consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

In addition, since these tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances set in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 6, 1998.

Stephen L. Johnson,

Acting Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. By adding § 180.532 to subpart C to read as follows:

§ 180.532 Cyprodinil, tolerances for residues.

(a) *General* . Tolerances are established for residues of the fungicide cyprodinil, 4-cyclopropyl-6-methyl-*N*-phenyl-2-pyrimidinamine in or on the following food commodities:

Commodity	Parts per million
Almond hulls	0.05
Almond nutmeats	0.02
Apple pomace, wet	0.15
Grapes	2.0
Pome fruit	0.1
Raisins	3.0
Stone fruit	2.0

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. 98–9679 Filed 4–9–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 258

[FRL–5994–7]

RIN 2050–AD77

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

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is amending the financial assurance regulations under the Resource Conservation and Recovery Act (RCRA) for owners and operators of municipal solid waste landfills. Today's rule increases the flexibility available to owners and operators by adding two mechanisms to those currently available: a financial test for use by private owners and operators, and a corporate guarantee that allows companies to guarantee the costs for another owner or operator.

EFFECTIVE DATE: This regulation is effective April 10, 1998. This rule provides regulatory relief by establishing additional, less costly mechanisms for owners and operators to comply with existing financial assurance requirements.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The Docket Identification Number is F–98–FTMF–FFFFF. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding federal holidays. To review docket materials during these hours, it is recommended that the public make an appointment by calling 703 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies cost $0.15/page. The docket index and some supporting materials are available electronically. See the **SUPPLEMENTARY INFORMATION** section for information on accessing them.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at 800 424–9346 or TDD 800 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call the RCRA Hotline at 703 412–9810 or TDD 703 412–3323. You may also contact Dale Ruhter at 703 308–8192, or by electronic mail at ruhter.dale@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Regulated entities

Entities potentially regulated by this action are private owners or operators of municipal solid waste landfills. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Privately owned municipal solid waste landfill facilities. Privately operated municipal solid waste landfill facilities.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your company is regulated by this action, you should carefully examine the

applicability criteria in §§ 258.1 and 258.70 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The docket index and the following supporting materials are available on the Internet: 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; Description of Data Used in the Analysis of Subtitles C and D Financial Tests; Analysis of Subtitle D Financial Tests in Response to Public Comments; memorandum entitled Bond Ratings and Investment Grade Status; memorandum entitled Updated Closure and Post Closure Cost Estimates for Subtitle C; Issue Paper, Relevant Factors to Consider in a Financial Test; Issue Paper, Recent Consolidation and Acquisitions Within the Solid Waste Industry; Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test; Issue Paper, Accounting Issues Affecting the Corporate Financial Test; Issue Paper, Domestic Assets Requirement; Issue Paper, Reporting Timeframes; Issue Paper, Effects of the Financial Test on the Surety Industry; Issue Paper, Market Effects of the Financial Test; Issue Paper, Assessment of Financial Assurance Risk of Subtitles C and D Corporate Financial Test and Third-Party Financial Assurance Mechanisms; Issue Paper, Performance of the Financial Test as a Predictor of Bankruptcy; Issue Paper, Assessment of First Party Trust Funds; Issue Paper, Assessment of Trust Fund/Surety Combination.

Follow these instructions to access the information electronically:

WWW: http://www.epa.gov/osw
FTP: ftp.epa/gov
Login: anonymous
Password: your Internet address
Files are located in /pub/OSWER.

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I. Authority

These amendments to Title 40, part 258, of the Code of Federal Regulations are promulgated under the authority of sections 1003(a), 1008, 2002(a), 4004, 4005(c), and 4010(c) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6902(a), 6907, 6912(a), 6944, 6945(c), and 6949a(c).

II. Background

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

In the August 30, 1988 proposal, rather than proposing specific financial assurance mechanisms, the Agency proposed a financial assurance performance standard. The Agency solicited public comment on this performance standard approach and, at the same time, requested comment on whether the Agency should develop financial test mechanisms for use by local governments and corporations. In response to comments on the August 1988 proposal, the Agency added several specific financial mechanisms to the financial assurance performance standard in promulgating 40 CFR 258.74 as part of the October 9, 1991 final rule on MSWLF criteria (56 FR 50978). That provision allows approved States to use any State-approved mechanism that meets that performance standard and thereby gives approved states considerable flexibility in determining appropriate financial mechanisms.

Commenters on the August 30, 1988 proposal also supported the development of financial tests for local governments and for corporations to demonstrate that they meet the financial assurance performance standard, without the need to produce a third-party instrument to assure that the obligations associated with their landfill will be met. (For a description of the third-party instruments available to MSWLF owners and operators, see 56 FR 50978.) The Agency agreed with commenters and, in the October 9, 1991 preamble, announced its intention to develop both a local government and corporate financial test in advance of the effective date of the financial assurance provisions.

On April 7, 1995, the Agency delayed the date by which MSWLFs must comply with the financial assurance requirements of the MSWLF criteria until April 9, 1997 (see 60 FR 17649) (remote, very small landfills as defined at 40 CFR 258.1(f)(1) must comply by October 9, 1997). See 40 CFR 258.70(b). EPA extended the compliance date to

provide additional time to promulgate financial tests for local governments and for corporations before the financial assurance provisions would take effect. The Agency proposed a local government financial test and a corporate financial test on December 27, 1993 (see 58 FR 68353) and October 12, 1994 (see 59 FR 51523), respectively. The proposed corporate financial test rule notice also included proposed amendments to the domestic asset requirements of the RCRA Subtitle C hazardous waste financial assurance rules. Promulgating these proposed changes to the Subtitle C rule, after considering and addressing public comments, will be part of an upcoming rulemaking on the Subtitle C financial assurance rules.

As part of the corporate test for MSWLFs rulemaking, on September 27, 1996 (61 FR 50787) EPA published a Notice of Data Availability for a document that had been inadvertently omitted from the rulemaking docket for part of the public comment period. This Notice provided a 30 day comment period on the missing document.

On November 27, 1996, EPA promulgated a final local government financial test rule for MSWLFs (61 FR 60328). That rule increases the flexibility of the financial assurance requirements in four important ways. First, it provides local governments owning or operating a MSWLF with the option of demonstrating financial assurance through a financial test. Second, it allows local governments to use the financial test to provide a guarantee for financial assurance for the owner or operator of a MSWLF. Third, the rule allows a State Director to waive the financial assurance requirements for up to twelve months until April 9, 1998 if the Director finds that an owner or operator cannot practically comply by April 9, 1997. Fourth, a State Director can allow the discounting of closure, post-closure, and corrective action costs for MSWLFs under certain conditions.

The flexibility to extend the effective date and to allow discounting are available to both locally and privately owned and operated MSWLFs under the November 27, 1996 final rule. In today's notice, EPA is taking final action on the corporate financial test and guarantee for MSWLFs under RCRA Subtitle D, that were proposed October 12, 1994. This notice extends to private owners and operators the flexibility that local governments have as a result of the November 27, 1996 final rulemaking notice.

III. Summary of the Rule

A. Corporate Financial Test (§ 258.74(e))

Today's rule allows private owners or operators of MSWLFs that meet certain financial and recordkeeping and reporting requirements to use a financial test to demonstrate financial assurance for MSWLF closure, post-closure care and corrective action costs up to a calculated limit. (Costs over the limit must be assured through a third-party mechanism such as a surety bond or trust fund, or, in approved States, through other appropriate mechanisms the State determines to meet the performance standard at existing § 258.74(l)). The financial test allows a company to avoid incurring the expenses associated with the existing financial assurance requirements which provide for demonstrating financial assurance through the use of third-party financial instruments, such as a trust fund, letter of credit, surety bond, or insurance policy. With the financial test, private owners or operators must demonstrate that they are capable of meeting their financial obligations at their MSWLFs through ''self insurance.'' The following sections discuss the requirements of the financial test in greater detail.

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

The financial component is designed to measure viability of the owner or operator, based on its current financial condition. To satisfy the financial component, a firm must: (1) have a minimum tangible net worth of $10 million plus the costs it seeks to assure (e.g., closure, post-closure care, or corrective action costs); (2) satisfy a bond rating requirement or pass one of two financial ratios; and (3) meet a domestic asset requirement.

a. *Minimum Tangible Net Worth.* In § 258.74(e)(1)(ii)(A), the Agency is requiring firms using the financial test to have a tangible net worth at least equal to the sum of the costs they seek to assure through a financial test plus $10 million. Tangible net worth means the tangible assets that remain after deducting liabilities. Tangible assets do not include intangibles such as goodwill or rights to patents and royalties.

The Agency is also providing an exception to the minimum net worth requirement in § 258.74(e)(1)(ii)(B). In this exception, a State Director may allow a firm that has already recognized all of its environmental obligations on its financial statements to utilize the financial test so long as it has a minimum tangible net worth of $10 million and meets all of the remaining requirements of the financial test. The exception in § 258.74(e)(1)(ii)(B) acknowledges that the recognition of environmental obligations as liabilities in financial statements has become more widespread. As explained more fully in the Response to Comments and Summary of Issues (see section VI below), EPA does not want to place a firm that has fully recognized these obligations as liabilities at a disadvantage in its ability to use the test.

Under § 258.74(e)(3), the costs an owner or operator seeks to assure must be equal to the current cost estimates for closure, post-closure care, and corrective action or the sum of such costs to be covered, and any other environmental obligations assured by a financial test. The owner or operator must include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if it assures them through a financial test: obligations associated with underground injection control (UIC) facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR part 280, polychlorinated biphenyl (PCB) storage facilities under 40 CFR part 761, and hazardous waste treatment, storage, and disposal facilities (TSDFs) under 40 CFR parts 264 and 265.

The Agency is requiring this minimum tangible net worth requirement to ensure that the costs of closure, post-closure care, and/or corrective action do not force a firm into bankruptcy. The minimum net worth is intended to help ensure that firms relying on the financial test have viable net worth to cover potential costs. EPA received several comments on the $10 million in net worth requirement which had also been part of the proposal. For the reasons discussed more fully in the Response to Comments and Summary of Issues section below, the Agency has retained this requirement in the final rule. The Agency believes that this minimum net worth should be required as an initial screen for corporations in demonstrating financial responsibility for the very large costs of closure, post-closure care, and corrective action. This requirement in addition to other financial criteria comprise the financial test adopted in this final rule.

b. *Bond Rating.* The Agency is promulgating regulations allowing firms that meet the minimum net worth requirement to satisfy the second requirement of the financial test in one of two ways.

Under § 258.74(e)(1)(i)(A), a firm can satisfy the financial component if its

senior unsecured bond rating is investment grade, that is, Aaa, Aa, A or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard & Poor's. The Agency is promulgating this option because it believes that a firm's bond rating incorporates an evaluation 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.

Including a bond rating option in this financial test is consistent with other Agency programs. For example, the regulations governing TSDFs under 40 CFR parts 264 and 265, petroleum underground storage tanks under 40 CFR part 280, UIC facilities under 40 CFR part 144, and PCB commercial storage facilities under 40 CFR part 761 all consider bond ratings as part of their financial tests. The local government financial test for owners and operators of MSWLFs under 40 CFR part 258, which was promulgated on November 27, 1996 (61 FR 60328), also allows a bond rating option.

In the local government test, EPA restricted the use of bond ratings to bonds which were not insured or collateralized. Insured bonds are increasingly popular for municipal issues and reflect the rating of the insurer, and not of the issuing municipality. Insured bonds are used less frequently for corporations. Similarly, a collateralized bond can receive a rating that is not indicative of the overall strength of the firm that issues it, but rather of the collateral backing it. In fact, a firm under financial distress may only be successful in issuing a bond if it pledges assets to back it. In this final rule, EPA is likewise adopting a regulation that effectively disallows the use of ratings based on collateralized bonds.

For the reasons described above, because bond ratings incorporate an evaluation of a firm's financial management practices, reflect the credible expert opinion of bond rating services and have been shown to be a good indicator of defaults, EPA proposed to include a bond rating option in the corporate financial test for MSWLFs. EPA proposed to implement the bond rating option using the rating for the last bond issued. (This is consistent with the current Subtitle C financial test and the revisions proposed on July 1, 1991 (56 FR 30201)). The reason for choosing the rating on the most recently issued bond was because the Agency considered this to be the most accurate indication of the firm's financial status. Under the assumption that the most recently issued bond would have had the most current analysis of its characteristics, EPA considered this the best indicator of the firm's ability to fulfill its financial obligations.

A commenter on the proposed corporate test for MSWLFs noted that the rating on a firm's senior debt was the best indicator of the firm's financial health. EPA reviewed its proposed position in response to the comment and found that bond ratings for corporations are continually being reviewed. Thus, there are more accurate indicators of a firm's financial health than the most recently issued bond. By using the rating on the firm's senior unsecured debt rather than on the most recent issue, EPA is ensuring that firms that use the bond rating alternative will not be qualifying on the basis of a secured obligation.

EPA recognizes that the use of a senior unsecured debt rating in this rule is potentially inconsistent with the financial test bond rating alternative in the hazardous waste financial assurance regulations in 40 CFR Part 264, Subpart H. EPA considers the arguments for adopting the use of the rating on senior unsecured debt to have considerable merit and is similarly considering adopting it as part of the revisions to the RCRA hazardous waste financial assurance requirements (proposed 56 FR 30201).

c. *Financial Ratios.* To provide the regulated community with additional flexibility in meeting the financial test, the Agency proposed to also allow financial test ratios that it is promulgating at § 258.74(e)(1)(i)(B)–(C) as an alternative to the bond rating. In order to satisfy the ratio requirement, a firm must have either:

- a debt-to-equity ratio of less than 1.5 based on the ratio of total liabilities to net worth. This ratio indicates the degree to which a firm is leveraged, and financed through borrowing; or
- a profitability ratio of greater than 0.10 based on the ratio of the sum of net income plus depreciation, depletion, and amortization, minus $10 million, to total liabilities. This ratio indicates cash flow from operations relative to the firm's total liabilities.

