.

See also Issue Paper, Effects of the Financial Test on the Surety Industry.

Thomas, Stidham & Acree **00004**

We oppose the promulgation of the proposed regulation: 30 C.F.R. 258.74(e) ACorporate Financial Test@ for three (3) reasons:

First, we believe that the net result of the Corporate Financial Test would be to segregate owners and operators of landfills into categories of Agood risk@ and Abad risk.@ The Agood risk@ owners and operators would be able to meet the financial assurance requirements of Subtitle D through the Corporate Financial Test leaving only the Abad risk@ owners and operators as potential clients of bonding and insurance companies offering such products. The inherent adverse selection would cause those limited number of surety and insurance companies to abandon the market thus placing the remaining owners and operators at a great disadvantage and perhaps signaling an end to a large portion of the industry.

Second, we believe that the Corporate Financial Test would serve to shift the risk of unfunded post-closure care and corrective action liability to the states. This situation would most likely occur in the event of an owner or operator initially satisfying the requirements of the Corporate Financial Test and subsequently failing to do so. Once this owner or operator fails to qualify under the Corporate Financial Test, he or she is also extremely unlikely to be able to procure an alternate financial mechanism through any of the other mechanisms of Section 258.74. Having failed to do so would be a violation of the permit and regulatory requirements to maintain adequate financial assurance the owner or operator could not correct. Ultimately, the state would bear the burden of closing the landfills post-closure care and maintenance and any potential corrective action.

US EPA ARCHIVE DOCUMENT

Third, the Corporate Financial Test places the owner or operator at peril. While an owner or operator may initially qualify under the Corporate Financial Test, subsequent events may prohibit the owner or operator from meeting the required size or ratio tests. This same inability would most likely render it impossible for this owner or operator to secure an alternative financial assurance mechanism (particularly in light of the almost ensured exodus of surety and insurance companies) and thus, in effect, require the closing of the landfill.

Several states have considered and rejected similar corporate financial tests in other environmental contexts. We would urge the Environmental Protection Agency to withdraw the proposed regulation as we believe that the adverse selection to be created thereby will drive surety and insurance companies out of the market and ultimately result in a shifting of the financial obligations of remediation upon the states.

Response: EPA recognizes that State requirements can be more stringent than the federal requirements, and that in the Subtitle C program some states have elected not to adopt the financial test. However, the majority of States have adopted the financial test in the Subtitle C program and as demonstrated by the comments received on this rule from Nebraska Department of Environmental Quality and John Phillip Taylor on the Illinois experience, these rules have worked well in States that have adopted them. EPA=s regulations provide an array of mechanisms that owner/operators can utilize to demonstrate financial assurance, and EPA=s experience is that owner/operators in the Subtitle C program utilize insurance and surety bonds as a mechanism for demonstrating financial assurance.

See also analysis of comment 00002 in this section.

Van-American Insurance Company **00005**

Comment: We believe that the proposed Corporate Financial Test would have an extremely adverse impact on the surety industry and will ultimately result in a shifting of remediation costs to the states. We accordingly oppose the proposed Corporate Financial Test and urge you to join in this opposition.

We oppose the promulgation of the proposed regulation 30 C.F.R. 258.74(e) ACorporate Financial Test@ for three (3) reasons:

First, we believe that the net result of the Corporate Financial Test would be to segregate owners and operators of landfills into categories of Agood risk@ and Abad risk@. The "good risk" owners and operators would be able to meet the financial assurance requirements of Subtitle D through the Corporate Financial Test leaving only the Abad risk@ owners and operators as potential clients of bonding and insurance companies offering such products. The inherent adverse selection would cause those limited number of surety and insurance companies to abandon the market thus placing the remaining owners and operators at a great disadvantage and perhaps signaling an end to a large portion of the industry.

US EPA ARCHIVE DOCUMENT

Second, we believe that the Corporate Financial Test would serve to shift the risk of unfunded post-closure care and corrective action liability to the states. This situation would most likely occur in the event of an owner or operator initially satisfying the requirements of the Corporate Financial Test and subsequently failing to do so. Once this owner or operator fails to qualify under the Corporate Financial Test, he or she is also extremely unlikely to be able to procure an alternate financial mechanism through any of the other mechanisms of Sections 258.74. Having failed to do so would be a violation of the permit and regulatory requirements to maintain adequate financial assurance the owner or operator could not correct. Ultimately, the state would bear the burden of closing the landfill, post-closure care and maintenance and any potential corrective action.

Third, the Corporate Financial Test places the owner or operator at peril. While an owner or operator may initially qualify under the Corporate Financial Test, subsequent events may prohibit the owner or operator from meeting the required size or ratio tests. This same inability would most likely render it impossible for the owner or operator to secure an alternative financial assurance mechanism (particularly in light of the almost ensured exodus of surety and insurance companies) and thus in effect require the closing of the landfill.

Several states have considered and rejected similar corporate financial tests in other environmental contexts. We would urge you to oppose the proposed regulation as we believe that the adverse selection to be created thereby will drive surety and insurance companies out of the market and ultimately result in a shifting of the financial obligations of remediation upon your state.

A collateral purpose to this letter is to determine your position on this issue. It is important for us to know how you view these proposed changes and what course of action your state will most likely take. At the time of this writing, we are attempting to determine whether to continue our program of writing surety instruments in the municipal solid waste landfill area. Clearly, the promulgation of such a corporate financial test on a wide scale by various states will result in our decision to abandon this market. We therefore ask that you provide us as much guidance as to your state's intention to enact a corporate financial test as is possible under your circumstances.

In closing, we urge to you oppose the promulgation of the proposed corporate financial test and to share with us your state's intentions with respect to enactment of similar corporate financial test.

Response: See response to 00002 and 00004 in this section.

Environmental Compliance Services, Inc. **00011**

Comment: It is our belief that the proposed $10 million net worth requirement used as an initial screen for corporations in demonstrating financial responsibility for the cost of landfill closure, post-closure and corrective action is unnecessary. The underwriting of this class of business is almost purely financial. If the stronger, larger companies are allowed to waive the bond requirement, sureties will be left with the small financially weak companies. This would preclude most sureties

US EPA ARCHIVE DOCUMENT

from becoming involved in this already difficult product line. With little competition, the underwriting requirements will be very strict.

Response: Under EPA=s regulations several mechanisms are available for demonstrating compliance with the financial assurance requirements. These include trust funds, surety bonds, letters of credit and insurance. Even without the availability of a financial test, companies would seek to comply with financial responsibility requirements using the least expensive mechanism, and sureties would therefore have to compete with other providers of financial assurance. Some of these providers may therefore face fewer pricing restrictions and so may be in a position to compete well for the business of larger, stronger companies. Therefore, there is no evidence that even in the absence of a financial test that any class of provider can expect to garner the business of the financially strongest companies.

Although the financial test may reduce the number of potential customers for the surety industry, a large pool of firms unable to use the financial test will remain as potential customers of the surety industry. In addition to larger firms that cannot pass the financial test, firms that can pass the financial test but do not qualify to use it for all of their obligations and smaller firms with a net worth of less than $10 million will also need to obtain third-party financial assurance. The private cost of the financial test is a direct measure of the cost for private owners and operators of MSWLFs of obtaining financial assurance from third parties such as sureties. While EPA estimates that financial test 562-10a is available to cover 71.67 percent of the estimated $7 billion in obligations, this still leaves approximately $1.85 billion in obligations that EPA estimates private owners or operators will spend approximately $45.6 million to assure. These firms would not be appropriate candidates for self-insurance, but are not necessarily financially weak, as the failure rate for these smaller firms is approximately 1.6 percent. The combination of small firms that cannot satisfy the net worth requirement of the financial test and larger firms that cannot satisfy other financial test requirements, should support a sufficient market for third-party financial assurance mechanisms.

See Issue Paper, Effects of the Financial Test on the Surety Industry, and response to comments 00002 and 00004 in this section.

Land and Lakes Company **00024**

Comment: 1) Overall, the proposed rule strongly discriminates in favor of the largest firms operating in the MSWLF industry. This discrimination adversely affects smaller, financially sound corporations which do not pose greater risk to environmental safety, especially if they secure their environmental obligations. The proposed rule creates and maintains artificial barriers to entry, (i.e. increased minimum financial size thresholds for mere entry into this market), and as such would have a decidedly anticompetitive effect. While the proposed rule may have at its heart a desire to improve environmental safety, it is not clear that increasing barriers to entry without providing for more financially and economically sound mechanisms of financial assurance actually will increase environmental safety, however, it will have clearly detrimental effects on competition.

US EPA ARCHIVE DOCUMENT

Increased competition keeps profit margins lower. By raising the barriers to entry to an industry, smaller firms are forced out. As competition is reduced, the survivors should be able to charge more. Industry analysts expect Regulation D requirements to decrease competition, and increase acquisitions resulting in higher profits for the surviving larger firms.

Response: The test is available for any firm which meets ratio requirements and has greater than $10 million in net worth. For obligations which cannot be covered, firms must use a third-party mechanism. Analysis by the Agency of smaller companies disclosed that many firms with smaller net worths nevertheless had closure and post-closure obligations greater than net worth or liabilities, thereby influencing bankruptcy and implying obligations are not accounted for in liabilities.

The Agency does not rely only on measures of net worth in determining which firms pass the financial test. The Agency proposed this minimum net worth as an initial screen for corporations in demonstrating financial responsibility for the very large costs of closure, post-closure care, and corrective action. Firms with more than $10 million in net worth are less likely to go bankrupt than firms with less than $10 million in net worth, and the model supporting this rulemaking has a lower rate of misprediction for firms with more than $10 million in net worth. See Exhibit 1 of Issue Paper, Relevant Risk Factors to Consider in a Financial Test. In addition to meeting the net worth threshold, companies must meet other financial requirements (i.e., ratios test or bond rating standards) to pass the financial test. If a firm which does not have investment grade bond ratings, it must demonstrate that it has a low debt to equity ratios (<1.5) or a high ratio of cash flow to liabilities (Cash Flow - $10 million / Total Liabilities > 0.1). These ratios are very strong in terms of their ability to screen out firms that will enter into bankruptcy.

Finally, the Agency does not consider the financial test a barrier into the solid waste industry. Firms that cannot pass the financial test may demonstrate financial responsibility using any of the other third-party mechanisms authorized by the Subtitle D regulations. These mechanisms, while more expensive than the financial test, are not prohibitively expensive. The Agency estimates the average cost of a third-party mechanism to be about two percent of total closure and post-closure costs per year.

See also the preamble to the final rule and response to comments in section I.A.1.a above.

William R. Lambert **L0003**

Comment: Selection Against the Surety (Adverse Selection)

Although surety companies are closely related to the banking industry in that they extend credit to their principals, the various states regulate the rates charged by surety companies to ensure that the rates are not inadequate, insufficient, or unfairly discriminatory. A bank may analyze various customers and charge different interest rates based on the credit worthiness of the customer. In general, surety companies may not do this. An undertaking by a surety carries the same rate regardless of the financial strength of the customer.

US EPA ARCHIVE DOCUMENT

Since sureties may not adjust their rates on an individual customer basis, sureties must find other ways to handle the credit needs of those that need bonds. There are three ways that sureties control their risk. First, a surety may decline the marginal customer. The customer that truly does not qualify for credit should not receive credit for it puts the surety company at risk and misleads the public by vouching for the creditworthiness of the principal. Second, a surety may require collateral to assume a risk. In this case, more collateral is required from the financial weaker principal than from the stronger client. (Some sureties have rate filings that allow them to offer lower rates for those customers that collateralize all or some of the bond.) Third a surety may provide bonds to all those risks within a class that meet minimal underwriting requirements. Since all of the members of the class need the credit, a surety may offset some of its losses on weaker, but acceptable, risks by profits on stronger risks.

A plan that exempts the strongest members of a class from obtaining credit but requires the weaker members to obtain credit is referred to as selection against the surety or adverse selection. Since the strongest members of the class are excused form obtaining credit, the surety is trying to find the best customers from a pool that has only been stocked with the weakest members. Sureties must raise underwriting standards because the percentage of likely losses is increased. Since there is less premium generated to cover overhead and losses, higher rates of collateral are needed. Rates for this type of risk must also be raised to cover overhead and potential losses. Raising the rates may make the surety alternative so costly that it is no longer an option for the small customer.