EPA is adopting these financial test ratios in § 258.74(e)(1)(i)(B)–(C) of today's rule. The Agency selected these two specific financial ratios with their associated thresholds based on their ability to differentiate between viable and bankrupt firms. The Agency's analysis demonstrated that debt-to-equity ratios (e.g., total liabilities/net worth) and profitability ratios (e.g. (cash flow minus $10 million)/total liabilities) are particularly good discriminators of financial health. The Agency selected as thresholds for these ratios values that, together with the other financial test criteria, minimized the costs associated with demonstrating financial responsibility. A more detailed discussion of this analysis can be found in the Background Document developed in support of the proposal, and the report entitled ''Analysis of Subtitle D Financial Tests in Response to Public Comment,'' which was developed to further assess the results of the Background Document in light of public comments. Both documents are available in the public docket for this rulemaking.

d. *Domestic Assets Requirement.* In § 258.74(e)(1)(iii), the Agency is promulgating a requirement that it had earlier proposed that all firms using the financial test have assets in the United States at least equal to the costs they seek to assure through a financial test. (See paragraph a. of this section, ''Minimum Tangible Net Worth,'' for more discussion on assured costs.) The domestic asset requirement is intended to ensure that the Agency has access to funds in the event of bankruptcy. Without this requirement, the Agency could experience substantial difficulty in accessing funds of bankrupt firms that have their assets outside of the United States. The Response to Comments and Summary of Issues section below discusses this requirement in more detail.

2. Recordkeeping and Reporting Requirements (§ 258.74(e)(2))

The rule requires that after a firm has determined that it is eligible to use this corporate financial test, it must document its use of the test by placing three items (discussed below) in the facility operating record. These requirements will help ensure that the self-implementing aspect of the test requirements have been met. In the case of closure and post-closure care, these items must be placed in the operating record prior to the initial receipt of waste or upon the effective date of the financial assurance requirements (see existing 40 CFR 258.70) whichever is later, or no later than 120 days after the corrective action remedy has been selected. This language is consistent with the language in the proposal, and in the other mechanisms allowable under 40 CFR 258.74. For example, the language for letters of credit in existing

258.74(c)(1) states ''The letter of credit must be effective before the initial receipt of waste or before the effective date of this section * * * whichever is later, in the case of closure or post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.''

EPA seeks to make clear that the deadline provision in today's rule allows the use of the financial test by an owner or operator of an existing facility for whom the financial responsibility requirements have already become effective. An owner or operator may change mechanisms for providing financial assurance. The regulations require that an owner or operator provide financial assurance without interruption. See, for example, 40 CFR 258.71(b), 258.72(b) and 258.73(c). However, qualifying owners or operators may choose from the mechanisms in § 258.74(a) through (j), and may substitute one mechanism for another in meeting financial assurance requirements (assuming all such mechanisms are available under the Federally-approved State program). For further information on this point, please see section III.E., below, Use of Alternative Mechanisms After the Effective Date.

The specific recordkeeping and reporting requirements are summarized below. Owners and operators must update these items annually, and must notify the State Director and obtain alternative financial assurance if the firm is no longer able to pass the financial test.

a. *Chief Financial Officer (CFO) letter.* Under § 258.74(e)(2)(i) of today's rule, the owner or operator must submit a letter from the firm's CFO. The letter must demonstrate that the firm has complied with the criteria of the test. Specifically, the letter must list all cost estimates covered by a financial test and provide evidence demonstrating that the firm satisfies the financial criteria of the test including: (1) The bond rating or financial ratios, (2) the tangible net worth requirement, and (3) the domestic asset requirement. The proposed regulatory language for the CFO's letter was inconsistent with the proposed regulatory language in § 258.74(e)(1) regarding the financial test. The regulatory language inadvertently omitting a cross-reference to the domestic asset requirement. The preamble to the proposed rule clearly provides that the CFO letter would document that the firm satisfies all the criteria of the financial test including the domestic asset requirement. 59 FR 51525. The final language clarifies that the letter must provide evidence that the owner or operator meets all of the requirements of Sec. 258.74(e)(1)(i), (ii), and (iii).

b. *Accountant's Opinion.* Under § 258.74(e)(2)(i)(B), the Agency requires an owner or operator to place in the facility's operating record the opinion from the independent certified public accountant of the firm's financial statements for the latest completed fiscal year. EPA expects that the documentation of the independent accountant's opinion will include the audited financial statements. An unqualified opinion (i.e., a ''clean opinion'') from the accountant demonstrates that the firm has prepared its financial statements in accordance with generally accepted accounting principles. Generally, an adverse opinion, disclaimer of opinion, or any qualification in the opinion would automatically disqualify the owner or operator from using the corporate financial test. The one potential exception is that the State Director of an approved State may evaluate qualified opinions on a case-by-case basis, and accept such opinions if the matters which form the basis for the qualified opinion are insufficient to warrant disallowance of the test.

c. *Special Report From the Independent Certified Public Accountant.* Under § 258.74(e)(2)(i)(C), the third item to be placed in the operating record is a special report of the independent certified public accountant upon examination of the chief financial officer's letter. In this report, the accountant would confirm that the data used in the CFO letter to pass the financial ratio test were appropriately derived from the audited, year-end financial statements or any other audited financial statements filed with the SEC. This report would not be required if the CFO uses financial test figures directly from the audited year end financial statements, or any other audited financial statements filed with the SEC. However, this report is required if the CFO letter uses data that are derived from and are not identical to the data in the audited annual financial statements or other audited financial statements filed with the Securities and Exchange Commission (SEC).

EPA has partially revised the proposed CPA's report in light of public comments. The proposal had included a requirement that the CPA provide negative assurance that ''no matters came to his attention which caused him to believe that the data in the chief financial officer's letter should be adjusted.'' 51 FR 51535. This proposed requirement is inconsistent with current American Institute of Certified Public Accountants standards which direct auditors not to use the types of language included in the proposed regulations. Instead the new language specifies that the independent certified public accountant should report on the findings from an agreed upon procedures engagement. Additionally, the language in today's rule clarifies that the accountant's report is about information used to calculate the financial ratios. Information that is not a part of the audited financial statements, such as the company's bond rating, is not subject to this requirement.

For example, in computing the financial ratios in § 258.74(e)(1)(i)(B) or (C) owners and operators are required to recognize total liabilities, including those associated with ''post-retirement benefits other than pensions (OPEB).'' The Financial Accounting Standards Board (FASB) allows the use of two different methods when accounting for these liabilities in annual financial statements. FASB 106 allows employers the option of accounting for OPEB obligations in one year (immediate recognition) or over a consecutive number of years (delayed recognition). Since both the immediate and delayed recognition methods are allowed by FASB 106, EPA does not require owners and operators that are demonstrating they meet the requirements of the financial test to use the same accounting method for OPEB obligations that is used for annual SEC submission purposes. For example, the owner or operator may use the immediate recognition method in the financial statement prepared for the SEC, but the delayed recognition method in computing liabilities for the purpose of demonstrating RCRA financial assurance.

As reflected in today's rule, EPA does not believe a separate CPA statement is needed where the CFO simply takes figures directly from an audited financial statement. This is a straight forward process. On the other hand, where the CFO ''derives'' the figures—for example, by using different accounting procedures to determine OPEB liabilities—the process may require a high level of financial expertise. In these cases, EPA believes review by an independent auditor is appropriate.

Consistent with the policy to confirm the accuracy of the information from the audited financial statement where it is not readily discernible, § 258.74(e)(2)(i)(D) of today's rule also includes a requirement for a report from the independent certified public

accountant when an owner or operator proposes to meet the tangible net worth requirement on the basis of having recognized all of the environmental obligations covered by a financial test as liabilities in the audited financial statements. This requirement is necessary to ensure that these liabilities have in fact been recognized since this would be difficult for the State Director to ascertain. There is also a requirement that the report ensure that at least $10 million in tangible net worth remains after any guarantees have been extended.

d. Placement of Financial Test Documentation and Annual Updates in the Operating Record. Section 258.74(e)(2)(ii) of today's rule requires firms to place the financial test documentation items specified in § 258.74(e)(2) in the operating record and notify the State Director that these items are there. Because the financial condition of firms can change over time, under § 258.74(e)(2)(iii), firms are required to update annually all financial test documentation, including each of the items described above, within 90 days of the close of the firm's fiscal year. The State Director is, however, allowed to extend this time by up to 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. This could occur in the case of a privately held firm which does not receive audited financial reports as early as publicly held firms. Under § 258.74(e)(2)(iv), the owner or operator is not required to submit the items specified in § 258.74(e)(2) when he substitutes alternate financial assurance as specified in this section that is not subject to these recordkeeping and reporting requirements; or is released from the requirements of this section in accordance with § 258.71(b), § 258.72(b), or § 258.73(b).

e. *Alternate Financial Assurance.* Under § 258.74(e)(2)(v), if a firm can no longer meet the terms of the financial test, the owner or operator must notify the State Director and obtain alternative financial assurance within 120 days of the close of the firm's fiscal year. The alternative financial assurance selected by the owner or operator would have to meet the terms of this section and the required submissions for that assurance would have to be placed in the facility's operating record. The owner or operator would have to notify the State Director within 120 days of the close of the fiscal year that he no longer meets the criteria of the financial test and that alternate financial assurance has been obtained.

f. *Current Financial Test Documentation.* Under § 258.74(e)(2)(vi), the Director of an approved State may, based on a reasonable belief that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, require the owner or operator to provide current financial test documentation. Although the Agency anticipates this provision will not be used often, it can be important in situations where the financial condition of the owner or operator comes into question. The State Director should have the flexibility to require the owner or operator to provide current financial test documents if information arises that raises questions about the financial conditions of the owner or operator. For example, an owner or operator may be forced into financial distress by a large, well-publicized liability judgment. In such cases and other appropriate situations, the State Director should be able to investigate the owner's or operator's change in financial condition, and require the owner or operator to demonstrate that it still meets the financial test.

B. Corporate Guarantee (§ 258.74(g))

As in the proposal, this rule allows owners and operators to comply with financial responsibility requirements for MSWLFs using a guarantee provided by another private firm (the guarantor). The language of the final rule includes clarifications of some of the deadlines in the proposal. Under such a guarantee, the guarantor promises to pay for or carry out closure, post-closure care, or corrective action activities on behalf of the owner or operator of a MSWLF if the owner or operator fails to do so. Guarantees, like other third-party mechanisms, such as letters of credit or surety bonds, ensure that a third party is obligated to cover the costs of closure, post-closure care, or corrective action in the event that the owner or operator goes bankrupt or fails to conduct the required activities. At the same time, a guarantee is an attractive compliance option for owners and operators because guarantees are generally much less expensive than other third-party mechanisms.

Section 258.74(g)(1) of the rule allows three types of qualified guarantors: (1) The parent corporation or principal shareholder of the owner or operator (i.e., a corporate parent or grandparent), (2) a firm whose parent company is also the parent company of the owner or operator (a corporate sibling), and (3) other related and non-related firms with a ''substantial business relationship'' with the owner or operator (including subsidiaries of the owner or operator). Guarantors also must meet the conditions of the corporate financial test.

To comply with the requirements of the corporate guarantee, the owner or operator must place in the facility operating record a certified copy of the guarantee contract and copies of all of the financial test documentation that is required of the guarantor as specified in the corporate financial test requirements. Pursuant to § 258.74(g)(3), the terms of the guarantee contract must specify that, if the owner or operator fails to perform closure, post-closure care, or corrective action in accordance with the requirements of part 258, the guarantor will either: (1) Carry out those activities or pay the costs of having them conducted by a third party (performance guarantee), or (2) fund a trust to pay the costs of the activities (payment guarantee). The required documentation must be placed in the operating record, in the case of closure and post-closure care, prior to the initial receipt of waste or before the effective date of the financial assurance requirements (see existing § 258.70), whichever is later, or in the case of corrective action, no later than 120 days following selection of a corrective action remedy. (See § 258.74(g)(2).) The financial test documentation from the guarantor must be updated annually, in accordance with the requirements of the corporate financial test.

The documentation required of the guarantor is the same as that required of a corporate financial test user with either one or two additional requirements depending upon the relationship of the guarantor to the owner or operator. First, for all users of the guarantee, the letter from the guarantor's chief financial officer must describe the value received in consideration of the guarantee. Second, in cases where the guarantor is not a corporate parent, grandparent, or sibling, the letter from the chief financial officer also must address the ''substantial business relationship'' that exists between the owner or operator and the guarantor. In particular, if the guarantor is a firm with ''a substantial business relationship,'' the letter must describe the relationship and the consideration received from the owner or operator in exchange for the guarantee, which are necessary to ensure that the contract is valid and enforceable.

For purposes of its hazardous waste financial assurance regulations, EPA has defined ''substantial business relationship'' in 40 CFR 264.141(h) as ''the extent of a business relationship necessary under applicable State law to make a guarantee contract issued

incident to that relationship valid and enforceable.'' However, as noted in the preamble to that regulation, ''No single legal definition exists of what constitutes a business relationship between two firms that would justify upholding a guarantee between them. Furthermore, such a determination would depend upon the application of the laws of the States of the involved parties.'' (53 FR 33942). The responsibility for demonstrating that the guarantee contract is valid and enforceable rests with the guarantor. (See § 258.74(g)(1)).

This regulation requires that guarantors agree to remain bound under this guarantee for so long as the owner or operator must comply with the applicable financial assurance requirements of Subpart G of part 258, except that guarantors may initiate cancellation of the guarantee by sending notice to the State Director and to the owner or operator. The rule provides that such cancellation cannot become effective earlier than 120 days after receipt of such notice by both the State Director and the owner or operator. (See § 258.74(g)(3)(ii).)