The problems of adverse selection is compounded when there are relatively few potential customers. If the potential customer base is too small to support the minimum overhead needed to adequately obtain, underwrite, and adjust claims for the class of business, sureties will generally look to other types of risks rather than be a market for adverse selection business.

Response: After the promulgation of this regulation, there will be a number of owners and operators which will not be able to use the financial test. While EPA estimates that approximately 72 owners or operators will be able to utilize the financial test to cover at least a portion of their financial assurance obligations, there are also about 121 owners or operators who will continue to rely upon third party mechanisms to demonstrate financial assurance. Overall, EPA estimates that the value of financial assurance obligations that will not be covered by a financial test total about $1.85 billion (exclusive of the obligations of municipal governments that will need third party coverage). EPA believes that given the size of the market, third party providers of financial assurance will make individual business decisions on whether or not they will enter this market, and that this rule does not have the effect of precluding professional insurance organizations from providing any level of participation. Therefore, the Agency does not believe that the commenter=s concerns regarding a negative impact on the surety industry are valid. Further, EPA does not believe the commenter=s concerns warrant precluding the regulatory flexibility and relief reflected in the financial test.

See also the response to other comments in this section.

US EPA ARCHIVE DOCUMENT

IX.A. General Support for Financial Test

Commenters supporting the proposed test noted that the test provides owners or operators a less expensive alternative to comply with financial assurance requirements. It was also noted that a uniform and standard format for the financial test under both Subtitles C and D facilities would provide a more efficient administrative process for States.

Browning-Ferris Industries **00010**

Comment: BFI believed that the Agency has developed a corporate test that is both pragmatic and effective. These two mechanisms will allow financially sound corporations to provide credible assurance that the costs of post-closure care and known corrective action costs will be provided for without having to resort to costly trust funds or third party mechanisms (e.g., surety bonds, letters of credit, etc.)

Response: Comment noted.

Coors Brewing Company **00014**

Comment: Specifically, this proposed rule would add two financial assurance mechanisms to those currently available to assure that closure, post-closure, or corrective action costs associated with municipal solid waste landfills operated under Subtitle D. These additional financial assurance mechanisms would justifiably place the financial responsibility of closure, post-closure or corrective action costs on the owner or operator of the municipal solid waste landfill. Thus it will: (a) avoid stretching existing federal or state cleanup authorities and (b) provide needed comfort to generators of municipal solid waste. Coors therefore supports the proposed rule.

Response: Comment noted.

Nebraska Department of Environmental Quality **00016**

Comment: NDEQ accepts the proposed rules as written. The Corporate Financial Test and Corporate Guarantee has been used in the NDEQ - RCRA Section financial assurance program successfully and NDEQ believes that keeping a uniform and standard format provides for a more efficient process in administering financial assurance programs.

Response: Comment noted.

John Phillip Taylor **00022**

Comment: I support the proposed addition of a corporate self-insurance test and guarantee to the Subtitle D financial assurance requirements. In my state, Illinois Solid Waste rules and regulations

US EPA ARCHIVE DOCUMENT

contain a similar self-insurance mechanism that is nearly identical in substance to the current RCRA Subtitle C rule. Illinois has not experienced any losses or difficulties with this rule since its promulgation in 1985. Although the proposed rules are different from the Illinois rule in form, the result is nearly identical and should provide adequate protection to the public.

Response: Comment noted.

US EPA ARCHIVE DOCUMENT

IX.B. General Opposition to Financial Test

Many commenters stated that a financial test is not an appropriate financial assurance mechanism because no funds are set aside and no monies are available should the financially responsible organization refuse to or be unable to pay for its obligations. Commenters also noted that the financial test is nearly impossible for state regulatory agencies to audit. Other commenters stated that the financial test requires the least amount of real dollars and that owners and operators, as they approach closure, may be able to transfer their assets, leaving the taxpayer responsible for the costs. Some commenters were concerned that the financial test presents an unfair competitive advantage for large corporations over small businesses, who are required to obtain otherwise more costly mechanisms. A commenter also noted that an owner or operator who initially satisfies the requirements of the financial test and subsequently fails to qualify would be unlikely to be able to obtain an alternate financial mechanism, leaving the taxpayer with the burden. One commenter observed that the existing rule already provides states with the flexibility to provide a financial test.

Asset Guarantee Insurance Company **00003**

Comment: The above-captioned proposal (the AProposal@) which would allow municipal solid waste owners and operators to be exempted from the posting of third party instruments to satisfy their Subtitle D financial assurance mechanisms can be expected to place the Federal Government and the taxpayers in substantial financial risk.

Exemption from third-party financial assurance mechanisms for post-closure is particularly troubling. The timetable for post-closure care and maintenance is measured in decades, long after the landfill is no longer active. If the owner or operator fails to financially reserve for the full post-closure costs during the landfill's useful life, what possible assurance does the Agency have as to the availability of financial resources to perform these responsibilities other than third-party financial assurance mechanisms.

Insurer of Last Resort

If the Agency views its role as "insurer of last resort" whereby it implicitly recognizes that in the ultimate, notwithstanding the financial ratio tests, a certain number of companies will result in losses to the taxpayer, then the Agency must charge an adequate insurance premium for accepting the risk. Absent an off-setting premium funded loss reserve fund, the Agency's Proposal will result in significant net cost to the taxpayer.

We can only presume that the Agency through its Proposal is trying to be responsive to the landfill owners and operators Aneeds@. The Proposal is broad and encompassing. If enacted, notwithstanding the intentions of the Agency, it is tantamount to allowing the landfill industry to police itself. The down-side risk under such a scheme is the public.

Various financial schemes and offshore captive reinsurance proposals have been proposed by landfill companies which purport to fund for the subtitle D obligations. The ability to properly evaluate

US EPA ARCHIVE DOCUMENT

these mechanisms and their concomitant risks may be beyond the scope of the Agency. Even investment grade companies' risks may not be investment grade.

Third-Party Mechanisms are Regulated

The letter of credit, insurance and surety bond financial assurance mechanisms provide the Agency and the public with a certainty that the subtitle D financial obligations will be met. The third-party providers are government regulated, independently audited professional risk management institutions. These institutions are equipped to evaluate, structure and manage the subtitle D obligations which in the alternative would fall to the Agency and the public. The abilities of these firms to pay financial claims are demonstrated and known.

The creation of an exempt class landfill operator by the Proposal effectively nets a universe of high, speculative risk landfill operators which must procure third-party financial assurance. Although it would be unlikely that every landfill company might obtain financial assurance through bonds or insurance, relegating only the speculative cases to the private sector providers would naturally preclude them from being willing to making a market under the conditions of adverse selection.

Conclusion

We hope the Agency withdraws the Proposal. We do not believe a formula of simple or compound financial tests, can be developed to assure compliance for the subtitle D financial obligations.

Response: EPA=s financial test relies on the financial health of a firm, rather than of a particular landfill to determine eligibility for the financial test. Generally, for any firm to use the financial test it must have financial statements bearing an unqualified opinion from the independent certified public accountant. Part of the requirement that a firm receiving an unqualified opinion is that it be a Agoing concern.@ This means that the firm is expected to continue its operations and is not expected to liquidate. In addition, the firm must pass the ratio requirements or the bond rating alternative which implies substantial resources for post-closure care.

EPA looked at the mispredictions from the financial test and computed public and private costs for the various tests as well as the public and private costs of not allowing a financial test. EPA=s analysis concluded that with the financial test the sum of public and private costs is less than half the cost of not allowing a test.

Under the test, landfill owners and operators must maintain records demonstrating that they meet the requirements of the financial test. If an owner or operator no longer meets the requirements of the test, the company must obtain an alternative within 120 days of the close of the fiscal year. EPA believes that owners or operators complying with the requirements of the financial test represent a small public cost in exchange for substantial savings in compliance costs.

Under its regulations EPA allows a limited number of mechanisms for demonstrating financial assurance. As part of promulgating this regulation, EPA examined the annual assurance risk for the financial test and estimated that it ranged from 0.233% to 0.644%. See Exhibit 1, Issue Paper, Relevant Risk Factors to Consider in a Financial Test.

US EPA ARCHIVE DOCUMENT

Many firms will be unable to utilize the financial test. While EPA estimates that approximately 72 owners or operators will be able to utilize the financial test to cover at least a portion of their financial assurance obligations, there are also about 121 owners or operators who will continue to rely upon third party mechanisms to demonstrate financial assurance. Overall, EPA estimates that the value of financial assurance obligations that will not be covered by a financial test total about $1.85 billion (exclusive of the obligations of municipal governments that will need third party coverage). EPA believes that given the size of the market, third party providers of financial assurance will make individual business decisions on whether or not they will enter this market, and that this rule does not have the effect of precluding professional insurance organizations from providing any level of participation. Therefore, the Agency does not believe that the commenter=s concerns regarding a negative impact on the surety industry are valid.

Frieh Insurance Corporation **00008**

Comment: The issue of closure, at a future non-specific date, cannot be left to subjective interpretation at that future. Actual and available funding must be developed prior to the actual need. The corporate financial test, while well meaning, could create a significant shortfall of funding at closure. The final source of closure funds would be the residents of the state in which closure occurs. Without their knowledge and consent the ultimate goal of an environment closure might not occur without undue delays and additional expense.

I urge you to reject the proposed rule change.

Response: The Agency notes that in order to use the financial test, the owner or operator must demonstrate annually that it meets its requirements. Under 258.74e)(2)(iii) the owner or operator must update the information in the operating record within 90 days following the close of the fiscal year. In addition, the owner or operator of a MSWLF must annually update the cost estimates for closure, post-closure care, and corrective action for inflation (See existing 40 CFR 258.71(a), 258.72(a) and 258.73(a)). The test ratios or investment grade bond rating requirements assure that the imposition of these closure obligations will not cause bankruptcy of the firm, and the annually updating of the financial tests and cost estimates ensures that the owner or operator will be able to afford the closure.

Michigan Department of Natural Resources **00012**

Comment: The MDNR opposes the concept of allowing a corporate financial test to meet the financial assurance requirements for MSWLF's. A corporate financial test is not an appropriate alternate mechanism for the following reasons:

1. **A financial test does not provide a state or the U.S. EPA with the same level of financial assurance as other mechanisms.** The language of 40 CFR 258.74(l) presently requires that a financial assurance mechanism, "ensure that the amount of funds assured is sufficient to cover the costs of closure post-closure care, and corrective action for known

US EPA ARCHIVE DOCUMENT

releases when needed." A financial test does not provide this assurance. The proposed "financial test" is only an indirect measure of the sufficiency of funding for closure, post-closure, and corrective action.

2. **A financial test does not provide a state or the U.S. EPA access to funds to complete closure, post-closure, or corrective action should the financially responsible corporation refuse to take the needed actions.** The presence of corporate funds do not assure completion of required activities or allow a state or the U.S. EPA to access such funds to complete such activities. The only recourse to a state or the U.S. EPA would be a lengthy and costly lawsuit with the owner or operator.

3. **A financial test in nearly impossible for state regulatory agencies to audit, given existing resources.** Although a state regulatory agency can review the language and wording of other financial mechanisms, compliance with the proposed financial test relies an the Aopinion@ of an independent certified public accountant. The experience of MDNR is that even independent certifications are slanted to the benefit of the owner/operator to the maximum extent allowed by law.

4. **Use of a financial test by more financially stable corporations will increase the risk to financial institutions providing assurance for the remaining facilities.** This result is likely to make other financial mechanisms more costly and difficult to obtain.

5. **The presence of a financial test presents an unfair competitive advantage for large corporations over small businesses attempting to compete with such corporations.** Michigan law requires that as part of development of any administrative rule, state agencies prepare a small business economic impact statement which includes, in part, all of the following:

   a. A statement regarding whether the proposed rules will have a disproportionate impact on small businesses because of the size of those businesses.

   b. The ability of small businesses to absorb the costs of compliance without suffering economic harm and without adversely affecting competition in the marketplace.

   c. A statement regarding how the agency reduced the economic impact on small businesses, or a statement regarding why such reduction was not feasible.