If notice of cancellation is given, the regulations require the owner or operator to, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days of the notice of cancellation, place evidence of the alternate assurance in the facility operating record, and notify the State Director. (See § 258.74(g)(3)(iii).)

Under § 258.74(g)(4), if the corporate guarantor no longer meets the requirements of the financial test, the owner or operator must, within 90 days, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within the next 30 days, place evidence of the alternate assurance in the facility operating record, and notify the State Director. These requirements are designed to avoid potential lapses in financial assurance.

C. Calculation of Obligations

EPA currently allows financial tests as mechanisms to demonstrate financial assurance for environmental obligations under several programs. These include hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265, petroleum underground storage tanks under 40 CFR part 280, UIC Class I hazardous waste injection wells under 40 CFR part 144, and PCB commercial storage facilities under 40 CFR part 761. Requiring that the owner or operator include all of the costs it is assuring through a financial test when it calculates its obligations prevents an owner or operator from using the same assets to assure different obligations under different programs. The Agency believes this is vital to assure the effectiveness of the financial test and assure that assets are available for all of the environmental obligations covered by the test. Thus, consistent with Agency policy, § 258.74(e)(3) of today's rule requires a firm using a financial test for its MSWLF obligations also to include those costs covered by a financial test under other Agency programs when it calculates assured costs.

D. Combining the Financial Test and Corporate Guarantee With Other Mechanisms

When EPA promulgated the financial test and guarantee for municipal owners and operators of municipal solid waste landfills (61 FR 60328, November 27, 1996), EPA inadvertently omitted the provisions allowing private owners and operators to use the financial test and corporate guarantee in combination with other mechanisms in 40 CFR 258.74(k). Thus, EPA is clarifying in today's rule that an owner or operator may use the financial test or guarantee and another payment mechanism at a single facility, thereby realizing greater flexibility and cost savings from this regulation. EPA is promulgating a change to 258.74(k) that allows the use of the financial test and corporate guarantee with the other mechanisms. In promulgating this change to add the omitted cross-references, EPA is repeating the entire paragraph solely for the convenience of the reader.

E. Use of Alternative Mechanisms After the Effective Date

Consistent with the other existing financial assurance mechanisms at 40 CFR 258.74, the language of today's regulations includes a requirement that the financial test or guarantee must be effective before the initial receipt of waste or before the effective date of the basic requirement that owners or operators of MSWLF units have financial assurance, whichever is later, in the case of closure or post-closure care. See § 258.74(e)(2)(ii) and § 258.74(g)(2). The effective date of the financial assurance requirement for owners or operators of MSWLF units is established under existing 40 CFR 258.70. For most, but not all, MSWLFs the effective date is April 9, 1997. The provisions establishing the compliance deadlines are to ensure that an existing MSWLF has financial assurance mechanisms in place by the effective date of the regulations and that a new MSWLF has the mechanisms in place by the first receipt of waste. In the case of corrective action, today's regulations for the financial test and guarantee, like the existing regulations for the other mechanisms, provides that the mechanism has to be in place no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of 40 CFR 258.58. See § 258.74(e)(2)(ii) and § 258.74(g)(2).

The requirement that financial assurance be in place by a specific deadline does not in any way preclude an owner or operator from subsequently switching to another eligible mechanism. The operative requirement is for an owner or operator of an MSWLF unit to have an eligible financial assurance mechanism in place by the specific compliance deadlines that ensures that the funds necessary to meet the costs of closure, post-closure care, and corrective action will be available whenever they are needed, and to provide such coverage continuously until the owner or operator is released from financial assurance requirements. See existing 40 CFR 258.71(b), 258.72(b), and 258.73(c). An owner or operator in compliance with the financial assurance requirement using one eligible mechanism may switch to another eligible mechanism so long as the relevant requirements are met.

The Agency's regulations expressly allow an owner or operator to substitute one mechanism for another in this manner. The regulations establishing specific Federal mechanisms (40 CFR 258.74(a)–(h)) each allow the termination of a financial assurance mechanism when a substitute mechanism has been established (or, of course, if the owner or operator is no longer subject to the requirement to have financial assurance). Today's rules establish a similar substitution provision for the financial test and the guarantee. See § 258.74(e)(2)(iv) and § 258.74(g)(5). Thus, the Federal regulations would allow an owner or

operator complying with the financial assurance requirements through, for example, a letter of credit mechanism to switch to a financial test or vice versa, assuming the owner or operator qualifies for the mechanisms and the mechanisms are available under the approved State program. In this way, the Federal regulations give owners and operators of MSWLF units broad flexibility in the mechanisms used to satisfy the financial assurance requirement.

In switching mechanisms, the owner or operator would be subject to the applicable requirements of the new mechanism. For example, each of the Federal mechanisms contains a specific requirement to provide notice to the State Director, to maintain particular documentation, and/or satisfy other requirements. For an owner or operator of an MSWLF unit to meet the operative requirement that it have an eligible financial assurance mechanism in place by the specific compliance deadlines that ensures that the funds necessary to meet the costs of closure, post-closure care, and corrective action will be available whenever they are needed, then the owner or operator must comply with all of the relevant requirements upon switching mechanisms and may not allow lapses in financial assurance compliance. Additionally, owners and operators should be aware that a State may have more stringent requirements in place and may not allow all of the mechanisms provided for under the Federal rules.

IV. National Solid Wastes Management Association (NSWMA) Petition

A. Discussion of the Petition

On February 16, 1990, NSWMA submitted a rulemaking petition to the Agency requesting that EPA revise various financial assurance requirements. The Agency noted in the preamble to the proposal of this rule (59 FR 51523) that it had addressed many of the concerns raised in the petition in a July 1, 1991 proposed rule (56 FR 30201) and a September 16, 1992 final rule (57 FR 42832). Among the changes in the September 16, 1992 final rule was the adoption of provisions allowing for guarantees by non-parent firms for Subtitle C closure and post-closure care financial responsibility requirements. This request had been part of the NSWMA petition. In adopting similar provisions in this rulemaking, EPA is extending this flexibility to private owners and operators of MSWLFs. Local governments already have the flexibility to provide guarantees for MSWLFs under 40 CFR 258.74(h). See 61 FR 60328.

In addition, when EPA promulgated the final rule on the local government financial test for MSWLFs, it established regulations (40 CFR 258.75) giving State Directors the discretion to allow the discounting of MSWLF costs (61 FR 60328). As noted in the Background Section of today's preamble, this discretion applies to both municipal and private owners and operators of MSWLFs. Discounting of costs was another issue in the petition. While today's final rule addresses the use of a financial test and guarantee for financial assurance for MSWLF closure, post-closure care, and, as necessary, corrective action costs, and one more issue (an alternative financial test) raised in this petition, it does not represent the full Agency response to NSWMA's petition. The Agency continues to examine the concerns raised in the NSWMA petition.

B. The Meridian Test

As part of its rulemaking petition, NSWMA submitted an analysis performed by Meridian Corporation which proposed an alternative to EPA's current Subtitle C financial test. In the docket to the proposal for today's rule, EPA included a copy of an analysis performed for EPA that evaluated the test in comparison with the one that EPA proposed to amend the current Subtitle C test. EPA also on September 27, 1996 published a Notice of Data Availability (61 FR 50787) providing additional opportunity to comment on this analysis. A summary of the comments EPA received on this notice and the Agency's response appear in the Response to Comments and Summary of Issues section of this preamble.

In evaluating public comments for the Subtitle D rule adopted today, EPA further examined the Meridian Test using the cost estimates and financial information which it had developed to assess other alternative tests. See Analysis of Subtitle D Financial Tests in Response to Public Comments, which is available in the public docket. This analysis allowed EPA to assess the Meridian Test along with several other potential tests on a consistent basis using updated information, and to determine whether the Meridian Test would be better than the financial test EPA had proposed for private owners and operators of MSWLFs.

The analysis showed that the Meridian Test would have public costs approximately 2.36 to 3.45 times larger than those of the test that EPA proposed and is issuing in final form in this rulemaking. (The range in estimates result from varying specifications of the net worth requirements and interpretations of how firms are accounting for financial responsibility requirements in their financial statements.) As discussed in the preamble to the proposed amendments to the financial test for Subtitle C owners and operators (56 FR 30201 at page 30210), selection of a test that results in lower public costs is consistent with the Agency's position that it is equitable to make the party that creates the environmental obligation pay for it.

In its petition, NSWMA noted that the current Subtitle C financial test is less available to some firms to cover large obligations than other alternative tests. In the Analysis of Subtitle D Financial Tests in Response to Public Comments, EPA found that the use of the financial test being adopted in this rulemaking will allow private MSWLF owners and operators to cover 71.67% of their obligations. Further, EPA's analysis estimates that the private cost of the Meridian Test could range from 42.1% to 122% of the private cost of EPA's test. Again, this range depends upon the net worth specification and interpretations of how firms are accounting for financial responsibility requirements in their financial statements. However, in all the permutations analyzed, the sums of the public and private costs for the Meridian Test are higher than for the test being promulgated in this rule. This provides an additional basis for rejecting the Meridian Test beyond EPA's concern with its higher public cost. EPA believes that this analysis further substantiates its decision not to establish a financial test for private owners or operators of MSWLFs based upon the Meridian Test, and that the Agency has adopted a test for MSWLF obligations that reasonably addresses the concerns in the NSWMA petition about a test that would be more available than the Subtitle C financial test.

V. State Program Approval

Section 4005(c) of RCRA provides that each State adopt and implement a ''permit program or other system of prior approval and conditions'' adequate to assure that each facility that may receive household hazardous waste will comply with the revised MSWLF criteria. EPA is to ''determine whether each State has developed an adequate program'' pursuant to section 4005(c).

The Agency has procedures for reviewing revised applications for State program adequacy determinations should a State revise its permit program in light of today's final rules. A State

that receives permit program approval prior to the promulgation of today's rule and later elects to adopt the financial test and guarantee mechanisms should work with its respective Regional EPA office as it proceeds to make changes to its permit program.

As stated above, today's proposal would amend part 258 by adding options for corporations to use when demonstrating financial assurance for the costs of closure, post-closure care, and clean-up of known releases. EPA generally encourages States to adopt the additional flexibility for financial assurance mechanisms reflected in these final rules. EPA believes that these mechanisms will result in significant cost savings for owners and operators subject to financial assurance requirements. At the same time, EPA believes the financial assurance mechanisms adopted today effectively delineate eligible owners and operators who have a low probability of business failure from owners and operators that are unable to meet their obligations. By restricting the financial test and guarantee to viable firms, the mechanisms in these final rule avoid undue public costs.

However, 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 criteria that the financial mechanism would need to meet are the following: (1) Ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed; (2) ensure that funds will be available in a timely fashion when needed; (3) guarantee the availability of the required amount of coverage from the effective date of the requirements under 40 CFR 258, Subpart G, or prior to the initial receipt of waste, whichever is later, in the case of closure and post-closure care, and no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58, until the owner or operator is released from financial assurance requirements under Secs. 258.71, 258.72 and 258.73; and (4) be legally valid, binding, and enforceable under State and Federal law. *See generally* 40 CFR 258.74(l).

As a result, while the Agency has developed financial tests that are designed to meet these performance criteria (the financial test promulgated in this **Federal Register** and the financial test promulgated November 27, 1996 (61 FR 60328)), approved States could develop their own financial tests that could be used by owners and operators of MSWLFs within those States for demonstrating financial responsibility so long as those tests are determined to have met the performance criteria.

Similarly, States initially seeking approval for the financial assurance portion of their MSWLF program would have flexibility in adopting Federally-promulgated standards. The State can simply adopt the Federal standard or could adopt a mechanism that meets the Federal performance criteria described above. In the latter case, the mechanism could be used by owners or operators for demonstrating financial responsibility for their MSWLF obligations in that State.

Owners and operators who can use the options in today's rule under Federally-approved State programs would be required to maintain appropriate documentation of the mechanism in the facility's operating record. They would not be required by Federal rules to submit that documentation to the State, but only to notify the State Director that the required items have been placed in the operating record. However, the Federal rules establish several minimum recordkeeping and reporting requirements. For example, owners and operators using the financial test or guarantee would also be required to update all required financial test information on an annual basis, and retain this information in their operating records. In addition, an owner or operator (or guarantor) that becomes unable to meet the financial test criteria would be required to notify the State Director and establish alternate financial assurance within specified deadlines. Finally, in order to cancel a guarantee, the guarantor would have to notify both the State Director and the owner or operator at least 120 days prior to cancellation.

However, EPA cautions owners and operators that wish to use the options in the Federal program that they should examine the options available under State law. If the State's rules do not include the option that the owner or operator wishes to use, the owner or operator would run the risk of being out of compliance with State law.

In unapproved States, if State law did not preclude the use of options established today (either because it did not include any financial assurance requirements, included only a general requirement that left the choice of mechanism to the discretion of the owner or operator, or included mechanisms like those promulgated today), an owner or operator would be able to use the corporate test or guarantee described in today's rule to satisfy both State and Federal law.

The Agency believes that most Tribes have an accounting structure similar or identical to those of most local governments. Tribes should be eligible to use the local government financial test to demonstrate financial responsibility for their obligations under the MSWLF criteria to the extent that they meet the provisions of that test. However, the Agency recognizes that there may be Tribes and local government units that use an accounting system similar or identical to those of most corporations. Those Tribes and local government units would be eligible to use the corporate financial test established today to demonstrate financial responsibility for their MSWLF obligations to the extent that they meet the relevant requirements.

VI. Response to Comments and Summary of Issues

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 original proposal 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. The Docket contains a compilation of the comments and EPA's responses. See ''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.''