In this case, MDNR will need to report that the proposed financial test, if adopted, will have a disproportionate impact on small business because of their size, will not provide the ability for small business to absorb the costs without affecting competition in the marketplace, and will provide no means of reducing the economic impact to small business. Such a report will endanger the state's ability to pass legislation and rule amendments necessary to comply with RCRA.

US EPA ARCHIVE DOCUMENT

6. **The existing rule already provides the flexibility for individual states to provide a financial test.** If a state determines that a financial test serves part or all of the state's financial assurance needs, such a test can already be approved under the provisions of 40 CFR 258.74(i) if the U.S. EPA thinks such a test meets the performance standard of 40 CFR 258.74(l).

Response: As noted in the Background section to the proposed rule, commenters on the August 30, 1988 proposed Subtitle D criteria supported the development of financial tests for local governments and for corporations. On November 27, 1996 EPA published in the Federal Register the final rule that allows local governments to utilize a financial test or guarantee to demonstrate financial assurance. Promulgation of this rule extends to private owners and operators of MSWLFs the same flexibility afforded to local governments that own or operate MSWLFs.

The Agency notes first that while it is promulgating today=s rule, this action does not prevent States that oppose use of a financial test from not adopting such tests. As noted in Section V of the preamble to the final rule, States may choose to regulate more stringently than the minimum federal requirements in Part 258. Thus, States may decline to adopt options under this final rule that they deem undesirable. States that have previously adopted Federally-approved financial assurance requirements without this financial test and guarantee are not required to take any action and may elect to retain only their current options. Further, such States may choose to establish their own financial assurance programs so long as they meet the minimum financial assurance requirements in the Federal performance criteria detailed in the October 9, 1991 final rule. (See existing ' 258.74(i))

The Agency responds to the commenter=s additional points as follows:

1. In evaluating the financial test EPA assessed its public cost and examined the level of misprediction. EPA found that the financial test is a very accurate predictor of firms which would enter bankruptcy and would thereby minimize potential public costs. In promulgating this rule, EPA provides a mechanism that owners or operators operating under the federal program can use to demonstrate financial assurance.

2. Even without financial responsibility requirements of any type, owners and operators would be required to conduct closure and post-closure and core corrective action activities. Should a financially responsible company refuse to take actions the State Director has the same enforcement tools available to ensure compliance with closure, post-closure and corrective action obligations as for the rest of the program.

3. The financial test should not be a burden to States reviewing financial mechanisms. As part of their recordkeeping owners/operators must have an audited set of financial statements which have an unqualified opinion. The vast majority of financial statements receive such an opinion. The ratios used in the financial test are straightforward to verify and the bond rating alternative is also easily verified through a telephone call to the rating agency. These mechanisms represent no greater hurdle in verification than the other mechanisms.

US EPA ARCHIVE DOCUMENT

4. After the promulgation of this regulation, there will be a number of owners and operators which will not be able to use the financial test. While EPA estimates that approximately 72 owners or operators will be able to utilize the financial test to cover at least a portion of their financial assurance obligations, there are also about 122 owners or operators who will continue to rely upon third party mechanisms to demonstrate financial assurance. Overall, EPA estimates that the value of financial assurance obligations that will not be covered by a financial test total about $2 billion (exclusive of the obligations of municipal governments that will need third party coverage). Further, the Agency does not believe that these owners and operators are Apoor risks.@ The financial test is a screen of those firms more likely to go bankrupt. It does not determine credit worthiness, nor does it provide an absolute determination of which firms will fail. The Agency believes that given the size of the market, third party providers of financial assurance will make individual business decisions on whether or not they will enter this market, and that this rule does not have the effect of precluding professional insurance organizations from providing any level of participation. Therefore, the Agency does not believe that the commenter=s concerns regarding a negative impact on the surety industry are valid.

See also response to comments in section VIII above.

5. EPA=s financial test does not change the obligations of businesses which do not qualify to use it. All owners and operators of municipal solid waste landfills, excepts owners or operators who are state and federal entities whose debts and liabilities are debts and liabilities of a State or the United States, must establish mechanisms to demonstrate financial assurance. This regulation extends to private owners and operators the ability to use a financial test to provide financial assurance that EPA has already extended to local governments. In the local government test, EPA limited the amount of obligations that could be covered to 43 percent of the local government=s revenue. In the proposal the additive requirement of requiring a tangible net worth of $10 million more than the amount to be assured serves a similar function.

For the final rule EPA examined the firms with lower net worth and compared the financial information on those firms with the estimates of closure and post-closure costs. This examination found that frequently firms with lower net worths had closure costs that were substantially in excess of both their liabilities and their net worth. Both of these factors are significant. First by having closure costs that are higher than liabilities demonstrates that these firms have not reflected these large costs fully on their balance sheets. As such, the liabilities for these operations can be understated, and their net worth correspondingly overstated. Second, by having net worths that are less than the amount of these obligations, incurring these obligations could by itself force a firm into bankruptcy.

EPA also examined the competitive effects of the financial test in evaluating the merits of the rule. This investigation found that financial assurance costs through a third party mechanism were in the range of two to three percent of the cost of landfill operation. The per ton costs were also often lower than the costs for transferring waste or transporting it longer distances. Issue Paper, Market Effects of the Financial Test. Since the risk of extending the financial test to firms with lower net worth was substantial, and the competitive effects caused by the financial tests do not appear to be substantial, EPA retained a $10 million net worth requirement in the final rule.

US EPA ARCHIVE DOCUMENT

The provision of the rule that requires a firm to have at least $10 million in tangible net worth over the amount of environmental obligations being covered ensures that firms that have not recognized their obligations as liabilities will still have adequate net worth to fulfill their obligations. However, if a firm has already recognized all of its environmental obligations as liabilities, it could demonstrate less ability to cover them through the financial test than if it had not recognized them as liabilities. EPA received comments that the additive requirement would have an impact on small owners or operators and effectively required a higher coverage ratio for them. To address these concerns, and to assist smaller owners or operators who have already recognized their environmental obligations as liabilities, EPA is establishing a special provision. Under this provision, a firm that has recognized all of its MSWLF closure, post closure care, or corrective action liabilities under 40 CFR 258.71, 258.72 and 285.73, obligations associated with UIC facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, PCB storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265 can utilize the financial test if it meets the other requirements of the test, receives the approval of the State Director, and still maintains a tangible net worth of at least $10 million plus the amount of any guarantees it has undertaken that have not been recognized as liabilities. See ' 258.74(e)(1)(ii)(B). This addition of any guarantees is necessary because EPA does not expect that a guarantee extended by a corporation will appear on that company=s financial statement until it is drawn upon and is recorded as a liability. In addition, the Agency believes that the additional flexibility allowed by this provision creates an incentives for owners or operators to fully recognize their environmental obligations in their audited financial statements.