Many of the comments raised issues that were outgrowths of topics that had been dealt with in the original proposal, but that benefitted from additional scrutiny in light of public comment. In performing this analysis EPA studied particular topics in additional depth and prepared issue papers on these topics which were used in responding to the public comments. For example, several commenters questioned the appropriateness of the $10 million tangible net worth requirement in the financial test. The proposal had included this requirement, and the analysis of public and private costs had examined the financial information for firms with more than $10 million in net worth. To assess the potential impact of changing this requirement, EPA assembled financial information from Dun and Bradstreet on additional owners and operators of MSWLFs, i.e. those with both more and less than $10 million in net worth. EPA then applied the same methodology it had used in support of the proposal to determine the public and private costs of alternative specifications of the financial test (including an alternative test that had been developed by Meridian Research Incorporated for the National Solid Wastes Management Association). The results of this analysis appear in the docket in a report entitled ''Analysis of Subtitle D Financial Tests in Response to Public Comments.''

The next sections summarize the major comments and the Agency's response.

A. Minimum Tangible Net Worth

Several commenters raised a variety of issues with the requirement in the proposed rule that firms have a minimum tangible net worth of $10 million plus the amount of obligations being covered by the financial test. One commenter suggested that the requirement was too little, particularly in the case of firms owning multiple landfills. Some comments agreed with its reasonableness. Others characterized the requirement as overly strict because it limited the availability of the test to larger firms.

In evaluating comments on the impact of the net worth requirement, EPA acquired updated financial information on the 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 ''Description of Data Used in the Analysis of Subtitles C and D Financial Tests,'' and ''Analysis of Subtitle D Financial Tests in Response to Public Comments'' which are available in the public docket for this rulemaking.

As examined further below, EPA received comments that the proposed minimum net worth requirement creates a competitive disadvantage for and affects smaller firms. EPA emphasizes that today's rule does not impose new regulatory requirments on any firm but would allow owners and operators of MSWLFs additional flexibility in meeting the existing financial assurance requirements. The existing financial assurance requirements are to ensure that owners and operators of MSWLF units will have the funds available to meet the costs of closure, post-closure care, and corrective action whenever they are needed. The existing regulations meet that objective by establishing a number of third-party mechanisms, as well as performance criteria for additional State-approved mechanisms, that could be used by owners or operators in meeting the financial assurance requirement. Today's rulemaking adds a financial test and a corporate guarantee as two additional, less costly mechanisms that could be used by eligible private owners or operators of MSWLFs to demonstrate financial responsibility under the existing regulatory requirements. Entities able to use these mechanisms would be allowed to demonstrate financial responsibility without incurring the costs of obtaining a third-party mechanism.

No small or large entity will be required to use the alternative mechanisms promulgated today. Further, as noted, States are not required to make these mechanisms available under their programs. However, all entities in States that allow these new mechanisms and that choose to make use of, and meet the relevant criteria for, the financial test or guarantee established by this rule will benefit from the savings that these alternative mechanisms offer. While presumably both small or large entities will choose to use one of the new mechanisms only if it is in their interest to do so, requirements apply to any firm ultimately seeking to use one of the alternative mechanisms. EPA has endeavored to reasonably minimize the requirements associated with the mechanisms and thereby promote private cost savings while at the same time limiting the public costs.

As noted above, the basic purpose of the financial assurance program is to ensure that corporate owners and operators of MSWLF units are financially able to meet their obligations for closure, post-closure care, and corrective action. The existing financial assurance requirements apply to all such owners and operators, regardless of their size, in view of the potential harm and public costs that can result if an owner or operator is unable to meet its responsibility for closure, post-closure care, and corrective action at a MSWLF unit. Today's rule adds a financial test that allows a less costly means of providing financial assurance to entities financially capable of covering the costs themselves, through self-insurance, or relying on a guarantor that meets the financial test. The basis for the financial test is necessarily tied to the financial capability of the MSWLF or guarantor. Later in the discussions of the public comments sections entitled Tangible Net Worth Does Not Have to Be Liquid and Bond Rating, EPA also examined the question of whether the financial test would create an uneven playing field and did not find that the savings potentially available from this rule would be sufficient to create a significant competitive advantage.

After examining the minimum net worth requirement in light of the public comments on the proposal, EPA concluded that the increase in public costs under a financial test that did not include this requirement would not justify the anticipated reduction in private costs. As noted in the section entitled Public Costs of Lower Net Worth Levels, there is an equity issue involving higher public costs. Higher public costs mean that costs that should have been borne by the owner or operator (and customers) of a landfill that goes bankrupt are unfairly transferred to society in general. Because of this fairness issue and other factors discussed below, EPA determined that it was appropriate to retain this component of the financial test even though the test EPA is establishing has a higher calculated sum of public and private costs than would have been the case had EPA selected this test with a lower minimum tangible net worth requirement. The test EPA is establishing has lower public costs and provides substantial private savings. Of course, if contradictory new information

is presented to EPA in the future, EPA will further examine this issue.

Further, EPA's existing rules for financial assurance under 40 CFR part 258, subpart G provide States with broad flexibility to fashion financial assurance mechanisms so long as the mechanisms meet the performance criteria at 40 CFR 258.74(l). Thus, in implementing the existing regulations, States can make specific judgments about additional flexibility in meeting the financial assurance requirements. Such judgments are more difficult in a general national rulemaking, where broader delineations must be made. Indeed, EPA encourages States to make reasoned judgments in implementing the performance criteria in the existing rules, including providing flexibility for firms in circumstances that States determine to reasonably balance the public and private cost of financial assurance. However, in this national rulemaking, EPA was faced with the choice of allowing eligible firms the potential regulatory flexibility of a financial test or foregoing the regulatory flexibility of a financial test altogether because it may not benefit all firms in the MSWLF industry. Faced with that choice, EPA determined it was reasonable to provide the regulatory flexibility for qualifying firms.

1. Minimum Tangible Net Worth Requirement Is Too Low

Comment: The minimum tangible net worth requirement is inadequate for firms with multiple facilities.

Response: 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 have 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 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 this point appears in Issue Paper, Recent Consolidation and Acquisitions in the Solid Waste Industry, which is available in the public docket.

Bond rating agencies also favor firms with relatively low debt levels, and tend to grant more favorable ratings to firms with large net worth. Thus, under the bond rating alternative as well as the financial ratio alternatives, firms with several operations and large assets would have to have substantially more than the $10 million minimum net worth to utilize the financial test. For example, EPA's analysis estimated that the two largest firms expected to be able to use the financial test have MSWLF financial assurance obligations which are approximately $1.7 and $1.4 billion, respectively. Their corresponding net worth are $5.3 and $2.8 billion, figures substantially higher than the $10 million minimum net worth requirement.

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. For the firms in EPA's analysis with the third and fourth largest number of landfills, EPA's estimate of their closure and post closure financial assurance obligations exceeds their net worth. The additive requirement means that these firms may need to provide a third party instrument for some of their obligations.

2. The $10 Million Net Worth Requirement Is Too Restrictive

Comment: Several commenters objected to the $10 million in tangible net worth requirement as being overly strict and restricting the test to larger firms.

Response: 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.

a. *The Size of Closure Obligations.* The net worth of a firm equals the value of its assets minus the value of its liabilities. As provided in 40 CFR 264.141, ''liabilities'' mean ''probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.'' EPA estimated in the analysis supporting the proposal that closure and post-closure obligations for MSWLFs range from $5.1 million (for a landfill with less than 275 tons per day) to $24 million for a landfill of more than 1125 tons per day. EPA received no public comments on the accuracy of these estimates, and so in the additional analysis supporting this notice merely updated them for inflation so that they would be in 1995 dollars like the financial information on the firms. This led to estimates ranging from $5.5 million to $26.1 million. (See the memorandum entitled ''Analysis of Subtitle D Financial Tests in Response to Public Comments.'') These costs represent substantial liabilities that are largely paid at the end of the landfill's life when there would be no revenue from tipping fees. Therefore it is

important to ensure that adequate provisions have been made for their recognition and payment.

These estimates can represent several multiples of a firm's liabilities (and net worth). These cost estimates combined with the financial information on firms with less than $10 million in net worth show that firms with relatively small net worth can accrue relatively large liabilities for closure and post-closure obligations. Under such a circumstance a firm that would have to undertake closure would be forced into bankruptcy (negative net worth) by closure.

b. *Recognition of Closure Obligations.* The financial analysis of firms with net worth between $1 million and $10 million show that these environmental obligations may not be universally recognized. When EPA examined the liabilities, net worth and estimated financial assurance amounts for forty firms with net worth between $1 and $10 million, it found that many of these firms had estimated financial assurance obligations that exceeded their net worth (thirty-seven) and their reported liabilities (thirty-five). In the instances of firms with financial assurance obligations that exceed their liabilities, this strongly implies that they are not recognizing these obligations as liabilities, particularly because liabilities also include money owed to creditors such as banks. This inconsistent reporting of landfill closure obligations has been reported by the Financial Accounting Standards Board (See, for example, pages 1 and 2 *Exposure Draft, Proposed Statement of Financial Accounting Standards, Accounting for Certain Liabilities Related to Closure or Removal of Long-Lived Assets,* No. 158–B, February 7, 1996, Financial Accounting Standards Board).

Firms that do not recognize their closure and post-closure care obligations as liabilities also may be overstating their ability to pass a financial test if they had to recognize their environmental obligations as liabilities. This arises because both financial test ratios utilize liabilities as a factor and require that the ratio meet a particular threshold (e.g. total liabilities divided by net worth must be less than 1.5). A higher amount of recorded liabilities for the same net worth or cash flow can make it more difficult for a firm to qualify for the financial test.

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.

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.

For an owner or operator to qualify for this alternative, it will be necessary for the letter from the chief financial officer to include a report from the independent certified public accountant verifying that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, how these obligations have been measured and reporteed, and that the net worth of the firm is at least $10 million plus the amount of any guarantees provided. See § 258.74(e)(2)(i)(D).

EPA recognizes that its treatment in this rule of environmental obligations that have already been recognized as liabilities differs from the treatment in the hazardous waste financial test in 40 CFR 264.151(f) and in the proposed amendments to those rules (56 FR 30201, July 1, 1991). In the current hazardous waste rules and the proposed amendments, closure and post closure care obligations which have already been recognized as liabilities can be deducted from the liabilities and added back to net worth for purposes of calculating the financial test. This adjustment provision was incorporated into the regulations ''in order not to penalize those firms that do include these costs in their liabilities'' (47 FR 15037, April 7, 1982). The proposal for today's rule did not include a similar adjustment provision, nor did the Agency receive comments suggesting incorporating such a provision. The proposal was consistent with the research in the Background Document which found a high availability of the test without incorporating an adjustment of liabilities or net worth as allowed by the current Subtitle C regulations. This finding was supported in the analysis associated with the public comments which found that the financial test would be available to cover approximately 72% of obligations even in the absence of the adjustment.

EPA does not have information on the extent to which companies have recognized all of their environmental obligations as liabilities. However, in its analysis of alternative tests, EPA examined a test designated as Test 58–10 that required the same bond ratings and financial ratios as the final rule, but would allow a firm with at least $10 million in tangible net worth that passed the requirements to cover any amount of environmental obligation with the financial test. Conceptually, the results from this test provide an upper bound estimate of approximately 82% for the maximum percent of obligations that could be covered with the adjustment if allowed by the State Director.

EPA believes that substantial progress has been made since the issuance of the 1982 hazardous waste financial assurance regulations in the recognition of environmental obligations as liabilities. Further, the rationale for allowing this adjustment was based upon fairness to firms who had recognized these obligations as liabilities, rather than a belief by EPA that these obligations should not be treated as liabilities. The Agency

continues to consider environmental obligations for closure, post-closure care, and corrective action as meeting the definition of liabilities as ''probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.'' (40 CFR 264.141(f)) As more firms recognize these obligations as liabilities, the basis for granting an adjustment to the liability and net worth measures in financial statements because of fairness has diminished, while their recognition as liabilities has become more accepted in the financial community. Thus, there is less of a need to allow an adjustment of liabilities and net worth in the calculation of the financial ratios.

This final rule allows those firms who have already recognized all of their environmental obligations as liabilities in their financial statements and who pass the financial test to assure for a potentially higher amount of obligations than would otherwise be allowed. EPA believes that this approach has preserved fairness while maintaining the notion of these environmental obligations as liabilities, and reduced the administrative burden of adjusting figures on the balance sheets. EPA will continue to assess the utility of the adjustment provision proposed for 264.151(f), and may determine that it is appropriate to promulgate a final Subtitle C financial test regulation that would take a similar approach to that used in this regulation.

c. *Accuracy of the Test at Lower Net Worth Levels.* EPA also examined whether its financial test would operate as well for firms with less than $10 million in net worth. Practically, no financial test can perfectly discriminate between firms that should be allowed to use the financial test and, therefore, not have to pay the cost of a third party mechanism, and firms that will go bankrupt and so should have to use a third party instrument. As a test becomes less stringent so that it becomes more available (such as by reducing the net worth requirement), it carries a higher risk that firms will qualify for the test that will enter bankruptcy. The worse the test is at screening out firms that will enter bankruptcy, the higher its misprediction rate. Moreover, since a test will not be perfect at screening out firms that will enter bankruptcy, a test that allows more obligations to be covered with a financial test will have a higher dollar amount of misprediction. EPA's analysis assessed the misprediction of the various tests and the attendant public costs. These public costs are the costs to the public sector of paying for financial assurance obligations for firms that pass the test but later go bankrupt without funding their obligations. This analysis revealed that the financial test had a 66% higher misprediction rate (1.067%) when applied to firms with less than $10 million in net worth than to firms with more than $10 million (0.644% to 0.233%) (See Issue Paper, Relevant Risk Factors to Consider in a Financial Test, which is available in the public docket). This means that without the $10 million net worth requirement, the test would not be as good at screening out firms that will enter bankruptcy at the lower net worth levels.

d. *Public Costs of Lower Net Worth Levels.* The higher misprediction rate for the test with a lower net worth requirement leads to higher public costs. Since these public costs are the costs to the public 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 ''polluters 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. This means that the customers of landfills that do not go bankrupt unfairly subsidize the customers of landfills that did not provide the funds for proper closure and post-closure care. This subsidy is through government expenditures for closure and post-closure care of the bankrupt landfills. EPA estimates that reducing the minimum net worth requirement for the financial test from $10 million to $1 million would increase the public cost of the financial test from $11.7 million to $13.2 million annually. This would have represented a 13% increase in public costs. In light of the substantial closure costs involved compared to the net worth of firms with less than $10 million in net worth, the reduced ability of the test to screen out firms that will go bankrupt, and the increased public cost of reducing the net worth requirement, EPA has declined to change this requirement. However, as discussed above, in light of concerns about impacts on smaller owners and operators, EPA has established a provision that would allow firms that have recognized all of their environmental obligations as liabilities additional flexibility in meeting the minimum net worth requirement, subject to the approval of the State Director.

3. Allow Firms to Include Closure and Post Closure Funds as Part of Net Worth

Comment: One company suggested that EPA allow any funded liability such as Closure/Post-Closure Trust Funds to be added to tangible net worth when calculating the size requirement.

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 deferred judgments on accounting matters to generally accepted accounting principles (See, for example, 40 CFR 264.141(f)). In this instance as well, EPA defers to 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. Therefore EPA has declined to specify particular additions to net worth for purposes of the financial test, but would interpret the tangible net worth requirement to be determined consistent with generally accepted accounting principles.

4. The Net Worth Requirement Reduces the Market for Sureties

Comment: Other commenters objected to the net worth requirement as unnecessary because it would allow the financially stronger companies with greater net worth to utilize the financial test and thereby remove these companies from the market for sureties and other third party instruments.

Response: The financial test allows those companies with the lowest

probability of failure, and hence the least need for a third party financial responsibility instrument, to self insure. EPA estimates that the closure and post-closure obligations for private owners and operators total approximately $6.4 billion. The cost for private owners or operators to obtain third party mechanisms, such as letters of credit or surety bonds, to assure these obligations is estimated at approximately $123 million. With today's rule, EPA estimates that the private cost of third party mechanisms would be $45.6 million for obligations that cannot be covered by the financial test. This will provide savings to owners and operators of MSWLFs of approximately $77 million annually.

The effect of this rule may be to reduce the market for certain types of third party financial responsibility instruments, but it does not eliminate the market which would still total approximately $45.6 million annually. This rule does not eliminate any of the third party instruments as options for a firm to use to comply with the regulations. In addition to sureties, the allowable instruments include trust funds, irrevocable standby letters of credit, insurance, or state-approved mechanisms. Therefore, even if sureties or insurers were to decide not to provide financial assurance (an outcome which EPA does not expect), owners or operators would still have mechanisms available for demonstrating financial assurance. EPA notes that the types of instruments available for demonstrating financial assurance for MSWLFs are similar to those for Subtitle C facilities, and other financial responsibility programs which help to sustain this market. It is EPA's experience that sureties provide financial assurance mechanisms for Subtitle C facilities, even though many Subtitle C facilities are able to utilize the financial test.

EPA also examined whether the availability of the financial test would cause some form of adverse selection whereby only ''bad risk'' firms would form the market for third party instruments and these ''bad risk'' firms would be unable to obtain a third party guarantee. EPA's financial test maximizes the availability of the test to strong firms while minimizing the number of firms allowed to use the test that later go bankrupt without covering their environmental obligations. Since no test can perfectly discriminate between financially viable firms and nonviable firms, a number of viable, financially sound firms will be unable to use the test. The financial test is a conservative predictor of long term viability and therefore a particular firm's inability to cover all or some of its obligations using the financial test does not necessarily mean that it poses an unreasonable risk for third-party guarantors of financial responsibility such as the insurance or surety industry.

Even though a firm does not pass the financial test, it remains a viable candidate for third party instruments. While such firms are not candidates for EPA's financial test, banks provide direct lending to these types of firms. Banks, for example, have the flexibility to require collateral or charge a higher interest rate to control their risk. A surety company also has ways to control its risk such as filing with a state a rating plan that decreases its rates for firms that meet certain financial strength requirements and charges higher rates to higher risk firms. For additional information on these points, please see the Issue Paper in the docket entitled Effects of the Financial Test on the Surety Industry.

5. Tangible Net Worth Does Not Have To Be Liquid

Comment: One commenter on the net worth requirement objected to the selection of tangible net worth because there was not a requirement that the assets had to be liquid, it can fluctuate dramatically so that a firm could qualify and then not qualify for the financial test, and it would create an uneven playing field with smaller owners and operators being unable to utilize the financial test.

Response: The proposed financial test did not include a requirement that owners or operators maintain a certain amount of liquid assets in addition to the other requirements such as minimum tangible net worth. The proposal relied upon two financial ratios, a leverage ratio of less than 1.5 based on the ratio of total liabilities to net worth, and a profitability ratio of greater than 0.10 based on the ratio of the sum of net income plus depreciation, depletion, and amortization, minus $10 million, to total liabilities. The leverage ratio and profitability ratios are highly effective in discriminating between viable and bankrupt firms, but liquidity ratios which measure firms' liquid assets are not as effective in discriminating between viable and bankrupt firms. In fact, liquidity ratios can be misleading as firms in financial distress often liquidate fixed assets to generate cash to continue operations. (For more information on these points, please see Chapter 4 of the Background Document, Revisions to the Subtitle C Financial Tests for Closure, Post-Closure Care and Liability Coverage, which was prepared in support of the July 1, 1991 proposed changes to the Subtitle C financial test 56 FR 30201).

While the market valuation of a corporation's stock can vary significantly, its net worth is a much more stable measure. Since net worth reflects the accounting value of the corporation's assets minus its liabilities, it will not have the volatility associated with the value of the company's stock that varies with the stock market's expectations of future dividends and interest rates. While it is possible that a firm could have a tangible net worth value close to the $10 million threshold, it seems unlikely that many would have a value close to this requirement and have losses and profits that would alternately bring them above or below the threshold. Also, the requirement for at least $10 million in net worth is reasonable in light of the substantial ($5.5 million for a 275 ton per day MSWLF to $26 million for a 1125 ton per day MSWLF) closure and post-closure costs for a MSWLF (See ''Analysis of Subtitle D Financial Tests in Response to Public Comments''), and other factors analyzed above.

Further, the use of the financial test does not create a significant competitive advantage. The cost of providing financial assurance through an alternative third party mechanism such as a letter of credit is approximately $1.35 to $0.94 per ton for 375 to 1500 ton per day landfills. This is not a large enough price difference to change substantially the competitive structure in many markets. Other factors are more important to competition within the industry. For example, transportation costs for transfer facilities can amount to $4.30 per ton, and an additional $4.30 to $7.50 per ton for every 100 miles for rail and truck hauling respectively. (For further information please see Issue Paper, Market Effects of the Financial Test.) Further, the alternative of maintaining the status quo would withhold greater flexibility for financially viable firms. EPA believes it is reasonable to extend regulatory flexibility to firms expected to be viable.

6. MSWLFs Should Have a Lower Minimum Net Worth Requirement Than Subtitle C Facilities

Comment: One commenter suggested that since MSWLFs pose less risk than hazardous waste activities, that the use of the same $10 million threshold for entry into the industry is much more appropriate for Subtitle C than for firms operating only in the MSWLF industry, and that EPA should choose a lower threshold for the municipal solid waste sector.

Response: This comment confuses the criteria for the financial test, which is one of the mechanisms for demonstrating financial responsibility, with EPA's broader requirement that companies demonstrate financial responsibility. For municipal solid waste landfills, EPA has long established financial assurance requirements at 40 CFR 258.71 for closure, 258.72 for post-closure care, and 258.73 for corrective action. These provisions already made a distinction between the financial responsibility requirements for MSWLFs and those for hazardous waste operations. Under 40 CFR 264.147 and 265.147 hazardous waste operations must maintain liability coverage for accidental occurrences, while EPA has deferred a corresponding requirement for MSWLFs (56 FR 51105). The fundamental requirements to maintain financial responsibility are not the subject of this rulemaking. Rather, this rule provides additional flexibility for private owners and operators to meet the financial responsibility requirements.

The demonstration of financial assurance can be through several mechanisms, including a financial test. There is no net worth requirement for firms to enter either the hazardous or municipal waste industry. The $10 million in net worth is only to qualify for the use of the financial test.

7. EPA's Proposed Net Worth Requirement Was Not the Best Investigated

Comment: Two commenters preferred a test with a net worth requirement at least equal to the amount being assured to EPA's proposal of at least $10 million plus the amount being assured. They noted that the two tests had the same public and private costs, and argued that this meant that the test EPA proposed was therefore not preferable to the other.

Response: The preamble to the proposed MSWLF financial test includes calculated private and public costs for three candidate tests which incorporate the same leverage and cash flow ratios or bond rating requirements, but differ in the amount of obligations that could be covered through the financial test. Test 562, which is the test that EPA proposed, allows a firm to cover obligation up to $10 million less than its net worth (i.e. the test requires a net worth at least $10 million greater than the amount being assured). Test 130 allows a firm with at least $10 million in net worth to cover obligations up to the amount of its net worth. Test 58 allows a firm with $10 million in net worth to cover any amount of obligations. Based upon the commenters' suggestion that EPA's proposal had wrongly rejected Test 130 in favor of Test 562, EPA reviewed all three tests using updated financial information from Dun and Bradstreet, Moody's and Standard & Poor's. This analysis appears in the docket under the title ''Analysis of Subtitle D Financial Tests in Response to Public Comments.''

Under the proposed test (identified as number 562–10 in the report), an owner or operator who meets the other test criteria can assure obligations as long as the firm's tangible net worth is at least $10 million larger than the obligation. This test has a private cost of $45.6 million and a public cost of $11.7 million for a total cost of $57.3 million. The private cost of the test represents the cost for owners or operators to provide a third party instrument (e.g. letter of credit) to demonstrate financial responsibility under the existing financial assurance requirements. The public costs represent the costs to the public sector of paying for financial assurance obligations (e.g. closure or post-closure costs) for firms that pass the test but later go bankrupt without funding their obligations. The cost figures for this and the other tests analyzed differ from the costs in the preamble to the proposal largely because the analysis performed in response to public comments included firms with less than $10 million in net worth. Therefore the private cost figures include not only the cost of securing a third party instrument for firms with more than $10 million in net worth, but also for firms with less than $10 million in net worth.

Under Test 130–10 the owner or operator with at least $10 million in net worth and meeting the other criteria of the test can assure obligations up to the net worth of the firm. For this test the private cost is lower at $43.2 million because a larger value of obligations can be assured. However, the public cost is higher than for Test 562 at $12.2 million for a total cost of $55.4 million.

Under Test 58–10 the owner or operator who passes the other criteria of the test could assure any amount of obligations so long as the company has a tangible net worth of at least $10 million. This test has a private cost of $32.9 million and a public cost of $14.1 million for a total cost of $46.9 million.

These cost estimates demonstrate that there are differences between Test 562, Test 130 and Test 58. Most notably, Test 562 has the lowest public costs of the three tests. EPA is concerned that allowing a company to assure environmental obligations up to the amount of its net worth, or any amount of obligations, could mean that these obligations could, of themselves, cause a firm's bankruptcy and so in the final rule adopted a regulation based upon the criteria in Test 562. However, the commenter's suggestion that EPA re-examine the relative merits of the tests led EPA to re-consider the appropriateness of Test 562 for firms that fully recognize environmental obligations as liabilities in financial statements. The provisions of today's rule which allow a firm that has recognized all of its environmental obligations as liabilities to assure them as long as it has at least $10 million in net worth (plus the amount of any guarantees not recognized on its financial statements) and meets the other criteria of the financial test means that these provisions with these important qualifications, are conceptually similar to the requirements of Test 58. As such these companies can assure a higher level of obligations than they could under Test 130. Therefore EPA believes that this provision potentially provides a larger amount of regulatory relief than the adoption of Test 130 since Test 58 has a lower private cost.

8. The Tangible Net Worth Requirement Is Appropriate

In addition to comments objecting to the proposed tangible net worth requirement, EPA also received comments supporting it. These comments came from the Texas Natural Resources Conservation Commission, and Browning-Ferris Industries. In addition, the State of Nebraska commented that they had no objection to the proposed financial test.

B. Bond Ratings

Comment: One commenter suggested that the proposed financial test accept ratings by Duff & Phelps, and Fitch in addition to bond ratings by Moody's, and Standard & Poor's.

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 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)

Comment: While supporting the use of bond ratings, one commenter noted that the proposed rule and preamble make no distinction relative to the seniority of the debt.

Response: The commenter correctly noted that the only qualification on the bond to be rated was that it be the most recent. As noted above, an analysis of bond ratings showed that bond ratings have been a good indicator of firm defaults. Part of the basis of the bond ratings is the assurances for timely repayment for the bond. A bond which is collateralized or insured will, in general, carry a higher rating than otherwise.

The bond rating in the financial test is an indicator of the certainty that environmental obligations being assured will be fulfilled. A bond may be of investment grade only because it is collateralized or insured. Because the financial test does not require establishment of collateral or a third party assurance, allowing a rating on an insured or collateralized bond could easily overestimate the certainty of the fulfillment of environmental obligations which are not collateralized or otherwise guaranteed. Since an investment rating on the most recent bond would not require a firm to pass any of the financial ratios, a firm using, for example, the investment rating on a bond that it had been forced to collateralize, would inappropriately pass the financial test.

Therefore, in light of this public comment, EPA has decided to base the bond rating alternative of the financial test on the rating of the firm's senior debt. This rating is readily available, regularly monitored by the rating agency, and avoids the issues of whether a particular bond has been collateralized or insured. Because the rating of the firm's senior debt reflects the rating agency's judgement of the overall financial management of the firm, it is a better indication of the financial health of the firm.

Comment: One commenter noted that 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 care. As evidenced by recent events involving highly rated entities, bond ratings are not infallible, and often times can fluctuate rapidly.