6. While the existing rules provide the flexibility for individual states to provide a financial test, States requested that EPA develop such a rule. Having a federal rule provides the benefits of such a rule in areas where a State is not operating the program, provides a potential template for States wishing to establish a financial test, and can lead to greater national consistency in the structure of financial tests.

The Solid Waste Association of North America 00013

Comment: Our comments are divided into two categories. The first category questions the position of the Agency to add additional financial assurance mechanisms for owners and operators of municipal solid waste landfills for the costs of closure, post-closure care and corrective action. The second category includes specific comments on the proposed corporate financial assurance test.

CATEGORY 1

SWANA fully supports regulations that establish reasonable requirements for financial assurance for closure, post-closure care, post-closure environmental monitoring, and post-closure corrective action. SWANA believes that the utilization of trust funds offers the most fair and equitable means to assure the availability of adequate and guaranteed funds at the time they are needed. Trust funds provide a funding method whereby the issue of ownership is not a factor.

US EPA ARCHIVE DOCUMENT

US EPA ARCHIVE DOCUMENT

Trust fund deposits can be raised through direct charges to the users of a disposal facility, who in turn will direct those charges back to the generators. Thus, the generators of the solid waste will pay all costs associated with current disposal as well as long term security of the disposal facility.

Owners who do not charge a gate fee can still annually provide deposits into a trust fund for the variety of activities requiring financial assurance. In the case of either the public sector or the private sector, those funds would come from the revenue sources that are the basis for their annual operating budgets.

A trust fund should be established for all closure and post-closure activities and should be funded based on a financial plan for the life of the facility. The plans should include the investments of deposited funds in secure assets and restrictions on withdrawal and use of the funds and their earnings.

In order to assure the complete integrity of the trust funds, state agencies and Indian Tribes should be authorized to maintain oversight over all funds established. While the funds would remain in the administrative and management hands of individual facility owners, their integrity must be assured. Much like a banking regulatory agency, state governments should establish rules and policies for the administration of such funds, provide oversight on establishing deposit dates for the fund, and see that the rules and policies are followed by those who have established the trust funds. The organization establishing a trust fund should have reasonable discretion to supervise and manage the funds subject to limitations necessary to protect the fund. When the post closure term is completed and all obligations complete, any balance of monies remaining in the fund should be returned to the organization establishing the fund.

CATEGORY 2

As stated in Section II of the proposed rule, AThe purpose of the financial assurance requirements of the MSWLF criteria was to assure that adequate funds will be readily available to cover the costs of closure, post-closure care and corrective action associated with MSWLF.@ In short, SWANA does not believe that the rule as outlined can provide this assurance.

SWANA finds that the rule as presented:

1. Places faith in a company based on a measure that does not represent an owner/operator's ability to pay for closure/post closure cost;

2. Does not make any provision to guarantee the availability of assets to pay for closure/post closure costs; and

3. Significantly limits who can own and/or operate a MSWLF.

OTHER

SWANA is concerned that owners and operators, as they approach closure and post closure, may be able to simply transfer their assets to a parent, grandparent, or sibling organization, leaving the local, state or federal government responsible for these costs. Because the owner or operator never had to put away a real dollars' there is no easy place to look for the money needed for closure and post closure costs.

SUMMARY

The proposed rule as written does not provide adequate means to assure that funds will be available to provide for closure and post closure costs, as it relies on the measure of a company's tangible net worth (which is based on assets, none of which have to be liquid) to provide assurance. At a minimum, this rule should require any owner/operator to provide pledged, liquid assets for all of the costs they are seeking to assure over a specified period. Only in this way will financial assurance be achieved.

Response: The Agency disagrees with the commenter and responds to each of the categories as follows:

Category 1.

The Agency does not consider the commenter=s suggested trust fund mechanism to be a viable method for demonstrating financial assurance. Under this plan the settler of the trust would become the trustee as well. In other words, rather than an independent third party overseeing the trust, the owner or operator would undertake this role. Under EPA=s current regulations, 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. To retain oversight of the trustee could require states or EPA to examine the operation of the owner/operator from a trust perspective. Under such a scheme a State would have to undertake the examination of additional trustees. Moreover, the advantages of a third party providing assurance is lost since the owner or operator would have control over the trust funds. EPA does not consider such a scheme to be a viable method for demonstrating financial assurance. For additional analysis of this concept please see Issue Paper, Assessment of First Party Trust Funds.

Category 2.

The financial test provides a measure of the financial viability of a company. EPA has estimated the accuracy of the test. Companies passing the ratios or having an investment grade bond rating have a low rate of bankruptcy or default on their obligations. Further, the test=s net worth requirement ensures that fulfillment of closure and post-closure obligations won=t cause bankruptcy.

The Agency does not favor the use of a liquidity measure because it appears that liquidity can be a misleading predictor of bankruptcy. This is because a firm in financial distress can liquidate its assets and appear more liquid even as potential creditors are less willing to advance credit. Under

US EPA ARCHIVE DOCUMENT

these circumstances a test incorporating liquidity could result in a misleading conclusion about the firm=s financial stability.

The financial test does not limit who can own or operate a MSWLF. The financial responsibility rules provide several mechanisms for owners and operators to demonstrate financial assurance, one of them being the financial test. A firm does not have to pass the financial test to own or operate a MSWLF.

Other

There are three disincentives to the action of transferring assets for the purpose of avoiding closure and post-closure costs. These issues are discussed in Issue Paper, Assessment of First Party Trust Funds.

William R. Lambert **L0003**

Comment: My first comment concerning the proposed rule is to point out the apparent conflict indicated in the proposed rule Part 11 (Background) under part IV (Section-by Section Analysis of Proposed Subtitle D Provisions), Subsection A. (Corporate Financial Test), Subpart 1. (Financial Component).