Response: While not infallible, bond ratings are excellent predictors of whether bonds will be repaid with more highly rated bonds having lower default rates than bonds with lower ratings. Overall, the annual assurance risk for investment grade bonds is 0.126% for Moody's and 0.175% for Standard and Poor's. (See Issue Paper, Issues Relating to the Bond Rating Alternative of the Corporate Financial Test in the public docket.)

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 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 ''watch 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 ''Ratings Performance 1996, Stability and Transition,'' Standard & Poor's, February 1997.) These data, and similar results from Moody's (See Exhibit 6 of ''Moody'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 will not often affect a firm's ability to use the financial test.

Comment: The bond rating alternative would be of advantage to only three firms in the industry. This is a further anticompetitive advantage for large firms. The proposed rules create a significant competitive advantage for larger firms and will lead to less competition and higher prices.

Response: The use of bond ratings provides a financial test that is highly reliable as shown by the low default rate on investment grade bonds. In addition to the bond rating alternative, EPA has allowed the use of financial ratios which also are accurate predictors of the financial viability of a firm. These two mechanisms provide additional flexibility for firms subject to the financial responsibility requirements which already provide several mechanisms by which a company can demonstrate financial assurance.

While the commenter notes that only three firms in the industry would meet the bond rating alternative, this appears to be an incomplete picture. EPA obtained bond ratings from Standard & Poor's, and Moody's for firms in the MSWLF industry. At the time of this data gathering, EPA was able to obtain ratings for nine firms (with their ratings in the parentheses): Allied Waste Industries, Inc. (BB−, B2); Browning-Ferris Industries (A, Aa2); Laidlaw, Inc. (BBB+, Baa2); Mid-American Waste Systems (Ca1); Norcal Waste Systems, Inc. (BB−, B3); Sanifill, Inc. (BB+); United Waste Systems, Inc. (BB+); USA

Waste Services, Inc. (BBB−), and WMX Technologies (A+, A1). Four of these firms had investment grade ratings and so could have qualified to use the financial test if they met the other qualifications, and four others had BB ratings, just below investment grade. If the financial situation for the four firms with BB ratings were to improve such that the rating agencies were to upgrade their ratings, they would also have been eligible to utilize the financial test. Were EPA not to adopt the bond rating alternative, this compliance option would be foreclosed to potentially more than the three firms suggested by the commenter.

EPA notes that some of these 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 have occurred between the time that EPA gathered this information and the publication of this rule. This consolidation has occurred in the absence of a corporate financial test, and indicates that factors beyond this rule are influencing the number of competitors in the industry. As the ownership patterns for municipal solid waste companies has changed substantially in the past, it is difficult to predict future directions. Eliminating the regulatory option of a bond rating alternative could preclude a future company from being able to utilize the financial test even if the analyses by bond rating agencies would show the company to be a good credit risk. Conversely, because bond ratings have been excellent predictors of bankruptcy, eliminating the bond rating alternative would deny to State Directors an effective test of companies' financial health. In response to this and other similar comments, the Agency further examined whether 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 would still face lower costs per ton than a smaller landfill. Further, for both small or large landfills third-party financial assurance costs constitute only two to three percent of total costs.

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 offset potentially lower tipping fees that the larger landfill might charge as a result of using the financial test to demonstrate financial assurance. Therefore, EPA does not believe that the financial assurance test will be a significant factor in influencing the competitive nature of the industry.

C. Financial Ratios

Comment: One commenter agreed with the use of bond ratings but disagreed with the use of a financial test involving only a single ratio. The commenter instead recommended at least three ratios to determine a firm's changes in cash flow, revenues and expenditures, and equity. The commenter stated that the use of three ratios would also be consistent with the three ratios required in the local government test and other Agency programs.

Response: EPA's financial test adopted in today's rulemaking action includes two alternative ratios that consider either the ratio of total liabilities to net worth (§ 258.74(e)(1)(i)(B)), or the ratio of net income plus depreciation, depletion, and amortization, minus $10 million, to total liabilities (§ 258.74(e)(1)(i)(C)). The analysis supporting the proposal indicated that the two alternative ratios do very well at allowing firms to qualify for the test while distinguishing between firms which will and will not go bankrupt. (This information can be found in Section VI of the preamble to the proposed rule (59 FR 51523)). Additional analyses, conducted in response to this and other comments confirmed these findings as shown by Exhibit 6 of the Analysis of Subtitle D Financial Tests in Response to Public Comments. This exhibit shows the high availability of the test (71.67% of obligations) and its low public cost ($11.7 million). By comparison, the current Subtitle C test, which uses three ratios, has a much lower availability (24.44% of obligations). While the analysis of the current Subtitle C test shows a low public cost of $4.3 million, this happens because of its low availability rather than because it is a better predictor of bankruptcy than the test being adopted today. A comparison of the misprediction of a test (M(f)) divided by its availability (A(f)) shows that the test EPA selected (Test 562–10) has a better ratio (0.362) than the current Subtitle C test (0.380). These ratios can also be taken from a single year's financial information.

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 lack reliability and 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 occurs 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 EPA's research found are crucial in the prediction of bankruptcy.

While the current Subtitle C financial test incorporates three ratios, they involve different measures than suggested by the commenter. Moreover, EPA has proposed changes to the Subtitle C test (56 FR 30201) involving the same ratios, and the same number of ratios, used in this test for corporate owners and operators of MSWLFs. Consistency with the current Subtitle C financial test is not a sufficient reason to include another test when the test being promulgated here has shown that it does a very good job of distinguishing between firms that will remain viable and those that could go bankrupt. Furthermore, while the commenter noted that EPA's proposed local government financial test incorporated three ratios, the final test has two ratios (61 FR 60328).

Comment: The profitability ratio incorporates a $10 million subtraction from net cash flow in the comparison with liabilities. One commenter recommended that the numerator instead subtract the lesser of $10 million or a percentage of the costs being assured.

Response: In light of public comments on its proposal, EPA has examined several alternative specifications of the financial tests. The results of these examinations appear in the report entitled ''Analysis of Subtitle D Financial Tests in Response to Public Comments'' that is included in the public docket of this rulemaking. The alternative specifications included fractional specifications (e.g. 0.66 times the financial assurance amount and identified as Test 94–10) of the amount of the liabilities compared with cash flow, a lower decrement from cash flow (e.g. Cash flow—$5 million and

identified as Test 544–10), no decrement from cash flow (Test 76–10) and different ratio requirements (e.g. 0.05 rather than 0.1 and identified as Test 127–10). None of these alternative specifications were as good overall at minimizing both the public and private costs as the tests that EPA had included in its proposed rule. Therefore, EPA is promulgating the same cash flow requirement in this rule as that proposed.

D. Domestic Assets

Comment: Several commenters supported the proposed domestic asset requirement, but others recommended alternatives such as a six times multiple, or assets in the United States equal to the minimum size requirement, or domestic assets equal to 50% to 90% of total assets.

Response: EPA has decided to promulgate the domestic asset requirement as proposed. While commenters offered alternative approaches for a domestic asset requirement, many of these were based upon the use of a number from, for instance, EPA's current Subtitle C financial test (e.g. the six times multiple which EPA proposed to change in the October 12, 1994 notice for this rulemaking, see 59 FR 51527), or a separate component of the proposal (e.g. the minimum tangible net worth) with little basis for adoption as part of the domestic asset requirement. These approaches would have the effect of potentially reducing the availability of the financial test, and thereby increasing private costs, without a demonstration of how they would make the test less available to firms which would enter bankruptcy, and thereby decrease the public costs. The information that the commenters provided did not demonstrate that requiring more domestic assets would lead to a reduced risk of bankruptcy, which is already a small probability. Both firms that only have domestic assets and firms that also have foreign assets must meet the same ratios or bond ratings to qualify for the test. The effect of a more stringent domestic asset requirement would have limited the amount of obligations that a firm qualifying for the financial test can cover. This would potentially have increased the private cost of the test, but not have made the test a better predictor of bankruptcy. Only in the unlikely event of a bankruptcy would this more stringent requirement have had an impact by having reduced the amount of costs covered. EPA believes that requiring domestic assets equal to the amount assured represents a balanced approach.

Comment: One commenter noted that none of the domestic assets had to be liquid and recommended that EPA should require that some or all of the domestic assets should be liquid and readily accessible.

Response: While liquid assets are more readily accessible than fixed assets, EPA is not establishing a requirement that a certain amount of domestic assets be liquid. During the normal course of business, firms can be expected to maintain a portion of assets in liquid form. However, liquidity can be a misleading predictor of bankruptcy. This arises because firms that are under financial distress tend to liquidate assets and thus appear more liquid as they move to bankruptcy. Further, if the underlying concern is that a foreign firm would withdraw from the US market and declare bankruptcy, a requirement for liquid assets, which can be readily transferred, would prove to be an ineffectual deterrent.

E. Recordkeeping and Reporting Requirements

Comment: One State noted that its program does not follow the self-implementing requirement of the test which allows the owner or operator to maintain the documentation as part of the operating record, but instead requires the submission of the original financial assurance documents.

Response: In developing its regulations for MSWLFs, EPA has adopted a self-implementing approach. However, EPA recognizes that some States may have different programs. This rule does not preclude a State from having more stringent requirements than EPA.

1. Qualified Accountant's Opinions

Comment: Some commenters suggested that the final rule disallow the use of the financial test automatically if there was a qualification to the accountant's opinion. These comments were based upon a concern that allowing the use of a qualified opinion without specifying the basis for that allowance could lead to inconsistent application by states or that states would have insufficient resources to consider these opinions. Others recommended that the rule provide narrower definitions of what would constitute something other than a clean opinion.

Response: 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 be cause for disallowance. See § 258.74(e)(2)(i)(B). However, this 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 this preamble also explains that an unqualified opinion (i.e. a ''clean 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.

2. Special Report From the Independent Certified Public Accountant

Comment: The American Institute of Certified Public Accountants (AICPA) recommended that the regulations provide for a CPA to perform an agreed-upon procedures engagement in accordance with standards issued by AICPA to report his or her findings. This would replace the review level or examination level procedure called for in the proposal.

Response: Under the regulations the owner or operator does not need to provide a report from the CPA if the Chief Financial Officer uses financial test figures directly from the annual financial statements or any other audited financial statements or data provided to the Securities and Exchange Commission. In these cases, EPA does not see a need for a special report from the CPA.

Under EPA's proposed regulations, if the owner or operator used financial test data that were different from the audited financial statements or not taken directly from SEC filings, then the owner or operator had to provide a special report from the independent

certified public accountant stating that ''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.'' 59 FR 51535. EPA agrees with the comment from AICPA that the special report required by the proposed rule was an inappropriate type of engagement.

In performing audits and other types of work, CPAs must follow certain professional standards. The AICPA's *Statement on Auditing Standards* no longer permits independent auditors to express negative assurance (i.e. ''No matter came to his attention which caused him to believe that the specified data should be adjusted.''). The current AICPA standards require the auditor to present the results of procedures performed in the form of findings, and explicitly disallow issuing ''negative assurance.'' Thus, the proposed regulatory language would have precluded an owner or operator who wanted to use adjusted data in the financial test from having that option.

If the owner or operator uses financial test figures that are not taken directly from the audited financial statements or SEC filings, then the owner or operator should include a report from the independent certified public accountant that is based upon an agreed-upon procedures engagement performed in accordance with AICPA standards. In an agreed-upon procedures engagement an accountant is engaged by a client to issue a report of findings based upon specific procedures performed on specific items of a financial statement. The final regulations require the report to describe the procedures performed in comparing 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, the findings of that comparison, and the reasons for any differences. See 258.74(e)(2)(i)(C).

F. Annual Updates

Comment: Commenters suggested allowing a minimum of 120 days for privately held firms (as opposed to publicly traded firms) to update their financial information because they are not considered major accounts and so frequently have their audits performed after publicly held firms.

Response: To address this comment, in the final rule, EPA has given State Directors the discretion to allow firms that can demonstrate that they cannot meet the annual requirement to acquire audited financial statements within 90 days of the close of the fiscal year up to an additional 45 days to demonstrate that they qualify. EPA believes that this can be particularly valuable to smaller firms that are not publicly traded and so may not have their audited financial statements prepared as quickly as larger firms.

G. Current Financial Test Documentation

Comment: Some commenters objected to the provision in 258.74(e)(2)(vi) that allows the State Director to request current financial test documentation when there is a reasonable belief that the owner or operator no longer meets the requirement of 258.74(e)(2).

Response: The Agency continues to believe that to promote and verify compliance it is important that State Directors may request additional information based upon a reasonable belief that the owner or operator may no longer meet the requirements of the financial test. As noted above and in the preamble to the proposed rule, the State Director may wish to request additional information in the event of a large liability judgment. Another example could be the reported downgrading of a firm's bonds so that the firm could no longer qualify 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. The final rule continues to use the criteria of ''reasonable belief.''

Comment: One commenter 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.

Response: In fact, this requirement appears in the Subtitle C financial test regulations promulgated April 7, 1982 (47 FR 15032) (See, for example, existing 40 CFR 264.143(f)(7)). It is important in both the financial tests for the hazardous and the municipal waste programs that the State Director have the ability to ensure that firms qualifying for the financial test continue to demonstrate financial viability.

Comment: One comment suggested that EPA allow the use of internal financial statements based upon the most recently unaudited quarterly financial statements to respond to a request by the State Director for additional information.

Response: Section 258.74(e)(2)(vi) of the proposed rule would have required the owner operator ''to provide current financial test documentation as specified in paragraph (e)(2) of this section.'' This may have been interpreted as merely the transmission to the State Director of the types of documentation required to be maintained in the facility's operating record. EPA agrees with the commenter that the types of documentation may differ depending upon the nature of the State Director's concern. The final rule modifies this requirement to clarify that the State Director may require the documentation in paragraph (e)(2) or additional information. This is consistent with the general purpose of the requirement, to ensure the State Director can obtain the information necessary to verify whether the firm still meets the financial test. 59 FR 51526. This leaves to the State Director the discretion to require the appropriate level of information, as warranted by the circumstances.

H. Corporate Guarantee

Comment: Some commenters agreed with allowing the use of a corporate guarantee, while others objected to its inclusion as a mechanism because of concerns about the ability of States to implement such a regulation.

Response: The Agency continues to believe that a corporate guarantee, like other third party mechanisms such as letters of credit or surety bonds, can ensure that a third party is obligated to cover the costs of closure, post-closure care, or corrective action in the event that the owner or operator goes bankrupt or fails to conduct the required activities. States concerned with implementation of a corporate guarantee could decline to adopt this mechanism. Conversely, if a state chooses to revise its permit program in response to today's rule, the state should work with the respective EPA regional office as it proceeds to make these changes.

Comment: One State recommended not allowing the use of a corporate guarantee based upon a substantial business relationship because it would require a decision by the State's Attorney General on its ability to enforce against a guarantor.

Response: While the final rule allows the use of a guarantee by a firm with a substantial business relationship, States do not have to adopt this provision if, for example, a state believes it creates undesirable administrative or enforcement burdens. EPA notes that its regulations in the hazardous waste program already allow the use of a corporate guarantee by a firm with ''a substantial business relationship'' in demonstrating financial assurance in, for example, 40 CFR 264.143(f)(10) or 40 CFR 265.147(g). (See also 40 CFR 264.141(h) for a definition of ''substantial business relationship.'') EPA expects that the number of owners

or operators who would qualify to use this provision in the MSWLF criteria will be substantially smaller than for coverage in the Subtitle C program if for no other reason than the number of firms that could need a guarantee is less than the number of Subtitle C firms.

Comment: Another commenter suggested that limiting the use to firms with a substantial business relationship was too restrictive.

Response: 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 scope of the corporate guarantee is the same as in the Subtitle C regulations that allow it for closure and post closure care liabilities (57 FR 42832). This rule was an extension to closure and post closure care liabilities of an earlier rulemaking allowing the guarantee for liability coverage by firms with a substantial business interest (53 FR 33938). In the preamble to the regulation establishing this mechanism for Subtitle C liability (53 FR 33942), EPA addressed whether a broader availability would be appropriate. The Agency determined that a substantial business relationship was necessary to ensure that the guarantee would be a valid and enforceable contract. ''EPA sought to ensure that a valid and enforceable contract was created. To this end, the Agency is requiring these firms to demonstrate a substantial business relationship with the owner or operator to ensure that the guarantee is a valid contract.'' As EPA noted in the preamble, ''A guarantee contract, by itself would be inadequate to demonstrate a substantial business relationship between two parties. However, an existing contract to supply goods or services, separate from the guarantee contract, could supply evidence of such a relationship. An example of such a relationship might be a contract for hazardous waste disposal between a generator and a disposal facility.'' The commenter provided no information on how to ensure that a guarantee between firms that do not have a substantial business relationship would be valid and enforceable, and therefore the Agency has insufficient basis for expanding the types of firms which can offer guarantees. To ensure the enforceability of the guarantee, EPA has retained the requirement that the guarantor have a substantial business relationship with the owner or operator.

Comment: One commenter suggested that the rule 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 would limit the exposure to only 30 days versus possibly a year or longer under the current proposed requirement.

Response: 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 ''following 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.

I. Impacts on Third Party Financial Assurance Providers

Comment: Several commenters felt that by allowing the financial test, EPA would create a situation where the best risks would use the financial test and the highest risk owners or operators would be left to third party instruments. Sureties and insurance companies would be uninterested in making a market for the highest risks.

Response: The financial test will allow firms with the least chance of bankruptcy to utilize the test rather than purchase third party mechanisms. However, with this flexibility EPA expects that there will still be a demand for third party instruments such as can be provided by insurers and sureties. Further, in addition to the financial test and guarantee, and sureties and insurance, the financial assurance regulations allow firms to demonstrate financial responsibility with trust funds, letters of credit, and other state-approved mechanisms meeting the performance criteria. Thus, even if sureties or insurers were no longer to provide a mechanism, firms that could not qualify for the financial test would still have mechanisms available to provide financial assurance.

With the exception of the state-approved mechanisms, the RCRA Subtitle D mechanisms are substantially the same as those that are available for owners and operators of RCRA Subtitle C treatment, storage and disposal facilities. In Subtitle C, a financial test has been available since 1982, and firms demonstrate financial assurance with the full range of mechanisms including surety bonds and insurance. EPA believes that sureties and insurers will evaluate the market for their products and, as demand warrants, will continue to provide mechanisms, as they have in Subtitle C.

J. General Support of and Opposition to the Financial Test

Comments: States and others expressed both general support of and opposition to the financial test. One State noted that a financial test does not provide a State or EPA access to funds to complete closure, post-closure, or corrective action should the financially responsible corporation refuse to take the needed action. The recourse for the State or EPA would be a lengthy and costly lawsuit.

Response: While the commenter notes a circumstance in the financial responsibility test where the owner or operator has the financial wherewithal to comply but does not, this circumstance does not distinguish itself

from others where EPA or a State must undertake enforcement to obtain compliance. The likelihood of a financially sound firm nevertheless being reluctant to fulfill its obligations is not affected by today's final rule.

Third party mechanisms do, however, provide easier access to funds to fulfill financial obligations. A State may, therefore, decide that it has facilities with poor compliance histories that do not make them a good candidate for the financial test in order to eliminate potential delays in obtaining closure, post-closure or corrective action. Similarly, States may decide to forego altogether adoption of the financial tests.

K. First Party Trust

Comment: As an alternative to a financial test and guarantee, one commenter suggested allowing facility owners to establish funds under their administration and management which would be regulated by a State agency which would establish rules for deposits as a trust fund. Once closure was complete, the funds would revert to the owner.

Response: The current financial responsibility standards allow owners and operators to establish financial responsibility through a trust fund managed by a third party. Under the commenter's plan, the facility would maintain control over the funds so the protections inherent in having a third party manage the funds would be lost. This plan would also require States to regulate these funds and ensure their safety. Since the funds remain under the control of the owner or operator, there could be concern for their safety unless the firm was in excellent financial condition. The mechanism to ensure this excellent financial condition could look substantially like a financial test so it is unclear what has been gained over EPA's approach of directly allowing a financial test. EPA does not consider this approach superior to its current system of allowing trust funds and a financial test and corporate guarantee.

L. Comments on the Notice of Data Availability

EPA received two comments on the September 27, 1996 Notice of Data Availability (61 FR 50787) providing additional opportunity to comment on EPA's analysis of the Meridian Corporation's alternate financial test: one from a private operator of MSWLFs, and one from a State regulatory agency.

Comment: The private operator who commented on EPA's analysis of the Meridian Report did 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.

Response: The Subtitle D program is intended to be a state implemented program. The Agency has therefore left it to the states to determine what financial mechanism they will allow and specific details regarding those mechanisms. Indeed, a Congressional objective of RCRA is to establish a joint state and Federal partnership in administering the law. RCRA 6902(a)(7). Further, § 3009 of RCRA explicitly allows a State to establish requirements more stringent than the federal requirements. Accordingly, EPA believes it would be inappropriate for policy and legal reasons to preempt disparate state requirements for MSWLFs. At the same time, EPA has developed sound national regulations that it encourages states to adopt that help to promote national uniformity.

Comment: The State regulatory agency was not in support of the Meridian Test and generally supported the evaluation performed by ICF Incorporated for EPA. The commenter also expressed concerns about the following aspects of the Meridian Test. The commenter did not agree with capping the period for which financial assurance would be provided, assuming a three percent real interest rate when preparing cost estimates because closure estimates are usually underfunded, amending the requirements for financial assurance requirements for contingent events to allow combined coverage within and across programs, and amending the requirements for closure and post-closure care by allowing owners or operators of multiple facilities to demonstrate financial assurance for less than the total costs of all facilities.

Response: EPA's regulations do not allow for capping the period for which financial assurance would be provided for MSWLFs. EPA's MSWLF regulations at 40 CFR 258.71(a)(1) require that closure cost estimate must equal the cost of closing the largest area of all MSWLF units ever requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive. 40 CFR 258.72(a) requires that post-closure cost estimates include annual and periodic costs over the entire post-closure care period, and 40 CFR 258.73(a) requires that the corrective action cost estimate account for the total cost of the corrective action activities for the entire corrective action period.

EPA agrees that estimates of environmental obligations can be underestimated and that discounting could exacerbate the attendant problems of insufficient funds being available. In the previously issued regulations allowing discounting, EPA requires that the State Director determine that cost estimates are complete and accurate and the owner or operator must submit a statement from a Registered Professional Engineer so stating. 61 FR 60339 (codified at 40 CFR 258.75(a). This requirement is designed to ensure that the cost estimates are not underestimated.

EPA agrees with the commenter that amending the requirements for contingent events is an irrelevant issue here because EPA has deferred any requirement for liability coverage as part of the MSWLF criteria.

Today's regulation requires that an owner or operator using the financial test to demonstrate financial assurance must have a tangible net worth that is greater than the sum of current closure, post-closure care, corrective action cost estimates, and any other environmental obligations covered by a financial test plus $10 million. The rules do, however, provide that if an owner or operator has already recognized the value of these obligations as liabilities on its financial statements, then the State Director may allow the firm to use the financial test if it meets the other criteria and has at least $10 million in net worth plus the amount of any guarantees extended by the firm that have not been recognized as liabilities on the financial statements. Thus, EPA's final rule requires that a firm must account for the value of all obligations covered by a financial test or guarantee.

VII. Miscellaneous

The discussion below addresses Executive Order 12866 (interagency regulatory review), the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, and Executive Order 12898 (Environmental Justice).

A. Executive Order 12866

Under Executive Order 12866, the Agency must determine whether a regulatory action is ''significant'' and, therefore, subject to Office of Management and Budget (OMB) review

and other requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Even though this rule provides owners and operators of MSWLFs with regulatory relief in meeting the existing requirements for financial assurance, EPA has submitted this rule to OMB for review because it raises important policy issues. The text of the draft final rule submitted to OMB, accompanying documents, and changes made in response to OMB suggestions or recommendations are in the public docket listed at the beginning of this notice.

EPA has evaluated the economic impact of the final rule. The Agency estimates that today's rule will save approximately $65.8 million annually. This figure is higher than the estimate for the proposed rule because it reflects additional analysis EPA performed in response to public comments, using updated financial and cost information. As explained above in the discussion of public comments, EPA's analysis for this final rule includes the costs for firms with less than $10 million in net worth. The underlying analysis, which followed the same methodology as the analysis supporting the proposed rule, can be found in the public docket for today's rule.

More specifically, EPA relied on updated (1995) financial information from Dun and Bradstreet on the firms in the MSWLF industry, bond rating information from Standard & Poor's, and Moody's, and augmented information on the financial characteristics of firms that entered bankruptcy. The economic impact analysis for this final rule estimated the availability of the financial test to firms in the MSWLF industry. If a firm was unable to cover any portion of its obligations, the analysis estimated the cost of the third party instruments that would be necessary. This inability to use the financial test could arise if, for example, the firm did not meet the ratio or bond rating requirements, or if its obligations were more than allowable under the tangible net worth requirement. The cost of the third party instruments was labeled the private cost of the test. It is the existing financial assurance requirements for owners and operators of MSWLFs under 40 CFR part 258 subpart G that imposes such costs, not the financial test being promulgated today.

As examined earlier in the notice, no financial test can perfectly discriminate between firms that should be allowed to use the financial test and therefore not have to pay the cost of a third party mechanism, and firms that will go bankrupt and so should have to use a third party instrument. Since a test will not be perfect at screening out firms that will enter bankruptcy, such costs are borne by the public. These public costs are the costs to the public sector of paying for financial assurance obligations, such a closure or post-closure costs, for firms that pass the test but later go bankrupt without funding their obligations. EPA analyzed the public costs associated with today's rulemaking. EPA's analysis assessed the misprediction of the various tests and the attendant public costs. As noted earlier in the notice, another relevant factor in designing a reasonable financial test is who should bear the costs, or how they should be reasonably allocated. In other words, there are public policy issues in deciding whether financial assurance costs should be borne by the owners or operators of MSWLFs (and their customers), or the public generally.

To calculate the cost savings of today's rule, EPA first estimated the cost for private owners or operators of MSWLFs of obtaining third party mechanisms (e.g., letters of credit) to assure their MSWLF obligations which the Agency estimates total approximately $7 billion for closure and post-closure obligations. EPA estimates that the cost of such financial assurance instruments under the existing financial assurance requirements would total $123.0 million annually. (See ''Analysis of Subtitle D Financial Tests in Response to Public Comments'' in the docket to this rule.)

There are a few potential adjustments to those costs. To the extent that owners or operators are able to use alternative mechanisms such as captive insurance that could be less expensive, this estimate of the cost of financial responsibility in the absence of this rule would be somewhat overstated. Also, on November 27, 1996 (61 FR 60328) EPA promulgated 40 CFR 258.75 that provided State Directors with the authority to allow the discounting of closure, post-closure and corrective action costs. EPA did not estimate the potential cost savings from that provision at that time, and does not have information regarding the extent to which State Directors have provided this allowance. However, to the extent that State Directors have provided that allowance to privately owned or operated MSWLFs, this allowance could lead to a relatively small overstatement of the savings associated with this rule. For more information on the changes in costs potentially associated with discounting, please see ''Analysis of Subtitle D Financial Tests in Response to Public Comments'' in the docket.