The Background Section states:

> AThe purpose of the financial assurance requirements of the MSWLF criteria was to ensure that adequate funds will be readily available to cover the costs of closure, postclosure care, and corrective action associated with MSWLFS.@

Part IV.A.I. states:

> AThe financial component is designed to measure viability of the owner or operator, *based on its current financial condition@* (Emphasis added)

It appears the proposed financial test will allow current conditions to be extrapolated to a time possibly decades in the future.

While the use of surety bonds or insurance policies rely on third party guarantors that are regulated by state agencies and in the case of surety companies on the Federal Treasury List, whose financial strength and size of guarantee issued is subject to the U.S. Treasury department review, the use of financial means test relies on current conditions of an entity that is unregulated as to its financial strength and is not limited by the Treasury Department in the size of obligation it may guarantee.

In Section IV.A.2(f) Current Financial Test {Proposed ' 258.74(e)(2)(vi)}, a hypothetical situation is described wherein the Owner/Operator might become subject to a large judgment and cause a State Director to question whether or not the Owner/Operator would continue to qualify under the financial

US EPA ARCHIVE DOCUMENT

means test. In the event the Owner/Operator no longer qualifies using the financial means test, the State Director would require alternative financial assurance. The logic in this makes a number of assumptions that in all probability would be unfounded.

Because the Owner/Operator would not qualify for the financial means test, either insurance or a surety bond would probably be sought. In both cases, the third party guarantor would also look at the financial strength of the proposed insured (insurance policy) or principal (surety). Because the Owner/Operator would be seeking a third party guarantee at a time when its financial strength was impaired, it is less likely a policy or bond would be available. In the case of the example given, i.e. a large judgment, one would presume that the judgment was over an above liability insurance carried by the Owner/Operator. If this is the case, the Owner/Operator would be asking an insurance carrier to assume a sizable financial risk when the insured's financial strength is impaired and just after the prospective insured has caused an insurance carrier a substantial loss.

If a bond or insurance policy is not available, the Owner/Operator would probably have to use a trust fund. Since, no contributions would have been made to a trust fund since the Owner/Operator would not have been required to fund a trust while it qualified under the financial means test, the trust would have to be funded at a level equal to the amount that would have been accumulated had contributions been made during the time the financial means test satisfied the financial assurance requirement. Because the financial strength of the Owner/Operator may have been severely impacted, debt financing to fund the trust fund may be unavailable. This would require the Owner/Operator to fund its trust fund form its operating cash or through the sale of needed assets.

The end result of an Owner/Operator that no longer qualifies under the financial means test may be bankruptcy with the State required to cover the cost of closure, postclosure care, and/or corrective action.

Using an insurance policy or bond to cover the cost of closure and postclosure care ensures that the amount of money needed for these costs, up to the policy or bond limits, will be there when needed. The insurance companies and sureties are regulated or analyzed by state and federal agencies to ensure that the companies meet prescribed standards and that they do not undertake activities that might put them at risk. The review of the insurance and surety companies looks at the quality and quantity of assets, the liabilities incurred, and the claim practices of the carriers.

Using a financial means test or a corporate guarantee would not consider the appropriateness of investments by the Owner/Operator or its guarantor nor is there consideration given to the response of the guarantor if a claim should arise. Regulated insurance companies and sureties must take those actions prescribed by law when faced with a claim. 'Tossing the keys to the claimant' is not one of the options of an insurance company or a surety company. In the event of a major claim against an Owner/Operator or its guarantor, the non-regulated guarantor may consider this option.

The proposed 258.74(e)(1)(i)(A) will allow the Owner/Operator the opportunity to refrain from posting financial assurance if its debt securities carry an investment grade rating as determined by Moody's or Standard and Poor=s. While both of these services are leaders in their field, using their rating to allow an Owner/Operator to satisfy their financial assurance requirement without

US EPA ARCHIVE DOCUMENT

accumulating funds or obtaining a surety bond or insurance policy again violates the purpose of the financial assurance requirement. AThe purpose of the financial assurance requirements of the MSWLF criteria was to ensure that adequate funds will be readily available to cover the costs of closure, postclosure care and corrective action associated with MSWLFs.@

Using the Moody=s or Standard and Poor=s rating presents three serious shortcomings. First, it uses current financial strength to predict decades in the future. Second, it relies on the assumption that an investment grade rating on a bond that may be only a fraction of the amount of financial assurance needed by the Owner/Operator is an indication that the Owner/Operator can meet the much larger financial needs many years into the future. Third, neither Moody=s nor Standard and Poor=s have any obligation to pay money to the State or U.S. EPA in the event the Owner/Operator is unable to satisfy its obligations. Both an insurance company and surety company back up their decisions with cash.

The only safe way to obtain the needed financial assurance is to require an insurance policy or surety bond to meet the financial assurance requirements. Although the use of a trust fund does not provide adequate protection in the early years of operation, the use of a trust fund does allow for monies to be set aside for the specific use of closure and postclosure care costs. All of the other alternatives make the assumption that current conditions will not change over many decades and that if they do change, the Owner/Operator will still be able to acquire alternative financial assurances. If either of these assumptions prove to be false, the states will have major MSWLF closure and postclosure care costs with which they must contend.

Response: The Agency responds to the comment regarding the ability of the financial test to predict future financial stability by noting that the financial test is an annual demonstration of financial strength. The test is intended to screen out those firms most likely to fail within three years of taking the test. The Agency chose the three year period because it believes that this time period would ensure that a firm failing the test would have sufficient credit worthiness to obtain third-party coverage of its obligations.

The Agency considered the commenter=s concerns regarding the use of bond ratings as an alternative for a financial test, but remains convinced that bond ratings provide an adequate measure of firm financial strength. EPA analyzed the default rates on bonds which had originally received investment grade ratings, and examined the default rates for bonds that currently have an investment grade rating. (See Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test). This review shows that over a twenty-year period, bonds rated as investment grade originally made prompt payment of the principal and interest (i.e. they were not in default) in over 93 percent of the cases. When looking at the default rate on bonds over a shorter period the default rate is much lower (4 percent over a thirteen year period). This is particularly relevant to the financial test which requires an annual update.

The commenter noted that neither Moody=s nor Standard and Poor=s would be financially liable if an owner or operator were to go bankrupt, implying that this lack of financial responsibility makes their rating decision-suspect. Again, the Agency does not find the commenter=s argument persuasive. As noted in the Issue Paper on Bond Ratings (Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test), bond ratings have been reliable predictors of default for

US EPA ARCHIVE DOCUMENT

several years. In addition, the future demand for rating services depends upon their continued ability to provide investors information on the quality of bonds and to facilitate operation of the bond markets. Thus, EPA believes that they have a financial incentive to continue to ensure accurate ratings.

The Agency also does not agree with the commenter that the only safe financial assurance can be provided by an insurance policy or surety bonds. The Agency conducted analyses specifically evaluating the relative assurance risks posed by all of the mechanisms proposed for use by owners and operators of MSWLFs. (See Issue Paper, Assessment of Financial Assurance Risk of Subtitle C and D Corporate Financial Test and Third-Party Financial Assurance Mechanisms.) The analysis concluded that, despite some variation in assurance risks, all of the proposed mechanisms provided acceptable and substantially equivalent degrees of financial assurance. The Agency notes also that alternative mechanisms similar to those available to Subtitle D owners and operators have been available to owners and operators of Subtitle C facilities since 1980. Many of those owners and operators have availed themselves of the letter of credit option; the Agency has no evidence to suggest that this alternative has failed to perform as intended.

See also responses to comments 00003 and 00012 above in this section and comment 00003 in section III.A.2.

US EPA ARCHIVE DOCUMENT

IX.C. Other Issues

One commenter proposed a "hybrid trust fund" mechanism as an alternative financial assurance mechanism. Another commenter suggested that the Agency streamline its regulations by including the same requirements for MSWLF and hazardous waste landfill owners and operators in a single CFR section.

Frieh Insurance Corporation **00007**

Comment: The agency's position on this matter is clear regarding the factoring of the future of value of funds towards the ultimate closure costs of MSWLFs.

As an alternative to this process, we have propose a derivative of this concept using a financial guaranty bond that we have titled The Municipal Solid Waste Landfill Guaranty Bond. (TMSWLGB).

Briefly, we will provide a surety instrument from a Treasury listed surety that will name, as obligee, either the EPA or the approved state. The penal amount of the bond will be equal to the initial closure value of the MSWLF and the term of the bond will be equal to the time to closure.

In conjunction with the trust fund mechanism, the principal will deposit funds, as collateral, equal to the present value of closure funds based upon the model above. Funds will be invested in Federally secure instruments and allowed to compound through maturity. At time of closure, the accumulated funds will be substituted for the bond and either the EPA or approved state will apply same towards closure pursuant to the accepted regulations in place at time of closure.

Positive benefits of this approach are:

- $ Simple Abookkeeping@- rather than billing and receiving funds each year until closure, all funds are handled only one, at inception.
- $ Improved cashflow for the operator - many states are accelerating the time frames of fund accumulation and putting additional stress on operational budgets.
- $ Security - funds are held in trust by Treasury listed surety.
- $ Insolvency of the principal does not disturb accumulated funds for closure and allows for timely closures without judicial interference.
- $ The deposits of collateral by the principal are applied properly and not subject to Aborrowing@by state treasuries.

US EPA ARCHIVE DOCUMENT

$ Ultimate net costs are reduced.

In contrast to the other approved financial assurance mechanisms, this hybrid of the trust fund provides greater availability to all operator in the most cost effective manner.

I submit that acceptance and approval of this alternative will allow operators the benefits of the time value of money and maintain the security that the EPA and approved states require.

Response: Under 258.74(k) an owner or operator can utilize a combination of instruments to demonstrate financial assurance. When using third-party instruments such as a trust fund or a surety bond, the sum of the instruments must be at least equal to the amount to be assured. Therefore the combination of mechanisms noted by the commenter could be allowable under current regulations.

EPA also examined whether an instrument of this type should be required. This analysis concluded that costs of a paid-up trust and a surety bond would be higher than for an alternative demonstration of financial assurance. (See Issue Paper, Trust Fund/Surety Bond Combination.) Since all of the financial assurance mechanisms provide financial assurance that complies with the regulations, EPA is not requiring such a combination.

American Institute of Certified Public Accountants 00009

Comment: The AICPA also monitors and analyzes proposed federal regulation that has the potential to affect accounting, auditing and related matters. We are pleased to comment on the proposed rule which appeared in the October 12, 1994 *Federal Register*. Our comments relate to the requirements in proposed section 258.74(e)(2)(i)(A) and (C) for a letter signed by the company=s chief financial officer (CFO) and a Aspecial report@ by the company=s independent CPA. The same requirement for a CFO letter and special report from the independent CPA are also contained in the following current sections of Title 40 of the Code of Federal Regulation (CFR): Sections 264.143(f)(3)(i)(iii), 264.145(f)(3)(i)(iii), 264.147(f)(3)(i)(iii), 265.143(e)(3)(i)(iii), 265.145(e)(3)(i)(iii), and 265.147(f)(3)(i)(iii).

Accordingly, our comments and suggestions also apply to those sections. We recommend the EPA consider streamlining the final regulations by including the same requirements for landfill owners and operators in a single CFR section.

Response: EPA responded to comments by this commenter on the letter from the company=s CFO and the Aspecial report@ by the company=s independent CPA in '258.74(e)(2)(i)(A) and (C) above in the section on the Special Report from the Independent Certified Public Accountant.

While combining both the financial responsibility regulations for MSWLFs and hazardous waste TSDFs into a single section may be useful for companies that have both types of operations, EPA notes that most companies in one area are not in the other. The disadvantage of putting the requirements in a separate and combined section would be that companies used to dealing with a

US EPA ARCHIVE DOCUMENT

particular section would have to reference a new section of the regulations and determine which portions would be applicable to them. Also, since many of EPA=s programs have financial responsibility requirements, EPA believes that it is easier for facilities to find the financial responsibility requirements that apply to themselves in the portion of the CFR where they regularly look.

On February 27, 1997 EPA issued guidance on the language in the special report required for owners or operators using the financial test under Subtitle C of RCRA. EPA will address changes to the language in Subtitle C in an upcoming rulemaking.

US EPA ARCHIVE DOCUMENT