As described earlier, in the analysis for this rule EPA has evaluated the private and public costs and savings associated with a number of regulatory alternatives. The regulatory alternative adopted in today's final rule is estimated to result in an annual savings of approximately $65.8 million or more, which puts it at the forefront in cost savings among the regulatory alternatives. Under the alternative adopted in today's final rule, an owner or operator could assure obligations so long as the firm's tangible net worth is at least $10 million larger than the obligation. This test had a private cost of $45.6 million annually and a public cost of $11.7 million annually for a total annual cost of $57.3 million. Subtracting the total cost from the cost of the existing requirement without a test ($123.0 million) gives a savings of $65.8 million annually.

Further, as noted earlier, EPA was concerned that this alternative could discriminate against firms which had already recognized all of their environmental obligations as liabilities on their audited financial statements. Therefore, EPA has given to State Directors the ability to allow firms that have their environmental obligations fully reflected in their liabilities on their audited financial statements to cover these obligations so long as they have a net worth of at least $10 million plus the amount of any guarantees that do not appear on their financial statements. The maximum annual savings from this rule as a result of this allowance are estimated to total $ 73.1 million, or $7.3 million more than $65.8 million.

The document entitled ''Analysis of Subtitle D Financial Tests in Response to Public Comments,'' contains additional information on the estimated cost savings of this rule, and is available in the public docket for this rulemaking.

B. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of certain regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a final rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Section 204 of UMRA requires each agency to develop ''an effective process to permit elected officers of state, local, and tribal governments . . . to provide meaningful and timely input'' in the development of regulatory proposals containing a significant Federal intergovernmental mandate.

Today's rule is not subject to the requirements of sections 202, 203, 204, and 205 of the UMRA. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. On the contrary, as described above, the Agency estimates that today's rule will save $65.8 million annually by allowing the use of a financial test or a corporate guarantee to demonstrate financial responsibility for environmental obligations without incurring the costs of obtaining a third-party mechanism. Further, as discussed previously in the notice, neither State nor local governments are subject to the requirements under this rule, but state governments have considerable flexibility in deciding how to implement the regulatory relief provided in this rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, provides that, whenever an agency is required to publish a general notice of rulemaking for a proposal, the agency must prepare an initial regulatory flexibility analysis for the proposal unless the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (section 605(b)). The EPA certified that the October 12, 1994 proposal for today's rule would not have a significant economic impact on a substantial number of small entities. 59 FR 51534. Accordingly, the Agency did not prepare an initial regulatory flexibility analysis for the proposed rule.

EPA has not received any adverse public comments on its decision under the RFA to certify the proposed rule and declining to prepare an initial regulatory flexibility analysis for the proposed rule. As discussed above, EPA did receive public comments that the tangible net worth requirement under the financial test is unnecessary and has an anticompetitive effect on small firms in the MSWLF industry, but these comments did not raise questions regarding the RFA certification. In the discussion of public comments, above, and in the ''Response to Public Comments'' document accompanying this rulemaking, EPA addresses the concerns about the proposed minimum net worth requirement. The discussion of public comments in section VI.A. above regarding the minimum tangible net worth requirement and other aspects of the preamble help explain EPA's decision here to also certify that the final rule will not have a significant adverse impact on a substantial number of small entities.

For the following reasons, EPA concludes that certification is still proper. As noted above, the RFA requires a regulatory flexibility analysis unless the rule ''will not have, if promulgated, a significant economic impact on a substantial number of small entities.'' RFA section 605(b). For purposes of the RFA, the ''impact'' of concern is the impact the rule at issue will have on the small entities that will have to comply with the rule. The stated purpose of the RFA, its requirements for regulatory flexibility analyses, its legislative history, the amendments made by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104–121), and case law all make clear that an agency must assess the impact of a rule on small entities to the extent that small entities will be subject to the requirements of the rule. Thus, the RFA is appropriately interpreted to require a regulatory flexibility analysis only for rules imposing requirements on small entities. See RFA Secs. 603 (b) & (c), and 604(a); *Mid-Tex Electric Co-op., Inc.* v. *FERC*, 773 F.2d 327, 340–43 (D.C. Cir. 1985) (holding the RFA does not require agencies to examine the economic impact on small entities that are not directly regulated by the rule or subject to the regulatory requirements of the rule); *United Distribution Companies* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *cert. denied, Associated Gas Distributors* v. *FERC*, 117 S.Ct. 1723 (1997) (same).

As discussed in greater detail in section VI.A. above and other sections of this preamble, today's rule does not impose new regulatory requirements on any firms, including small entities. Rather, the rule provides additional flexibility for owners or operators of MSWLF units in meeting the existing financial assurance requirements established under 40 CFR part 258, subpart G.

The comments discussed in section VI.A. do not relate to compliance burdens imposed on firms subject to the rule, but rather to secondary competitive effects that the commenters believe may result from a minimum net worth requirement. These are not the kinds of effects that a regulatory flexibility analysis is intended to address. Therefore, after considering public comments and other relevant information, EPA continues to believe that this deregulatory final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and EPA has not prepared a final regulatory flexibility analysis for this rule.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA

submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

E. Paperwork Reduction Act

OMB approved the information collection requirements of the MSWLF criteria, including financial assurance criteria, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and assigned OMB control number 2050–0122. The burden estimate for the financial assurance provisions included the burden associated with obtaining and maintaining any one of the allowable financial assurance instruments, including a financial test.

F. Environmental Justice

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. This regulation provides additional mechanisms by which firms can demonstrate financial assurance for their MSWLF closure, post-closure, and if necessary, corrective action obligations. It is not expected to have any impact on minorities or low-income populations.

G. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act (''NTTAA''), the Agency is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practice, etc.) which are developed or adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the Agency to provide Congress, through the Office of Management and Budget, an explanation of the reasons for not using such standards. EPA identified no potentially applicable voluntary consensus standards for today's final rule.

List of Subjects in 40 CFR Part 258

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

Dated: April 3, 1998.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, title 40, Chapter I of the Code of Federal Regulations is amended as follows:

PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

1. The authority citation for part 258 is revised to read as follows:

Authority: 33 U.S.C. 1345(d) and (e); 42 U.S.C. 6902(a), 6907, 6912(a), 6944, 6945(c) and 6949a(c).

2. Section 258.74 is amended by revising paragraphs (e), (g), and (k) to read as follows:

§ 258.74 Allowable mechanisms.

* * * * *

(e) *Corporate financial test.* An owner or operator that satisfies the requirements of this paragraph (e) may demonstrate financial assurance up to the amount specified in this paragraph (e):

(1) *Financial component.* (i) The owner or operator must satisfy one of the following three conditions:

(A) A current rating for its senior unsubordinated debt 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

(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.

(ii) The tangible net worth of the owner or operator must be greater than: (A) The sum of the current closure, post-closure care, corrective action cost estimates and any other environmental obligations, including guarantees, covered by a financial test plus $10 million except as provided in paragraph (e)(1)(ii)(B) of this section.

(B) $10 million in net worth plus the amount of any guarantees that have not been recognized as liabilities on the financial statements provided all of the current closure, post-closure care, and corrective action costs and any other environmental obligations covered by a financial test are recognized as liabilities on the owner's or operator's audited financial statements, and subject to the approval of the State Director.

(iii) The owner or operator must have assets located in the United States amounting to at least the sum of current closure, post-closure care, corrective action cost estimates and any other environmental obligations covered by a financial test as described in paragraph (e)(3) of this section.

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

(A) A letter signed by the owner's or operator's chief financial officer that:

(*1*) Lists all the current cost estimates covered by a financial test, including, but not limited to, cost estimates required for municipal solid waste management facilities under this part 258, cost estimates required for UIC facilities under 40 CFR part 144, if applicable, cost estimates required for petroleum underground storage tank facilities under 40 CFR part 280, if applicable, cost estimates required for PCB storage facilities under 40 CFR part 761, if applicable, and cost estimates required for hazardous waste treatment, storage, and disposal facilities under 40 CFR parts 264 and 265, if applicable; and

(*2*) Provides evidence demonstrating that the firm meets the conditions of either paragraph (e)(1)(i)(A) or (e)(1)(i)(B) or (e)(1)(i)(C) of this section and paragraphs (e)(1)(ii) and (e)(1)(iii) of this section.

(B) A copy of the independent certified public accountant's unqualified opinion of the owner's or operator's financial statements for the latest completed fiscal year. To be eligible to use the financial test, the owner's or operator's financial statements must receive an unqualified opinion from the independent certified public accountant. An adverse opinion, disclaimer of opinion, or other qualified opinion will be cause for disallowance, with the potential exception for qualified opinions provided in the next sentence. The Director of an approved State may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Director deems that the matters which form the basis for the qualification are insufficient to warrant disallowance of the test. If the Director of an approved State does not allow use of the test, the owner or operator must provide alternate financial assurance that meets the requirements of this section.

(C) If the chief financial officer's letter providing evidence of financial assurance includes financial data showing that owner or operator satisfies

paragraph (e)(1)(i)(B) or (e)(1)(i)(C) of this section 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, then a special report from the owner's or operator's independent certified public accountant to the owner or operator is required. The special report shall be based upon an agreed upon procedures engagement in accordance with professional auditing standards and shall describe the procedures performed in comparing 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, the findings of that comparison, and the reasons for any differences.

(D) If the chief financial officer's letter provides a demonstration that the firm has assured for environmental obligations as provided in paragraph (e)(1)(ii)(B) of this section, then the letter shall include a report from the independent certified public accountant that verifies that all of the environmental obligations covered by a financial test have been recognized as liabilities on the audited financial statements, how these obligations have been measured and reported, and that the tangible net worth of the firm is at least $10 million plus the amount of any guarantees provided.

(ii) An owner or operator must place the items specified in paragraph (e)(2)(i) of this section in the operating record and notify the State Director that these items have been placed in the operating record before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997 or October 9, 1997 for MSWLF units meeting the conditions of § 258.1(f)(1)), whichever is later in the case of closure, and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.

(iii) After the initial placement of items specified in paragraph (e)(2)(i) of this section in the operating record, the owner or operator must annually update the information and place updated information in the operating record within 90 days following the close of the owner or operator's fiscal year. The Director of a State may provide up to an additional 45 days for an owner or operator who can demonstrate that 90 days is insufficient time to acquire audited financial statements. The updated information must consist of all items specified in paragraph (e)(2)(i) of this section.

(iv) The owner or operator is no longer required to submit the items specified in this paragraph (e)(2) or comply with the requirements of this paragraph (e) when:

(A) He substitutes alternate financial assurance as specified in this section that is not subject to these recordkeeping and reporting requirements; or

(B) He is released from the requirements of this section in accordance with § 258.71(b), § 258.72(b), or § 258.73(b).

(v) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 120 days following the close of the owner or operator's fiscal year, obtain alternative financial assurance that meets the requirements of this section, place the required submissions for that assurance in the operating record, and notify the State Director that the owner or operator no longer meets the criteria of the financial test and that alternate assurance has been obtained.

(vi) The Director of an approved State may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require at any time the owner or operator to provide reports of its financial condition in addition to or including current financial test documentation as specified in paragraph (e)(2) of this section. If the Director of an approved State finds that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance that meets the requirements of this section.

(3) *Calculation of costs to be assured.* When calculating the current cost estimates for closure, post-closure care, corrective action, or the sum of the combination of such costs to be covered, and any other environmental obligations assured by a financial test referred to in this paragraph (e), the owner or operator must include cost estimates required for municipal solid waste management facilities under this part, as well as cost estimates required for the following environmental obligations, if it assures them through a financial test: obligations associated with UIC facilities under 40 CFR part 144, 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.

* * * * *

(g) *Corporate Guarantee.* (1) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a ''substantial business relationship'' with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraph (e) of this section and must comply with the terms of the guarantee. A certified copy of the guarantee must be placed in the facility's operating record along with copies of the letter from the guarantor's chief financial officer and accountants' opinions. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter from the guarantor's chief financial officer must describe the value received in consideration of the guarantee. If the guarantor is a firm with a ''substantial business relationship'' with the owner or operator, this letter must describe this ''substantial business relationship'' and the value received in consideration of the guarantee.

(2) The guarantee must be effective and all required submissions placed in the operating record before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997 or October 9, 1997 for MSWLF units meeting the conditions of § 258.1(f)(1), whichever is later, in the case of closure and post-closure care, or in the case of corrective action no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.

(3) The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform closure, post-closure care, and/or corrective action of a facility covered by the guarantee, the guarantor will:

(A) Perform, or pay a third party to perform, closure, post-closure care, and/or corrective action as required (performance guarantee); or

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

(ii) The guarantee will remain in force for as long as the owner or operator must comply with the applicable financial assurance requirements of this Subpart unless the guarantor sends prior notice of cancellation by certified mail to the owner or operator and to the State Director. Cancellation may not occur,

however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the State Director, as evidenced by the return receipts.

(iii) If notice of cancellation is given, the owner or operator must, within 90 days following receipt of the cancellation notice by the owner or operator and the State Director, obtain alternate financial assurance, place evidence of that alternate financial assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within 120 days of the cancellation notice, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director.

(4) If a corporate guarantor no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must, within 90 days, obtain alternative assurance, place evidence of the alternate assurance in the facility operating record, and notify the State Director. If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance within the next 30 days.

(5) The owner or operator is no longer required to meet the requirements of this paragraph (g) when:

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

(ii) The owner or operator is released from the requirements of this section in accordance with § 258.71(b), § 258.72(b), or § 258.73(b).

* * * * *

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

* * * * *

[FR Doc. 98–9558 Filed 4–9–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 65

[Docket No. FEMA–7253]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the base (1% annual chance) flood elevations is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified base flood elevations for new buildings and their contents.

DATES: These modified base flood elevations are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Associate Director reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: Matthew B. Miller, P.E., Chief, Hazards Study Branch, Mitigation Directorate, 500 C Street SW., Washington, DC 20472, (202) 646–3461.

SUPPLEMENTARY INFORMATION: The modified base flood elevations are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified base flood elevations are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program.

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities.

The changes in base flood elevations are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Associate Director, Mitigation Directorate, certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the National Flood Insurance Program. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows: