United States
Environmental Protection
Agency

Federal Register Notices Pertaining to Underground Storage Tanks

Federal Register Notices: Proposed and final federal regulations are published in the Federal Register. Unlike the CFR, Federal Register notices contain additional text that explains the rationale behind a proposed or final regulation. This additional text may be very helpful in understanding the regulation.

QA documents referred to in some of the following FR notices may be outdated. Visit The EPA Quality System web site for the latest version of EPA's QA documents.

50 FR 46602-46618 Friday, Nov. 8, 1985
Notification Requirements for Owners of Underground Storage Tanks

46602-46618 Federal Register / Vol. 50, No. 217 / Friday, November 8, 1985 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 280

[OSW-FRL 2911-6]

Notification Requirements for Owners of Underground Storage Tanks

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY:

Today the Environmental Protection Agency (EPA) is publishing a notification form to be used by owners of underground storage tanks that store or have stored petroleum or hazardous substances. Under section 9002 of the Resource Conservation and Recovery Act (RCRA), as amended, these owners are required to notify designated State or local agencies of the existence of their tanks. In publishing this form, EPA is fulfilling its obligation under section 9002(b) to prescribe the form of notice and the information it must contain. On May 28,1985, EPA proposed two notification forms in the **Federal Register** (50 FR 21772-21781). In addition, the Agency noticed the availability of a revised form on August 30, 1985 in the **Federal Register** (50 FR 35261). Today's rulemaking reflects several modifications made to the proposed forms as well as the revised form in response to comments received. The form published today must be used by all owners subject to the section 9002 notification provisions unless the State in which the tank is located requires use of its own form or forms and such form(s) meet the requirements of section 9002.

DATE:

Final rule effective November 8, 1985.

ADDRESS:

The public docket for this final rule [Docket No. 9002] is located in Room S-212, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, and is available for viewing from 9:00

a.m. to 4:00 p.m., Monday through Friday, excluding holidays. This docket contains, among other material, the economic analyses, background documents, and comments discussed in this preamble.

FOR FURTHER INFORMATION CONTACT:

The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC; or Virginia Cummings, Office of Solid Waste (WH-565A), U.S. Environmental Protection Agency, Washington, DC 20460, (202) 382-7925.

For information on implementation of this rulemaking, contact the EPA regional office below:

Region I

William Torrey, Waste Management Division, 150 Causeway Street. Room 701-709, Boston, Massachusetts 02223, (617) 223-6883

Region II

Tom Taccone, Program Support Section, Solid Waste Branch, 26 Federal Plaza, New York, New York 10278, (212) 264-0504

Region III

Dennis Carney, Hazardous Waste Management Division, 841 Chestnut Street, Philadelphia, Pennsylvania 19107, (215) 597-3182

Region IV

Mike Williams, Waste Management Division, 345 Courtland Street, N.E., Atlanta, Georgia 30365, (404) 881-3633

Region V

Gerald Phillips, Waste Management Division, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 335-6159

Region VI

Faye Sandberg, Hazardous Materials Branch, 1201 Elm Street, Dallas, Texas 75270, (214) 767-2941

Region VII

Chest McLaughlin, RCRA Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101, (913) 236-2852

Region VIII

C. Jay Silvernale, LUST Coordinator, 999 18th Street, Suite 1300, Denver, Colorado 80202, (303)293-1503

Region IX

Eve Levin, RCRA Program Section, 215 Fremont Street, San Francisco, California 94105, (415) 974-8169

Region X

Joan Cabreza, Waste Management Branch, RCRA, Program Development Section, 1200 6th Avenue, Seattle, Washington 98101, (206) 442-0344

SUPPLEMENTARY INFORMATION:

I. Authority

These regulations are issued under the authority of sections 9001, 9002, and 9006 of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended (42 U.S.C. 6991, 6992, and 6996).

II. Background

A. The Statutory Framework

On November 8, 1984, President Reagan signed the Hazardous and Solid Waste Amendments of 1984. These Amendments extend and strengthen the provisions of the Resources Conservation and Recovery Act (RCRA) of 1976, the Federal law protection human health and the environment from improper waste management practices. One of the new RCRA provisions, Subtitle I, initiates a program to control hazards created by underground storage tanks. The Subtitle I program regulates underground tanks that store petroleum and substances defined as hazardous under section 101(14) of the Comprehensive Environmental Response, Compensation. and Liability Act (CERCLA) (except substances regulated as hazardous wastes under Subtitle C of RCRA).

Underground storage tank is defined in section 9001(l) of Subtitle I as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground."

Section 9001(l) excludes the following from the definition of underground storage tank:[1]

(1) Farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

(2) Tanks used for storing heating oil for consumptive use on the premises where stored;

(3) Septic tanks;

(4) Pipeline facilities (including gathering lines) regulated under (a) the Natural Gas Pipeline Safety Act of 1968, (b) the Hazardous Liquid Pipeline Safety Act of 1979, or (c) which is an intrastate pipeline facility regulated under State laws comparable to the provisions of law referred to in (a) and (b) above;

(5) Surface impoundments, pits, ponds, or lagoons;

(6) Storm water or wastewater collection systems;

(7) Flow-through process tanks;

(8) Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations; or

(9) Storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the tank is situated upon or above the surface of the floor.

Subtitle I was developed by Congress in response to a growing number of groundwater contamination incidents caused by substances leaking from underground storage tanks. To assist States in locating and evaluating such tanks. Congress required in section 9002 of Subtitle I that owners of underground storage tanks notify designated State or local agencies of the existence of their tanks. As a means of enforcing the notification requirements for owners of such tanks, Congress authorized the assessment of civil penalties against any owner who knowingly fails to notify or who submits false information regarding any tank for which notification is required.

B. The Notification Requirements

Section 9002 requires owners of underground storage tanks used to store or dispense regulated substances on or after November 8, 1984, to notify by May 8, 1986, and provide information on the age, size, type, location, and use of each tank.[2] Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tank into use and provide information on the age, size, type, location, and use of such tanks.

Section 9002 also imposes requirements on owners of underground storage tanks which were taken out of operation after January 1, 1974, but remain in the ground. Owners of these tanks must notify by May 8,1986, and provide information to the extent known on the date the tank was taken out of operation; the size, type, and location of the tank; and the type and quantity of substances left stored in the tank on the date it was taken out of operation.

With respect to tanks in use on or November 8, 1984, the term "owner" is defined in the statute as "any person who owns an underground storage tank." Thus, for any tank used to store or dispense regulated substances after November 8, 1984, the "owner" is the current owner.

With respect to tanks permanently taken out of operation before November 8, 1984, the statute defines "owner" as "any person who owned the tank immediately before discontinuation of its use." Thus for tanks taken out of operation between January 1, 1974 and November 8, 1984, the person obligated to provide notification concerning the tank is the person who last owned the tank before it was taken out of use.

To ensure that owners of underground storage tanks are informed of their responsibility to notify, Congress also imposed certain obligations on persons who deposit regulated substances in tanks and on tank sellers. From December 9, 1985 through May 9, 1987 anyone depositing regulated substances in an underground storage tank must notify the owner or operator of such tanks of the owner's notification responsibilities. Beginning 30 days after EPA issues new tank performance standards under section 9003(e), any person who sells a tank intended to be used as an underground storage tank must inform the purchaser of the tank of the owner's notification requirements.

Section 9002 requires EPA, in consultation with State and local officials and after notice and opportunity for public comment, to prescribe the form of the notice and the information it must contain. Section 9002 requires that designated State or local agencies, not EPA, receive the notification. EPA has provided in Appendix II a list of these Agencies. Owners of underground storage tanks are advised to consult this list to determine: (1) To whom notice must be sent; and (2) whether the State in which the underground tank is located requires the use of the EPA form or an alternate State form for notification purposes. The State forms noted in Appendix II have been reviewed by EPA and are consistent with Federal requirements. Owners may thus use these forms to fulfill their Federal notice obligation. The listing, however, does not represent an EPA finding that State requirements, such as those concerning who must notify and when notification must be received, are consistent with section 9002.

III. Response to Comments on the Proposed Notification Requirements

A. Introduction

The majority of the commenters supported the proposed rulemaking with minor modifications. Five major issues, however, were raised in the comment letters received by the Agency on the May 28, 1985, proposal. These issues concerned:

1. Mandatory use of the Federal notification form by all tank owners;
2. Additional information to be provided by tank owners;
3. Clarification of certain definitions;
4. Notification responsibilities for sellers of tanks and depositors of regulated substances:
5. Implementation of the notification requirements.

1. Mandatory use of the Federal notification form.

In the preamble to the proposed rule, EPA suggested that States could modify the Federal notification forms to obtain additional information, or develop a separate notification form specifically suited to State needs. The issue most frequently mentioned by commenters was whether EPA should require States to use EPA's form or to use their own forms. Many industry commenters felt that EPA should encourage States to adopt EPA's form in the interest of maintaining uniformity and simplicity in the underground storage tank program. For companies with underground storage tanks in two or more States, they noted, compliance with the notification provisions of EPA's underground storage tank regulations would be considerably simplified if a uniform Federal notification form were required. They argued that, should a State insist upon having additional information, the State could provide an addendum to the Federal form or carry out a follow-up data request on only those facilities of interest.

In addition. several commenters expressed the belief that section 9002 requires EPA to prescribe a form to be used nationwide and that there is no statutory authority for EPA to approve alternative State forms.

In response to these comments, the Agency points out that section 9002 does not require EPA to mandate nationwide use of the Federal form. It merely requires EPA to "prescribe the form of notice and the information to be included in the notifications." Using a standard dictionary definition, the word "prescribe" can be interpreted several ways. It could mean "to lay down as a guide, direction, or rule of action; to specify with authority; or to designate or order the use as a remedy." Accordingly, EPA believes that section 9002 provides EPA the flexibility to prescribe its form as a guide for States but does not necessarily mandate use of EPA's form by States that opt to use their own forms.

In light of the specific language used in this provision, the Agency believes that the phrase "to prescribe the form of the notice" does not require the use of one standardized notice form. Rather, the Agency believes that the statute requires it to set out the type of notice that will comply with section 9002 information requirements.

The EPA form is to be used as the notice form in States where no State notification forms have been developed (that conform to the minimum statutory requirements) and as a guide for States that develop

their own forms. This interpretation accords with EPA's view of the principal purpose of section 9002, which is to aid States in developing basic information concerning the tank universe within their borders.

Furthermore, EPA believes that it would be unreasonable to require States with notification programs already underway that satisfy the requirements of section 9002 to adopt the Federal forms. For them to make major changes in their programs and to require a second notification would be a needless and expensive duplication of effort for both the State and the tank owner subject to its reporting requirements. In those States where data collection that accords with the requirements of section 9002 has already taken place, therefore, EPA believes that notification under these State registration programs should be accepted as compliance with section 9002. Thus, EPA is not requiring States to use the Federal form if the State provides a form that meets the statutory requirements of section 9002.

In response to the argument made by commenters for mandating use of the Federal form with a State addendum, EPA does not believe that this action would significantly reduce the burden to tank owners. The regulated community may need to provide as much information in an addendum as would be required by a State form.

In light of the burden on owners subject to reporting in more than one State, the Agency is encouraging States to use the EPA form. EPA has tried to produce a form that States will want to use, one that is simple and straightforward, yet meets the requirements of section 9002. We have worked closely with many States in developing the form and have communicated to them that the objective of the present notification program is to obtain basic and accurate information quickly while avoiding imposition of excessive burdens or unproductive requirements on the regulated community. In addition, we notified the public of the availability of a new form in the **Federal Register** on August 30 (50 FR 35261) and invited comments on it. The present form reflects those comments on both the May and August proposals.

2. Additional information to be provided by tank owners.

In the preamble to the proposed rule (50 FR 21774, May 28, 1985), the Agency indicated that it had rejected the option of requiring more information from tank owners than is expressly required under section 9002. EPA expressed its belief that inclusion of additional information requirements across the board, in all States, would involve increased time and costs to the regulated community and to the State or local agency processing the information. EPA noted that if a State prefers to request more information, it can provide an addendum to the EPA form to suit its needs or develop its own form.

The Agency solicited comment from the States in the proposal on the applicability of the proposed forms to their needs. At that time, EPA also requested comment from the members of the public who would be required to use the form.

Commenters representing six States believed EPA should require additional information. Many State commenters stated that EPA should require a description of any leaks or spills that have occurred at the

facility. Other commenters said the notification forms should contain information on the installation status (i.e., whether the tank was installed under industry approved methods) and on methods or equipment used for leak detection or prevention.

Nearly all of the commenters who opposed additional information requirements were members of the regulated community. Many of these commenters recommended that EPA resist all attempts to expand and further complicate the notification form to include additional information not specifically required by section 9002. They argued that additional information requirements would increase the cost and complexity of implementation.

In response to EPA's suggestion that States could "piggy back" additional State information requirements to the Federal form, only one industry representative expressly disapproved. That commenter felt that EPA should discourage States from providing an addendum to the Federal form on the grounds that the initial notification should not attempt to address all the questions that may arise concerning underground storage tanks. Several other commenters said that States that perceive gaps in the section 9002 notification program or that require additional information for their particular tank programs should use section 9004 ("Approval of State programs") rather than 9002 to obtain that data.

The Agency believes that the latter commenter's reference to section 9004 in this matter is inappropriate. Section 9004 provides for the approval by EPA of State underground storage tank programs that meet minimum Federal requirements. It requires that States seeking approval have a notification program that accords with the requirements of section 9002, but it does not provide States authority apart from section 9002 to collect information for notification purposes.

After careful consideration of the other comments and concerns described above, EPA has decided to promulgate a form that will limit the information required in the notification form to those matters specifically mentioned, in section 9002. The Agency based this decision on a number of factors. First, the Agency believes that the purpose of the notification program is to collect information that could be used to develop a preliminary tank inventory. To add more detailed reporting requirements would convert the relatively modest notification obligation contemplated by Congress into a major undertaking. The Agency believes there will be ample opportunity later for the States and tank owners to consider what additional information might be necessary for the administration of ongoing State programs.

Second, the Agency also recognizes that requiring additional information will escalate costs because such additional information may often be difficult to obtain. Even if one assumes that additional information can be obtained, the Agency questions the value of such information for this notification program. For example, leak detection systems and methods of tank gauging are frequently changed. Thus, such information could soon be outdated or be in need of continuous revision.

In some areas, however, the Agency found it necessary to request additional information. The first area is piping. Although piping is included in the legal definition of underground storage tank contained in

section 9001(1), EPA did not differentiate the parts of the tank system in the proposed forms. Several State commenters expressed concern that the proposed form appears to exclude piping, a significant oversight because piping is part of the tank definition and leaks from piping have been identified as a significant source of release incidents. We now include information requirements on the piping portion of the tank separately on the notification form.

The second area for which additional information is required on the final form is closure. For purposes of clarification, a box was added for owners to indicate if the tank was filled with an inert solid material. EPA believes this information can be useful to agencies in determining which of the tanks no longer will require follow-up action.

The third area concerns the addition of a box under "type of notification" where owners can indicate whether the notification is an original submission or an amendment to a previous submission. It should be noted, however, that the submission of this information will be optional on the form and that owners are not required to amend or update their registrations under the Federal law. Nevertheless, owners may be required to update the forms under State law. Thus, the addition of these boxes will be useful in those States.

3. Clarification of certain definitions.

EPA received many comments requesting clarification of several statutory definitions that were found in the proposed rule.

(a) Owner. One definition several commenters found unclear was the term "owners." Under the statute an owner is defined as: "(a) in the case of an underground storage tank in use on the date of enactment of the Hazardous and Solid Waste Amendments of 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances; and (b) in the case of any underground storage tank in use before the date of enactment of the Act, but no longer in use on the date of enactment, owner means any person who owned such tank immediately before the discontinuation of its use."

A number of commenters found this definition confusing. With respect to tanks taken out of operation by former owners, one commenter stated that, because the term "owner" may include former owners, if the tanks were taken out of service between January 1, 1974 and November 8, 1984, it may be extremely difficult for such owners to know or determine whether their tanks will be placed back into use by subsequent owners. Another commenter stated that, unless a former owner of a nonoperational tank is aware of the requirements, he will probably assume that the current tank owner or landowner where the tank is located is the owner for purposes of notification. One commenter recommended that the definition of tank owner be reworded to make the current owner of the facility responsible for notification.

With respect to tanks of current owners, several commenters pointed out that ownership questions may be difficult to resolve because tanks have been purchased, installed, and transferred under many kinds of arrangements, including partnerships, executory interests, and trusts. In some instances tanks may have been installed under sale and lease-back arrangements, or a bank may have taken title as a security interest for a purchase money loan. One commenter said that because tank owners were often not required to keep documentation concerning the sale or transfer of their tanks, such documentation in many cases had been lost or destroyed.

Several other commenters suggested that with respect to current owners the following approaches be considered, only where ownership may be disputed or is uncertain: (1) presume that the person in direct control of the real property and facilities is the owner of the tank unless he ascertains that another entity accepts ownership and will file the notification form; (2) presume that a person is *not* an owner of the tank if he cannot, through reasonable efforts, confirm the sale or transfer of such tanks, and is not the owner of the real estate where the tank is located, and has not received notice pursuant to the depositor notice requirement.

Another commenter suggested that with respect to all tanks, EPA could indicate that any person with an interest in a tank could submit the required notification without admitting ownership.

EPA has carefully considered these suggestions of the commenters. While EPA cannot revise the definition contained in the statute, the Agency will attempt to clarify its meaning by providing the Agency's interpretation of what tanks EPA considers to be "no longer in use" prior to November 8, 1984, for which notice must be provided by former owners discontinuing their use, and what tanks it considers to be "in use" on or after November 8, 1984, for which notification must be provided by current owners.

With regard to a tank no longer in use on November 8, 1984, for which notification must be provided by the owner who discontinued its use, EPA believes that such an owner should notify if the owner knows or has reason to believe the tank was *permanently* taken out of use for storing regulated substances. Indications that a tank is permanently out of use are: (a) If it is filled with inert solid material or otherwise rendered unusable, or (b) if there is reason to believe that it will not be used in the future (e.g., the owner abandoned the tank, intakes and vents are paved over, access piping is disconnected or removed, or the tank was sold to a person who had no use for the tank, such as a residential real estate developer).

With regard to tanks in use on or after November 8, 1984, notification must be provided by the tank's current owner. If the tank was in operation on November 8, 1984, the current owner is responsible to provide notification under the statute even if the tank was permanently taken out of use after November 8,1984, and even if the current owner was not the person who took the tank out of use. For example, if a tank was in use on November 8,1984, but was taken out of use before it was sold to a new owner the following month, the new owner has the responsibility to notify even though the new owner had never used the tank to store regulated substances.

The Agency has presented these interpretations in an effort to minimize confusion concerning the notification requirements for tanks taken out of operation. With respect to tanks for which ownership is unclear because of uncertain title, however, EPA has determined not to adopt presumptions suggested by commenters. The Agency believes these presumptions may define ownership in a manner that is not consistent with the statutory definition of owner. The Agency recognizes the need for further guidance with respect to the definition of "owner," but believes that such guidance cannot be given until the Agency has had an opportunity to consider its implications. EPA will address these issues in a later rulemaking or guidance.

Recognizing that there may be confusion concerning ownership interests and wishing to encourage notification for all tanks, the Agency has decided to modify the notification form to allow persons other than the "owner" to notify. By permitting persons other than the owner to notify, however, the Agency realizes that some double reporting may occur, but such reporting would likely provide States with a more complete inventory of underground storage tanks. Because of this modification to the form, EPA believes it is unnecessary to adopt commenters' suggestions for establishing ownership by using presumptions.

(b) Depositors. The Agency also received comments requesting clarification of who is a "person who deposits regulated substances" into a tank for purposes of Section 9002(a)(4). In the proposed rule, EPA indicated that depositors could include operators, distributors, and transporters. Several commenters recommended that a "person who deposits" should be defined as an entity whose employees or agents physically transfer regulated substances into an underground storage tank. Under this definition, the transporter would be the most likely person to give notice. Commenters did not clarify to whom notice should be given (e.g.. hourly worker at facility, supplier, facility office).

Another commenter suggested that the refiner or marketer, not the common carrier or trucker, should be responsible for giving notice to the tank owner. The commenter argued that the refiner or marketer has already been given that responsibility under the FTC octane rules as well as the Department of Energy's price rules.

EPA believes that the purpose of this provision is to provide a source of information via normal commercial relationships for tank owners concerning their responsibility to notify. Thus, EPA has concluded that the burden for informing owners should be on the party last selling the regulated substances (i.e., the person who conveys title in the substances to the owner) prior to its being placed in the tank, and not necessarily the entity who physically deposits the substance in the tank. The Agency believes that enforceability of the requirements for depositors would be otherwise difficult. For these reasons, the Agency encourages those who sell regulated substances to outline the notification requirements on the shipping papers or on the invoice that accompanies the sale. EPA also acknowledges, however, that there are other acceptable methods for depositors of regulated substances to fulfill their statutory duty to provide reasonable notification to owners or operators. These methods are addressed in more detail elsewhere in this Section.

(c) Seller. Several commenters requested that EPA clarify who is "a person who sells a tank intended to be used as an underground storage tank." The Agency believes that the tank seller, in the context of the notification requirements, is the last person in the marketing distribution chain. It should be noted that the notification requirements apply to sellers of second-hand tanks as well as new tanks.

(d) Underground storage tank. The Agency received many comments requesting clarification on the statutory definition of underground storage tank. Several commenters suggested that the Agency provide guidance on what is a "tank" and what is "connected piping." Other commenters requested EPA to clarify its intent regarding the following exclusions for tanks: tanks situated in an underground area; liquid traps; flow-through process tanks; pits; and tanks used for storing heating oil for consumptive use on the premises where stored. Several commenters suggested EPA consider a de minimus exemption for small storage tanks.

The Agency recognizes the need for guidance on the terms discussed above. The inclusion of such definitions in the final rulemaking would require proposal, solicitation of comments, and in-depth consideration of the implications of each definition with regard to future rulemakings under Subtitle I. Because the Agency needs time to study the exclusions before it defines these terms, however, EPA has chosen to define such terms when it promulgates technical standards in 1987. The Agency is aware that some tanks may eventually not qualify as underground storage tanks regulated under Subtitle I when the definitions are refined. In the meantime, owners are advised that, until these issues are clarified, the failure to notify will be at their own risk. EPA does not regard the submission of this notification as an admission of ownership for the purpose of this program or for any future regulatory program under Subtitle I. Likewise, failure to notify does not relieve an owner of obligations that are imposed under the statute or under future rulemakings.

4. Notification responsibilities for sellers of tanks and depositors of regulated substances.

In the preamble to the proposed rule, EPA suggested several methods by which a tank seller or depositor of regulated substances could inform the owner, operator, or purchaser of an underground storage tank of the owner's notification responsibilities. These methods included leaving a copy of the EPA notification form with the owner or operator, printing the notification requirements on the shipping papers, or providing a description of the notification requirements on the invoice. The Agency solicited comment from persons who deposit regulated substances into tanks and tank sellers on the kind of guidance that would be helpful to them in communicating the notification requirements to the appropriate persons.

Many commenters agreed with the methods recommended by the Agency and felt that it is essential that persons who deposit regulated substances and tank sellers be given the flexibility to decide how their responsibilities might best be carried out. One commenter also suggested that notification could be in the form of mailing certified letters to the owners or operators advising them of the notification requirements. Other commenters requested that EPA provide standardized wording for use with delivery tickets or invoices and recommended this language be included in an appendix to the final rule.

Several commenters requested clarification on whether a depositor must inform an owner or operator each time product is delivered during the 18-month notification period or whether a one-time notification complies with the requirements of Section 9002. Other commenters pointed out that there is no guarantee that operators who receive notices from depositors will pass that information on to the owner. They suggested that EPA require an operator who is served notice by the supplier or tank seller to submit such notice to the owner within a specified amount of time.

The Agency would like to reiterate its belief that there are a number of acceptable methods that depositors could use to notify the tank owner or operator of the owner's notification responsibility, including mailing of a certified letter to owners or operators.

EPA also believes there should be a number of acceptable methods available to a tank seller to fulfill his responsibility to inform the tank purchaser of the owner's notification obligations. Thus, EPA does not intend to use this rule to prescribe, restrict, or prohibit any particular method.

In response to the comment that standard language be used by depositors and sellers in notifying owners, EPA agrees that unless EPA recommends such language, there may be inaccuracies or deficiencies in the notice provided. Accordingly, Appendix III sets forth suggested language to be used for a one-time notification letter and for a statement on shipping tickets and invoices.

In response to the comment requesting clarification on the adequacy of a one-time notice by depositors, EPA believes that notifying an owner or operator once during the 18-month period is sufficient.

The Agency has considered the issue of forwarding the advisory notice from the operator to the owner. EPA has determined, however, that it does not have the authority under section 9002 to impose such a requirement on operators.

5. Implementation of the notification requirements.

The Agency received many comments on EPA's intended use of the existing toll-free RCRA/Superfund Hotline to assist tank owners in completing the notification form. Several commenters were concerned that, in view of the large number of newly regulated small businesses, the Agency would receive many questions. This additional burden could overload the existing hotline, rendering it ineffective. To rectify this situation, a number of commenters suggested a separate hotline for the UST program. They stated that if a toll free telephone number were used, it should be a number separate from the existing RCRA/Superfund Hotline.

The Agency has evaluated the need for a separate hotline and has determined that it will augment the resources for the existing hotline rather than create a separate service. EPA believes that this decision is appropriate given that State agencies will be the primary points of contact concerning the notification requirements and form for owners of underground storage tanks.

C. The Notification Form

The majority of commenters endorsed EPA's decision to adopt a simple notification form that is limited to the information required by the 1984 RCRA Amendments. Many commenters stated that the form is straightforward and can be easily completed. Others recommended that EPA adopt the proposed forms but with minor modifications and additions.

The following paragraphs discuss the comments EPA received on the proposed forms and the Agency's response to these comments.

1. General Instructions.

EPA received a number of comments concerning the general instructions for the proposed forms. Many of these comments were editorial. Others concerned the definitions of "underground storage tank" and "owner." One commenter believed that the statutory language to define these terms may be too technical for small entities to understand. The Agency has already responded to comments concerning definitions in Section III(A)(3) of this preamble.

Several commenters recommended that the instructions on the forms should indicate that owners are not expected to expend extensive time and resources to retrieve the necessary data.

Congress provided in Section 9002 that owners of tanks taken out of service submit information "to the extent known" rather than require owners of tanks taken out of service to expend extensive time and resources to retrieve the necessary data (e.g., going beyond available documents and contacting previous owners to determine the age of tanks, construction materials, etc.). Congress made no such provision, however, for current owners of tanks. Thus, current owners of underground storage tanks in use or that will be brought into use in the future are expected to take any available steps to provide the necessary information about their tanks. In recognition, however, that there may be situations where it is impossible for current owners to obtain all the necessary data to complete the form, the Agency has provided owners the option of indicating "unknown" as an answer. In a situation where no actual record exists, an owner may provide a response based an reasonable estimates, rather than indicate the answer is unknown.

One commenter stated that the instructions for the out-of-service tanks are not acceptable. The commenter suggested that the Agency clarify whether all the information requested is to be accurate as of the time the tank was taken out of service, or whether some of the information is to be current as of the date of notification. For example, is the name of the facility to be what it was at the time the tank was taken out of service (Jones Service-Station) or what it is now (perhaps a parking lot)?

Because the primary purpose of the notification program is to assist States in determining where underground storage tanks are located and what regulated substances they contain, EPA believes that information on both the previous and current owners should be noted in this situation. Providing only the

name of the owner at the time the tank was taken out of service could be misleading as the above example suggests. Requiring information in both previous and current owners provides a greater degree of certainty of knowing what the tanks contained (or may still contain) and where they are located. In an effort to help States distinguish between current and former owners, EPA has provided boxes on the form to indicate whether the respondent is a "current" or "former" owner.

Several commenters recommended that EPA reword the penalty statement in the instructions. Evidence of deliberate failure to notify or knowing submission of false information is the statutory standard, they stated, and the sentence should be modified to comply with the statute. EPA has adopted the language of the penalty statement as it appears in the statute. The additions suggested by the commenters would significantly change the meaning of the statute, and such alterations are not within the Agency's authority.

2. Format.

Many commenters suggested that EPA combine the two forms into one form. This would result in less paperwork for tank owners and serve to minimize confusion. It would also reduce the printing costs and simplify administrative handling by the State agencies processing the information. The Agency agrees with the commenters and has combined the information requirements of the two proposed forms into a single, two-sided form.

Other format changes suggested by commenters have been adopted and include: (1) Eliminating all Federal agency logos, names, and mailing addresses so that State or local logos and addresses can be inserted; (2) adding a space for total number of tanks being reported and (3) reducing the number of lines for specific tanks. EPA also removed the preprinted tank numbers from the form in response to a comment that photocopies of the form must be altered for facilities with more than eight tanks, and in response to the desire expressed by some commenters to use existing company tank identification numbers in lieu of preassigned, sequential numbers.

Several commenters requested that EPA provide coding lists for materials of construction, external protection, and substance stored to make the form more amenable to a computerized data-processing system. EPA has consulted statisticians concerning this suggestion and on the basis of their analyses, has decided that the probability for error is greater with coded responses than with direct indication of choice.

3. Specific Line Items.

Name and Address of the Facility. One State commenter requested that EPA change the heading on the form from "name and address of the facility" to "location of tanks." Accordingly, the Agency has made this requested modification for clarity. The Agency has also modified the location address block so that the owner may now provide the name of the company site identifier as an alternative to the facility name. The owner is also required to provide the street address (or, in rural areas, the name or route number of the State road) as well as the city where the tanks are located. A number of commenters requested that the

Agency include a space for county name and zip code so that batch reports of tank facilities may be printed. In response to this comment, the Agency has included such requirements on the final form.

Several State commenters suggested that tank location should be specified by some universal locator system such as township, range and section number, universal transverse meridians, or latitude and longitude. They suggested that this requirement would be particularly useful outside of metropolitan areas. Another State commenter suggested that facility locations, particularly in rural areas, should reference municipal tax maps. They pointed out that the location of a facility is often difficult to describe because of the lack of street numbers and names.

EPA recognizes that sometimes street addresses alone are not sufficient and that inclusion of the information suggested above could add considerable precision to determining the location of tanks. The Agency has decided not to require such information however, because it would complicate the form and would require owners to undertake additional effort by researching tank records, deeds and mortgages. EPA believes this additional effort is not warranted.

Owner of Tank . Elsewhere in this preamble tank ownership is discussed. EPA recognizes that because of the varied nature of ownership interests in real property (particularly for gasoline-marketing operations) there are many cases where tank ownership is uncertain. One commenter recommended that EPA change the heading in Item 3 on the proposed form to read "owner of tank and owner of property." The commenter pointed out that the property owner may not own the tank and may not be aware that the lessee has installed an underground storage tank on his property. These comments have prompted EPA to add a box that can be checked in cases where ownership of the tank is uncertain.

Contact Person . In response to comments, EPA would like to clarify that the contact person for the facility is the person responsible for the day-to-day monitoring of the tank. The contact person may be the owner or the owner's authorized representative. In recognition that employees are more subject to change than are their job titles, EPA has modified the form to include a space for the job title of the contact persons. By so doing, inquiries can be directed to a particular position, even if the position is no longer held by the same individual.

Type of Owner . EPA has revised Item 5 ("Type of Owner") to provide for identification of State or local government-owned tanks, federally-owned tanks, and privately-owned tanks. The form requires the owner to provide a federal facility General Services Administration (GSA) identification number for Federal tanks, to assist Federal agencies that may want to ascertain the status of their tanks. In an effort to simplify the form, information concerning the "type of owner" is now included in Section 1, "Ownership of the Tanks."

For State Use Only . One State commenter requested that EPA provide space on the notification form so that States may attach a form serial or accounting number identification. The Agency agrees and has

changed the form accordingly to facilitate the identification of those owners who may file subsequent notifications and to facilitate automated data processing.

Information on Tanks.--(a)Age . A number of commenters remarked that many owners do not know the age of their tanks. Accurate information on the age of tanks or when the tanks were last used may be even more difficult or impossible to obtain. In consideration of these comments, the Agency now requests owners to provide an estimate of the age of their tanks rather than specifying the exact age of their tanks.

(b) Material of Construction . In the proposal, EPA listed only steel and fiberglass reinforced plastic tanks for specific identification in the notification form. EPA has since determined that there may be tanks that are partially in-ground or above-ground that satisfy the underground storage tank definition. In addition, review of the comments indicates that some devices, such as sumps, which typically may not be considered tanks by the owner, may also meet the definition of underground tank contained in section 9001(1). Many of these devices are constructed of concrete. Thus, in the final notification form, EPA has added "concrete" to the list of tank construction materials. This addition does not necessarily mean that all sumps or concrete tanks are underground storage tanks. It will still be up to the owner to determine if he owns a tank that satisfies the statutory definition of "underground storage tank."

(c) Corrosion Protection . EPA received many comments concerning types of internal and external corrosion protection systems. On the proposed forms, owners are required to specify whether the tank is internally protected with a lining or whether it is unlined. One commenter requested that the Agency define the kinds of tank linings considered to be internal protection.

Other commenters directed their remarks toward external protection systems. For example, several commenters requested that the term "coating" be clarified and defined. One commenter recommended that the Agency revise the instruction concerning this to indicate that all appropriate boxes should be checked. The commenter stated that it is common for a tank to be both coated and wrapped or have some form of cathodic protection plus a coating.

EPA defines internal lining as any material that is applied over the inside surface of the tank. Many types of materials are used for this purpose, such as polyesters, epoxies, and ceramics. On the notification form, the Agency asks only that the owner indicate whether or not the tank is internally lined. The owner is not required to specify the type of lining.

In regard to external protection systems, the term "coating" means any material that is applied over the outside surface of the tank. Types of coatings commonly used include asphalt, coal tar epoxy, and fiberglass reinforced plastic (FRP). On today's form, EPA requires the owner to indicate the kind of external protection system used on the tank. The Agency has listed fiberglass reinforced plastic coating to the list of types of external corrosion protection because it is one of the more common methods of corrosion protection. Other coatings are generally supplemented with cathodic protection. EPA has also

modified the instruction concerning external protection so that the owner can now indicate whether the tank is equipped with more than one protection system.

(d) Type of Substance Stored . On the proposed forms, owners are asked to identify which of two categories of substances the tank contains: CERCLA hazardous substances or petroleum. If the tank is storing petroleum, the owner is asked to indicate which type (i.e., gasoline, diesel, or kerosene). If the tank is storing a CERCLA hazardous substance, the owner had to provide the name of the hazardous substance or the Chemical Abstracts Service (CAS) registry number.

Several commenters questioned the Agency's classification of petroleum substances. One commenter did not believe there is any need to distinguish between diesel and kerosene petroleum substances and suggested grouping these along with heating oil into a single category of distillates. Several commenters believed that the Agency should distinguish the types of gasoline stored in a tank (i.e., regular, unleaded, premium) because the type of gasoline is related to the issue of product compatibility with tanks. One commenter also suggested that the Agency expand the choices beyond those discussed above to include used oil, aviation gas, jet fuel, and gasohol.

EPA has considered these comments and has decided not to combine petroleum substances into a single category of distillates because EPA believes the substances are sufficiently different to warrant obtaining information about them individually. On the other hand, the Agency has determined that it is not necessary to distinguish the types of gasoline stored. Listing gasoline by type does not provide useful information concerning substance compatibility with tanks because different brands of the same type of gasoline can vary in formulation. Likewise, the Agency has allowed for the reporting of alcohol blends with gasoline under the "gasoline" category. In an effort to keep the form simple, the Agency has restricted its list of type of petroleum substance stored to generic classes.

EPA has added "used oil" to the list of choices because it is one of the most commonly stored regulated substances. The Agency has determined that if used oil is eventually listed as a hazardous waste under Subtitle C of RCRA, the Agency would have jurisdiction under both Subtitle C and Subtitle I to regulate used oil. This position is based on the fact that the exclusion for hazardous wastes under Subtitle I applies to CERCLA substances (Section 9001(2)(A)). It does not apply to petroleum substances that are identified in section 9001(2)(B). The technical standards that will apply to used oil tanks will be promulgated in the future. In the meantime, notification under Subtitle I is required for used oil and for any petroleum hazardous waste that is not currently regulated as a hazardous waste under Subtitle C of RCRA.

Several commenters addressed the identification of CERCLA hazardous substances. In the preamble to the proposed rule, EPA suggested that owners contact the RCRA/Superfund Hotline at (800) 424-9346 if they were unsure whether the chemicals stored in their tanks were CERCLA hazardous substances. EPA also stated that the Agency could provide interested persons with a list of such substances upon request.[3]

One commenter stated that in situations where a commercially available product (which contains CERCLA hazardous substances) is being stored in an underground storage tank, readily available chemical identification information should suffice for identifying the "substance type" on the notification, such as information from material safety data sheets required by the Occupational Safety and Health Administration. The Agency believes that the "regulatory synonyms" identified in Table 302.4 of the Reportable Quantity regulation (50 FR 13475, April 4, 1985) may be used in the notification form. The use of trade names, however, may not be used since the exact chemical constituents of any particular product generally are not readily available to State or local agencies.

A commenter who referred to the list of CERCLA hazardous substances noted that it contains both commercial chemicals and discarded commercial chemical products. The commenter requested that EPA clarify which of these substances would be subject to the notification requirements. Every substance on the CERCLA list is a regulated substance unless it is a hazardous waste regulated under Subtitle C. This means some waste streams on the CERCLA list are not regulated substances for the purposes of Subtitle I. On the other hand, commercial products that become Subtitle C hazardous wastes when discarded or when they are intended to be discarded, are regulated substances under Subtitle I until they are discarded or intended to be discarded as wastes.

In the preamble to the proposed rule, EPA solicited comment regarding what is the most appropriate indication of stored CERCLA hazardous substance when there is a mixture of chemicals in one tank. The Agency proposed that the owner indicate the substance of greatest quantity in the mixture.

The majority of commenters stated that it is sufficient to report only the major component present in the mixture. They also stated that, because many industry products are complex mixtures containing potentially large numbers of hazardous substances, it would be difficult and very expensive to list all products stored. One State commenter stated that his agency's ADP system would not have the capability to include information an more than one substance per tank.

Several commenters argued that all substances should be identified so that the potential environmental threat from a tank could be determined. Other commenters stated that, although listing all the substances in the mixture would be an unnecessary burden, EPA's proposal to list the substance of greatest quantity would not accurately reflect the tank's contents. One commenter recommended that all major substances present in volumes of 10 percent or greater be identified. Another commenter stated that EPA should provide a space for a product description, the CERCLA substance of greatest quantity, and the concentration of the substance.

Other commenters stated that using toxicity as one basis for notification is inappropriate because the degree of toxicity of a substance is unrelated to its potential to leak from an underground storage tank. One commenter stated that the Agency should not require tank owners to list the substance that is most toxic because few owners possess the technical or scientific expertise to evaluate the relative toxicities of materials in the mixture.

The Agency has carefully considered these comments and recognizes that, while more detailed information may be needed to respond to an actual tank leak, this greater level of detail is unnecessary for development of a general tank inventory, which is the primary objective of this notification effort. The data supplied under this initial notification effort should not be viewed as the sole source of information to be used for emergency responses. Therefore, the notification form continues to require the owner to indicate only the CERCLA hazardous substance of greatest quantity in a mixture. Where a tank is used to store more than one substance during a year, the Agency requires that only the most typical use or use of greatest quantity during the year be identified on the notification form.

Certification . In the instructions for the proposed notification form, EPA stated that the form must be signed and certified by the owner or authorized representative of the facility. The Agency defined authorized representative as "person responsible for the overall operation of the facility, as for example, a plant manager or superintendent, or a person of equivalent responsibility." A number of commenters disagreed with this definition, arguing that the certification should be restricted to an officer or other official representative of the owner, and not permit the signature by a mere employee.

In response to these comments, EPA would like to clarify its definition of authorized representative: it is a person who is authorized by the owner to sign the notice.

One commenter requested that, for companies with many tanks or multiple locations, certification be allowed in a cover letter rather than on the notification form itself so that the owner would not have to sign hundreds of certifications. In response to this comment, the Agency has modified the form to take into account locations with many tanks. Thus, the certification statement and the signature line have been moved to first page of the form. Owners are permitted to sign one form, if it is part of a series of notification forms for several tanks at one location. We have rejected the commenter's suggestion, however, to permit certification by cover letter for owners of tanks at more than one location. To permit such certification could result in separation of the certifications from the forms and present a problem in data management and storage of the forms.

There may be instances when the notifier is not an owner or his authorized representative but some other interested party. In such cases, the notifier should indicate this on the form by crossing out the word "owner" under the certification and substituting the word "notifier."

4. Additional data requests.

Elsewhere in this preamble, the Agency discussed its rationale for limiting the information required in the notification form to the items specified in Section 9002. As we have explained earlier, in response to comments EPA has added information requirements concerning tank closure and piping.

A number of commenters also requested that EPA provide space for the owner's identification of tanks (e.g.. number, code name, location). In particular, one commenter stated that for large facilities having

several buildings, such identifiers may be critical as tanks containing the same material may be located at more than one building. As its response to these comments, EPA has eliminated the prenumbering found on the proposed forms and has designated that space for such identifiers.

EPA received many comments, including six from States, requesting that the Agency provide for updating of information whenever significant changes occur at the site. These changes could include the installation or replacement of tanks or piping, permanent removal of a tank from operation, and changes in the chemical substance(s) being stored. Several commenters stated the notification form would be a much more effective management and enforcement tool if the owner were required to update a tank's status as it changes.

Other commenters believed that tank notifications should be made on a one-time-only basis because a continual notification system could be resource intensive and yield little additional useful information.

EPA recognizes that the accuracy of the underground storage tank data compiled from the notifications submitted under Section 9002 will not remain current unless updated to incorporate future changes, but believes that Section 9002 does not provide EPA authority to require owners to update their notices in the future. To compensate for this limitation, however, EPA provided a place on the form to indicate whether the notification is an initial or an amended report, so that States that may opt to require updates of the information received in the original notification can do so using EPA's form. The addition of this block imposes no additional Federal information requirements on the tank owner.

D. Other Comments

The Agency also received a number of comments concerning the following subjects: (1) Jurisdiction for the Subtitle I program on Indian lands; and (2) EPA's role in communicating the notification requirements to the regulated community.

Several commenters requested clarification as to how EPA would handle notification of tanks located on Indian lands. The Agency believes that Subtitle I does not provide States the authority to assert jurisdiction over underground storage tanks on Indian reservations or other lands held in trust for Indian peoples. Some States may have such authority by treaty or an act of Congress other than Subtitle I. Nevertheless, Section 9002 imposes a Federal requirement on all underground storage tank owners to provide notification to the State or local agencies designated under Section 9002(b). This is an obligation under Federal law, not State law, and applies to Indians in the same way it applies to any other "person" who is an owner of an underground storage tank. Accordingly, Indian tank owners must provide notification to the appropriate agencies listed in Appendix II. In States that do not have jurisdiction to assert State laws over Indian tribes or individual Indians, however, Indians cannot be required by such States to use State forms. In such States, Indians will be deemed to have complied with Section 9002 if they use the Federal form, but such form must be sent to the appropriate State or local agencies listed in

Appendix II. The notification form has been amended to include a box that should be checked if a tank is located on Indian reservations or other trust lands.

Other commenters requested clarification of EPA's role in the implementation of State notification programs. Two State commenters recommended that EPA conduct a national or regional advertising campaign to inform tank owners of their requirements to notify. One of these States also said that EPA should assist States with regional mailings of general underground storage tank information to all permit holders.

EPA plans to provide a notification handbook to the States to aid in implementing and informing tank owners of their notification programs.

IV. The Final Notification Form

As was stated earlier in this preamble, Section 9002 was included in Subtitle I to provide States with some basic information about underground storage tanks within their jurisdictions. This information could be used to establish State programs aimed at preventing, detecting, and correcting leaks from these tanks. Owners are encouraged by EPA to maintain records of the data they submit to the designated State agencies.

EPA attempted to produce a notification form that is easy to complete and that fulfills the requirements of Section 9002. The format is designed to simplify the completion of the form (i.e., in most cases, answers may be provided by checking a box). The Agency has thus attempted to minimize the burden upon all tank owners, the majority of whom own small businesses.

A. Information Included in the Form

Appendix I sets forth the form to be used by owners of underground storage tanks. The following paragraphs provide details concerning the information requirements of this form.

The owner of an underground storage tank must give his name, address, and phone number. The owner must also provide information concerning a contact person: i.e., an individual who is responsible to him for monitoring the day-to-day operation of the tank. This information should include such persons name, title, address, and phone number. In addition, the owner is required to provide information on the location of his tank and the status of the tank, (whether it is currently in use, temporarily out of use, or permanently out of use).

For underground storage tanks in use or that are brought into use after May 8, 1986, EPA requires owners to estimate the age of the tank and to indicate its capacity in gallons. With respect to the type of tank, EPA has characterized type to mean materials of construction and internal and external corrosion protection, if any. The owner is required to indicate whether the tank is constructed of steel, fiberglass reinforced plastic, or concrete. If the tank is not constructed of these materials, the owner is asked to specify the material. Listed in the form are several types of corrosion protection systems. The owner must specify the kind of internal and external protection system with which the tank is equipped. The owner is also required to provide information on piping.

Concerning the use of the tank, the owner must identify which of two categories of substances the tank contains: CERCLA hazardous substances or petroleum. If the tank is storing a hazardous substance, the owner must provide the name of the CERCLA chemical or the Chemical Abstracts Service (CAS) registry number. When a mixture of several hazardous substances is stored in one tank, the owner must specify the name of the substance of greatest quantity. If the tank is used to store different hazardous substances at different times, the owner must specify the name of the substance typically stored or stored

in greatest quantity during the year immediately preceding the submission of the notice. If a tank is storing petroleum, the owner is required to indicate the type of petroleum that is stored.

For underground storage tanks taken out of use permanently after January 1, 1974 (but still in the ground), the owner is required to provide the same information as discussed above. In addition, the owner must estimate the date of last use and the quantity of substance remaining in the tank. The owner must also indicate whether the tank was filled with inert material, such as sand or concrete. If the tank is taken out of the ground prior to May 8, 1986, notification is not required.

B. Copies of the Form

EPA is providing States with a camera-ready copy of the notification form. Owners of underground storage tanks should contact the appropriate designated State agency that is implementing the notification program to determine if the State has copies of the form or is using its own State form. (Appendix II provides a list of the designated State agencies.)

V. Confidentiality Provisions

EPA received several comments concerning the confidentiality provisions that were discussed in the preamble to the proposed regulation. Commenters were concerned that confidentiality may not be adequately protected in States that do not effectively implement the underground storage tank regulations. Several commenters recommended that EPA strengthen the confidentiality provisions to provide assurance to the regulated community that legitimate proprietary information will be adequately safeguarded.

Because the information reported in the notification forms will be sent to a designated State or local agency, not to EPA, the information will not be subject to Federal public disclosure laws. The Agency cannot, of course, interfere with State confidentiality provisions. Owners of underground storage tanks who seek protection from disclosure should, therefore, contact the appropriate State office for information on applicable confidentiality provisions.

National Costs for the Notification Requirements

EPA received a number of comments on the Agency's estimated costs to tank owners to meet the notification requirements.

Some commenters disagreed with the Agency's assumption that an average facility was comprised of three tanks. One representative of the chemical industry stated that a more typical facility would have ten to several hundred tanks; another commenter estimated that a utility company may have as many as 600 tanks at one facility. Commenters argued that because the Agency has underestimated the number of tanks at a facility, it has significantly understated the costs of the notification requirements. One

commenter stated that as a result of underestimating the number of tanks at large facilities, the costs to a large facility could be underestimated by a factor of ten to twenty. Should this be the case, the commenter argued that the regulations would be classified as a major rule.

Although the Agency agrees that some facilities do have more than three tanks per facility (e.g., large chemical companies), the majority of facilities with tanks used for petroleum (e.g., gas stations; and specialty chemical products are unlikely to have more than three tanks. The Agency believes that a typical facility has three tanks. EPA recognizes, of course, that for facilities with a significantly larger number of tanks, the costs could be underestimated; the number of these facilities is not great, however, and, therefore, the total national costs of the regulation will not increase significantly. In addition, large facilities that have computer capabilities for monitoring the contents of their tanks may be able, through negotiations with States, to substitute computer printouts for the EPA or State notification forms. This will reduce the cost to these facilities both in data retrieval and in notification costs.

A number of commenters stated that the Agency underestimated the average time required per facility to complete the notification from. Because tanks may be used for mixtures of products or for more than one product over a year, identifying all the products included in the tank would take more than 30 minutes per facility. Commenters stated that for facilities with tanks taken out of service since 1974, it would take much longer than 30 minutes to obtain the necessary information, especially for facilities that have been sold. If the Agency required detailed information on the internal lining of the tank and external corrosion protection (information similar to that required on the California notification form), it could take significantly longer than 30 minutes to complete the form. Commenters' estimates of the time required ranged from 30 minutes to 2 hours per tank and from several hours to 8 hours per facility.

In response to these comments, the Agency points out that the final notification form, as modified in response to comments, should take less time to fill out than the forms previously proposed. First, the Agency is specifying that the notification form include only information on the most predominant chemical constituent stored in the tank over the past year. For tanks containing mixtures, the form now includes a box indicating that the tank contains a mixture of regulated substances. Owners, will not, therefore, be required to identify all the different constituents in the tank. Second, EPA is not requiring extensive information on the internal and external characteristics of the tank that could increase the amount of time required to complete the form.

EPA is requiring owners of tanks taken out of service to provide the information requested on the form only "to the extent known." Thus, these owners need not contact all previous owners to obtain the notification information. This is consistent with the assumptions EPA used to estimate the time required to complete the form and that the Agency presented in the proposed rule.

The Agency has assumed that an owner of a facility that has three tanks will require 30 minutes to complete the notification form. This includes the time necessary to read the instructions, delegate responsibility for completing the form, retrieve information, complete the form, submit it for management

review, and to do the necessary clerical work. It should be possible for an owner of a large facility to supply the information in about eight hours, especially if the facility has computer capabilities for data retrieval.

The Agency also received comments challenging EPA's estimated hourly salary rate. The commenters argued that a person with considerable expertise would be needed to complete the notification form, especially if detailed information on the tank's liner and external materials were required. The Agency disagrees with this comment because detailed technical information is not requested on the form. Only information that is readily available is expected. Thus, the Agency continues to maintain that the average estimate of $15 per hour is a reasonable estimate.

Finally, one commenter challenged the Agency's assumption that notification costs for product distributors would range from $50 to $100. This commenter argued that it would be significantly more expensive to account for the costs of collecting State forms, printing, and driver training, especially if a distributor has clients in many different States with different State forms.

The preamble to the proposed rule stated that a depositor must "reasonably notify" the tank owner or operator of his notification obligations. Approaches that the Agency considers appropriate for notifying the tank owner or operator include providing the tank owner with a copy of the notification form (or the required State form) or printing the notification requirements on the shipping papers that accompany the shipment or on the invoice itself or writing a one-time letter to the owners.

The Agency estimated the notification costs of $50 for depositors and tank sellers. This assumes that the tank owner will need about two hours of managerial and clerical time to comply with the notification requirements. This translates into a combined hourly rate of $25, including benefits and overhead. This cost is for preparing a cover letter and obtaining notification forms, or for preparing a standard notice that would be distributed at the time of transactions. The $100 estimate includes a follow-up letter after the initial notification.

In developing the costs for depositors, the Agency assumed that the distributor would choose the least-cost option. Therefore, a large distributor with clients in many different States would most likely choose to include the notification requirements on the shipping papers or invoices rather than collect and distribute notification forms for each of the applicable States. Thus, the costs to the distributor would involve only the costs of printing the notice on the invoice.

Although EPA continues to consider its per facility notification cost to be reasonable estimates, EPA has revised the population estimate in light of new information. The Agency has undertaken more thorough research of the facilities subject to the Subtitle I requirements in support of the technical standards that the Agency will be proposing. This research indicates that there is a maximum of 500,000 facilities that, have petroleum tanks. The Agency expects chemical product tank facilities to compose no more than 20 percent of the total underground storage tank facility population. Therefore, the Agency is revising the

underground storage tank population estimate from 1.2 million facilities to about 600,000 facilities. The Agency still assumes that 40 percent of these facilities have three tanks apiece. The remaining 10 percent are large facilities with 10 tanks apiece.

EPA has concluded that the notification requirements do not impose a significant economic burden on members of the affected population. (See Sections VII and IX for additional information on the economic impact of this rule.)

VII. Compliance With Executive Order 12291

Executive Order 12291 (46 FR 13193, February 9, 1981) requires that a regulatory agency determine whether a new regulation will be "major" and, if so, that a Regulatory Impact Analysis be conducted. A major rule is defined as a regulation that is likely to result in:

1. An annual effect of the economy of $100 million or more:

2. A major increase in costs or prices for consumers, individual industries, Federal, State, and local Government agencies, or geographic regions; or

3. Significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Since today's rulemaking does not result in any of the above effects, it does not meet the definition of a major regulation. Accordingly, the Agency is not conducting a Regulatory Impact Analysis.

This rulemaking has been submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

VIII. Paperwork Reduction Act

Pursuant to section 3504(h) of the Paperwork Reduction Act of 1980, the reporting and recordkeeping provisions of today's final rule have been approved by OMB and the approval number is 2050-0049. to comments by OMB and the public regarding the reporting and recordkeeping provisions of the rule.

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act requires that Federal agencies prepare regulatory flexibility analyses assessing the impacts of proposed rules on entities such as small businesses, small organizations, and small governmental jurisdictions. Such an analysis is not required, however, when the head of an agency

certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities.

EPA considers the information required by these rules to be the minimum necessary to administer the notification program effectively. Since most of the requested information is readily accessible, little time should be needed to prepare the notification response. Any additional economic impact on the public resulting from implementation of this regulation is expected to be negligible since notification is required only once, and is primarily an administrative procedure. Accordingly, I certify that these proposed rules, if promulgated, would not have a significant impact on a substantial number of small entities.

X. List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Underground storage tanks, Hazardous materials, Hazardous waste, Water pollution control, Confidential business information.

Dated: November 5, 1985.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, Title 40 of the Code of Federal Regulations, Part 280 is amended as follows:

PART 280-UNDERGROUND STORAGE TANK REGULATIONS

(1) The authority cite for Part 280 continues to read as follows:

Authority: 42 U.S.C. §§ 6991, 6992, and 6996.

(2) Section 280.1 is amended by adding the following definitions in alphabetical order:

§ 280.1 Definitions and Exemptions.

"Operator" means any person in control of, or having responsibility for, the daily operation of the underground storage tank.

"Owner" means (a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and (b) in the case of any underground storage tank in use before

November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before discontinuation of its use.

*** * * * ***

(3) Section 280.3 is added to read as follows:

§ 280.3 Notification requirements.

(a) On or before May 8, 1986, each owner of an underground storage tank currently in use must submit, in the form prescribed in Appendix I of this section, a notice of the existence of such tank to the State or local agency or department designated in Appendix II of this section to receive such notice.

(b) On or before May 8,1986, each owner of an underground storage tank taken out of operation after January 1, 1974 (unless the owner knows that such tank has been removed from the ground) must submit, in the form prescribed in Appendix I of this section, a notice of the existence of such tank to the State or local agency or department designated in Appendix II of this section to receive such notice.

(c) Any owner who brings an underground storage tank into use after May 8, 1986, must, within 30 days of bringing such tank into use, submit, in the form prescribed in Appendix I of this section, a notice of the existence of such tank to the State or local agency or department designated in Appendix II of this section to receive such notice.

(d) In States where State law, regulations, or procedures require owners to use forms that differ from those set forth in Appendix I of this section to fulfill the requirements of this section, the State forms may be submitted in lieu of the forms set forth in Appendix I of this section. If a State requires that its form be used in lieu of the form presented in this regulation, such form must meet the requirements of Section 9002.

(e) Owners required to submit notices under paragraphs (a) through (c) of this section must provide notices to the appropriate agencies or departments identified in Appendix II of this section for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

(f) Notices required to be submitted under paragraphs (a) through (c) of this section must provide all of the information indicated on the prescribed form (or appropriate State form) for each tank for which notice must be given.

(g) Beginning on December 9, 1985 through May 9, 1987 any person who deposits regulated substances in an underground storage tank must make reasonable efforts to notify the owner or operator of such tank of the owner's obligations under paragraphs (a) through (c) of this section.

(h) Beginning 30 days after the Administrator issues new tank performance standards pursuant to RCRA section 9003(e), any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under paragraphs (a) through (c) of this section.

(i) Paragraphs (a) through (c) of this section do not apply to tanks for which notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

*** * * * ***

[1] The term underground storage tank does not include any pipes connected to any of the tanks described in the exclusions.

[2] No notification is required for tanks taken out of the ground prior to May 8, 1986 or for tanks taken out of operation on or before January 1, 1974.

[3] The list of CERCLA hazardous substances was published in the **Federal Register** on April 4, 1985 (50 FR 13546).

Notification Form for Underground Storage Tanks

(Form 7530-1 effective 11/85)

The form is 5 pages in length.

APPENDIX II to § 280.3

List of Agencies Designated to Receive Notifications

Alabama (EPA Form)

Alabama Department of Environmental Mgmt.
Ground Water Section/Water Division
1751 Federal Drive
Montgomery, Alabama 36130

Alaska (EPA Form)

Department of Environmental Conservation
Pouch O
Juneau, Alaska 99811
907/465-2653

American Samoa (EPA Form)

Executive Secretary
Environmental Quality Commission
Office of the Governor
American Samoan Government
Pago Pago, American Samoa 96799
Attention: UST Notification

Arizona (EPA Form)

Attention: UST Coordinator
Arizona Department of Health Services
Environmental Health Services
2005 N. Central
Phoenix, Arizona 85004

Arkansas (EPA Form)

Arkansas Department of Pollution Control and Ecology
P.O. Box 9583
Little Rock, Arkansas 72219
501/562-7444

California (State Form)

Ed Anton
California Water Resources Control Board

P.O. Box 100
Sacramento, California 95801
916/445-9552

Colorado (EPA Form)

Kenneth Mesch, Section Chief
Colorado Department of Health
Waste Management Division
Underground Tank Program
4210 East 11th Avenue
Denver, Colorado 80220
303/320-8333 Ext. 4364

Connecticut (State Form)

Hazardous Materials Management Unit
Department of Environmental Protection
State Office Building
165 Capitol Avenue
Hartford, Connecticut 06106

Delaware (State Form)

Division of Air and Waste Management
Department of Natural Resources and Environmental Control
P.O. Box 1401
89 Kings Highway
Dover, Delaware 19903
302/736-5409

District of Columbia (EPA Form)

Attention: UST Notification Form
Department of Consumer and Regulatory Affairs
Pesticides and Hazardous Waste Management Branch
Room 114
5010 Overlook Avenue, S.W.
Washington, D.C. 20032

Florida (State Form)

Florida Department of Environmental Regulation
Solid Waste Section
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

904/487-4398

Georgia (EPA Form)

Georgia Department of Natural Resources
Environmental Protection Division
Underground Storage Tank Program
3420 Norman Berry Drive
Hapeville, Georgia 30354

Guam (State Form)

James B. Branch, Administrator
Guam Environmental Protection Agency
P.O. Box 2999
Agana, Guam 96910
Overseas Operator (Commercial Call 646-8863)

Hawaii (EPA Form)

Chief, Noise and Radiation Branch
Hawaii Department of Health
591 Ala Moana Boulevard
Honolulu, Hawaii 96801
808/548-4129

Idaho (EPA Form)

Underground Storage Tank Coordinator
Water Quality Bureau
Idaho Department of Health & Welfare
Division of Environment
450 W. State Street
Boise, Idaho 83720
208/334-4251

Illinois (EPA Form)

Underground Storage Tank Coordinator
Division of Fire Prevention
Office of State Fire Marshal
3150 Executive Park Drive
Springfield, Illinois 62703-4599

Indiana (EPA Form)

Division of Land Pollution Control, UST Program

Indiana State Board of Health
P.O. Box 7015
Indianapolis, Indiana 46207
317/243-5060

Iowa (State Form)

Iowa Department of Water, Air and Waste Management
900 East Grand
Des Moines, Iowa 50319
515/281-8692

Kansas (EPA Form)

Office of Environmental Geology
Kansas Department of Health & Environment
Forbes Field, Building 740
Topeka, Kansas 66620
913/862-9360 Ext. 221

Kentucky (State Form)

Natural Resources Cabinet
Division of Waste Management. Attention: Vicki Pettus
18 Reilly Road
Frankfort, Kentucky 40601
502/564-6716

Louisiana (State Form)

Patricia L. Norton, Secretary
Louisiana Department of Environmental Quality
P.O. Box 44066
Baton Rouge, Louisiana 70804
504/342-1265

Maine (State Form)

Attention: Underground Tanks Program
Bureau of Oil & Hazardous Material Control
Department of Environmental Protection
State House--Station 17
Augusta, Maine 04333
207/289-2651

Maryland (EPA Form)

Science and Health Advisory Group
Office of Environmental Programs
201 West Preston Street
Baltimore, Maryland 21201

Massachusetts (EPA Form)

UST Registry, Department of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215
617/566-4500

Michigan (EPA Form)

Ground Water Quality Division
Department of Natural Resources
Box 30157
Lansing, Michigan 48909

Minnesota (State Form)

Underground Storage Tank Program
Division of Solid and Hazardous Wastes
Minnesota Pollution Control Agency
1935 West County Road, B-2
Roseville, Minnesota 55113

Mississippi (EPA Form)

Department of Natural Resources
Bureau of Pollution Control
P.O. Box 10385
Jackson, Mississippi 39209

Missouri (EPA Form)

Gordon Ackley, UST Coordinator
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

Montana (EPA Form)

Solid and Hazardous Waste Bureau
Department of Health and Environmental Science
Cogswell Building, Room B201
Helena, Montana 59620

Nebraska (EPA Form)

Nebraska State Fire Marshal
PO. Box 94677
Lincoln, Nebraska 68509-4677

Nevada (EPA Form)

Attention: Underground Storage Tanks
Division of Environmental Protection
Department of Conservation and Natural Resources
Capitol Complex
201 S. Fall Street
Carson City, Nevada 89710
800/992-0900 Ext. 4670

New Hampshire (EPA Form)

Water Supply and Pollution Control Commission
Hazen Drive
P.O. Box 95
Concord, New Hampshire 03301
Attention: UST Registration
603/271-3503

New Jersey (State Form)

Underground Storage Tank Coordinator
Department of Environmental Protection
Division of Water Resources (CN-029)
Trenton, New Jersey 08625
609/292-0424

New Mexico (EPA Form)

New Mexico Environmental Improvement Division
Ground Water/Hazardous Waste Bureau
P.O. Box 968
Sante Fe, New Mexico 87504
505/827-2933 or 505/827-2918

New York (EPA Form)

Bulk Storage Section
Division of Water
Department of Environmental Conservation
50 Wolf Road, Room 326

Albany, New York 12233-0001
518/457-4351

North Carolina (EPA Form)

Division of Environmental Mgmt./ Ground Water Section
Dept. of Natural Resources & Community Development
P.O. Box 27687
Raleigh, North Carolina 27611
919/733-5083

North Dakota (State Form)

Division of Hazardous Waste Mgmt. and Special Studies
North Dakota Department of Health
Box 5520
Bismarck, North Dakota 58502-5520

Northern Mariana Islands (EPA Form)

Chief
Division of Environmental Quality
P.O. Box 1304
Commonwealth of Northern Mariana Islands
Saipan, CM 96950
Overseas Operator: 6984
Cable Address: GOV. NMI Saipan

Ohio (State Form)

State Fire Marshal's Office, UTN
Department of Commerce
8895 E. Main Street
Reynoldsburg, Ohio 43068
State Hotline 800/282-1927

Oklahoma (EPA Form)

Underground Storage Tank Program
Oklahoma Corporation Comm.
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

Oregon*
Underground Storage Tank Program
Hazardous and Solid Waste Division
Department of Environmental Quality

P.O. Box 1760
Portland, Oregon 97207
503/229-5788

Pennsylvania (EPA Form)

Pennsylvania Department of Environmental Resources
Bureau of Water Quality Management/Ground Water Unit
9th Floor, Fulton Building
P.O. Box 2063
Harrisburg, Pennsylvania 17120

Puerto Rico (EPA Form)

Director, Water Quality Control Area
Environmental Quality Board
Commonwealth of Puerto Rico
P.O. Box 11488
Santurce, Puerto Rico 00910
809/725-0717

Rhode Island (EPA Form)

UST Registration
Department of Environmental Management
204 Cannon Building
75 Davis Street
Providence, Rhode Island 02908
401/277-2234

South Carolina (State Form)

Attention: Susana Workman
Groundwater Protection Division
South Carolina Dept. of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
803/758-5213

South Dakota (EPA Form)

Office of Water Quality
Department of Water and Natural Resources
Joe Foss Building
Pierre, South Dakota 57501

Tennessee (EPA Form)

Terry K. Cothron, Director
Division of Ground Water Protection
Tennessee Department of Health and Environment
150 Ninth Avenue, North
Nashville, Tennessee 37219-5404
615/741-7206

Texas (EPA Form)

Underground Storage Tank Program
Texas Water Commission
PO. Box 13087
Austin, Texas 78711

Utah (EPA Form)

Kenneth L. Alkema
Division of Environmental Health
P.O. Box 45500
Salt Lake City, Utah 84145-0500

Vermont (State Form)

Underground Storage Tank Program
Vermont AEC/Waste Management Division
State Office Building
Montpelier, Vermont 05602
802/828-3395

Virginia (EPA Form)

Russell P. Ellison, III, P.G.
Virginia Water Control Board
P.O. Box 11143
Richmond, Virginia 23230-1143
804/257-6685

Virgin Islands (EPA Form)

205(J) Coordinator
Division of Natural Resources Management
14 F Building 111, Watergut Homes
Christianstead, St. Croix, Virgin Islands 00820

Washington (State Form)

Earl W. Tower, Supervisor

Department of Ecology, M/S PV-11
Management Division, Solid and Hazardous Waste
Olympia, Washington 98504-8711
206/459-6316

West Virginia (EPA Form)

Attention: UST Notification
Solid and Hazardous Waste/Ground Water Branch
West Virginia Department of Natural Resources
1201 Greenbriar Street
Charleston, West Virginia 25311

Wisconsin (State Form)

Bureau of Petroleum Inspection
P.O. Box 7969
Madison, Wisconsin 53707
608/266-7605

Wyoming (EPA Form)

Water Quality Division
Department of Environmental Quality
Herschler Building, 4th Floor West
122 West 25th Street
Cheyenne, Wyoming 82002
307/777-7781

* May be using a State form. Owners should consult EPA to determine whether such form is in compliance with Section 9002.

☆ U.S. Government Printing Office: 1985 - 491-191/46103

51 FR 20418-20420 Wednesday, June 4, 1986
Hazardous Waste; Interpretive Rule on the Interim Prohibition Against Installation of Unprotected Underground Storage Tanks

20418-20420 Federal Register / Vol. 51, No. 107 / Wednesday, June 4, 1986 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 280

[FRL 2928-9]

Hazardous Waste; Interpretive Rule on the Interim Prohibition Against Installation of Unprotected Underground Storage Tanks

AGENCY: Environmental Protection Agency

ACTION: Interpretive rule.

SUMMARY: New Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, provides for the regulation of underground storage tanks. Section 9003(g) of Subtitle I establishes interim requirements for underground storage tanks that are installed between May 7, 1985 and the effective date of new tank standards required to be promulgated by EPA under section 9003(e). This notice sets forth EPA's interpretation of Section 9003(g).

FOR FURTHER INFORMATION CONTACT:

Pamela Harris, (202) 382-4814; or Steven Way (207) 475-9328; or the RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, D.C.

SUPPLEMENTARY INFORMATION:

I. Introduction: The Hazardous and Solid Waste Amendments of 1984

On November 8, 1984, the President signed into law the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616. These Amendments extend and strengthen the provisions of the Solid Waste Disposal Act of 1970 as amended by RCRA. A major portion of this new legislation, Subtitle I, provides for the development and implementation of a regulatory program for underground storage tanks used to contain regulated substances, which include petroleum and substances defined as hazardous substances under section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). [1]

Among the provisions of new Subtitle I, section 9003 requires EPA to promulgate regulations pertaining to the detection, prevention, and correction of releases from underground storage tanks as may be necessary to protect human health and the environment.[2] Section 9003(c) sets forth minimum requirements that must be promulgated for all underground storage tanks and section 9003(e) sets forth

additional requirements that must be promulgated for new underground storage tanks. Regulations under both sections 9003 (c) and (e) for tanks containing petroleum products are to be effective by May 8, 1987. With respect to tanks containing hazardous substances, regulations under section 9003(e) for new tanks are to be effective by November 8, 1987 and regulations under section 9003(c) for existing tanks are to be effective by November 8, 1988.

Until new tank standards promulgated under section 9003(e) become effective, section 9003(g)(1) establishes interim requirements for any tank installed on or after May 7, 1985. That section provides as follows:

. . . [No] person may install an underground storage tank for the purpose of storing regulated substances unless such tank (whether of single or double walled construction)--

(A) will prevent releases due to corrosion or structural failure for the operational life of the tank;

(B) is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material, or designed in a manner to prevent the release or threatened release of any stored substance; and

(C) the material used in the construction or lining of the tank is compatible with the substance to be stored.

As a limited exception, section 9003(g)(2) allows the installation of tanks without corrosion protection in soil with a resistivity of 12,000 ohm-cm or more. Under that provision, soil tests must be conducted in accordance with American Society for Testing and Materials (ASTM) Standard G57-78.

II. Purpose of the Interpretive Rule

An interpretive rule is a statement issued by an agency to advise the public of the agency's construction of the statutes and rules that it administers. An interpretive rule simply construes the language of the statute or regulation and does not impose additional obligations. Such rules are exempt from the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. 553(b)(A) (1982). A substantive rule, such as the new tank standards authorized by section 9003(e), is a rule that is issued by an agency pursuant to statutory authority that implements the statute. EPA intends this notice to be an interpretive rule, not a substantive rule.

Section 9003(g) establishes statutory requirements that took effect on May 7, 1985 without prior action on the part of EPA. Several of the requirements set forth under section 9003(g) are in the form of performance standards. EPA believes that the interpretive rule clarifies obligations of the regulated community in complying with the interim prohibition. The rule also puts the regulated community on notice of the circumstances under which the Agency will proceed with enforcement action for noncompliance.

III. Other Related EPA Activities

On July 15, 1985, EPA codified the statutory language of section 9003(g) in its regulations at 40 CFR 280.2.

EPA is preparing a guidance document that is available in draft form in the Regional Offices. This document discusses methods and technologies for preventing releases from tanks due to corrosion, structural failure, or the storage of materials that are incompatible with the tanks' construction or lining. This guidance will assist tank users in determining effective approaches to meet the performance standards in section 9003(g).

IV. Legislative History of Section 9003(g)

Many of the storage tank provisions now contained in Subtitle I, including section 9003(g), had their origins in a bill introduced by Senator Durenberger on February 29, 1984 as an amendment to the Safe Drinking Water Act, 130 Cong. Rec. S2026 (Feb. 29, 1984). Among these provisions was a requirement that EPA promulgate new tank standards within nine months of the date of enactment of the proposed amendments. Such standards were to include a prohibition on bare steel tanks. *Id*. at S2026. The provisions established an exception from the bare steel tank ban "where the Administrator finds there is minimal danger of corrosion." *Id*. In describing that provision, Senator Durenberger stated that "installation of common but less adequate tanks--those made of bare steel--would be prohibited unless the hydrogeology of the area is such that there is a minimal danger of corrosion." *Id.* at S2027.

On July 25, 1984, Senator Durenberger offered a modified version of his storage tank provisions as an amendment to RCRA. 130 Cong. Rec. S9164 (July 25, 1984). This amendment was passed by the Senate. *Id.* at S9201. In this modified version, the deadline for new tank standards was extended and the bare steel ban was converted into an interim requirement that new tanks be installed in accordance with enforced national consensus code." This requirement was to go into effect ninety days after the bill was passed and remain effective until EPA promulgated new tank standards.*Id*. at S9163-64.

On the House of Representatives side, amendments to RCRA were passed but did not contain provisions for the regulation of underground storage tanks. 130 Cong. Rec. H9184 (November 3, 1983). On August 10, 1984, however, the House passed an underground storage tank bill as an amendment to CERCLA. 130 Cong. Rec. H8938, H9027 (August 10, 1984). The House bill contained an interim prohibition that provided as follows:

Until the effective date of the regulations promulgated by the Administrator under subsection (a) and after 180 days after the date of the enactment of this title, no person may install or begin using an underground storage tank for the purpose of storing hazardous substances unless such tank, of either single or double wall construction, is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material which would prevent corrosion for the operational life of the tank, or contained in a manner designed to prevent the release or threatened release of any stored hazardous substance and unless in all cases the material used in the construction or lining of the tank is compatible with the substance to be stored. *Id*. at H8939.

Subsequently, a Conference Committee was formed to consider the RCRA amendments passed by the Senate and the House. Although the House CERCLA bill was not officially under consideration by the RCRA Conference Committee, the conferees adopted the language of that bill's interim prohibition with several significant modifications. 130 Cong. Rec. H11121 (Oct. 3, l984). These modifications included the requirement that every new tank prevent releases due to "Structural failure" for its "operational life" (section 9003(g)(A)) and the exception from corrosion protection requirements for tanks located in soil

with a resistivity of 12,000 ohm/cm or more. The Conference Report described the reported provision as follows:

Following enactment, the installation of bare steel tanks, i.e. those which provide little or no protection against corrosion, will be prohibited until the Administrator promulgates regulations establishing the conditions for installation. Bare steel tanks may be installed (pending promulgation of EPA regulations) only where properly conducted soil tests show resistivity at 12,000 ohms/cm or more. This provision replaces the provision in the Senate amendment which prohibits installation of bare steel tanks except in states that enforce a national consensus code.

130 Cong. Rec. 11139 (Oct 3, 1984).

The bill, as reported by the Conference Committee, ultimately passed both houses and was signed by the President on November 8, 1984.

The legislative history of section 9003(g) reveals that, as originally introduced in the Senate, the section was aimed at preventing the installation of steel tank systems without corrosion protection. Ultimately, however, section 9003(g) was expanded not only to prohibit installation of bare steel tanks, but also to include requirements pertaining to the structural integrity of all newly installed tanks and the compatibility of the substances stored with the materials used in the construction and lining of such tanks.

V. EPA's Interpretation of Section 9003(g)

EPA reviewed the statutory language of section 9003(g) and its legislative history. Based upon this review, EPA's conclusions are set forth below.

Section 9003(g) (codified as 40 CFR 280.2) establishes three requirements that must be satisfied by all underground storage tanks (including underground pipes connected to the tanks) installed between May 7, 1985 and the effective date of new tank standards promulgated under RCRA section 9003(e), with the exception of tanks qualifying for the exemption from corrosion protection requirements under section 9003(g)(2). There requirements are: (1) That the tank and underground piping be designed, constructed, and installed to prevent releases due to corrosion for the operational life of the tank and the piping; (2) that the tank and underground piping be designed, constructed, and installed to prevent releases due to structural failure for the operational life of the tank and the piping; and (3) that the materials used in the construction or lining of the tank and its underground piping be compatible with the substance to be stored in the tank.

The first two of the above requirements are established by section 9003(g)(1)(A), which provides that tanks must "prevent releases due to corrosion or structural failure for the operational life of the tank." The third requirement is established by section 9003(c)(1)(C). In addition, section 9003(g)(1)(B) sets forth minimum requirements for tank design and construction. Under section 9003(g)(1)(B), tanks must be either cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material or designed in a manner to prevent the release or threatened release of any stored substance.

In addition to cathodically protected tanks and tanks constructed or clad with non-corrosive materials, section 9003(g)(1)(B) would permit the use of other types of tanks and protective measures if they are

"designed in a manner to prevent the release or threatened release of any stored substance." Interested parties may consult with EPA on a case-by-case basis concerning the effectiveness of particular technologies for preventing releases.

There are several examples of tanks that do not satisfy the requirement of section 9003(g)(1)(A) that they prevent releases due to corrosion for the operational life of the tank. A steel tank whose only corrosion protection is a coating of noncorrosive materials that is applied in such a way that it will not prevent releases due to corrosion for the operational life of the tank is not adequate. Similarly, a cathodically protected tank whose cathodic protection is not designed to prevent releases for the operational life of the tank will not be deemed to have satisfied this requirement.

Paint and asphalt coatings are not adequate for cathodic protection. Asphalt paints are soluble in a number of regulated substances that are normally stored in tanks, including solvents and hydrocarbons, such as gasoline. Applications of both asphalt paints and lead paints are thin, easily damaged during installation and easily worn away during use. They do not provide a complete seal for the tank. Such paint or asphalt coatings do not provide corrosion resistance for the operational life of the tank and, therefore, do not comply with the interim prohibition.

Tanks that satisfy the requirement of section 9003(g)(1)(A) to prevent releases due to corrosion must still satisfy the requirements that they prevent releases due to "structural failure" and that the materials used in the construction of the tank be compatible with the substances to be stored. For example, a tank constructed of noncorrosive material that is subject to structural failure because of its design or installation would not satisfy the requirements of section 9003(g)(1). Similarly, a tank whose construction materials are not compatible with the product to be stored would not satisfy the requirements of section 9003(g)(1) because, although it satisfies the corrosion protection requirement of section 9003(g)(1)(A), it does not satisfy the compatibility requirement of section 9003(g)(1)(C).

Section 9003(g)(1) provides that "no person may install an underground storage tank" unless such tank satisfies the requirements of sections 9003(g)(1) (A), (B), and (C). EPA interprets the term "no person may install an underground storage tank" to encompass any persons responsible for having a tank installed, including among others owners, operators and installers. EPA also interprets section 9003(g) as applying to all new installations, including installation of previously used tanks and to any new installation of underground piping associated with underground tanks subject to the prohibition. When the new installation is only piping, only the new piping would be subject to the standards in section 9003(g).

With respect to the exemption from corrosion protection requirements provided by section 9003(g)(2), EPA interprets this provision as permitting the installation of a tank without corrosion protection if a person, prior to installation, demonstrates by means of soil testing conducted in accordance with ASTM Standard G57-58 that the soil at the location where the tank is to be installed does not have a resistivity of less than 12,000 ohm-cm.

A tank exempted from corrosion protection requirements under this section, however, must still satisfy the requirement that the tank be designed, constructed, and installed to prevent releases due to the structural failure of the tank and that the materials used in the construction or lining of the tank be compatible with the substances to be stored in the tank. Thus, for example, a steel tank without any type of corrosion protection may be installed at a location where the soil continues to have a resistivity of

12,000 ohm-cm during the operational life of the tank. However, if the tank is constructed or installed so that it suffers structural failure or is not compatible with the stored product and releases its contents, the tank would not be in compliance with section 9003(g).

VI. Summary of Supporting Analyses

1. Executive Order 12291

Executive Order 12291 [46 FR 13193, February 9, 1981] requires that a regulatory agency determine whether a new regulation will be "major" regulation and, if so, that a Regulatory Impact Analysis be conducted. A major rule is defined as regulation which is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, and local government agencies, or geographic regions;

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule does not have any of the impacts listed above. The Agency did conduct an economic impact analysis of the interim prohibition as part of the Hazardous Waste Management System; Final Codification Rule published in the **Federal Register** July 15, 1985. The Regulatory Impact Analysis concludes that upper bound cost estimates for the Interim Prohibition are under $10 million per year.

The interpretive rule has been submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

2. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, whenever an agency publishes a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small entities (i.e., small businesses, small organizations, small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities.

The Regulatory Impact Analysis for the Final Codification Rule also addresses the impact of the Interim Prohibition on small entitles are concludes that the interim Prohibition will not have a significant economic impact on a substantial number of small entities. This interpretive rule does not, therefore, require a regulatory flexibility analysis.

Dated: May 21,1986.

Lee M. Thomas,

Administrator.

[FR Doc. 86-12002 filed 6-3-86; 8:45 am]

[1]

"Underground storage tank" is defined under RCRA Subtitle I, section 9001(1) as any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. Such term does not include any--

(A) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes,

(B) Tank used for storing heating oil for consumptive use on the premises where stored.

(C) Septic tank.,

(D) Pipeline facility (including gathering lines) regulated under-

(i) The Natural Gas Pipeline Safety Act of 1968, (49 U.S.C. App. 1671, et seq.),

(ii) The Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001, et seq.); or

(iii) Which is an intrastate pipeline facility regulated under State laws comparable to the provisions of law referred to in clause (i) or (ii) of this subparagraph;

(E) Surface impoundment, pit, pond or lagoon.

(F) Storm water or waste water collection system.

(G) Flow-through process tank.

(H) Liquid trap or associated gathered lines directly related to oil or gas production and gathering operations, or

(I) Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft or tunnel) if the storage tank is situated upon or above the surface of the floor.

"Regulated substances" are defined under RCRA Subtitle I, section 9001(2) as:

A) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under Subtitle C), and

(B) Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

[2]

"Release" is defined under RCRA Subtitle I, section 9001(5) as any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water or subsurface soil

53 FR 37082-37247 Friday, Sept. 23, 1988 40 CFR Parts 280 and 281, Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules

37082-37247 Federal Register / Vol. 53, No. 185 / Friday, September 23, 1988 / Rules and Regulations

For convenience, this document has been separated into the following pieces:

54 FR 47077-47082 Thursday, Nov. 9, 1989
Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

47077-47082 Federal Register / Vol. 54, No. 216 / Thursday, November 9, 1989 / Rules and Regulations

ENVIROMENTAL PROTECTION AGENCY

40 CFR Part 280

[FRL-3677-4]

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY:

EPA is today publishing an interim final rule amending the financial responsibility requirements for underground storage tanks containing petroleum which appeared in the **Federal Register** on October 26, 1988 (53 FR 43322). Specifically, EPA is interpreting the required language of endorsements to existing insurance policies under 40 CFR 280.97(b)(1) and certificates of insurance under 40 CFR 280.97(b)(2). The provisions interpreted and amended include the requirement that all endorsements and certificates include a six-month extended reporting period for claims-made policies and that cancellations or terminations of insurance by insurers will be effective 60 days after written notice of such termination is received by the insured. The amendments published today will bring the financial responsibility requirements into greater conformity with insurance industry practices concerning cancellation and extended reporting and thus avoid possible impacts on the availability and affordability of such insurance.

DATES:

The amendments to 40 CFR part 280 contained in this rulemaking published today were effective on October 26, 1989. EPA will accept comments on today's rulemaking that are submitted on or before December 11, 1989.

ADDRESSES:

Comments may be mailed to the Docket Clerk (Docket No. UST-3), Office of Underground Storage Tanks (WH-562A). U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments received by EPA, and all references used in this document, may be inspected in the public docket, located in Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW.,

Washington, DC 20460, from 9:00 a.m. to 4:00 p.m.**,** Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC.

SUPPLEMENTARY INFORMATION: On October 26, 1988, EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks containing petroleum (53 FR 43322). The final rules permitted the owner or operator of a petroleum underground storage tank to satisfy the requirements by obtaining liability insurance from a qualified insurer or risk retention group.

Section 280.97 of the rules specified certain coverage terms that must be included in any new insurance policy or in any endorsement to an existing insurance policy. Except for limited opportunities to supply information regarding the parties to the contract, addresses, types of tanks, the scope of coverage, and so forth, the insurer and insured are not allowed to vary the language of the policy or the endorsement. Language in the endorsement and certificate of insurance found in § 280.97(b) require that the insurer attest to the fact that the language of the endorsement and certificate of insurance is identical to the form specified in the regulations. The Agency believes that the requirement of uniform language would ensure the availability of insurance to cover corrective action or third party damage payments.

Through meetings with insurers and segments of the regulated community, EPA has subsequently learned of the prevalence of certain interpretations of the required language of the certificate of insurance and endorsement not intended by EPA. EPA has received information indicating that insurers are reluctant to issue policies or to enter the underground storage tank insurance market so long as these interpretations are not refuted by EPA. Thus EPA is today setting forth its intended interpretations of the required language of the certificate of insurance and the endorsement as well as amending the certificate and endorsement to require that insurers use alternative language that more explicitly reflects the intended meaning of these provisions. EPA is not changing the requirements that the language of all endorsements and certificates of insurance be identical to that language found in the regulations. Instead, EPA is changing the exact nature of that mandatory identical language in accordance with the wishes of insurers and insureds.

EPA is not soliciting comments prior to the effective date of today's rulemaking. Under section 3(b) of the Administrative Procedures Act, 5 U.S.C. 553(b), the Agency may for good cause or where the rule is interpretative, omit notice and comment procedures. The Agency believes that it has good cause to omit notice and comment prior to the effective date of today's technical amendments. First with the exception of changes to §§ 280.97(b)(1)(d), 280.97(b)(2)(d) and 280.105(a)(2), the Agency believes that notice and comment are unnecessary due to the non-substantive nature of the changes. These changes do not impose new substantive standards upon the regulated community, but rather require only that insurers substitute in future endorsements and certificates of insurance language that more carefully reflects the intended meaning of the currently required provisions.

Second, the Agency believes that it is in the public interest to omit notice and comment procedures with respect to all of the regulatory amendments made today, including those to §§ 280.97(b)(1)(d), 280.97(b)(2)(d) and 280.97(b)(2)(e), which govern termination due to non-payment of premium. The

Agency has received information to the effect that these amendments may increase the availability of insurance policies to owners and operators of 100-999 tanks required to comply with the financial responsibility rule by October 26, 1989, as required by 40 CFR 280.91(b). At the same time, the Agency has received information that greater availability of insurance may ease the burden of compliance with the financial responsibility requirements among those owners and operators subject to the October 26, 1989, deadline. Finally, the information referred to was received too late to prepare and publish regulatory changes in response to this information before today. Thus the Agency has concluded that, due to the delays involved in such procedures, providing notice and comment on these amendments is contrary to the public interest. The delays consequent to soliciting and responding to public comments are likely to prevent these amendments from becoming effective in time for insurers entering the underground storage tank insurance market because of these amendments to prepare policies and for owners and operators to obtain these new policies by the October 26, 1989, deadline.

However, the Agency is soliciting comment on today's regulatory amendments. Comments may be submitted on or before December 11, 1989. Comments will be considered by the Agency and, if necessary, the Agency will issue a final rule changing today's amendments to respond to these comments.

The amendments to 40 CFR part 280 contained in today's rulemaking and effective today apply only to those insurance policies, endorsements and certificates of insurance that are issued or renewed after today's date. Thus policies, endorsements and certificates of insurance that were issued prior to today's date and in compliance with 40 CFR part 280 as written prior to today's rule will continue to be valid until such time as they are canceled or terminated, or must be renewed.

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, and 9009 of the Solid Waste Disposal Act. as amended. The principal amendments to this Act have been under the Resource Conservation and Recovery Act of 1976, the Hazardous and Solid Waste Amendments of 1984 (Pub. L 98-616) and the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499) (42 U.S.C. 6921, 6991, 6991(a), 6991(b) 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h)).

II. Background

A. Six-month Extended Reporting Requirement for Claims-Made Policies

Mandatory language in the endorsement and certificate of insurance requires that a claims-made insurance contract cover claims for any occurrence that commenced during the term of the policy and that is discovered and reported to the insurer within six months of the effective date of the cancellation or other termination of the policy. The language of 40 CFR 280.97(b), Endorsement paragraph 2.e; § 280.97(b), Certification paragraph 2.e. reads: "The insurance covers claims for any occurrence that commenced during the term of the policy that is discovered and reported to the ['Insurer' or 'Group'] within six months of the effective date of the cancellation or termination of the policy.]" This provision was meant to address concerns that a claims-made policy might leave a gap in coverage, if, for example, a claim is reported after the expiration of a policy for a release that began prior to the policy expiration date.

Such claims might not be covered by the usual claims-made policy that is issued in the insurance industry. This is discussed in the preamble to the October 26, 1988, final rule. 53 FR 43350-51.

Through discussions with representatives of the insurance industry, however, EPA has learned that the industry generally interprets EPA's extended reporting period provision to require that every claims-made policy issued, regardless of what retroactive date is incorporated, contain an extended reporting period. Because charging a fee for the extended reporting period is a widespread practice within the industry, this interpretation has caused insurance companies to routinely request payment for the extended reporting period at the start of the policy period. Due to a reluctance on the part of insureds to pay for this coverage at the beginning of a policy period when they expect to renew their policy or otherwise purchase a new policy with the same retroactive date as their prior policy, this interpretation is apparently impinging upon the availability of UST insurance.

As explained below, however, this prevalent interpretation of the extended reporting period is not intended by the Agency, and is in fact unnecessary to the protection of human health and the environment. EPA intends that insurers provide extended reporting period coverage only where the termination or non-renewal of the policy results in the owner or operator having no coverage for releases that occurred during the time period of the previous policy and which are reported within six months after the termination or non-renewal of that policy. For discussion purposes, EPA has labeled this predicament as a "gap" in coverage. Because a "gap" in coverage will not always exist at the termination or other non-renewal of every insurance policy, interpreting the EPA regulation to require every insurance policy to have an extended reporting period results in the provision of unnecessary coverage and, considering the industry's standard fee practice, an unnecessary restraint upon the availability of UST insurance. For instance, a "gap" in coverage will not normally occur where an existing policy is renewed. According to standard insurance industry practice, a renewed policy incorporates the retroactive date of the previous policy. Thus should the insured who renews his policy report a release that occurred during the time period of the previous policy, the release would be covered by the renewed policy. It may also be true that no "gap" will exist even when the insured purchases a new policy from a different insurance company. Many companies will incorporate the retroactive date of the insured's previous policy (as well as the same type of insurance coverage as provided by the previous policy) for releases that are reported during the time period of the new policy but which occurred during the time of the previous policy. Here, as in the case of renewed policies, the requirement to obtain an extended reporting period at the end of the first policy period would not be of any benefit to human health and the environment since the new policy provides the same coverage as that provided by the extended reporting period.

EPA believes that there are only two situations where the termination of a policy results in a "gap" in coverage and thus only two situations where the insured whose policy is terminated must obtain extended reporting period coverage. The first situation occurs where the insured renews his existing policy or purchases a new policy and the renewed or new policy contains a retroactive date subsequent to the retroactive date of the insured's previous insurance policy. The second situation occurs where the policy is terminated or is otherwise not renewed and the insured elects a financial assurance mechanism other than insurance (such as a guarantee, surety bond, etc.) as a replacement. EPA is today promulgating revised language to clarify EPA's intended interpretation of paragraph 2.e. of the Endorsement contained in § 280.97(b)(1) and of paragraph 2.e. of the Certification contained in § 280.97(b)(2).

In addition, EPA is also revising the language of these two paragraphs to state explicitly what it had previously believed to be self-evident: that claims reported to the insurer during the six-month reporting period are subject to all of the terms, limits and conditions that existed during the policy period that it modifies. Because the Agency has received questions on this matter since promulgating the October 26, 1988 rule, the Agency decided to add clarifying language on this point in addition to the more important changes to § 280.97(b) described above.

The language of paragraph 2.e. of the Endorsement and Certification in 280.97(b) now reads:

> The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability. and exclusions of the policy.

Because EPA expects that these regulatory changes will result in owners and operators purchasing extended reporting period coverage, where needed, at the end, rather than the beginning of their policy period, EPA wishes to clarify exactly when such coverage must be obtained for compliance purposes. Where extended reporting period coverage is necessary, such coverage must be obtained before the time and date of the expiration of the prior policy.

A related issue raised by insurers concerns the possibility of double coverage through an expansive interpretation of what constitutes "termination" of the claims-made policy under § 280.97(b)(1) Endorsement paragraph (e), and § 280.97(b)(2) Certification paragraph (e),--the act that triggers the six-month extended reporting requirement discussed above. For example, under some state insurance laws, the mere addition or deletion of retail outlets from a company's insurance policy may constitute a "termination" of the policy. Such a change would not constitute a "termination" under EPA's interpretation of that term. EPA interprets "termination" to encompass only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

Finally, the Agency wishes to clarify its position with respect to the current insurance industry practice of charging insureds for the six month extended reporting period. EPA's regulations require that owners and operators obtain a six-month extended reporting period whenever a gap in their insurance coverage may exist. EPA's regulations go to owners and operators and not to those providing the insurance required under the rules. Therefore, whether insurers choose to provide the extended reporting period to insureds only for an additional cost is of no concern to the Agency with respect to compliance with the financial responsibility requirements. Insurers are free to provide the extended reporting period only for an additional cost; however, insureds who fail to obtain such coverage due to non-payment of this added cost will be out of compliance with EPA's financial responsibility requirements.

B. Sixty Days Required Coverage Following Cancellation or Termination by Insurer

Mandatory language in the endorsement and certificate of insurance requires that cancellation or any other termination of the insurance by the insurer will be effective only upon written notice and only after expiration of 60 days after written notice is received by the insured. 40 CFR 280.97(b)(1) Endorsement paragraph d. and 280.97(b)(2) Certification paragraph d. A separate provision of the regulations restates this requirement for cancellation of insurance. 40 CFR 280.105(a)(2). Additionally, the insurer must provide a six-month extended reporting period following cancellation. These provisions were meant to ensure that an owner or operator whose insurance was cancelled or terminated would have sufficient time to obtain an alternative assurance mechanism thereby avoiding any unacceptable gaps in coverage. These provisions did not distinguish between the effective date of cancellation where the cancellation was due to non-payment of premium or misrepresentation as opposed to cancellation for any other cause.

Subsequent discussions with insurers and segments of the regulated community that are seeking insurance have persuaded the Agency that the provision for extended coverage for sixty days following cancellation of coverage for non-payment of premium or misrepresentation is reducing the availability of insurance. The Agency has received indications that some insurers have decided against entering the market because of concerns that they might be forced to pay claims without ever having received any premiums or where the insured has made a misrepresentation. The Agency has also been informed that other insurers have increased premiums to protect against situations in which the insurer would have to pay for losses for which it has never collected a premium.

EPA is today amending the language of § 280.97(b)(1) Endorsement paragraph d, § 280.97(b)(2) Certification paragraph d and § 280.105(a)(2) to allow an insurer to terminate an insurance contract for non-payment of premium or misrepresentation by the insured after a 10 day notice period. EPA does not intend for this shortening of the coverage period from 60 to 10 days to apply to termination for any reason other than non-payment of premium or misrepresentation. The Agency is aware that some state insurance laws mandate a longer notice period following cancellation. In order to accommodate these state-specific situations, the amended language of § 280.97(b)(1) Endorsement paragraph d, § 280.97(b)(2) Certification paragraph d and § 280.105(a)(2) specifies that the mandatory coverage period following termination for non-payment of premium or misrepresentation shall be a "minimum of 10 days." The insurer is still bound to provide the owner or operator with written notice of cancellation with the 10 day period beginning upon receipt of notice by the owner or operator.

When the final rule was promulgated, the Agency believed that a 60-day cancellation coverage period was necessary to allow the insured owner or operator to obtain an alternative assurance mechanism, and thus avoid any unacceptable gap in coverage. The Agency thought that this requirement would not have a serious impact on insurance providers since insurers could protect themselves by establishing an appropriate schedule of premium payment. For example, insurers could require payment 90 days before the expiration date of coverage for maintenance or renewal of the policy. The insurer could then terminate the policy with 60 days notice if an insured does not meet the schedule of payment within 30 days of the premium due date.

Subsequently, the Agency has come to a better understanding of the economic impact on insurers of not allowing more than a 10-day cancellation period for non-payment of premium or misrepresentation. Insurers currently covering USTs have found restructuring premium payment schedules to be costly and

impractical, primarily because the practice is a major departure from existing industry practices. An important consequence of the 60-day cancellation requirement for non-payment of premium or misrepresentation has been the deterrence of new insurers from entering the UST market.

Although the Agency continues to be concerned about the adequacy of the 10-day cancellation in terms of finding alternative financial assurance after cancellation for non-payment, EPA does not want this requirement to have an impact on the availability and affordability of UST insurance. The Agency believes that today's amendment will bring the financial responsibility requirements into greater conformity with insurance industry practices concerning cancellation and thus avoid possible impacts upon the availability and affordability of such insurance. Generally, EPA believes that the insurance industry should be paid for bearing the risks of corrective action and third-party liability costs. In the cases of non-payment, the industry is unfairly undertaking risks without rightful compensation. For those insurers resisting entry into the market, the threat of insuring risks without ever receiving any premium is apparently a serious concern. Thus, today's change should remove a serious obstacle to the supply of insurance to owners and operators of underground storage tanks.

The Agency is not amending the requirement for a six-month extended reporting period following cancellation for non-payment of premium or misrepresentation. As noted in the previous section, the Agency believes that such a reporting period must be mandatory for all claims-made insurance contracts used to demonstrate financial assurance, regardless of the reason for termination. The six-month extended reporting period is essential to avoiding gaps in coverage that could threaten human health and environment, especially in cases where the owner or operator may have as few as 10 days upon receipt of notice of cancellation to obtain substitute coverage. The distinction between the two provisions, extended reporting period and the effective date of cancellation, is that even if a policy is canceled for non-payment of premium, the extended reporting period merely extends the time during which an insured may report occurrences covered by the policy for which he or she has not paid. Thus the extended reporting provision does not provide the insured with a benefit for which he or she has not paid. In contrast, any delay in the effective date of a policy cancellation or termination due to regulatory requirements provides insureds who failed to pay their premiums coverage for which they have not paid.

C. Other Regulatory Changes

Today's action makes three other regulatory changes in the requirements for the language in the endorsement and certificate of insurance. As noted above, EPA is not changing the requirement that the language of all endorsements and certificates of insurance be identical to that language found in the regulations. Instead, EPA is changing the mandatory language itself to meet the needs of insurers and insureds.

While insurance policies issued in connection with the financial responsibility requirements must be amended by attaching the endorsement or evidenced by the certificate of insurance, the endorsement and certificate do not stand apart from the insurance policy. Some insurers were concerned that the existing mandatory language did not allow the parties to make the relationship between the scope of the policy and the requirements of the certificate and endorsement clear. The first two technical amendments made today are intended to make that connection.

First, the phrase "in accordance with the subject to the limits of liability, exclusions, conditions, and other terms, of the policy" is being added to the first paragraph of both the endorsement and certification after the explanation of what the endorsement and certificate provide to clarify that these instruments do not narrow or broaden the scope of coverage provided in the policy itself. This correction also brings the required regulatory language into conformity with standard UST insurance industry practices. The amendment should reduce any confusion on the part of insureds concerning the coverage they are purchasing and also minimize insurers' concerns about potential conflicts with insureds over the scope of coverage. The second phrase, "which are subject to a separate limit under the policy," is inserted in the language of the certificate and endorsement to modify the phrase "exclusive of legal defense costs" in paragraph 1 of the endorsement and certification where the limits of liability found in the policy are discussed. While the language of the endorsement and the certification prevent the insurer from describing any existing limits upon legal defense costs, EPA did not intend to indicate that such limitations are not allowable or that such limitations that may be present in the policy are not valid. The Agency does not want the mandatory language concerning legal defense costs to interfere with the parties' understanding of the policy itself. Third, the phrase "after the policy retroactive date" is being added to specify the beginning of the period when occurrences are covered under the policy. It is common for insurers to establish such a date in a policy and use that date to determine when to divide coverage between policies when a second policy is coming into effect. Each of the above phrases being added conform to standard UST insurance industry usage and are not intended to change the requirements for the certificate and endorsement. These technical changes are effective immediately.

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Surety bonds, Underground storage tanks.

Dated: October 26, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

Accordingly, title 40 of the Code of Federal Regulations is amended as set forth below.

PART 280--TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h).

2. Section 280.92 is amended to add the following new definition:

§ 280.92 Definition of terms.

*** * * * ***

(o) *Termination* under § 280.97(b)(1) and § 280.97(b)(2) means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

§ 280.97 [Amended]

3. In § 280.97(b)(1), under "*Endorsement:*", the first paragraph of 1, is amended by removing " 'accidental releases'; if" and adding " 'accidental release'; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if".

4. In § 280.97(b)(1), under "*Endorsement:*", in the second paragraph of 1., after "exclusive of legal defense costs." insert ", which are subject to a separate limit under the policy."

5. In § 280.97(b)(l), under "*Endorsement:*", in paragraph 2.d., after "['Insurer' or 'Group']" insert ", except for non-payment of premium or misrepresentation by the insured,"

6. In § 280.97(b)(1), under "*Endorsement:*", in paragraph 2.d., after "received by the insured." insert "Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured."

7. In § 280.97(b)(1), under "*Endorsement:*", the first paragraph of 2.e., is revised to read as follows:

*** * * * ***

2.

e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

*** * * * ***

8. In § 280.97(b)(2), under "*Certification:*", the first paragraph of 1., removing " 'accidental releases'; if" and adding " 'accidental releases'; in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy; if",

9. In § 280.97(b)(2), under "*Certification:*", in the second paragraph of 1., after "exclusive of legal defense costs." insert ", which are subject to a separate limit under the policy."

10. In § 290.97(b)(2), under "*Certification:*", in paragraph 2.d., "['Insurer' or 'Group']" insert ", except for non-payment of premium or misrepresentation by the insured,".

11. In § 280.97(b)(2), under "*Certification:*", in paragraph 2.d., after "received by the insured." insert "Cancellation for non-payment of premium or misrepresentation by the insured will be effective only

upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured."

12. In § 280.97(b)(2), under "*Certification:*", the first paragraph of 2.e., is revised to read as follows:

*** * * * ***

2 * * * * *

e. The Insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]

*** * * * ***

13. Section 280.105 is amended by revising paragraph (a)(2) to read as follows:

§ 280.105 Cancellation or nonrenewal by a provider of financial assurance.

*** * * * ***

(a) * * *

(2) Termination of insurance or risk retention group coverage, except for non-payment or misrepresentation by the insured, or state-funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for non-payment of premium or misrepresentation by the insured may not occur until a minimum of 10 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

*** * * * ***

[FR Doc. 89-26104 Filed 11-8-89; 8:45 am]

55 FR 18566-18567 Wednesday, May 2, 1990 Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

18566-18567 Federal Register / Vol. 55, No. 85 / Wednesday, May 2, 1990 / Rules and Regulations

ENVIROMENTAL PROTECTION AGENCY

40 CFR Part 290

(FRL-3761-8)

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule with request for comments.

SUMMARY:

The Environmental Protection Agency (EPA) is today publishing an interim final rule amending the financial responsibility requirements for underground storage tanks (USTs) containing petroleum that appeared in the **Federal Register** on October 26, 1988 (53 FR 43322). Specifically, EPA is modifying the compliance dates under 40 CFR 280.91(c). Under the modification, all petroleum marketing firms owning 13-99 USTs at more than one facility will be required to comply with the requirements of 40 CFR part 280. subpart H--Financial Responsibility--as of April 26, 1991. This modification extends the deadline from the previous date of April 26, 1990. The amendments published today will provide additional time for the development of financial assurance mechanisms (especially, state assurance funds) to enable this group to comply.

DATES:

The amendments to 40 CFR part 280 contained in this rulemaking are effective May 2, 1990. EPA will accept comments on today's rulemaking on or before June 1, 1990.

ADDRESSES:

Comments may be mailed to the Docket Clerk (Docket No. UST-3). Office of Underground Storage Tanks (OS-400), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments received by EPA may be inspected in the public docket, located in room 2427 (Mall), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

FOR FUTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC.

SUPPLEMENTARY INFORMATION:

On October 26, 1988, EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks (USTs) containing petroleum (53 FR 43322). In the final rule, EPA established a phased schedule of compliance for owners and operators of petroleum USTs. Petroleum marketing firms with 13-99 USTs at more than one facility were required to comply with the financial responsibility requirements by April 26, 1990. The principal reason for adopting the phased compliance approach was to allow providers (including private insurance companies and states intending to establish state assurance funds) of financial assurance mechanisms the time necessary to develop new policies and programs or to conform their policies and programs with EPA requirements. (See 53 FR 43324.)

Since October 1988, EPA has monitored the development of financial assurance markets, especially (1) insurance for corrective action and third party liability and (2) state assurance funds, to determine whether financial assurance mechanisms were becoming available to satisfy the needs of the regulated community. Based on this ongoing review, EPA believes that tank owners required to comply by April 26, 1990, need additional time to meet insurers' standards for coverage. Also, states need additional time to develop state assurance funds, to submit them to EPA for review and approval as financial assurance mechanisms, and to make any modifications necessary for approval. Therefore, EPA is now extending the compliance date for owners and operators of 13-99 USTs at more than one facility from April 26, 1990 to April 26, 1991. The Agency is hopeful that this one year extension will provide adequate time for tank owners and operators to obtain assurance.

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, 9009 of the Solid Waste Disposal Act, as amended. The principal amendments of this Act have been under the Resource Conservation and Recovery Act of 1976, the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616) and the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499)(42 U.S.C. 6921, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h)).

II. Background

When devising the phased compliance approach, the Agency wanted to achieve the beat balance between the need to ensure financial capability for addressing UST releases and the necessary time for owners and operators to obtain assurance mechanisms. The Agency attempted to establish compliance dates which were as early as possible, considering the type of assurance different types of facilities were likely to obtain. Petroleum marketers owning or operating 1,000 or more USTs and non-marketers with more than $20 million in tangible net worth were required to comply by January 24, 1989, based primarily on their ability to qualify for self-insurance. Petroleum marketers with 100-990 USTs were required to comply by October 26, 1989.

These marketers were estimated to be relatively more likely to be able to obtain insurance; some of them were also expected to qualify as self-insurers. Petroleum marketers owning l3-99 USTs at more than one facility were required to comply by April 26, 1990. These marketers were estimated to be less likely to be

able to obtain insurance than members of the October 26, 1989 compliance group. Petroleum marketers owning or operating fewer than 13 USTs (or owning or operating a single facility with fewer than 100 USTs), and UST owners and operators that were not petroleum marketers (including local government entities) were required to comply by October 26, 1990. This group was expected to rely primarily on state assurance funds for compliance.

As EPA has been monitoring the development of financial assurance mechanisms, and as the Agency has learned more about the way insurers' operate in the UST insurance market, EPA believes that our original compliance date for this group (marketers owning 13-99 USTs at more than one facility) has to be extended based on new information. When devising the original phased compliance schedule, the Agency expected that members of this compliance group would rely primarily on insurance and that 18 months from promulgation of the final financial responsibility rule would provide adequate time for insurers to process applications and for owners and operators to upgrade their USTs to meet insurers' requirements. Since promulgation of the final rule, however, we have learned that tank owners and operators require additional time to comply with conditions imposed by the insurance industry. Some of these conditions include having tanks newer than 15 years of age, a clean site, a reliable method of leak detection, etc. For example, some insurers have informed EPA that they have rejected UST coverage applications because of existing contamination, poor tank management, and inadequate leak detection monitoring. Many members of this compliance group may not be able to meet these standards by April 26, 1990. The Agency has collected information from the major providers of UST insurance which indicated that less than 2% of the USTs in the April 26, 1990 compliance group were covered by UST insurance as of March 1, 1990. Because of the still limited availability of insurance, EPA does not believe this low compliance record is due to an unwillingness to comply with EPA's requirements. Rather, the Agency believes that this low compliance rate is a symptom of the problems of UST owners and operators in obtaining the requisite insurance.

In addition. the Agency believes that many more members of this compliance group must rely on state assurance funds to demonstrate compliance with the financial responsibility requirements, and not on insurance, than the Agency had originally projected. In order for owners and operators to rely on state assurance funds as compliance mechanisms, states must submit their funds to EPA. Although owners and operators are deemed to be in compliance when the state funds are submitted, the Agency has not considered submitted funds when determining availability, since the funds ultimately could be disapproved. To date, nine state assurance funds have been approved by EPA to serve as compliance mechanisms. Many more states have submitted funds and are in the process of making any modifications necessary for approval. The remaining states either have not submitted their funds to EPA or are in the process of developing assurance funds. Since many of the members of this compliance group must rely on state assurance funds to comply with the requirements, additional time is needed to allow states to develop, submit, and receive approval for the funds.

By extending the compliance date for this group to April 26, 1991, owners and operators will have additional time to meet insurers' standards and states will have additional time to submit their state assurance funds to EPA for approval so that owners and operators can use them to comply with the financial responsibility requirements.

EPA is not soliciting comments prior to the effective date of today's rulemaking. Under section 3(b) of Administrative Procedures Act, 5 U.S.C. 553(b), the Agency may for good cause omit notice and comment procedures. The Agency believes it has good cause to omit notice and comment procedures. When the Agency developed the phased schedule of compliance, it predicted that 18 months of promulgation of the final financial responsibility rule would provide adequate time for petroleum marketers owning 13-99 tanks to comply with the financial responsibility requirements. Since that time, the Agency has been monitoring the development of financial assurance mechanisms, particularly insurance and state assurance funds.

Through monitoring the insurance market, the Agency has learned that the UST insurance market is a volatile one. Because of this volatility, the Agency remained hopeful that it would not be necessary to revise the phased compliance schedule.

Recent developments in the UST insurance market demonstrate the volatility of this sector of the insurance industry. When the final financial responsibility regulation was promulgated in 1988, there were approximately three providers of UST insurance. Since that time additional insurers have entered the market while some insurers have left the market. For example, the Pollution Liability Insurance Association was a major provider of UST coverage, but withdrew from the market in 1989. The Environmental Protection Insurance Company, a new entrant into the UST insurance market, also withdrew in 1989. In February 1990, Petromark, a major provider of UST insurance, experienced serious financial difficulties and announced that it may not be able to continue providing UST insurance.

In addition to monitoring the development of the UST insurance market, the Agency is also monitoring the development of state assurance funds. EPA is currently reviewing numerous state assurance funds to determine whether they are acceptable compliance mechanisms for owners and operators.

Because delays involved in proposing the amendments for public comment would prevent the promulgation prior to the originally scheduled compliance date, allowing the opportunity for public comment would result in unnecessary closure of tanks and economic distress to the regulated community with no additional benefits to the environment and public health. EPA believes therefore, that providing notice and comment on these amendments is impracticable and contrary to the public interest.

The Agency is, however, soliciting comments on today's regulatory amendments. Comments may be submitted on or before June 1, 1990.

Comments will be considered by the Agency and, if necessary, the Agency will issue a revised final rule changing today's amendments to respond to these comments.

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control.

Dated: April 25, 1990.

William Reilly,

Administrator.

For the reasons set out in our preamble, part 280 of title 40 of the Code of Federal Regulations is amended as set forth below.

PART 280--TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(e), 6991(f), and 6991(h).

2. Section 280.91(c) is revised to read as follows:

§ 280.91 Compliance dates.

*** * * * ***

(c) All petroleum marketing firms owning l3-99 USTs at more than one facility: April 26, 1991.

*** * * * ***

[FR Doc. 90-10198 Filed 5-1-90; 8:45 am]

55 FR 46022-46025 Wednesday, Oct. 31, 1990 Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

46022 - 46025 Federal Register / Vol. 55, No. 211 / Wednesday, October 31, 1990 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 280 and 281

[FRL-3857-1]

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a final rule to amend the financial responsibility regulations promulgated on October 26, 1988 (53 FR 43322) for underground storage tanks (USTS) containing petroleum. Specifically, EPA is modifying the compliance dates under 40 CFR 280.91(d). Under the modifications, all petroleum marketing firms owning 1 to 12 USTs (or fewer than 100 USTs at one facility) and nonmarketers whose net worth is less than $20 million will be required to comply with the requirements of 40 CFR part 280 subpart H-Financial Responsibility-as of October 26, 1991. Local government entities will be required to comply with these requirements one year from the date of publication of final regulations that will provide additional mechanisms that they may use to comply with financial responsibility requirements for USTs containing petroleum in 40 CFR part 280. These modifications establish two new deadlines, both extended from the original date of October 26, 1990. The amendments published today will provide additional time for the development of financial assurance mechanisms (especially state assurance funds and mechanisms for use by local governments) to enable these UST owners and operators to comply. The Agency is also modifying 40 CFR part 281.37(b) to allow approved state programs a comparable amount of time during which they must phase in their financial responsibility requirements.

DATES: The amendments to 40 CFR part 280,281 contained in this rulemaking are effective October 31, 1990.

ADDRESSES: The final rule, the proposed rule, and EPA's responses to comments on this rulemaking may be inspected in the public docket, located in room 2427 (Mall), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800)424-9346 (toll free) or (202) 382-3000 in Washington, DC.

SUPPLEMENTARY INFORMATION: On October 26,1988 EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks (USTS) containing petroleum (53 FR 43322). (These requirements are referred hereinafter as "the final rule.") In the final rule, EPA established a phased schedule of compliance for owners and operators of petroleum USTS. Petroleum marketing firms with 1 to 12 USTs (or fewer than l00 USTs at one facility), local government entities, and nonmarketers whose net worth is less than $20 million were required to comply with the financial responsibility requirements by October 26, 1990. The principal reason for adopting the phased compliance approach in the final rule was to provide the time necessary for providers of financial assurance mechanisms (including private insurance companies and States intending to establish state assurance funds) to develop new policies and programs or conform their policies and programs to EPA requirements. (See 53 FR 43324.) The final rule required those organizations with the greatest ability to comply to obtain financial assurance first. Others, particularly smaller businesses and local governments, were allowed more time to obtain coverage. EPA has since proposed additional mechanisms for use by local government entities to comply with the financial responsibility requirements (55 FR 24692, June 18, 1990).

Since October 1988, EPA has monitored the development of financial assurance markets, especially (1) insurance for corrective action and third party liability, and (2) state assurance funds, to determine whether financial assurance mechanisms were becoming available to satisfy the needs of the regulated community. Based on this ongoing review, EPA believes that tank owners required to comply by October 26, 1990 need additional time to meet insurers' standards for coverage. Also, States need additional time to develop state assurance funds, to submit them to EPA for review and approval as financial assurance mechanisms, and to make any modifications necessary for approval. On July 6, 1990, EPA published a proposed rule to extend the compliance deadline for these owners and operators by one year and invited comments on the proposed action (55 FR 27837).

After reviewing the comments submitted in response to the proposed rule, EPA is now extending the compliance date for owners and operators of 1 to 12 USTS, or fewer than l00 USTs at one facility, and nonmarketers whose net worth is less than $20 million from October 26,1990 to October 26, 1991. EPA is also deferring the compliance date for local government entities from October 26, 1990 to one year from the date of publication of final regulations for additional mechanisms for use by local government entities to comply with financial responsibility requirements for USTs containing petroleum in 40 CFR part 280. Publication of a final rule is now expected during the summer of 1991. The Agency believes that these extensions will provide adequate time for tank owners and operators to obtain assurance. EPA is also modifying the State Program Approval Objective (40 CFR part 281) to allow state programs approved to administer and enforce UST programs to modify their regulations to match the new federal standards.

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, 9009 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c 6991d, 699le, 6991f, and 6991h).

II. Background

The financial responsibility regulations promulgated on October 26, 1988 (53 FR 43322) included a phased schedule for compliance by UST owners and operators. When devising the phased compliance approach, the Agency wanted to achieve the best balance between the need to ensure financial capability for cleaning up or redressing UST releases and the need to allow necessary time for owners and operators to obtain assurance mechanisms. The Agency attempted to establish compliance dates that were as early as possible, considering the type of assurance different types of facilities were likely to obtain. The Agency established four categories for purposes of setting compliance deadlines. Owners or operators in Category I (petroleum marketers owning or operating 1,000 or more USTs and non-marketers with more than $20 million in tangible net worth) were required to comply by January 24, 1989 based primarily on their ability to qualify for self-insurance. Of the remaining tank owners and operators, those in Category II (petroleum marketers with l00 to 999 USTS) were projected to be the most able to obtain insurance; some of them were also expected to qualify as selfinsurers. These marketers were required to comply by October 26, 1989. Owners or operators in Category III (petroleum marketers owning 13 to 99 USTs at more than one facility) which were estimated to be less likely to be able to obtain insurance than members of Category 11 compliance group, were originally required to comply by April 26, 1990; on May 2, 1990 the Agency published an Interim Final Rule (40 FR 18566) extending the compliance date of April 26, 1991. Owners or operators in Category IV (petroleum marketers owning or operating fewer than 13 USTs or owning or operating a single facility with fewer than 100 USTS, and UST owners and operators, including local government entities, that were not petroleum marketers) were required to comply by October 26, 1990. This group was expected to rely primarily on state assurance funds for compliance.

Through monitoring the development of financial assurance mechanisms, and as the Agency has learned more about the way insurers operate in the UST insurance market, EPA now believes that the original compliance date for owners or operators in Category IV did not allow adequate time for compliance. When devising the original phased compliance schedule, the Agency expected that members of this compliance group would rely on insurance and State funds. The Agency had believed that 24 months from promulgation of the final rule would provide adequate time for owners and operators to upgrade their USTs to meet insurers' requirements, for States to develop and submit funds to EPA, and for EPA to approve those funds meeting its criteria. Since promulgation of the final rule, however, EPA has learned that UST owners and operators require additional time to comply with conditions imposed by the insurance industry. Some of these conditions include having tanks younger than 15 years of age, a clean site, a reliable method of leak detection, etc. For example, some insurers have informed EPA that they have rejected UST coverage applications because of existing contamination, poor tank management, and inadequate leak detection monitoring. Many members of this compliance group may not be able to meet these standards by October 26, 1990 and thus would be required to seek an alternative financial assurance mechanism.

Consequently, the Agency believes that more members of this compliance group than the Agency had originally projected must rely on State assurance funds and other mechanisms, rather than on insurance, to demonstrate compliance with the financial responsibility requirements. In order for owners and operators to rely on State assurance funds as compliance mechanisms, States must submit their funds to EPA. Although owners and operators are deemed to be in compliance when the State funds are submitted, the Agency has not considered submitted funds when determining availability, because the funds

ultimately could be disapproved. To date, fourteen State assurance funds have been approved by EPA to serve as compliance mechanisms. Eleven more States have submitted funds and some are in the process of making modifications necessary for approval. The remaining States either have not submitted their funds to EPA or have not yet developed assurance funds. Since many of the members of this compliance group must rely on State assurance funds to comply with the requirements, additional time is needed to allow States to develop, submit, and receive approval for the funds.

EPA is also in the process of developing several new mechanisms, including a self-insurance test, that could be used by local governments to meet the financial responsibility requirements. The Agency proposed some additional financial responsibility mechanisms on June 18, 1990 (55 FR 24692) for use by local governments. The Agency is in the process of responding to comments on the proposed rule and plans to promulgate a final rule in the summer of 1991. EPA believes that local governments will need additional time to comply with financial responsibility requirements, particularly any of the new mechanisms that EPA has proposed become final and local governments use them.

Today's rule accommodates these unanticipated delays in the development of the private insurance market, State funds, and financial responsibility mechanisms by extending the compliance deadline for UST owners and operators in Category IV. Marketers owning or operating 1 to 12 USTs (or fewer than 100 USTs at a single facility) and non-marketers with net worth of less than $20 million must comply by October 26, 1991. Local government owners or operators must comply within one year of promulgation of additional mechanisms for meeting the financial responsibility requirements. EPA proposed several new mechanisms on June 18, 1990 (55 FR 24692). Barring unanticipated delays, EPA now expects to promulgate a final rule during the summer of 1991.

The Agency reviews State UST programs based on criteria established in 40 CFR 281 and may approve them to operate in lieu of the Federal program if the State program is no less stringent than the requirements set out at 9004(a)(1-8) and the program provides for adequate enforcement of compliance with the requirements. Under 40 CFR 281.37(b), State programs must phase in their financial responsibility requirements within 21 months of the effective date of the Federal financial responsibility requirements, which is considered to be October 26, 1988. In the absence of an amendment to part 281, the effect of today's modifications to the final compliance date would be to require that State programs be more stringent than the Federal rules by requiring compliance with financial responsibility requirements sooner than the amended Federal Regulations. Consequently, the Agency is also amending 40 CFR 281.37 so that approved State programs may phase in their financial responsibility requirements on a schedule comparable to the Federal phase-in, as modified under today's amendment to 40 CFR 280.91. These changes do not require States to change any existing compliance schedule, because States may have more stringent requirements.

Ill. Analysis of Today's Rule

On July 6,1990 the Agency proposed to amend the financial responsibility compliance dates under 40 CFR 280.91(d) and the schedule for phase-in of financial responsibility requirements for approved State programs under 40 CFR 281.37(b) (55 FR 27837). The Agency provided a 30-day comment period. The following section of the preamble describes the final rule, some of the major comments that were made on the proposed rule, and the rationale for the changes. A Comment/Response Document ("Summary of Comments and EPA's Response to Comments on the July 6, 1990, Proposed Amendments to the

Financial Responsibility Rule for Petroleum Underground Storage Tanks") containing a detailed summary of all comments on the proposed rule and the Agency's responses to those comments has been placed in the public docket.

Today's rule extends the financial responsibility compliance deadline for UST owners or operators in Category IV of the final rule. Petroleum marketers owning 1 to 12 USTS, or owning fewer than l00 USTS at only one facility, and non-marketers whose net worth is less than $20 million must comply by one year from the previous date of October 26, 1990. Local government entities are given an additional period of time to comply and are now required to demonstrate compliance within one year from the date of promulgation of additional mechanisms for use by local government entities to comply with financial responsibility requirements for USTs containing petroleum. Additional mechanisms were proposed on June 18, 1990, 55 FR 24692. The Agency believes that the extensions promulgated in today's rule will allow sufficient time for these UST owners to come into compliance. Specifically, the rule will have four effects: (1) Owners and operators will have additional time to meet insurers' standards, (2) States will have additional time to submit their state assurance funds to EPA for approval, (3) the Agency will have adequate time to complete work on alternative compliance mechanisms for local governments, and (4) local governments will have additional time to select and implement a compliance mechanism. Thus owners and operators will be able to make much greater use of all these mechanisms to comply with the financial responsibility requirements.

Comments on EPA's proposed rule were generally supportive of action to extend the compliance deadline for UST owners and operators in Category IV by one year, although some requested a longer extension and one supported a shorter extension. The major concerns expressed by commenters include the limited availability of private insurance, the lack of approved state assurance funds, the lack of financial responsibility mechanisms available to local governments, and the increasing cost of compliance with other regulatory requirements.

Several commenters indicated that the high cost, strict qualification requirements, and limited supply of private insurance providers are critically hampering owners and operators efforts to obtain pollution liability insurance, EPA acknowledges the validity of many of these points which justify today's extension of the original October 26, 1990 compliance deadline.

A number of commenters agreed that the proposed extension of the Category IV financial responsibility compliance deadline will afford the insurance industry the time necessary to respond to the needs of UST owners or operators with few USTs or those not engaged in petroleum marketing. A few commenters, however, suggested that EPA re-evaluate extending the compliance deadline beyond the proposed date of October 26, 1991. EPA believes that, barring any severe contraction of the pollution liability insurance market or slowdown in the progress of approval of state funds, one additional year will provide sufficient time for Category IV owners or operators, excluding local government entities, to obtain financial assurance and come into compliance. Currently, EPA is aware of at least 12 companies providing UST insurance to owners and operators, four of which offer policies in most or all States. In addition, another recently entered the market and is expected eventually to write policies across the country. Furthermore, 14 States currently have approved funds and another 11 States have funds that are under review and therefore tentatively approved. EPA understands that an additional 11 States have passed legislation establishing state funds, and that almost all remaining States are considering or have considered such

legislation. EPA expects that both the availability of private insurance and the number of approved state funds will be higher by this time next year. Nonetheless, although EPA expects that the availability of private assurance mechanisms and state funds will improve sufficiently to accommodate Category IV owners or operators, EPA will continue to monitor the availability of assurance mechanisms.

The majority of the commenters conceded that state assurance funds are an increasingly important financial responsibility mechanism, and, likewise, supported the proposed extension of the financial responsibility compliance deadline. The Agency's primary intent in proposing the extend the financial responsibility compliance deadline for Category IV owners and operators was to provide additional time for the development of financial assurance mechanisms, particularly state assurance funds, to enable this group to comply. Toward this end, 14 state funds have been approved and another 11 funds have received tentative approval while they are under review. EPA continues to encourage States to enact trust fund legislation and submit state funds for review.

One commenter expressed concern that the approval of funds is occurring slowly. The commenter claims that EPA proceeds much too slowly on state assurance fund approval to allow marketers to use them as a financial responsibility mechanism. The commenter further indicated that some States have not been willing to consider enacting trust fund legislation to date and may never do so. For those States, the commenter believes that the existence of a deadline extension will have no affect on the State's willingness to develop a State assurance fund mechanism.

With respect to these comments, EPA believes that there is noticeable progress in the approval of state funds. Twenty-five States have submitted funds to EPA for review, and are providing at least temporary coverage for eligible owners and operators; fourteen of these States' funds have been formally approved by the Agency. EPA expects that more States will develop and submit funds for approval, and that more state funds will receive approval in the coming year. The rate of approval of these assurance mechanisms, however, is not based solely on the time necessary for EPA to approve funds, but it is also contingent on the time it takes for States to develop and submit funds to EPA for review. While the Agency plans to continue supporting States in their efforts to develop and implement assurance funds, EPA cannot guarantee that all States will choose to develop funds. Twelve States with legislation authorizing funds have not yet submitted them to EPA for review. It is EPA's understanding, however, that state fund legislation is or has been under consideration in virtually all other States. EPA believes that the extension of the compliance deadline will allow those States actively considering funds to develop and submit them to EPA for approval. Nevertheless, States are not required to establish assurance programs, and EPA does not have control over whether States develop or submit funds.

One commenter supported an extension of EPA's financial responsibility compliance deadline for local governments, claiming that EPA needs to allow itself sufficient time to develop financial responsibility mechanisms for local governments. However, the commenter maintains that the proposed compliance date of October 26, 1991 does not allow local governments sufficient time to review, select, and implement a sound compliance program. It was argued that the additional mechanism proposed by EPA for local governments, such as the creation of a dedicated fund, would require at least one full budget cycle to implement. The commenter, therefore, requests EPA to further extend the compliance date by one year from the date of publication of a final financial responsibility rule for local governments.

The Agency agrees with the commenter that additional time may be necessary for local governments to comply with the financial responsibility requirements, particularly if they are to use any of the new mechanisms that EPA may promulgate. The Agency has concluded that the budgetary constraints under which local governments operate, and the current timetable for promulgating a final municipal test of self-assurance, justify granting them an exception to the deadline that will apply to the other members of this compliance group. The final rule, therefore, incorporates the commenter's suggestion for extending the compliance deadline for local governments by one year from the date of publication of a final regulations for additional mechanisms for use by local government entities to comply with financial responsibility requirements for USTs containing petroleum.

One commenter suggested extending the compliance date to December 22, 1991, remarking that the incremental UST regulatory compliance costs, in addition to costs imposed by other statutory mandates, make the financial responsibility requirements truly burdensome. The commenter stated that Reid vapor pressure controls, Stage II vapor recovery, community right-to-know and toxic reporting requirements, drug testing, and hazardous materials transportation programs are all imposing significant burdens on the independent segment of the petroleum marketing industry. The commenter stated that extending the compliance date to December 22, 1991 would alleviate some of the burden.

The Agency acknowledges that all new regulations have incremental costs. However, Congress gave no indication that other regulatory costs were to be considered in determining the dates for demonstrating financial responsibility compliance. Although complying with the financial responsibility requirements may pose an incremental burden for some owners or operators, EPA is not aware of any evidence that the additional two-month extension suggested will provide any additional significant relief over the one-year extension proposed.

IV. Economic and Regulatory Impacts

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.)* requires all Federal agencies to review the impact of their regulations to determine whether the regulations will have a significant economic impact on a substantial number of small entities. If so, the Agency must prepare a Regulatory Flexibility Analysis. EPA believes that this rule will not have a significant economic impact on a substantial number of small entities. The extension of the compliance date will provide regulatory relief to members of the Category IV compliance group by allowing them the additional time necessary to achieve compliance with the financial responsibility requirements. Accordingly, the Agency has concluded that the law does not require a Regulatory Flexibility Analysis, and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The information collection requirements of EPA's UST financial responsibility rule have been previously approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.)* and have been assigned OMB Control Number 2050-0066. Because today's rule does not require collection of any information or change the paperwork burden, EPA has not amended the estimate of burden.

If you wish to submit comments regarding any aspect of this collection of information, including suggestions for reducing the burden, or if you would like a copy of the information collection request (please reference ICR #1359), contact Rick Westlund, Information Policy Branch, PM-223, U.S.

Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 (202-382-2745); and the Desk Officer for Underground Storage Tanks, Office of Management and Budget, Washington, DC 20503.

List of Subjects in 40 CFR 280 and 281

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control.

Dated: October 25, 1990.

William Reilly,

Administrator.

For the reasons set out in the preamble, parts 280 and 281 of title 40 of the Code of Federal Regulations are amended as set forth below.

PART 280 - TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 is revised to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 699le, 6991f, and 6991h.

2. Section 280.91 is amended by revising paragraph (d) and by adding paragraph (e) to read as follows:

§ 280. 91 Compliance dates.

(d) All petroleum UST owners not described in paragraphs (a), (b), or (c) of this section, excluding local government entities; October 26, 1991.

(e) Alllocal government entities; one year from the date of promulgation of additional mechanisms for use by local government entities to comply with financial responsibility requirements for underground storage tanks containing petroleum.

PART 281 - APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

4. The authority citation for part 281 continues to read as follows:

Authority: Secs. 2002, 9004, 9005, 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6912, 6991 (c), 6991(d), 6991(e).

5. Section 281.37 is amended by revising paragraph (b) to read as follows:

§ 281. 37 Financial responsibility for UST systems containing petroleum.

(b) Phase-in of requirements. Financial responsibility requirements for petroleum UST systems must, at a minimum, be scheduled to be applied at all UST systems on an orderly schedule that completes a phase-in of the financial responsibility requirements within the time allowed in the Federal regulations under 40 CFR 280.91.

56 FR 24-26 Wednesday, Jan. 2, 1991 Underground Storage Tanks; Technical Requirements

24-26 Federal Register / Vol. 56, No. 1 / Wednesday, January 2, 1991 / Rules and Regulations

ENVIROMENTAL PROTECTION AGENCY

40 CFR Part 280

(FRL-3895-1)

Underground Storage Tanks; Technical Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing an interim final rule amending the technical requirements for underground storage tanks (USTs) promulgated in the**Federal Register** on September 23, 1986 (53 FR 37082). Specifically, EPA is extending for 270 days (or until September 22, 1991) the time frame UST owners and operators have to install automatic line leak detectors on new or existing underground pressurized piping systems *without* the minimum performance of this detection equipment having to meet the 40 CFR 280.43(a)(3) requirements for a probability of detection of 0.95 and a probability of false alarm of 0.05. Under today's modification, owners and operators are still required to (1) equip all pressurized piping with an automatic line leak detector and (2) have either an annual line tightness test conducted, or begin conducting monthly monitoring, by December 22, 1990. Also, all automatic line leak detectors are still required to detect leak rates of 3 gallons per hour (gph) at 10 pounds per square inch (psi) within 1 hour as contained in § 280.44(a), but the associated probabilities of detection and false alarm in § 280.43(a)(3) are being delayed until September 22, 1991, for automatic line leak detectors only.

EFFECTIVE DATE: The amendment to 40 CFR part 280 contained in this rulemaking published today is effective January 2, 1991.

ADDRESSES: The Docket for this rulemaking (Docket No. UST 2-1) is located at the U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC, 20460. The Docket is open from 9:30 a.m. to 3:30 p.m., Monday through Friday, except for federal holidays. You may make an appointmenent to review materials in the Docket by calling (202) 475-9720.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or 382-3000 (in Washington, DC).

SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 1988, (53 FR 37082) EPA promulgated technical requirements under subtitle I of RCRA for underground storage tanks containing petroleum or substances defined as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), except for substances regulated as a hazardous waste under subtitle C of the Resource Conservation and Recovery Act (RCRA). These rules went into effect 90 days later on December 22, 1988. The effect of today's document is to delay for 270 days (or until September 22, 1991) the requirement in § 280.40(a)(3) for owners and operators to install automatic line leak detectors on pressurized piping that detect the specified leak rate (under the specified conditions)*with* a probability of detection (Pd) of 0.95 and a probability of false alarm (Pfa) of 0.05.

Section 280.40(a)(3) in the final rule specifies that all leak detection methods used after December 22, 1990--except for those permanently installed prior to that date--have to be capable of detecting the leak rate or quantity specified for that method with a Pd of 0.95 and a Pfa of 0.05. This requirement applies to automatic line leak detectors, among other methods. EPA stated in the September 23, 1988, preamble to the final rule (53 FR 37145), that the Agency intended to give the various manufacturers time to evaluate their methods to prove they meet the standards in the rule. EPA also explained that the Agency was in the process of developing several different procedures for testing the different release detection methods in order to help manufacturers evaluate their equipment in an objective and technically sound fashion.

EPA has since published over the last 8 months, a series of seven guidance documents entitled *Standard Test Procedures for Evaluating Leak Detection Methods.* The series includes standards for particular release detection methods specified in the September 23, 1988 rule (53 FR 37082). Most of these procedures were published in final form early in the summer of 1990, and the last procedure, "Pipeline Leak Detection Systems," was published in late September of 1990. Most parties interested in obtaining a copy of this last protocol probably did not receive it until October 1990. As a result, a relatively short time period was allowed for piping leak detector manufacturers to receive the final protocol and make the necessary arrangements for evaluating the performance of their methods.

Over the past two months, the Agency has received comments from the leak detection industry, including comments from the nation's long-time major manufacturer of automatic pressurized line leak detection equipment, regarding the inadequate amount of time available to carry out the EPA protocol evaluation for piping given the late-September release of the final pipeline leak detection systems protocol and the December 22, 1990, regulatory deadline for owners and operators to demonstrate Pd and Pfa for new equipment. This commenter further requested more time to test its equipment and to carry out the protocol in this area. Some commenters also raised several technical concerns about the protocol itself that they believe may require EPA technical revision.

The above situation raises the serious concern that some major manufacturers of automatic line leak detectors will not be able to complete their evaluation under the EPA piping protocols (or another acceptable procedure) by December 22, 1990, when the Pd/Pfa requirements for automatic line leak detectors are scheduled to come into effect under § 280.40(a)(3). This may force some key manufacturers through no apparent fault of their own to withdraw, at least temporarily, a major portion of the currently

available detectors from the market place. EPA is concerned with such a potentially significant short fall in the availability of equipment (even if only for a few months) that UST owners and operators could purchase to comply with EPA's pressurized line leak detection requirements. Such a result could cause widespread non-compliance problems as well as unintended detrimental impacts to the environment and public health. As was discussed in the preamble to the final rule (53 FR 37153), the Agency considers the use of automatic line leak detectors to be a key part of our regulatory strategy for avoiding catastrophic releases from pressurized piping leaks. The Agency has received no new information that indicates currently available devices are not discovering, and therefore resulting in the curtailment of, significant pressurized line leaks.

Today's interim final rule is necessary to overcome the above implementation difficulties. By delaying for 270 days the effective date of the 0.95 Pd/0.05 Pfa standard as they apply to automatic line leak detectors, UST owners and operators can continue to install those mechanical line leak detectors for pressurized piping which are most widely available and currently being used extensively in the industry. EPA has been encouraging the use of these devices for the past two years. This temporary action also represents a significant benefit in terms of protecting human health and the environment since these leak detection devices will continue to be used uninterrupted and the catastrophic-type releases they are designed to detect will continue to be detected. Today's action is intended to allow manufacturers sufficient time to complete their equipment evaluations that have been delayed by the late release of the EPA protocol. They will also be able to make manufacturing adjustments (if necessary) before the Pd and Pfa for automatic line leak detectors become effective. Finally, the 270-day delay gives EPA the time it needs to consider the technical comments it has received about the protocol.

Until the probabilities become effective for automatic line leak detectors (September 22, 1991), these devices need only detect the leak rate of 3 gph as specified in § 280.44(a). Automatic line leak detectors installed prior to September 22, 1991, will not have to be replaced after the probabilities become effective, but all those installed after that period of time will have to achieve the probability standards.

It is important to note that delaying the Pd and Pfa performance criteria for automatic line leak detectors to September 22, 1991, in no way changes the requirement that all new and existing and piping that conveys regulated substances under pressure be equipped with an automatic line leak detector and either have an annual line tightness test conducted or have applicable monthly monitoring conducted. It is also important to note that the delay in Pd and Pfa is only for the automatic line leak detector requirements for pressurized piping. The Pd and Pfa associated with all other leak detection methods (e.g., tank tightness testing, automatic gauging and line tightness testing) will become effective December 22, 1990, as mandated in § 280.40(a)(3) of the regulations, and for the reasons discussed in the original September 23, 1988, **Federal Register** (53 FR 37082).

II. Need for Interim Final Rule

EPA is not soliciting comments prior to the effective date of today's rulemaking. Under section 3(b) of the Administrative Procedures Act, 5 U.S.C. 553(b) the Agency may for good cause omit notice and comment procedures. The Agency believes it has good cause to omit notice and comment procedures. When EPA developed the phase-in schedule of compliance for the Pd and Pfa, the Agency believed that the development of the protocols for testing, evaluating and reporting on the performance of the different methods of leak detection and the accompanying evaluation by manufacturers and/or third parties would

be complete 24 months from promulgation of the final technical requirements. However, because of unforeseen delays in getting the final piping protocol completed, as was previously explained in this preamble discussion, unintended non-compliance with an essential requirement (automatic line leak detection) would result without today's interim final amendment to delay the compliance date in the rules for 270 days. EPA believes, therefore, that providing notice and comment on this amendment is impractical and contrary to public interest.

The Agency is, however, soliciting comments on today's regulatory amendments. Comments may be submitted on or before February 1, 1991.

Comments will be considered by the Agency and, if necessary, the Agency will issue a revised final rule changing today's amendment to respond to these comments.

III. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. Since this document is merely an amendment to an existing regulation delaying one compliance date, the rule is not "major" as contained in the Office of Management and Budget's Interim Regulatory Impact Analysis Guidance.

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

Dated: December 21, 1990.

William K. Reilly,

Administrator.

List of Subjects in 40 CFR Part 280

Hazardous substances, Insurance, Oil pollution, Surety bonds, Water pollution, Water supply.

For the reasons set out in this document, part 280 of title 40, Code of Federal Regulations, is amended as set forth below.

PART 280--TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c) , 6991(d), 6991(e), 6991(f), and 6991(h).

2. Section 280.40 is amended by revising paragraph (a)(3) to read as follows:

§ 280.40 General requirements for all UST systems.

(a) * * *

3. Meets the performance requirements in § 280.43 or 280.44, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, methods used after the date shown in the following table corresponding with the specified method except for methods permanently installed prior to that date, must be capable of detecting the leak rate or quantity specified for that in method in the corresponding section of the rule (also shown in the table) with a probability of detection (Pd) of 0.95 and a probability of false alarm (Pfa) of 0.05.

Method	**Section**	**Date after which Pd/ Pfa must be demonstrated**
Manual Tank Gauging.	280.43(b)	December 22, 1990.
Tank Tightness Testing.	280.43(c)	December 22, 1990.
Automatic Tank Gauging.	280.43(d)	December 22, 1990.
Automatic Line Leak Detection.	280.44(a)	September 22, 1991.
Line Tightness Testing.	280.44(b)	December 22, 1990.

* * * * *

[FR Doc. 90-30595 Filed 12-31-90; 8:45 am]

56 FR 55066-55069 Monday, Aug. 5, 1991 40 CFR Part 280 Underground Storage Tanks; Technical Requirements

40 CFR Part 280 Underground Storage Tanks; Technical Requirements

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This document by the Environmental Protection Agency finalizes a technical amendment to the underground storage tank regulations. The Agency is adding to overfill design standards that require the use of overfill prevention equipment by allowing alternative uses of equipment located closer to the tops of larger tanks if it can be done in a manner that achieves certain minimum levels of performance. This technical amendment is issued to complete EPA's response to a petition for rulemaking. Effective Date: [insert date 30 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or 382-3000 (in Washington, DC).

SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 1988 (53 FR 37082) EPA promulgated technical requirements under subtitle I of the Resource Conservation and Recovery Act (RCRA) for underground storage tanks containing petroleum or substances defined as hazardous under the Comprehensive Response, Compensation, and Liability Act of 1980 (CERCLA), except for substances regulated as hazardous waste under subtitle C of RCRA. Those rules went into effect 90 days later an December 22, 1988. Today's document finalizes a technical addition to Section 280.20 of those final regulations where they address design requirements for overfill prevention equipment.

In a letter dated December 8, 1988, the American Petroleum Institute submitted a petition under section 7004(a) of RCRA requesting technical amendments to the final regulations. On April 27, 1990 the Agency published its decision to deny the petition for rulemakinq in 5 issue areas (55 FR 17763). On that date the Agency also proposed to grant the petitioner's request in one technical issue area, and accordingly solicited public comment on a proposed technical amendment to the regulations in the design requirements for overfill equipment (55 FR 17767). In sum, the issue raised by API was whether or not the Agency should allow alternative environmentally protective ways for locating overfill prevention equipment on new and existing tanks not allowed under the final rules: particularly by allowing the use of some equipment located closer to the top of larger tanks (those greater than 4,000 gallons). EPA proposed to add a performance standard to the spill and overfill requirements in Section 280.20 (c) (1) (ii) to address these technical questions.

Today, the Agency is finalizing the proposed performance standard to enable the use of numerous types of overfill equipment closer to the tops of larger tanks, as long as the equipment achieves the minimum standards of performance required to prevent overfills.

II. Amendment of Spill and Overfill Prevention Requirements (Section 280.20 (c) (1) (ii) (C))

Overfilling UST systems is a common source of petroleum and hazardous substance USTs releases onto the surface of the ground. EPA studies have found that UST owners and operators without overfill prevention equipment on their USTs often inadvertently force product into the environment through tank bung holes, vent lines, or fill ports when the volume of liquid delivered exceeds the tank's storage capacity. Sections 280.20 (c) and 280.30 of the final regulations provide requirements for spill and overfill prevention that mandate UST owners and operators use prevention equipment as well as follow procedures for preventing spillage and overfills into the environment during each tank in-filling operation. More specifically, section 280.20 (c) (1) (ii) of the existing rules requires that owners and operators prevent overfills by installing equipment with a design that will either: (1) alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering an alarm, or (2) automatically shut off flow into the tank when the tank is no more than 95 percent full.

On December 8,1988, the American Petroleum Institute submitted a rulemaking petition requesting, in part, that EPA review and change the technical requirements for overfill prevention equipment. This petition identified a technical oversight in an assumption used to develop the rule's final design standards for where to locate overfill prevention equipment at the top of tanks, particularly as they are applied to larger tanks. In calculating the percent of tank capacity at which flow restrictors, alarms, or shut off devices should be triggered (see previous paragraph above), the final design standard was based on an assumed average tank size of 4,000 gallons. As pointed out by API in its petition, new tank sizes are likely to increase over time, particularly in the retail motor fuel sector. Therefore, under the design standard alternatives allowed under the existing regulation, the maximum tank capacity of larger tanks (i.e., 10,000 gallons) is needlessly restricted from the standpoint of protecting the environment For example, under the existing rules, a 10,000 gallon tank equipped with a flow restrictor overfill prevention device can be filled only to 90% capacity (and necessitates 1000 gallon of ullage be left in the tank) to enable the operator sufficient time to respond and safely prevent an overfill by shutting off the delivery after the on-set of the flow restrictor. In response to the petition, EPA proposed performance criteria for what constitutes a safe response time (see 55 FR l7767) using various types of equipment, and the Agency requested public comments on whether such additional standards allowing larger tanks to be filled to a much higher capacity would still be protective of human health and the environment.

The April 27, 1990 proposal consisted of an additional set of performance standards that could be used as another alternative to the existing overfill prevention design standards. The proposed overfill performance standards would allow use of equipment capable of:

> Restricting flow 30 minutes prior to overfill, Alerting the operator with a high level alarm one minute before overfilling, or Automatically shutting off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

The Agency chose these alternative performance criteria to present the minimum response times necessary to prevent overfills with the major types of available equipment and thereby protect human

health and the environment. The proposed performance standards were intended to enable the location of the different types of overfill equipment sometimes even closer to the tops of the larger tanks, as long as the use of the equipment achieves one of these proposed minimum levels of performance.

EPA received public comments concerning these proposed alternative performance standards. Some specific technical concerns received on the overfill performance criteria included such items as the potential for spillage from larger tanks that may be tilted, and the insufficient time a one-minute alarm allows for the operator to shut off the inflow of product before it reaches the top of the tank. All these technical issues addressed by the commenters were previously raised and considered when devising the existing overfill design standards promulgated September 23, 1988. Because the Agency did not solicit more comment on these technical questions (such as the adequacy of flow restrictor methods of overfill prevention), they were not considered in finalizing today's amendment. No new evidence or data were provided by commenters that called into question the basic design assumptions used by the Agency to guide the development of the overfill equipment standards.

One commenter believed the performance standard for flow restrictors was unnecessarily strict because the requirement to begin flow restriction 30 minutes prior to overfilling would unduly add time and expense to a delivery. EPA does not agree and believes the commenter does not understand the intent and effect of this rule. The requirement for a flow restrictor (or some other type of equipment) is intended to simply serve as a warning device to the operator that the filling process is to stop and the remaining product in the delivery hose should be emptied into the tank. The equipment is not intended to alert the deliverers that it will take 30 minutes longer to completely fill the remaining ullage. The requirement grants a deliverer using flow restrictor equipment 30 minutes longer reaction time as a margin of safety. Within this 30 minute period, the delivery process must cease in order to prevent overfills.

EPA agrees with those commenters who support the proposed performance standards as an environmentally protective option for spill and overfill requirements. Several commenters recognized that adopting a time-based performance standard for overfill equipment provides the advantages of more efficient utilization of tank capacities. For example, some commenters identified that fuller use of tanks decreases petroleum product transportation and associated delivery hazards (i.e., spillage through hose connections and disconnections), thereby increasing efficient supply to the American consumer. They also pointed out that time-based performance standards also eliminate various expenditures, including those associated with more frequent deliveries, installation of otherwise unnecessarily larger-sized tanks to compensate for the excessive ullage requirement, and retrofitting tanks with alternative overfill protection systems.

EPA expects that the existing overfill design standards will continue to be the requirement of choice by owners and operators of tanks smaller than 4,000 gallons. However, today's added performance standard alternatives address the petitioner's concerns that the September 23, 1988 regulation in several cases unnecessarily reduced maximum tank storage capacity for larger tanks, and will allow additional options for owners and operators, and equipment providers. EPA has concluded that today's amendment provides some additional flexibility in the use of overfill equipment with no reduction in protection of human health and the environment. The full comment response document is available in the UST Docket. Call (202) 475-9720 to make an appointment with the docket clerk.

III. Economic and Regulatory Impacts

A. Regulatory and Impact Analysis

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. Since this amendment simply increases the regulated community's flexibility of implementation by adding some equally protective minimum performance standard alternatives to the existing overfill design standards, the amendment does not require a Regulatory Impact Analysis.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the Agency to prepare and make available for public comment a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (i.e., small businesses, small organizations and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have significant impact on a substantial number of small entities. EPA believes that this rule will not have a significant economic impact on a substantial number of small entities. The rule will provide additional flexibility in complying with the standards for preventing the overfilling of USTs. Accordingly, the Agency has concluded that the law does not require a Regulatory Flexibility Analysis and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Federalism Assessment

Executive Order 12612 requires the Agency to perform a federalism assessment on proposed and final rules. The Executive Order specifies that Federal agencies should refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is a clear constitutional authority and the presence of a problem of national scope. The Executive Order provides for a preemption of State law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

The Agency has revised today's rule and concluded that a federalism assessment as defined by Executive Order 12612, is not required. Today's rule merely adds another option for meeting the Federal overfill prevention standards; the overfill protection objective for State programs approval has not changed.

D. Paperwork Reduction Act

This final rule contains no new information collection requirements and thus will not increase the paperwork burden on the regulated community in contravention of the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 280

Hazardous materials, Petroleum, Underground storage tanks.

Dated: August 5, 1991

William K. Reilly,

Administrator.

56 FR 38342-38345 Tuesday, Aug. 13, 1991 Underground Storage Tanks; Technical Requirements, Final Rule

38342-38345 Federal Register / Vol. 56, No. 156 / Tuesday, August 13, 1991 / Rules and Regulations

ENVIROMENTAL PROTECTION AGENCY 40 CFR Part 280 (FRL-3951-9) Underground Storage Tanks; Technical Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document by the Environmental Protection Agency finalizes a technical amendment to the underground storage tank regulations. The Agency is adding to overfill design standards that require the use of overfill prevention equipment by allowing alternative uses of equipment located closer to the tops of larger tanks if it can be done in a manner that achieves certain minimum levels of performance. This technical amendment is issued to complete EPA's response to a petition for rulemaking.

DATES: *Effective Date:* September 12, 1991.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or 382-3000 (in Washington, DC).

SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 1988 (53 FR 37082) EPA promulgated technical requirements under subtitle I of the Resource Conservation and Recovery Act (RCRA) for underground storage tanks containing petroleum or substances defined as hazardous under the Comprehensive Response, Compensation, and Liability Act of 1980 (CERCLA), except for substances regulated as hazardous waste under subtitle C of RCRA. Those rules went into effect 90 days later on December 22, 1988. Today's document finalizes a technical addition to § 280.20 of those final regulations where they address design requirements for overfill prevention equipment.

In a letter dated December 8, 1988, the American Petroleum Institute submitted a petition under section 7004(a) of RCRA requesting technical amendments to the final regulations. On April 27, 1990 the Agency published its decision to deny the petition for rulemaking in 5 issue areas (55 FR 17763). On that date the Agency also proposed to grant the petitioner's request in one technical issue area and accordingly solicited public comment on a proposed technical amendment to the regulations in the design requirements for overfill equipment (55 FR 17767). In sum, the issue raised by API was whether or not the Agency should allow alternative environmentally protective ways for locating overfill prevention equipment on new and existing tanks not allowed under the final rules particularly by allowing the use of some equipment located closer to the top of larger tanks (those greater than 4,000 gallons). EPA proposed

to add a performance standard to the spill and overfill requirements in § 280.20(c)(1)(ii) to address these technical questions.

Today, the Agency is finalizing the proposed performance standard to enable the use of numerous types of overfill equipment closer to the tops of the larger tanks, as long as the equipment achieves the minimum standards of performance required to prevent overfills.

II. Amendment of Spill and Overfill Prevention Requirements (Section 280.20(c)(111(ii)(C))

Overfilling UST systems is a common source of petroleum and hazardous substance USTs releases onto the surface of the ground. EPA studies have found that UST owners operators without overfill prevention equipment on their USTs often inadvertently force product into the environment through tank bung holes, vent lines, or fill ports when the volume of liquid delivered exceeds the tank's storage capacity. Section 280.20(c) and 280.30 of the final regulations provide requirements for spill and overfill prevention that mandate UST owners and operators use prevention equipment as well as follow procedures for preventing spillage and overfills into the environment during each tank in-filling operation. More specifically, § 280.20(c)(1)(ii) of the existing rules requires that owners and operators prevent overfills by installing equipment with a design that will either: (1) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering an alarm, or (2) automatically shut off flow into the tank when the tank is no more than 95 percent full.

On December 8, 1988, the American Petroleum Institute submitted a rulemaking petition requesting, in part, that EPA review and change the technical requirements for overfill prevention equipment. This petition identified a technical oversight in an assumption used to develop the rule's final design standards for where to locate overfill prevention equipment at the top of tanks, particularly as they are applied to larger tanks. In calculating the percent of tank capacity at which flow restrictors, alarms, or shut off devices should be triggered (see previous paragraph above), the final design standard was based on an assumed average tank size of 4,000 gallons. As pointed out by API in its petition, new tank sizes are likely to increase over time, particularly in the retail motor fuel sector. Therefore, under the design standard alternatives allowed under the existing regulation, the maximum tank capacity of larger tanks (i.e., 10,000 gallons) is needlessly restricted from the standpoint of protecting the environment. For example, under the existing rules, a 10,000 gallon tank equipped with a flow restrictor overfill prevention device can be filled only to 90% capacity (and necessitates 1000 gallon of ullage be left in the tank) to enable the operator sufficient time to respond and safely prevent an overfill by shutting off the product delivery after the on-set of the flow restrictor. In response to the petition, EPA proposed performance criteria for what constitutes a safe response time (see 55 FR l7767) using various types of equipment, and the Agency requested public comments on whether such additional standards allowing larger tanks to be filled to a much higher capacity would still be protective of human health and the environment.

The April 27, 1990 proposal consisted of an additional set of performance standards that could be used as another alternative to the existing overfill prevention design standards. The proposed overfill performance standards would allow use of equipment capable of:

- Restricting flow 30 minutes prior to overfill,
- Alerting the operator with a high level alarm one minute before overfilling, or

- Automatically shutting off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

The Agency chose these alternative performance criteria to present the minimum response times necessary to prevent overfills with the major types of available equipment and thereby protect human health and the environment. The proposed performance standards were intended to enable the location of the different types of overfill equipment sometimes even closer to the tops of the larger tanks, as long as the use of the equipment achieves one of these proposed minimum levels of performance.

EPA received public comments concerning these proposed alternative performance standards. Some specific technical concerns received on the overfill performance criteria included such items as the potential for spillage from larger tanks that may be tilted, and the insufficient time a one-minute alarm allows for the operator to shut off the inflow of product before it reaches the top of the tank. All these technical issues addressed by the commenters were previously raised and considered when devising the existing overfill design standards promulgated September 23, 1988. Because the Agency did not solicit more comment on these technical questions (such as the adequacy of flow restrictor methods of overfill prevention), they were not considered in finalizing today's amendment. No new evidence or data were provided by commenters that called into question the basic design assumptions used by the Agency to guide the development of the overfill equipment standards.

One commenter believed the performance standard for flow restrictors was unnecessarily strict because the requirement to begin flow restriction 30 minutes prior to overfilling would unduly add time and expense to a delivery. EPA does not agree and believes the commenter does not understand the intent and effect of this rule. The requirement for a flow restrictor (or some other type of equipment) is intended to simply serve as a warning device to the operator that the filling process is to stop and the remaining product in the delivery hose should be emptied into the tank. The equipment is not intended to alert the deliverers that it will take 30 minutes longer to completely fill the remaining ullage. The requirement grants a deliverer using flow restrictor equipment 30 minutes reaction time as a margin of safety. Within this 30 minute period, the delivery process must cease in order to prevent overfills.

EPA agrees with those commenters who support the proposed performance standards as an environmentally protective option for spill and overfill requirements. Several commenters recognized that adopting a time-based performance standard for overfill equipment provides the advantages of more efficient utilization of tank capacities. For example, some commenters identified that fuller use of tanks decreases petroleum product transportation and associated delivery hazards (i.e., spillage through hose connections and disconnections), thereby increasing efficient supply to the American consumer. They also pointed out that time-based performance standards also eliminate various expenditures, including those associated with more frequent deliveries, installation of otherwise unnecessarily larger-sized tanks to compensate for the excessive ullage requirement, and retrofitting tanks with alternative overfill protection systems.

EPA expects that the existing overfill design standards will continue to be the requirement of choice by owners and operators of tanks smaller than 4,000 gallons. However, today's added performance standard alternatives address the petitioner's concerns that the September 23, 1988 regulation in several cases unnecessarily reduced maximum tank storage capacity for larger tanks, and will allow additional options for owners and operators, and equipment providers. EPA has concluded that today's amendment provides

some additional flexibility in the use of overfill equipment with no reduction in protection of human health and the environment. The full comment response document is available in the UST Docket. Call (202) 475-9720 to make an appointment with the docket clerk.

III. Economic and Regulatory Impacts

A. Regulatory and Impact Analysis

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. Since this amendment simply increases the regulated community's flexibility of implementation by adding some equally protective minimum performance standard alternatives to the existing overfill design standards, the amendment does not require a Regulatory Impact Analysis.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C 601 *et seq.*) requires the Agency to prepare and make available for public comment a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (i.e., small businesses, small organizations and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have significant impact on a substantial number of small entities. EPA believes that this rule will not have a significant economic impact on a substantial number of small entities. The rule will provide additional flexibility in complying with the standards for preventing the overfilling of USTs. Accordingly, the Agency has concluded that the law does not require a Regulatory Flexibility Analysis and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Federalism Assessment

Executive Order 12612 requires the Agency to perform a federalism assessment on proposed and final rules. The Executive Order specifies that Federal agencies should refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is a clear constitutional authority and the presence of a problem of national scope. The Executive Order provides for a preemption of State law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

The Agency has revised today's rule and concluded that a federalism assessment as defined by Executive Order 12612 is not required. Today's rule merely adds another option for meeting the Federal overfill prevention standards; the overfill protection objective for State programs approval has not changed.

D. Paperwork Reduction Act

This final rule contains no new information collection requirements and thus will not increase the paperwork burden on the regulated community in contravention of the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 280

Hazardous materials, Petroleum, Underground storage tanks.

Dated: August 5, 1991

William K. Reilly, *Administrator.*

For the reasons set out in the preamble, 40 CFR 280 is amended as set forth below:

PART 280--TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), 6991(h)

2. Section 280.20 is amended by revising paragraph (c)(1)(ii)(B) and by adding paragraph (c)(1)(ii)(C) to read as follows:

§ 280.20 Performance standards for new UST systems.

*** * * * ***

(c) * * *

(1) * * *

(ii) * * *

(B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level alarm; or (C) Restrict flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

*** * * * ***

[FR Doc. 91-19204 Filed 8-12-91; 8:45 am]

56 FR 49376-49381 Friday, Sept. 27, 1991
Issuance of and Administrative Hearings on RCRA Section 9003(h) Corrective Action Orders for Underground Storage Tanks

49376 - 49381 Federal Register / Vol. 56, No. 188 / Friday, September 27, 1991 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 24

[FRL-4012-4]

Issuance of and Administrative Hearings on RCRA Section 9003(h)

Corrective Action Orders for Underground Storage Tanks

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Hazardous and Solid Waste Amendments of 1984 (HSWA) added to the Resource Conservation and Recovery Act (RCRA) a new Subtitle I which provides for the regulation of underground storage tanks CUSTS). Section 9003(h), which was added to Subtitle I by the Superfund Amendments and Reauthorization Act of 1986 (SARA), authorizes EPA to issue orders requiring owners and operators to take corrective action in response to releases from their USTS. This rule establishes procedures governing the issuance of administrative corrective action orders issued under authority contained in section 9003(h) of RCRA, and conduct of administrative hearings requested by recipients of such orders.

EFFECTIVE DATE: This rule becomes effective October 28, 1991.

FOR FURTHER INFORMATION CONTACT: RCRA/SUPERFUND Hotline at (600) 424-9346; or in Washington, DC at (202) 382-3000.

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

I. Authority

The rules governing issuance of and administrative hearings on corrective action orders, 40 CFR part 24, were promulgated on April 13,1988, at (53 FR 12256), under the authority of sections 2002 and 3008 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act, (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA)), 42 U.S.C. 6912 and 6928. This amendment to 40 CFR part 24 is issued under the authority of sections 2002 and 9003 of RCRA, as amended, 42 U.S.C. 6912 and 69gib.

II. Background

A. Subtitle I of RCRA

On November 8, 1984, the President signed into law the Hazardous and Solid Waste Amendments of 1984. The amendments added to RCRA a new Subtitle 1, sections 9001 through 9010, which establishes a federal program for the regulation of underground storage tanks (USTs). Section 9006(a) authorizes EPA to issue administrative orders that require compliance and/or assess penalties for violations of Subtitle 1. Section 9003(h) authorizes EPA to issue administrative orders requiring owners or operators of leaking USTs to undertake corrective action.

Under section 9(b), any administrative order issued under section 9006(a) shall become final in 30 days unless the recipient requests an administrative hearing. Section 9003(h) states that corrective action orders issued under section 9003(h) shall be subject to the same requirements as 9006(a) orders. Thus, recipients of 9003(h) corrective action orders maintain the right for 30 days to request a hearing.

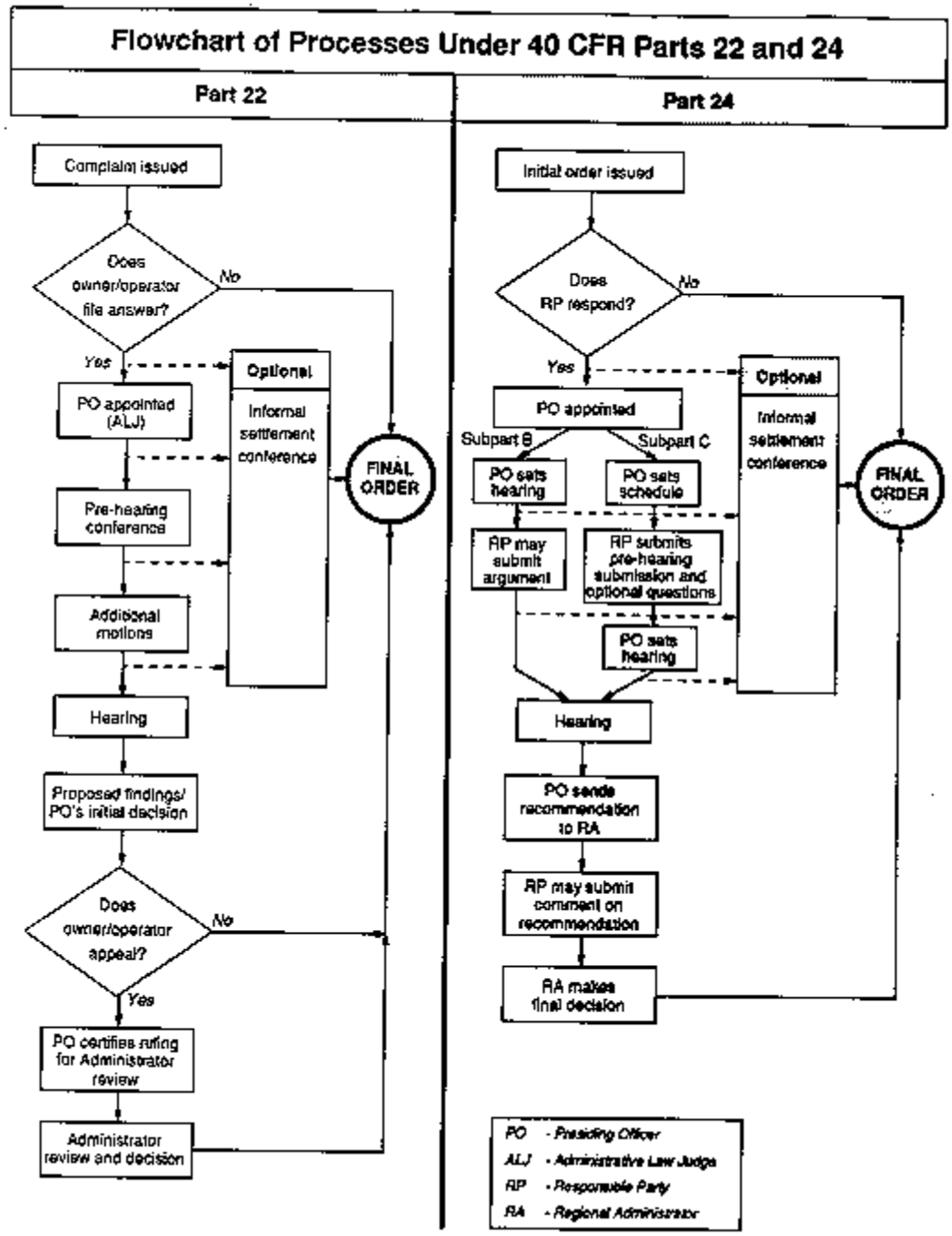
The procedures for issuing administrative compliance orders and conducting administrative hearings pursuant to RCRA section 3008(a) are governed by 40 CFR part 22. On February 24, 1988, EPA amended the part 22 procedures to include orders issued pursuant to section 9006(a) (53 FR 5373). The Agency subsequently developed more streamlined procedures at 40 CFR part 24 for corrective action orders issued pursuant to section 3008(h) of RCRA. These streamlined procedures were published April 13,1988 (53 FR 12256) and applied to 3008(h) corrective action orders only.

In the absence of Congressional requirements, the Agency has the ability, circumscribed by constitutional due process considerations, to decide what administrative procedures are appropriate to be followed for 9003(h) corrective action orders. Because EPA believes that the part 24 procedures are consistent with the statute and its goal of minimizing the environmental risks posed by leaking USTS, it feels that part 24 should be employed for corrective action orders issued pursuant to section 9003(h) and for administrative hearings requested by recipients of such orders. Thus, EPA proposed that the part 24 procedures be amended to include corrective action orders issued pursuant to section 9003(h). The proposed amendment

was published in the **Federal Register** on August 15, 1990 (55 FR 33430) along with an invitation to interested members of the public to comment on the proposed rule.

B. Summary of Proposed Rule

EPA believes that use of the part 24 procedures is the most appropriate way to handle the issuance of and administrative hearings on 9003(h) corrective action orders and, thus, proposed to extend the scope of part 24 to include such orders. The Agency believes that the uncomplicated, streamlined nature of the administrative procedures under part 24 make it more suitable than part 22 for issuing corrective action orders. The primary difference between the two sets of proceedings is that part 22 requires full, adjudicatory hearings with discovery and examination of witnesses, while part 24 provides instead for the respondent's full review of the administrative record. Other differences between the proceedings are illustrated in the flowcharts (Figure 1).



Because of their nature and purpose, part 24 proceedings are less formal and resource-intensive than part 22 proceedings. In part 22, EPA decision makers are required to adjudicate specific factual issues relating to the violation in question. However, the primary purpose of part 24 proceedings is to establish that a release has occurred, not that a specific *violation* has occurred, and to determine the most appropriate corrective measures for the release. Because the part 24 proceedings do not allow examination and cross examination of witnesses, less time and fewer resources are needed for preparation and conduct of the hearings. This approach is congruous with the UST program's philosophy, where the primary goals include reducing the risks from UST releases as quickly as possible. Thus, EPA believes that using part

24 procedures for 9003(h) corrective action orders would avoid unnecessary time delays and expenditures of Agency or respondent's resources, and would provide a more suitable framework for issuing corrective action orders than would the part 22 procedures.

In its August 1990 proposal, the Agency's intent was to amend 40 CFR part 24 by expanding the scope of coverage of the rule to include 9003(h) orders. Consistent with use of part 24 for RCRA section 3008(h) orders, EPA proposed that the part 24 procedures be used only when issuing a 9003(h) corrective action order alone. If a 9003(h) corrective action order is issued in conjunction with a 9006 order to compel compliance with specific requirements or to assess civil penalties, the part 22 procedures will be followed. This allows for the full adjudicatory proceedings under part 22 in those cases where issues of fact are most likely to be in dispute. Table 1 illustrates when to follow part 22 and part 24 procedures.

TABLE 1

Type of order	Procedures to use
Section 9003(h) Corrective Action Order requiring investigations, studies, and/ or corrective action.	40 CFR part 24.
Section 9003(h) Corrective Action Order issued in conjunction with a 9006(a) Compliance Order requiring compliance with specific requirements.	40 CFR part 22.
Section 9003(h) Corrective Action Order issued in conjunction with a section 9006(a) Compliance Order assessing civil penalties.	40 CFR part 22.
Section 9006(a) Compliance Order requiring compliance with specific requirements and/or assessing civil penalties.	40 CFR part 22.

EPA also proposed to amend part 24 by selecting the appropriate hearing procedures (section 24.08) for 9003(h) corrective action orders. The rules at 40 CFR part 24 use a two-tiered set of procedures for conducting administrative hearings. The two tiers are: (1) Subpart B-Hearings on Orders Requiring Investigations or Studies; and (2) Subpart C-Hearings on Orders Requiring Corrective Action. Subpart B procedures are used when the initial RCRA section 3008(h) corrective action order directs the respondent to undertake either: (1) Studies of the nature and extent of releases of hazardous waste constituents; or (2) studies of the available alternatives for remediating such releases, either alone or with limited interim corrective action measures. Procedures in subpart C are used when the initial 3008(h) corrective action order directs the respondent to undertake specific, comprehensive corrective measures, either alone or in conjunction with investigatory studies. EPA proposed that the subpart C procedures be used for 9003(h) corrective actions orders, including those rare instances when an order would be issued that did not instruct the owner or operator to conduct corrective measures.

III. Analysis of Today's Rule

A number of comments on the proposed rule were received from representatives of the regulated community and trade associations. While the basic approach and structure of the rule remain unaltered, the comments have prompted the Agency to make certain changes to the rule. A summary of EPA's response to the major comments and a discussion of the revisions to the rule are provided below. The full comment response document is available in the UST docket. Call (202) 475-9720 to make an appointment with the docket clerk.

A. Statutory Mandate

The issue raised most frequently by commenters addressed the Agency's interpretation of RCRA section 9003(h)(4), which requires that 9003(h) orders be subject to the "same requirements" as 9006 orders. The commenters argued that since EPA uses the part 22 procedures to issue 9006 orders, and not those in part 24, the part 22 procedures also should apply to 9003(h) orders.

The Agency disagrees that section 9003(h) requires that part 22 procedures be used for corrective action orders. The statute, at section 9003(h)(4), states that corrective action orders "shall be issued and enforced in the same manner and subject to the same requirements as orders under section 9006," but does not provide any reference to the procedures as part 22. Thus, EPA believes that the statutory reference to "the same requirements" is directed toward the requirements in section 9006 itself, and not the requirements in the part 22 procedures that EPA has chosen to implement section 9006. There are three requirements set forth in section 9006(b):

- Respondent must be guaranteed a public hearing;
- Respondent has 30 days to request a hearing before the order becomes final; and
- EPA "may" promulgate rules for discovery procedures.

The part 24 procedures provide for due process through a public hearing (see discussion below) and allow the respondent 30 days to request such a hearing and, therefore, fulfill the requirements of section 9006(b). With respect to the statutory language for discovery procedures, it should be noted that the statute says that the Agency 11 may" promulgate discovery rules, clearly suggesting that hearings which did not contain this feature also would be acceptable. Thus, because the part 24 procedures meet the requirements set forth in section 9006, their use is permitted by the statute, regardless of the fact that the part 22 procedures were chosen to implement orders under section 9006.

This interpretation is consistent with EPA's previous rulemaking to establish the part 24 procedures for RCRA section 3008(h) corrective action orders (53 FR 12256, April 13, 1988). In addition, the use of part 24 procedures for 3008(h) corrective action orders has been upheld in a recent court decision, *Chemical Waste Management Inc. v. United States Environmental Protection Agency*, 873 F.2d 1477 (D.C. Cir. 1989). The court ruled that because the statute did not specifically reference the part 22 procedures, the Agency's use of part 24 procedures for hearings on corrective action orders under section 3008(h) reflects a reasonable interpretation of the statute.

One commenter also suggested that section 9003(h)(4) only provides authority to issue corrective action orders for releases from petroleum USTS. The Agency disagrees, because section 9003(h)(4) also includes orders "to carry out regulations under subsection (c)(4) of this section," and that section (and the regulations issued pursuant thereto) includes both petroleum and hazardous substance USTS. Therefore, the Agency is promulgating the rule as proposed.

B. Due Process Issues

A number of commenters expressed concern that the procedures under part 24 would deprive recipients of 9003(h) orders of due process. In particular, commenters were concerned about the respondent's right to discover the government's evidence or cross-examine government witnesses, and to appeal the order. Commenters also requested clarification on whether orders would be judicially reviewable.

The Agency's argument that part 24 procedures do provide due process for corrective action orders was initially set forth in the preamble to the final rule on use of part 24 procedures for RCRA section 3008(h) orders (53 FR 12256, April 13, 1988). In that preamble, the Agency weighed the factors cited in *Mathews v. Eldridge,* 424 U.S. 319 (1976), which established how much process is due in an administrative hearing. Those factors were, on the one hand, EPA's interest in avoiding (1) resource outlays and (2) delays in responding to releases that would result from the preparation for and participation in full adjudicatory hearings, and, on the other hand, (1) the respondent's costs of undertaking corrective action, and (2) the risk that the respondent might be forced to incur such costs unnecessarily, because EPA has promulgated rules that do not adequately provide for resolution of factual disputes. The Agency concluded in the preamble that given the technical nature of corrective action cases, the part 24 proceedings would provide adequate resolution of technical disputes and, thus, the risks to the respondent would be minimal. In addition, the corrective action regulations in Subpart F of 40 CFR part 280, with which section 9003(h) orders must be in conformity, provide direction to the issuer of the order and thus reduce the likelihood of error and, consequently, the need for a hearing. Furthermore, lengthy administrative proceedings would be resource intensive and incompatible with the Agency's need to accomplish clean-ups quickly to avoid adverse health and environmental impacts. EPA's argument that part 24 procedures provide due process has been upheld in *Chemical Waste Management Inc. v. EPA,* in which the court declared that use of part 24 procedures for RCRA 3008(h) corrective action orders did not on their face deprive respondents of the constitutional requirement of due process.

Specifically, although cases involving corrective action orders may present some factual issues for resolution, there will be fewer factual issues than in cases where there are alleged regulatory violations. Furthermore, the questions that do arise will be more technical in nature, and will focus on whether a release has occurred and what remediation should be undertaken, rather than on specific factual issues needed to prove whether a violation has occurred. Such technical questions can just as easily, and perhaps more effectively, be resolved through careful analysis of the administrative record and the written submissions and oral statements of the parties. Thus, formal discovery will not be necessary because part 24 provides the respondent with full access to the administrative record. The part 24 regulations also provide several opportunities for a closer examination of difficult factual issues, such as liability for corrective action. Specifically, § § 24.11 and 24.15(a) allow the Presiding Officer to address questions to either party; § 24.11 (Subpart B) provides opportunity for technical and legal discussions between the parties; and § 24.24(d) (Subpart C) allows the respondent (with the Presiding Officer's permission) to submit questions in writing to EPA prior to the hearing. Thus, lengthy administrative hearings that include extensive discovery and cross-examination not only are incompatible with the need to accomplish clean-ups quickly, but also are unnecessary from a due process standpoint.

The Agency believes that the part 24 proceedings also provide due process with respect to appeals. In particular, part 24 allows the respondent to identify and bring to the attention of the Regional Administrator any factual or legal errors in the recommended decision, prior to the final decision. Thus, final decisions issued under the part 24 procedures already incorporate review and approval by the Regional Administrator. Furthermore, the Agency is clarifying that the final decision made by the Regional Administrator after the conclusion of the hearing to either sign or modify the Presiding Officer's decision is final Agency action that is not appealable to the Administrator. However, the final order is not judicially reviewable until the agency seeks to enforce the order or until the order has been fully implemented, because the statute, in the opinion of the Agency, precludes pre-enforcement or

preimplementation review. In addition, the completion of the dispute resolution process does not permit immediate judicial review, for the same reasons that a final order is not immediately reviewable by the courts.

C. Procedures for the Hearing Process

The rules at 40 CFR part 24 use a twotiered set of procedures for conducting administrative hearings. Subpart B procedures, which are less formal and time-consuming, are used when the initial corrective action order directs the respondent to undertake either studies of the nature and extent of releases, or studies of the available alternatives for remediating such releases. Subpart C procedures are used when the initial corrective action order directs the respondent to undertake specific or comprehensive corrective measures.

In the preamble to the proposed rule, EPA suggested that 9003(h) corrective action orders will be issued primarily in situations when a release is suspected to have occurred. In these cases, the Agency typically will issue a single order requiring the owner or operator both to confirm the release and to conduct corrective measures. The Agency also indicated that procedures for hearings requested by the recipients of such orders would be more appropriately governed by the subpart C procedures. Thus, the Agency proposed that the subpart C procedures be used for all 9003(h) corrective actions orders, including those rare instances when an order would be issued that did not instruct the owner or operator to conduct corrective measures. However, several commenters disagreed with the Agency's intent to issue single orders for both the investigation and clean-up phases of UST remediation. In general, the commenters indicated that such orders would be unfair to respondents and would be inconsistent with the Agency's procedures for RCRA section 3008(h) orders.

With respect to releases from USTS, the statute at section 9003(h) provides Regional enforcement officers with the choice of issuing either a single or joint order. Because 9003(h) orders usually will be issued in response to releases of known substances (i.e., petroleum or chemical products that contain hazardous substances), no detailed studies or extensive site investigations will be needed to characterize the substances released. Thus, the Agency maintains that a typical 9003(h) order will either require corrective action only, or will require investigations and studies along with a directive that corrective action must be undertaken, if necessary, based on the results of those studies.

Consistent with the comments received, the Agency does acknowledge that there may be circumstances when an order would be issued for investigation/study only. The comments received on the proposed rule indicated that there was confusion as to whether subpart B or subpart C would be used in those circumstances. To resolve this confusion, the Agency determined that it would be appropriate to make the rule consistent with the procedures for 3008(h) orders. Thus, EPA revised the rule to clarify that subpart B procedures would be used in situations when an order compels an investigation/study only, while subpart C would be used for joint orders or corrective action only (see Table 2).

TABLE 2

Action required	§ 3008(h) orders	§ 9003(h) orders
Site investigation only.	Subpart B procedures	Subpart B procedures.
Corrective action only.	Subpart C procedures.	Subpart C procedures.
Site investigation and corrective action.	Subpart C procedures.	Subpart C procedures.

IV. Economic and Regulatory Impacts

A. Regulatory Impact Analysis Under Executive Order No. 12291, the Agency must determine whether a new regulation is a "major" rule and prepare a Regulatory Impact Analysis (RIA) in connection with a major rule. A "major" rule is defined as one that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, and local government agencies or geographical regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises in domestic or export markets. The notice published here is procedural in nature, will not have any important economic impacts, and will not significantly affect the operations of regional or other program offices, Therefore, today's rule is not deemed to be a "major" rule and, accordingly, does not trigger the requirement that a regulatory impact analysis be prepared.

B. Regulatory Flexibility Act The Regulatory Flexibility Act **(**5U.S.C. 601 *et seq.)* requires the Agency to prepare and make available for public comment a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have significant economic impact on a substantial number of small entities. Since this amendment merely establishes hearing procedures and has no significant economic impact on a substantial number small entities, it does not trigger the requirement in the Regulatory Flexibility Act that a regulatory flexibility analysis be prepared.

C. Paperwork Reduction Act

This final amendment contains no information collection requirements and thus will not increase the paperwork burden on the regulated community in contravention of the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 24

Administrative practice and procedure, Corrective action, Hazardous materials, Revocation of operating authority; Underground storage tanks.

Dated: September 17, 1991.

William K. Reilly,

Administrator.

For the reasons set out in the Preamble, part 24, Chapter 1, of Title 40, *Code of Federal Regulations* is amended as follows:

PART 24 -[AMENDED]

1. The authority citation for part 24 is revised to read as follows:

Authority: 42U.S.C. sections 6912, 6928, 6991b.

2. Section 24.01is amended by redesignating paragraph (c) as (d) and by revising paragraph (a) and adding paragraph (c) to read as follows:

§ **24.01 Scope of these rules.**

(a) These rules establish procedures governing issuance of administrative orders for corrective action pursuant to sections 3008(h) and 9003(h) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (the Act), and conduct of administrative hearings on such orders, except as specified in paragraphs (b)

and (c) of this section.

* * * * *

(c) The hearing procedures appearing at 40 CFR part 22 govern administrative hearings on any order issued pursuant to section 9003(h) of the Act that is contained within an administrative order that includes claims under section 9006 of the Act.

* * * * *

3. Section 24.02 is amended by revising paragraph (a) to read as follows:

§ **24.02 Issuance of initial orders; definition of final orders and orders on consent.**

(a) An administrative action under section 3008(h) or 9003(h) of the Act shall be commenced by issuance of an administrative order. When the order is issued unilaterally, the order shall be referred to as an initial administrative order and may be referenced as a proceeding under section 3008(h) or 9003(h) of the Act. When the order has become effective, either after issuance of a final order following a final decision by the Regional Administrator, or after thirty days from issuance if no hearing is requested, the order shall be referred to as a final administrative order. Where the order is agreed to by the parties, the order shall be denominated as a final administrative order on consent.

* * * * *

4. Section 24.04 is amended by revising paragraph (a) to read as follows:

§ **24-04 Filing and service of orders, decisions, and documents.**

(a) Filing of orders, decisions, and documents. The original and one copy of the initial administrative order, the recommended decision of the Presiding Officer, the final decision and the final administrative

order, and one copy of the administrative record and an index thereto must be filed with the Clerk designated for 3008(h) or 9003(h) orders. In addition, all memoranda and documents submitted in the proceeding shall be filed with the clerk.

* * * * *

5. Section 24.08 is revised to read as follows:

§ **24.08 Selection of appropriate hearing procedures.**

(a) The hearing procedures set forth in subpart B of this part shall be employed for any requested hearing if the initial order directs the respondent ----

(1) To undertake only a RCRA Facility Investigation and/or Corrective Measures Study, which may include monitoring, surveys, testing, information gathering, analyses, and/or studies (including studies designed to develop recommendations for appropriate corrective measures), or

(2) To undertake such investigations and/or studies and interim corrective measures, and if such interim corrective measures are neither costly nor technically complex and are necessary to protect human health and the environment prior to development of a permanent remedy, or

(3) To undertake investigations/ studies with respect to a release from an underground storage tank.

(b) The hearing procedures set forth in subpart C of this part shall be employed if the respondent seeks a hearing on an order directing that ----

(1) Corrective measures or such corrective measures together with investigations/studies be undertaken, or

(2) Corrective action or such corrective action together with investigations/studies be undertaken with respect to any release from an underground storage tank.

(c) The procedures contained in subparts A and D of this part shall be followed regardless of whether the initial order directs the respondent to undertake an investigation pursuant to the procedures in subpart B of this part, or requires the respondent to implement corrective measures pursuant to the procedures in subpart C of this part.

56 FR 66369-66373 Monday, Dec. 23, 1991 Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements, Final Rule

66369 - 66373 Federal Register / Vol. 56, No. 246 / Monday, December 23, 1991 / Rules and Regulations

40 CFR Part 280

[FRL-4086-5]

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating a rule to amend the financial responsibility requirements for underground storage tanks (USTS) containing petroleum that appeared in the Federal Register on October 26, 1988 (53 FR 43322), as amended October 31, 1990 (55 FR 46022). Specifically, this rule modifies the compliance dates under 40 CFR 280.91(d). Under the modification, all petroleum marketing firms owning 1 to 12 USTs at more than one facility or fewer than 100 USTs at a single facility and non-marketers with net worth of less than $20 million are required to comply with the requirements of 40 CFR part 280 subpart H-Financial Responsibility-by December 31, 1993. Today's rule extends the deadline from the previous date of October 26, 1991. This change will provide additional time for the development of financial assurance mechanisms (especially State assurance funds) to enable this group to comply.

EFFECTIVE DATE: The amendment to 40 CFR 280.91(d) contained in this rulemaking is effective December 23, 1991.

ADDRESSES: The public docket for this rule is in room M2427, U.S. EPA, 401 M St., SW., Washington, DC 20460. Call (202) 260-9327 for an appointment to review docket materials.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (703) 920-9810 in Virginia. For technical questions, contact Andrea Osborne in the Office of Underground Storage Tanks at (703) 308-8883.

SUPPLEMENTARY INFORMATION: On October 26, 1988, EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks (USTS) containing petroleum (53 FR 43322). In the final rule, EPA established a phased schedule of compliance for owners and operators of petroleum USTS. Petroleum marketing firms with 1 to 12 USTs at more than one facility or fewer than 100 USTs at a single facility, local government entities, and non-marketers whose net worth is less than $20 million were required to comply with the financial responsibility requirements by October 26,1990. The principal reason for adopting the phased compliance approach was to provide the time necessary for providers (including private insurance companies and States intending to

establish State assurance funds) of financial assurance mechanisms to develop new policies and programs or conform their policies and programs with EPA requirements. (See 53 FR 43324.)

On October 31, 1990, EPA published regulations (55 FR 46022) extending for one year (to October 26, 1991) the compliance deadline for marketers with I to 12 USTs at more than one facility or fewer than 100 USTs located at a single facility and non-marketers whose net worth is less than $20 million. The compliance deadline for local governments was extended until one year after the promulgation of a final rule providing additional mechanisms for local governments. Additional mechanisms for local governments were proposed on June 18, 1990 (55 FR 24692).

Since October 1990, EPA has continued to monitor the development of financial assurance markets, especially (1) insurance for corrective action and third party liability and (2) State assurance funds, to determine whether financial assurance mechanisms are becoming available to satisfy the needs of the regulated community. Based on this on-going review, EPA believes that tank owners required to comply by October 26, 1991, need additional time to meet insurers' standards for coverage. Also, States need additional time to develop State assurance funds, to submit them to EPA for review and approval as financial assurance mechanisms, and to make any modifications necessary for approval. Therefore, EPA is extending the compliance date for marketers with 1 to 12 USTs at more than one facility or fewer than 100 USTs at a single facility and non-marketers whose net worth is less than $20 million from October 26, 1991 to December 31, 1993. The Agency believes that this 26-month extension for Category IV tank owners will provide adequate time for tank owners and operators to obtain assurance. By October 1990, when the deadline was previously extended, EPA had approved 14 State assurance funds and had begun to review 11 State assurance funds that were submitted to EPA for approval. (It is important to note that upon submission of a State assurance fund, the fund is considered to be approved unless and until EPA disapproves it.) During the subsequent 12 months, an additional 13 State assurance funds have been approved by EPA to serve as financial responsibility compliance mechanisms. Currently, 27 State assurance funds have been approved by EPA and an additional 9 State assurance funds have been submitted to EPA for approval. EPA expects State assurance fund development to continue during the 26-month extension. The Agency notes, however, that States are not required to develop assurance funds and that several States have indicated that they do not intend to develop State fund programs. Nevertheless, EPA anticipates that the extension will allow all States intending to develop State funds adequate time to do so.

Additionally, States will have more time to develop and implement financial assistance programs (e.g., direct loan programs, loan guarantee programs, grant programs) which help owners and operators pay for technical improvements such as tank upgrading, which, in turn, helps owners and operators qualify for insurance. Four States-Alaska, Hawaii, Maryland, and Washington-indicated that they have or are developing State financial assistance programs, and that an extension would provide more time for qualified owners and operators to obtain financial assistance to upgrade their UST facilities to meet insurance underwriting criteria. Finally, extension of the compliance deadline to December 319 1993 will relate the compliance deadline for Category IV owners and operators to the final compliance date for implementation of release detection. Implementation of a release detection program is a critical element of the underwriting criteria for many insurers, and the ability to demonstrate that tanks are not leaking will allow more owners and operators to obtain insurance. Under EPA's phased schedule for release detection, all owners and operators must implement release detection no later than December 23, 1993.

1. Authority

These regulations are issued under the authority of Sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, and 9009 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 69gle, 6991f, and 6991h).

II. Effective Date

This rule will be effective on December 23, 1991 pursuant to 5 U.S.C. 553(d). This rule may be made effective immediately because it extends a deadline for compliance in existing regulations and therefore is a "substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1). The Agency also finds that there is good cause to make the rule effective immediately because the regulated community does not need time to come into compliance. 5 U.S.C. 553(d)(3).

III. Background

When devising the phased compliance approach, the Agency wanted to achieve the best balance between the need to demonstrate financial responsibility for UST releases and the time necessary for owners and operators to obtain assurance mechanisms. The Agency attempted to establish compliance dates that were as early as possible, considering the type of assurance different types of facilities were likely to obtain. Petroleum marketers owning or operating 1,000 or more USTs and nonmarketers with more than $20 million in tangible net worth were required to comply by January 24,1989, based primarily on their ability to qualify for self-insurance. Petroleum marketers with 100 to 999 USTs were required to comply by October 26,1989. These marketers were estimated to be relatively more likely to be able to obtain insurance; some of them were also expected to qualify as self-insurers. Petroleum marketers owning 13 to 99 USTs at more than one facility were originally required to comply by April 26, 1990. However, on May 2, 1990, the Agency published a rule (55 FR 18566) extending this compliance date to April 26, 1991. These marketers were thought to be less likely to be able to obtain insurance than members of the October 26,1989, compliance group. Petroleum marketers owning or operating fewer than 13 USTs at more than one facility or owning or operating only one facility with fewer than 100 USTS, and UST owners and operators who were not petroleum marketers (including local government entities) were required to comply by October 26,1990. This group was expected to rely primarily on State assurance funds for compliance. On October 31, 1990, EPA extended the compliance deadline for one year for small marketers (marketers with fewer than 13 USTs or fewer than 100 USTs at a single facility) and small nonmarketers (non-marketers with less than $20 million in net worth). This extension was based on the rate of development of State assurance funds. In addition, EPA extended the compliance deadline for local governments until one year after publication of a final rule with additional mechanisms for local governments to demonstrate compliance. Additional mechanisms for local governments were proposed on June 18,1990 (55 FR 24692). The deadline for compliance by local governments is not affected by this rule.

Through monitoring the development of financial assurance mechanisms, the Agency has learned more about the way insurers operate in the UST insurance market. EPA now believes that the extended compliance date of October 26, 1991 for Category IV tank owners (marketers owning 1 to 12 USTs or fewer than 100 USTs at one facility and nonmarketers whose net worth is less than $20 million) did not allow adequate time for compliance. When devising the original and revised phased compliance schedule,

the Agency expected that members of this compliance group would rely on insurance and State assurance funds. The Agency had originally believed that 24 months from promulgation of the final financial responsibility rule would provide adequate time for owners and operators to upgrade their USTs to meet insurers' requirements and for States to develop and submit assurance funds to EPA. Since promulgation of the 1988 final rule, however, EPA has learned that tank owners and operators require additional time to comply with conditions imposed on them by the insurance industry. Some of these conditions include operation of only tanks younger than 15 years of age, clean site conditions, a reliable method of leak detection, etc. For example, some insurers have informed EPA that they have rejected UST coverage applications because of existing contamination, poor tank management, and inadequate leak detection monitoring. Many members of this compliance group may not be able to meet these standards by October 26, 1991, and thus would be required to seek an alternative financial assurance mechanism.

On August 14, 1991, EPA proposed to extend the compliance deadline for this group (56 FR 40292). EPA based the proposal on its understanding that more members of this compliance group than the Agency had originally projected must rely on State assurance funds, rather than on insurance, to demonstrate compliance with the financial responsibility requirements. EPA believed that, in order for owners and operators to rely on State assurance funds as compliance mechanisms, States must have more time to submit their State assurance funds to EPA for approval.

At this time, EPA has approved 27 State assurance funds to serve as financial responsibility compliance mechanisms that provide full or partial coverage; 9 more have formally submitted their State assurance funds to EPA for approval.

In addition to State assurance funds, which serve as financial responsibility compliance mechanisms, some States, such as Alaska, Hawaii, Oregon, Washington, and Maryland, are developing financial assistance programs, such as grant programs and loan programs, to assist UST owners in upgrading their facilities to meet insurance underwriting standards. The State of Washington has also implemented a reinsurance program, under which the State relies on private insurers to sell insurance but provides reinsurance coverage to limit the insurers' risk and reduce premium costs.

Comments on the proposed rule were received from 57 commenters. A Response to Comments Document is in the public docket for the rule. Most commenters supported the extension of the compliance deadline for Category IV owners and operators. Commenters asserted that the proposed extension would allow the time needed for owners and operators seeking insurance to meet insurers' standards for coverage. They also stated that an extension would allow the time necessary for States that do not have State assurance funds or financial assistance programs to develop such funds and programs; whereas in States where these funds and programs exist, the extension would provide States with more time to develop outreach programs, and would provide owners and operators with more time to participate.

Some commenters argued against extending the compliance deadline, however, stating that affordable private insurance is available to both marketers and nonmarketers, and that an extension would discourage UST owners from taking the necessary steps toward compliance and would undermine the credibility of the UST program. Some of the comments regarding the availability and affordability of insurance in certain States were countered directly by comments from UST owners in those States that they were able to obtain only minimal pollution liability coverage, with high deductibles, and that the

costs for this coverage were prohibitive. Some of the commenters opposing a general extension acknowledged that an extension was justified in States without State assurance funds.

One commenter, who removed tanks before the proposal to extend the compliance deadline, argued that an additional extension places those who have already complied with the regulations at a competitive disadvantage with respect to those who have not. The Agency believes that this situation is an unfortunate result of the regulatory development process, but is not indicative of the potential effects on the majority of the regulated community. The Agency is unable to determine whether an extension is necessary until near the deadline for compliance, however, and so is unable to provide more advanced notice of the extension. This difficulty is exacerbated by statutory requirements to obtain public participation in the rulemaking process, which further restricts EPA's ability to provide definitive answers about forthcoming changes in the regulations. The Agency regrets any problems experienced by specific UST owners and operators as a result of the changes in the regulatory deadline.

Regarding the length of an extension, many commenters supported the proposal to extend the compliance deadline to December 31, 1992. One commenter proposed a shorter extension of the deadline to allow States more time to develop State assurance funds, yet not undermine the financial responsibility requirements through excessive delay of compliance deadlines. Several commenters favored an extension until December 31, 1993. These included the Hawaii Department of Health, which requested the extra time to implement its loan program for UST owners, and the National Air Transportation Association, which advocated synchronizing the compliance schedule for financial responsibility requirements with that for release detection requirements. Other commenters also suggested longer extensions; two of these requested an indefinite extension.

Based on a review of the comments, EPA has decided to extend the compliance date to December 31, 1993, for small petroleum marketing firms (those with fewer than 13 USTs or fewer than 100 USTs at a single facility) and nonmarketers with net worth of less than $20 million. This 26-month extension will allow all States that intend to develop State assurance funds or financial assistance programs to do so, and will allow UST owners and operators in these States to participate. It will also delay the need for meeting financial responsibility requirements until after the December 22, 1993 compliance deadline for release detection under 40 CFR 280.40. Installing release detection may be a requirement for obtaining insurance in some areas; this extension will assure that all UST owners seeking insurance would have already complied with Federal release detection requirements. The Agency notes that the extension provided by this rule does not preclude States from adopting an earlier deadline; in those States where a State assurance fund exists, States may find it appropriate to maintain the previous deadlines for compliance with financial responsibility requirements. This final rule applies to the Federal compliance date only, and does not preclude different State compliance deadlines.

Several commenters requested that the extension be broadened to include owners and operators in compliance Category III, which were required to have complied by April 26,1991. Commenters argued that these owners and operators are also having difficulty obtaining insurance or otherwise demonstrating financial responsibility, and that extending the compliance deadline for owners and operators in Category IV only would place owners and operators in Category III at a competitive disadvantage. EPA believes, however, that owners and operators with financial assurance mechanisms may have an advantage over competitors without these mechanisms since the infrequent, unknown and possibly large costs associated

with a leak may be greater than the regular, known, and possibly smaller costs of the financial assurance mechanism. In addition, EPA analysis suggests that up to 80% of the owners and operators in Category III have already obtained assurance mechanisms through State funds and private insurance. The Agency emphasizes that its intention has been and continues to be to require demonstration of financial responsibility at the earliest date reasonably achievable, which for Category III has already passed. UST owners and operators in Category III were required to have demonstrated compliance with the financial responsibility requirements more than six months ago. The Agency believes that "extending" the deadline at this time would penalize those owners and operators who have made a good faith effort to comply with the requirements.

Several commenters argued for special treatment for USTs owned by Indian Tribes and for USTs located on tribal lands. The commenters claimed that these USTs are not covered by State assurance funds, are not eligible for coverage by the LUST Trust Fund, are located in geographic regions that offer a low potential for contamination of groundwater supplies, and have limited access to insurance. While Indian Tribes cannot get State program grants or LUST Trust Fund Cooperative Agreements (as States can), they are eligible to receive LUST Trust Fund dollars from EPA under certain circumstances. State financial assurance funds do not necessarily exclude tribally-owned tanks; however, since States do not have taxing powers over tribal lands, States cannot collect the taxes and fees that are usually required for participation and access to these State funds unless the Tribe or individual owner opts to pay the fee voluntarily to participate in the fund.

The Agency anticipates that the extension will provide additional time for many owners and operators of USTs located on tribal lands to obtain financial assurance mechanisms. Nevertheless, EPA acknowledges the concerns expressed by these commenters. As discussed below, EPA intends to continue to monitor the development of financial assurance mechanisms during the extension period to determine whether specific groups of UST owners and operators, including owners and operators of USTs located on tribal lands, may require additional consideration.

USTs directly owned or operated by Tribal governments are not within the scope of this rule because the Agency treats them as local governments for the purposes of the financial responsibility requirements. Tribal governments will be eligible to use the new mechanisms being developed for local governments by the Agency and will be required to comply within 12 months of publication of the new mechanisms for demonstrating financial responsibility.

IV. Discussion of Options Considered But Not Proposed

In addition to the proposed rule, EPA considered, but did not propose, two additional options to grant relief to UST owners and operators. Under the first option, a subset of those entities currently required to comply by October 26, lR91 would be granted an additional extension. Under the second option, any UST facility meeting certain Federally-specified conditions as determined by the States would receive an extension.

Under the first option, retail marketers in Category IV that provided essential services such as being the sole source of petroleum products for a rural community and whose tanks posed minimal environmental risks would be granted an extension of the compliance deadline of up to 90 days following the final date for compliance with the technical standards for new tanks (i.e., March 22, 1999). Owners and operators

must generally meet these technical requirements (which include tank upgrading, leak detection, etc.) to qualify for private insurance.

If EPA were to adopt the second option, EPA would extend the federal deadline for any facility, regardless of its compliance category, if the State made certain findings based on federally determined criteria. The extension would last up to 90 days following the final date for compliance with the technical standards for new tanks (March 22,1999). The specified criteria could include facilities that (1) had been identified by States as entities in need of an extension, (2) sold petroleum products on a retail basis, (3) were the sole provider of a class of petroleum transportation fuels (e.g., gasoline or diesel fuel) within a 25-mile radius, and (4) met certain environmental criteria such as that the underground storage tank not be too close to groundwater or that the percentage of the local population that relies on groundwater as their drinking water source not exceed a certain number. Under this option, the federal extension could be granted to local governments, especially those in isolated rural areas that provide essential community services (e.g., public health and safety). Additionally, EPA could allow extensions for Indian tribes owning and operating USTs on Indian lands or to owners and operators of USTs on Indian lands that provided essential services.

Most commenters opposed Option 1. Some claimed that the definitions of "rural" or "sole source provider" would prove unworkable. Others claimed that non-marketers have an equivalent need for an extended compliance deadline. A few commenters stated that the definitions could provide some firms with unfair competitive advantages. A few commenters supported Option 1. Commenters in favor of Option 1 stated that current UST regulations are reducing the retail availability of petroleum products in rural areas where retail outlets for these products may already be scarce. Commenters also proposed definitions of "rural area" for EPA to consider if the Agency were to propose Option 1.

Many more commenters supported Option 2, under which any facility unable to comply with the financial responsibility deadline, or having difficulty in obtaining financial assurance, could be granted an extension in States where certain findings are made based on Federally determined criteria. Others advocated extensions when neither State assurance funds, financial assistance programs, nor affordable insurance were available. Some commenters challenged the use of "sole provider" as a criterion, while others suggested definitions for "sole provider" for EPA's consideration if the Agency were to propose Option 2. Commenters also proposed environmental criteria to be considered for use under Options 1 or 2.

Three commenters requested that EPA review the special circumstances of tribal governments and of UST owners and operators on tribal lands. The commenters noted that Indian tribes do not impose taxes and therefore do not have the financial resources to self-insure. At the same time, they said that State assurance funds generally do not apply to tribes, because States do not have the authority to levy and collect taxes on Indian lands. EPA acknowledges the concerns expressed by these commenters. EPA intends to use the time available during this extension period to continue to monitor the development of financial assurance mechanisms and to determine whether specific groups of UST owners and operators, including owners and operators of USTs located on tribal lands, may require additional consideration. Under today's rule, however, category IV USTs on Tribal lands that are not owned by Tribal governments must demonstrate financial responsibility by December 31, 1993.

USTs directly owned or operated by Tribal governments are not within the scope of today's rule. The Agency treats Indian Tribes as local governments for the purposes of the financial responsibility requirements. Consequently, USTs owned by Tribal governments will be required to comply within one year of the publication of the final rule providing additional mechanisms for local governments to demonstrate financial responsibility; these mechanisms were proposed on June 18, 1990 (55 FR 24692).

EPA appreciates the efforts of commenters in providing information relative to Options 1 and 2. These comments suggest that some specific classes or categories of UST owners or facilities may face exceptional or unique difficulty in complying with the financial responsibility requirements by December 31, 1993. Although neither option is being adopted in today's rule, EPA is continuing to review how and whether some variation of Option 2 should be adopted. EPA will use the 26 month period provided by today's rule to continue to monitor the development of programs to assist the most affected segments of the regulated community and to determine whether additional relief may be necessary. If further relief is determined to be appropriate, after considering all statutory, environmental, economic, and programmatic concerns, EPA will determine the best method, if any, to provide the relief. The Agency believes, however, that more information will be necessary to characterize fully the segments that may require further assistance and to develop appropriate criteria. To obtain this information, EPA intends to continue its dialogue with States and the regulated community.

V. Economic Impacts

This section provides an estimate of the economic impacts of the proposed rule. Because the proposed rule will not cause an annual impact on the economy of $100 million or more and will not cause an increase in the costs of production or the prices charged by the affected community, a Regulatory Impact Analysis is not required. Instead, EPA has prepared an economic impact analysis to estimate the number of affected facilities and the costs to affected facilities under the proposed and alternate options, and has evaluated the impacts on small entities as required by the Regulatory Flexibility Act.

A. Economic Impact Analysis The economic analysis examines the potential economic effects of extending the compliance deadline. It provides an estimate of the number of potentially affected entities, a comparison of the financial condition of affected entities with and without a State assurance fund, and an analysis of rural stations.

EPA analyses have suggested that a large number of USTs and UST-owning entities are subject to the October 26, 1991 deadline. Of the approximately 1.7 million USTs subject to the technical and financial responsibility standards, about 790,000 are owned by petroleum marketers with 12 or fewer USTS, by marketers that own or operate fewer than 100 USTs at a single facility, or by non-marketers with net worth of less than $20 million. These USTs are located at about 216,000 facilities, and are owned by about 213,000 firms (for an average of 3.8 USTs per owner). As a result, the extension of the compliance deadline will affect a significant proportion of the UST-owning population.

The development of State assurance funds and State financial assistance programs provides relief to UST owners and operators, particularly those with fewer facilities and USTS. Small service stations (including single-outlet stations) required to obtain private insurance or otherwise cope with cleanup costs without State aid face potentially severe impacts. EPA estimates that 45 percent of small stations could suffer severe financial distress, and 41 percent could fail. (The figure for severe financial distress includes those

firms that would fail; thus, about go percent of those firms suffering financial distress would fail.) Small stations in rural areas may be even more heavily affected, because they tend to have a smaller revenue base and are less financially robust than stations in metropolitan areas.

In general, State assurance funds can reduce instances of failure over the next ten years if their deductibles are small enough. State assurance funds with $10,000 deductibles can reduce failures from 41 percent to only 14 percent. State assurance funds with $50,000 deductibles are predicted to reduce failures by a much smaller amount. State financial assistance programs that help firms upgrade their USTs can also help by alleviating some of the burden associated with obtaining insurance.

B. Regulatory Flexibility Analysis The Regulatory Flexibility Act generally requires all federal agencies to review the impact of their regulations to determine whether the regulations will have a significant economic impact on a substantial number of small entities. If so, the Agency must prepare a Regulatory Flexibility Analysis. EPA believes that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The proposed extension of the compliance date will provide relief to members of this compliance group by allowing them additional time to comply with the financial responsibility requirements. Accordingly, the Agency has concluded that the law does not require a Regulatory Flexibility Analysis, and certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control.

Dated: December 16,1991.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, part 280 of title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 280-TECHNICAL STANDARDS AND CORRECTIVE ACTION REOUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h).

2. Section 280.91 is amended by revising paragraph (d) to read as follows:

§ 280.91 Compliance dates.

* * * * *

(d) All petroleum UST owners not described in paragraphs (a), (b), or (c) of this section, excluding local government entities; December 31, 1993.

57 FR 36866-36867 Friday, Aug. 14, 1992 Deferral of Petroleum UST-Contaminated Media and Debris From RCRA Hazardous Waste Requirements: Notice of Data Availability; Proposed Rule

36866-36867 Federal Register / Vol. 57, No. 158 / Friday, August 14, 1992 / Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL-34791-5]

Deferral of Petroleum UST-Contaminated Media and Debris From RCRA Hazardous Waste Requirements: Notice of Data Availability; Proposed Rule

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of data availability.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a notice describing several studies which the Agency has completed concerning the temporary deferral from the hazardous waste Toxicity Characteristics (TC) rule of petroleum-contaminated media and debris from underground storage tanks (USTs). Since the temporary deferral was published on march 29, 1990, EPA has conducted several studies and held meetings with interested members of the public regarding the temporary deferral and the anticipated effects of regulating UST petroleum-contaminated media and debris as hazardous wastes under Subtitle C of the Resource Conservation and Recovery Act (RCRA). This notice summarizes the findings of the studies and the results of the public meetings. These materials will be used by the Agency to make a final determination regarding the hazardous waste regulatory status of petroleum UST-contaminated media and debris. EPA encourages public review and comment on these materials.

DATES: Written comments on these materials must be submitted on or before September 28,1992.

ADDRESSES: Written comments on the materials described in today's notice should be addressed to the docket clerk at the following address: U.S. Environmental Protection Agency, RCRA Docket (OS-305), 401 M Street, S.W., Washington, DC 20460. One original and two copies of comments should be sent and identified by regulatory docket reference number F-92-DPUA-FFFFF. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Docket materials may be reviewed by appointment by calling (202) 260-9327. Copies of docket materials may be made at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, please contact the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, Washington, DC 20460, (800) 424-9346 (toll-free) or (202) 260-3000 (local). For the hearing impaired, the number is (800) 553-7672 (toll-free), or (202) 260-9652 (local). For specific information about the

studies and meetings described in this notice or about the UST deferral, please contact John Heffelfinger in the EPA Office of Underground Storage Tanks at (703) 308-8881.

SUPPLEMENTARY INFORMATION:

I. Background

A. Toxicity Characteristics Rule

The Toxicity Characteristics (TC) rule for identifying hazardous wastes was promulgated by the Agency on March 29, 1990 (55 Fed. Reg. 11798) and became effective on September 25, 1990. The rule replaced the Extraction Procedure (EP) leach test with the Toxicity Characteristic Leaching Procedure (TCLP), added 25 organic chemicals to the list of toxic constituents of concern and established regulatory levels for these organic chemicals.

The overall effect of the TC rule was to subject additional solid wastes to regulatory control under the hazardous waste provisions of Subtitle C of RCRA. Under this rule, a waste may be a hazardous waste of any chemicals listed in the rule, such as benzene, are present in leachate from the waste (generated from use of the TCLP) at or above the specified regulatory levels. Management of such hazardous waste is subject to stringent RCRA Subtitle C controls.

B. The UST Deferral

Among the wastes that could be TC wastes are petroleum-contaminated media and debris. At the time of promulgation of the final TC rule, the Agency made a determination to temporarily defer applicability of the TC rule to media and debris (e.g. soils and groundwater) contaminated with petroleum from underground storage tanks (USTs) that are subject to the corrective action requirements of Subtitle I of RCRA. 55 FR 11836 (March 29, 1990). The deferral was limited to the 25 newly listed organic chemicals under the TC (i.e. Hazardous Waste Codes D018 through D043 only). See 40 CFR 261.4(b)(10).

The deferral was the result of several factors. Because the potential impact of the TC on materials generated from UST cleanups did not become apparent until very late in the rulemaking process, at the time of promulgation of the final TC rule, the Agency had little information regarding the full impact of the TC rule on UST cleanups, particularly regarding the amount of contaminated media that would become hazardous waste and the type of management feasible and appropriate for such waste. However, available information suggested that the impact of applying Subtitle C to UST cleanups might be severe in terms of the administrative feasibility of both the Subtitle C and Subtitle I programs. A preliminary assessment indicated that the number of UST cleanup sites and the amount of media and debris at each site that would exhibit the toxicity characteristic could be extremely high, with EPA expecting hundreds of thousands of UST releases to be identified in the next few years. The Agency believed that subjecting all, or even a significant portion, of these sites to Subtitle C requirements could overwhelm the hazardous waste permitting program and the capacity of existing hazardous waste treatment, storage, and disposal facilities.

In addition, EPA believed that imposition of the requirements could delay UST cleanups significantly, require an enormous new commitment of Federal and State resources, and undermine the State and local focus of the UST program. All of these factors suggested that EPA needed additional time to determine

with more certainty what the impacts of the TC would be on UST cleanups before subjecting such materials to hazardous waste requirements. In addition, EPA needed time to investigate whether regulatory changes could be made to the RCRA Subtitle C regulations to allow appropriate integration of the two programs. EPA also believed that the UST regulations governing cleanups at these sites would be adequate to protect human health and the environment in the interim, until a final determination was made regarding the regulation of UST wastes.

In the preamble explaining the need for the deferral, EPA committed to undertaking several studies and meetings in order to make a final determination concerning the regulation of these UST wastes under the Subtitle C program. The studies and meetings described below are those that EPA agreed to undertake in the 1990 TC rule. The information that EPA is making available to the public today for review and comment will provide key inputs into EPA's final determination regarding the permanent regulatory status of UST petroleum-contaminated media and debris as hazardous waste under RCRA Subtitle C.

II. EPA's Studies

As explained above, the application of the TC rule to UST cleanups was temporarily deferred to allow cleanups under the UST program to proceed while the Agency evaluated the extent and nature of the potential impacts of Subtitle C requirements if applied to the UST program and the feasibility of regulatory alternatives for program integration. In fulfillment of the commitment the Agency made in the preamble to the final TC rule, EPA has completed studies that will be used as key inputs to the final determination regarding the regulation of petroleum UST-contaminated media and debris as hazardous waste. These studies are available for review in the docket for this notice and are briefly described below.

A. Technical Study

The Agency is making available today for public comment a draft report entitled "TC Study of Petroleum Contaminated Media." This report is organized as follows:

- Estimates of the amounts of UST petroleum-contaminated soils that might be expected to exhibit the hazardous waste characteristic of toxicity if subject to the TCLP test;
- Impacts on hazardous waste capacity nationwide if these materials required management as hazardous waste;
- State management practices for petroleum-contaminated soils from USTs;
- Overview of technologies currently used for management of petroleum-contaminated soils and groundwater; and
- Impacts on the RCRA Subtitle I and C programs of removing the temporary deferral.

B. Impacts Study

The Agency is also making available today for public comment a draft report entitled "The Impacts of Removing the TCLP Deferral for Petroleum-Contaminated Media at Underground Storage Tanks Sites." This report is organized as follows:

- Procedural impacts of removing the deferral with regard to changes that would be required in cleanup procedures, technologies and the pace of UST corrective actions;

- Cost impacts of removing the deferral, to the regulated community as well as to EPA and the States; and
- Preliminary assessment of health risk impacts associated with removing the temporary deferral.

C. Study Findings

The findings of these two reports corroborate the preliminary assessment that EPA made at the time of promulgation of the temporary deferral. Specifically, the findings of the two studies indicate that removing the TC deferral would significantly affect UST cleanup procedures, delay remedial actions, and increase soil remediation costs. Further, delays in site remediation caused by compliance with Subtitle C requirements could increase health and environmental risks prior to cleanup.

In addition to findings concerning the impacts of removing the deferral, these studies also indicate that many States have programs in place to regulate the management of UST petroleum-contaminated media and debris. The vast majority of these State programs address in some manner the entire cycle of UST petroleum-contaminated soils and groundwater management, from initial characterization through storage and ultimate treatment or disposal.

EPA is interested in any comments that the public may have on the content of these studies and in the use of these studies to support a final determination concerning the regulation of UST petroleum-contaminated media and debris as hazardous waste.

III. Public Meetings

In the preamble to the 1990 TC rule. EPA also stated its intention to convene a public forum to discuss the issues associated with regulating UST petroleum-contaminated soils and debris under Subtitle C of RCRA. To fulfill this commitment, in September and December, 1991. EPA convened several meetings with various interested parties (including representatives from the States, Congressional staff, environmental groups and the waste treatment and waste generating industries) to discuss issues related to the cleanup of petroleum contamination from UST at well as non-UST sources, and the potential impacts of the TC rule on these cleanups.

The thirteen States attending these meetings expressed significant concern about the adverse environmental impacts resulting from the application of the TC rule to petroleum UST releases. In the view of many States, the delays associated with RCRA Subtitle C management would allow for volatilization and migration of certain TC constituents, such as benzene prior to cleanup. Groups representing the waste generating industries generally agreed with the States, although several stated that this problem was not unique to petroleum-contaminated media.

Representatives of environmental groups and certain members of the hazardous waste treatment industry expressed concerns with the deferral as a mechanism for solving the implementation problems posed by Subtitle C regulation of petroleum-contaminated media and debris. They suggested that EPA consider modifying the hazardous waste requirements to accommodate these cleanup wastes rather than exempting the wastes entirely from important procedural and substantive hazardous waste requirements.

A complete summary of these meetings is in the docket for this action. The various viewpoints expressed in these meetings will be considered as part of EPA's final decisionmaking concerning the deferral.

IV. Schedule for Final Determination

EPA will review and evaluate the public comments on the studies and meetings described in this notice as part of its decisionmaking concerning the regulatory status of UST petroleum-contaminated media and debris. The Agency also expects to publish later this year another notice addressing the regulatory status of UST petroleum-contaminated media and debris. That notice will include EPA's evaluation of whether and how the Subtitle C regulations can be amended to accommodate the UST wastes and avoid the administrative and environmental problems associate with regulation of UST wastes as hazardous that are noted above and were discussed in the preamble to the 1990 TC final rule.

Following review of all the public comments submitted on these notices, EPA plans to publish a final determination that will terminate the temporary deferral (codified at 40 CFR 261.4(b)(10)), permanently exempt UST petroleum-contaminated media and debris from the TC, or take some other regulatory action concerning the applicability of hazardous waste requirements to these cleanup wastes. EPA currently expects to publish this determination in the Federal Register by March 31, 1993.

Dated: July 23, 1992.

Don R. Clay,

Assistant Administrator.

[FR Doc. 92-19184 Filed 8-13-92; 8:45 am]

BILLING CODE 8560-50-M

58 FR 8504-8512 Friday, Feb. 12, 1993 Exemption of Petroleum-Contaminated Media and Debris From Underground Storage Tanks From RCRA Hazardous Waste Requirements: Proposed Rule

8504 - 8512 Federal Register / Vol. 58, No. 28 / Friday, February 12, 1993 / Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[FRL-4595-9]

RIN 2050-AD69

Exemption of Petroleum-Contaminated Media and Debris From Underground Storage Tanks From RCRA Hazardous Waste Requirements: Proposed Rule

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to take final action on an issue deferred in the 1990 hazardous waste Toxicity Characteristics (TC) rule under the Resource Conservation and Recovery Act (RCRA). The Agency proposes to exempt, from certain portions of EPA's hazardous waste regulations, petroleum contaminated media and debris, such as soils and groundwater, that are generated from underground storage tank (UST) corrective actions that are subject to subtitle I of RCRA. The exemption would be limited to the 25 newly listed organic chemicals under the TC (i.e., Hazardous Waste Codes D018 through D043 only). After consideration of comments received in response to this proposed rule, EPA will publish a rule containing the Agency's final determination regarding the permanent regulatory status of UST petroleum-contaminated media and debris under RCRA.

DATES: Written comments on this proposed rule must be submitted on or before April 13, 1993.

ADDRESSES: Written comments on today's proposal should be addressed to the docket clerk at the following address: U.S. Environmental Protection Agency, RCRA Docket (OS-305), 401 M Street, SW., Washington, DC 20460, One original and two copies of comments should be sent and identified by regulatory docket reference number F93-DPUP-FFFFF. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Docket materials may be reviewed by appointment by calling (202) 26G-9327. Copies of docket materials may be made at a cost of $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information about this proposal, contact the RCRA/Superfund Hotline, Office of Solid Waste, U.S. Environmental Protection Agency, Washington, DC 20460, (800) 424-9346 (toll-free) or (703) 412-9810 (local). For the hearing impaired, the number is (800) 553-7672 (toll-free), or (703) 4123323 (local). For technical information on this proposal, contact John Heffelfinger in the EPA Office of Underground Storage Tanks at (703) 308-8881.

To obtain copies of the reports or other materials referred to in this proposal, contact the RCRA Docket at the phone number or address fisted above.

SUPPLEMENTARY INFORMATION:

I. Background

A. Toxicity Characteristics Rule

The Toxicity Characteristics (TC) rule for identifying hazardous wastes was promulgated by the Agency on March 29, 1990 (55 FR 11 798), was amended on June 29, 1990 (55 FR 26986), and became effective on September 25, 1990. The rule replaced the Extraction Procedure (EP) leach test with the Toxicity Characteristic Leaching Procedure (TCLP), added 25 organic chemicals to the list of toxic constituents of concern, and established regulatory levels for these organic chemicals.

The overall effect of the TC rule was to subject additional solid wastes to regulatory control under the hazardous waste provisions of subtitle C of RCRA. Under this rule, a waste may be a hazardous waste if any chemicals listed in the rule, such as benzene, are present in leachate from the waste (generated from use of the TCLP) at or above the specified regulatory levels. Management of such hazardous waste is subject to stringent RCRA subtitle C controls.

B. The UST Deferral

Among the wastes that could be TC wastes are petroleum contaminated media and debris. At the time of promulgation of the final TC rule, the Agency made a determination to temporarily defer applicability of the TC rule to media and debris (e.g., soils and groundwater) contaminated with petroleum from underground storage tanks (USTs) that are subject to the corrective action requirements of subtitle I of RCRA. 55 FR 11862 (March 299 1990), as amended 55 FR 26986 June 29, 1990). The deferral was limited to the 25 newly listed organic chemicals under the TC (i.e., Hazardous Waste Codes D018 through D043 only), See 40 CFR 261.4(b)(10).

The deferral was the result of several factors. See 55 FR 11836 (March 29, 1990). Because the potential impact of the TC on materials generated from UST cleanups did not become apparent until very late in the rulemaking process, at the time of promulgation of the final TC rule, the Agency had little information regarding the full impact of the TC rule on UST cleanups, particularly regarding the amount of contaminated media that would become hazardous waste and the type of management feasible and appropriate for such waste. However, available information suggested that the impact of applying subtitle C to UST cleanups might be severe in terms of the administrative feasibility of both the subtitle C and subtitle I programs. A preliminary assessment indicated that the number of UST cleanup sites and the amount of media and debris at each site that would exhibit the toxicity characteristic could be extremely high, with EPA expecting hundreds of thousands of UST releases to be identified in the next few years. The Agency believed that subjecting all, or even a portion, of these sites to subtitle C requirements could overwhelm the hazardous waste permitting program and the capacity of existing hazardous waste treatment, storage, and disposal facilities.

In addition, EPA believed that imposition of the requirements could delay UST cleanups significantly, require an enormous new commitment of Federal and State resources, and undermine the State and local

focus of the UST program. All of these factors suggested that EPA needed additional time to determine with more certainty what the impacts of the TC would be on UST cleanups before subjecting such materials to hazardous waste requirements. In addition, EPA needed time to investigate whether regulatory changes could be made to RCRA subtitle C regulations to allow appropriate integration of the two programs. EPA also believed that the UST regulations governing cleanup at these sites would be adequate to protect human health and the environment in the interim, until a final determination was made regarding the regulation of UST wastes. the preamble explaining the need for the deferral, EPA committed to undertaking several studies and meetings in order to make a final determination concerning the regulation of these UST wastes under the subtitle C program, Since the temporary deferral was published on March 29,1990, EPA has conducted several studies and held meetings with interested members of the public regarding the temporary deferral and the anticipated effects of regulating UST petroleum-contaminated media and debris as hazardous wastes under subtitle C of RCRA. EPA recently published a Notice of Data Availability summarizing the findings of these studies and the results of the public meetings. 55 FR 36866 (August 14, 1992). Comments received in response to the Notice of Data Availability will also be used by the Agency in making its final determination regarding the permanent regulatory status of UST petroleum-contaminated media and debris as hazardous waste under RCRA subtitle C.

II. Explanation of Today's Proposal

Today's action proposes to exempt contaminated media and debris, that are generated from petroleum UST corrective actions that are subject to subtitle I of RCRA, from certain portions of the RCRA Toxicity Characteristics rule. The exemption would be limited to the 25 newly listed organic chemicals under the TC rule (i.e., Hazardous Waste Codes D018 through D043 only) . The proposed action would be accomplished by maintaining the language contained in the current temporary deferral for UST petroleum-contaminated media and debris, found at 40 CFR 261.4(b)(10). This deferral currently reads as follows:

Section 261.4 Exclusions

* * * * *

(b) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

* * * * *

(10) Petroleum-contaminated media and debris that fail the test for the Toxicity Characteristic of section 261.24 (Hazardous Waste Codes D018 through D043 only) and are subject to the corrective action regulations under part 280 of this chapter.

If EPA issues the final determination as it is being proposed today, the current language of the deferral would remain unchanged. Each of the individual elements of the proposal is discussed in more detail below.

A. Contaminated Media and Debris

The term contaminated media includes naturally-occurring materials such as soil, groundwater, surface water, and air that have become contaminated with substances released from petroleum underground storage tanks.

The term debris means solid material exceeding 60 mm (2.5 inch) particle size that is: (1) A manufactured object; or (2) plant or animal matter; or (3) natural geologic material. This term is defined by EPA at 40 CFR 268.2(g). See 57 FR 37270 (Aug. 18, 1992). The definition of debris includes material that is plant or animal matter such as grass, trees, and stumps; or is natural geologic material such as rocks and boulders; or is a solid, man-made material such as concrete, buried tires, buried empty drums, as well as empty petroleum USTs and empty piping that are present at the site. Included in this term are the UST and piping from which the petroleum substance was released, provided they are empty in accordance with EPA's closure regulations for underground storage tanks. 40 CFR 280.70(a) of these regulations defines an UST system to be empty when "no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system. "

B. Petroleum UST Corrective Actions

Under today's proposal, contaminated media and debris are exempted if "subject to the corrective action regulations" under 40 CFR part 280. EPA interprets this to include all media and debris generated in response to known or suspected releases from a petroleum UST system. The term 11 petroleum UST system" is defined in EPA's UST regulations at 40 CFR 280.12. Responses to releases from petroleum UST systems are covered by EPA's UST regulations at 40 CFR part 280 under subpart E-Release Reporting, Investigation, and Confirmation, and subpart F-Release Response and Corrective Action for UST Systems Containing Petroleum and Hazardous Substances.

The proposed exemption also includes contaminated media and debris discovered as a result of routine petroleum UST closures, UST site assessments, and UST replacements. The rationale for this approach is that the discovery of contamination when performing these routine activities requires reporting under EPA's UST regulations, as the contamination represents a known or suspected release from an UST. See 40 CFR 280.50. Such releases are subject to subparts E and F of EPA's UST regulations, referenced above.

C. Subtitle I of RCRA

Today's proposal applies only to contaminated media and debris from petroleum USTs that are subject to the corrective action regulations under subtitle I of RCRA (40 CFR part 280.60280.67). Contaminated media and debris from non-subtitle I regulated sources (e.g., above ground tanks; farm and residential motor fuel USTs of 1100 or less gallons capacity) are not included in the proposed exemption. These materials, however, are the subject of a separate proposed rulemaking by the Agency. This separate rulemaking is discussed elsewhere in today's preamble.

USTs storing heating oil for consumptive use on the premises where stored are not regulated under subtitle I and, thus, are not covered by the proposed exemption. However, contaminated media and debris generated from residential heating oil tanks are "household wastes" under 40 CFR 261.4(b)(1). Under EPA's subtitle C regulations, household wastes are solid wastes but are excluded from consideration as

hazardous wastes. Thus, contaminated media and debris from residential heating oil tanks are not hazardous wastes under subtitle C of RCRA.

D. Request for Comments

EPA requests commenters to indicate their support or opposition, with supporting rationale, to the proposed exemption for UST petroleum contaminated media and debris as described in the preceding paragraphs. In particular, EPA is interested in comments addressing whether the scope of the proposed exemption is appropriate, or whether it should be broadened or narrowed. EPA is also interested in any analytical test data that indicate the concentration of the TCLP constituents in petroleum UST contaminated media and debris. EPA also requests comments on alternatives to the exemption proposed today, which are discussed below.

E. Other Options Considered

1. Expansion of the Exemption to all TC Contaminants

When the temporary deferral was clarified in June, 1990, it was limited to the 25 newly listed organic contaminants under the 1990 TC rule. The deferral does not apply to the original 14 contaminants identified under EPA's 1980 Extraction Procedure (EP) toxicity characteristic rule. The contaminants regulated under the EPTC are arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver, as well as endrin, lindane, mothoxychlor, toxaphene, 2,4-D, and 2,4,5-TP silvex. The deferral was limited only to the new contaminants because the issue of the relationship between hazardous waste rules and UST cleanups came to the Agency's attention during the development of the TC rulemaking, and was a result of the regulation of new constituents under that rule.

Since the original 14 contaminants were not part of the temporary deferral, generators are currently obligated to make a determination of whether the petroleum-contaminated media and debris would be hazardous for the original 14 constituents. Generators are allowed to make the determination either by subjecting the materials to the TCLP, or "applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used" (40 CFR 262.11(c)).

EPA believes it may also be unnecessary to require a hazardous waste determination for the 14 EP contaminants. As discussed in the preamble to EPA's underground storage tank regulations on September 23, 1988 (53 FR 37189), information the Agency had at that time from several States indicated it was highly unlikely that UST petroleum-contaminated soils would exhibit the characteristic of EP toxicity, even for lead that may have resulted from releases of leaded gasoline. Further, with the phase-out of leaded gasoline, it would seem even less likely for contaminated media and debris resulting from more recent releases of gasoline to exhibit the Toxicity Characteristic for lead. Thus, inclusion of these contaminants in the exemption would appear to have no impact on protection of human health or the environment, and testing for these contaminants appears unnecessary.

In addition, including these contaminants in the exemption will result in cost savings in the form of avoided TCLP sampling and analysis costs because owners and operators would no longer be required to determine whether petroleum contaminated media and debris exhibits the Toxicity Characteristic. If UST owners make this determination through TCLP testing of the materials, rather than applying some form of "knowledge" about them, laboratory analytical costs can range from a few hundred to more than a

thousand dollars per sample. Since several samples of the contaminated media and debris would likely be necessary in order to adequately characterize the contamination at a particular site, the savings in sampling and analysis costs could amount to several thousand dollars per facility. These cost savings could be used to pay for proper management of the contaminated media and debris, rather than for unnecessary sampling and laboratory analyses.

Therefore, the Agency is interested in obtaining comments from the public regarding whether the final rule for the exemption should include these contaminants. EPA is particularly interested in commenters' rationale for including these contaminants within the exemption, and in any supporting data that indicate the concentration of these contaminants in petroleum UST contaminated media and debris.

2. Expansion of the Exemption to Other Hazardous Waste Characteristics

EPA considered, but has tentatively rejected, proposing to expand the exemption for UST petroleum contaminated media and debris to the other three characteristics of hazardous waste, in addition to the Toxicity Characteristic. These three characteristics are Ignitability, Corrosivity, and Reactivity. See 40 CFR 260.20-260.23. EPA generally believes that UST petroleum-contaminated media and debris are unlikely to exhibit these characteristics and, thus, would be unlikely to be regulated as hazardous waste because of these characteristics. However, in the event that UST petroleum-contaminated media and debris were to exhibit one of these characteristics, improper management of the media or debris could pose severe acute human health or environmental impacts. The Agency believes that the potential for such acute impacts warrants management of contaminated media and debris as hazardous waste, in the unlikely event that these materials exhibit one of these three characteristics. EPA is interested in public comments on this aspect of today's proposal.

3. Subtitle I Management Standards for Contaminated Media and Debris

Another option considered by EPA in lieu of regulation under subtitle C was to develop Federal management standards under subtitle I for the treatment and disposal of UST petroleum-contaminated media and debris. Such management standards may provide a greater degree of certainty regarding the ultimate disposition of these materials than the current subtitle I regulatory structure, while avoiding the problems associated with regulating these materials under subtitle C. This approach, however, would reduce the flexibility that the States currently have in terms of establishing technology requirements, cleanup standards, and oversight processes that they consider adequate and appropriate for management of these materials.

This approach would also tend to inhibit the development of innovative technologies for remediation of these materials. The Agency is currently promoting the use of innovative technologies for cleanups and the streamlining of State corrective action procedures, in an effort to improve the effectiveness and efficiency of corrective actions. Establishing Federal management standards for UST petroleum-contaminated media and debris could limit the effectiveness of these efforts.

Establishing new regulations under subtitle I would likely require States to enact new legislation or regulations to be "no less stringent" than the Federal requirements in order to obtain approval of their State UST program to operate in lieu of the Federal program. This could cause administrative problems

for those States that have already received approval of their State UST program from EPA, as well as delay those that are far along in the approval process.

EPA is interested in comments on this issue, particularly regarding the scope and content of potential Federal management standards for UST petroleum-contaminated media and debris under subtitle I. EPA is interested in comments regarding the usefulness and desirability of such Federal standards, in view of existing State UST corrective action and solid waste management programs.

III. Basis for Today's Proposal

A. Purpose and Legal Basis

The primary purpose of today's action is to allow corrective action, including management of petroleum-contaminated media and debris, to occur under the authority of subtitle I of RCRA rather than under overlapping requirements of both subtitle C and subtitle I. Subtitle I contains comprehensive requirements for the reporting and cleanup of soil and groundwater contamination from petroleum USTs. Further, subtitle I requires that treatment or disposal of soils be conducted in compliance with applicable State and local requirements. See 40 CFR 280.62.

Subtitle I requirements are primarily implemented by each of the individual States and Territories, under provisions of subtitle I State Program Approval regulations, or under Memoranda of Agreement with EPA in States whose programs have not yet been approved by EPA. In the case of an approved State, EPA has deemed the State's UST program to be "no less stringent" than the Federal subtitle I program. In a State operating under a Memorandum of Agreement with EPA, the State is implementing the subtitle I regulations on behalf of EPA. EPA retains the authority to implement the requirements, where necessary, in unapproved States. In either case, the UST program is protective of human health and the environment, despite differences in specific corrective action procedures or approaches that may exist between States.

EPA believes that States are in the best position to oversee management of the approximately 50,000 new UST releases identified each year. As discussed below, EPA studies confirm that State agencies are currently managing UST petroleum-contaminated media and debris in a manner that protects human health and the environment. Thus, it is unnecessary to subject these materials to management as hazardous wastes under subtitle C of RCRA.

Section 1004 of RCRA defines a "hazardous waste" as a solid waste which may pose a substantial threat "when improperly * * * managed." In addition, section 3001 of RCRA authorizes EPA to determine whether subtitle C regulation is appropriate in determining whether to designate a waste as "hazardous." EPA thus may determine that subtitle C regulation is not appropriate because such wastes are not "hazardous" when properly managed and, based on existing regulatory programs, would not be mismanaged, Under this approach, regulation of UST petroleum-contaminated media and debris under subtitle C is not necessary to protect human health and the environment, due to the presence of the Federal subtitle I regulations for underground storage tanks and the UST programs that are active in each of the States.

EPA is also concerned about the implementation and risk impacts associated with subjecting some or all aspects of petroleum UST cleanups to subtitle C. As discussed in more detail below, EPA believes that the findings of its studies and the information received during the course of meetings with interested

members of the public support today's proposal for a final determination to make permanent the current temporary deferral for UST petroleum-contaminated media and debris.

B. EPA's Studies

The findings of the Agency's studies corroborate the preliminary assessment that EPA made at the time of promulgation of the temporary deferral. Specifically, the findings of EPA's studies indicate that removing the TC deferral would significantly affect UST cleanup procedures, delay remedial actions, and increase soil remediation costs. Further, delays in site remediation caused by compliance with subtitle C requirements could increase health and environmental risks prior to cleanup.

In addition to findings concerning the impacts of removing the deferral, these studies also indicate that many States have programs in place to adequately regulate the management of UST petroleum contaminated media and debris, The vast majority of these State programs address in some manner the entire cycle of UST petroleum contaminated soils and groundwater management, from initial characterization through storage and ultimate treatment or disposal.

1. Technical Study

The Agency has made available for public comment a draft report titled "TC Study of Petroleum UST Contaminated Media and Debris." This report is organized as follows:

- Estimates of the amounts of UST petroleum contaminated soils that might be expected to exhibit the hazardous waste characteristic of toxicity if subjected to the TCLP test,

- Impacts on hazardous waste capacity nationwide if these materials required management as a hazardous waste,

- State management practices for petroleum contaminated soils from USTS,

- Overview of technologies currently used for management of petroleum contaminated soils and groundwater, and

- Impacts on the RCRA subtitle I and C programs of removing the temporary deferral.

2. Impacts Study

The Agency has also made available

for public comment a draft report titled "The Impacts of Removing the TCLP Deferral for Petroleum-Contaminated Media at Underground Storage Tank Sites." This report is organized as follows:

- Procedural impacts of removing the deferral with regard to changes that would be required in cleanup procedures, technologies and the pace of UST corrective actions,

- Cost impacts of removing the deferral, both to the regulated community, as well as EPA and States, and

- Preliminary assessment of health risk impacts associated with removing the temporary deferral.

3. Study Findings

As stated previously, EPA believes

that these study findings support a final determination to make permanent the current temporary deferral for UST petroleum contaminated media and debris. The primary study findings that serve as a basis for making the deferral permanent are summarized below.

a. Procedural impacts. Removal of the deferral would result in substantial delays in UST cleanups due to the necessity of issuing a RCRA permit, by EPA or authorized States, for cleanups that involve treatment of TC-hazardous contaminated media on site (other than treatment that occurs on site in tanks in less than 90 days, or other units exempt from permitting). EPA's studies estimate that approximately 10% to 20% of the soil contaminated at a petroleum UST release may exhibit the Toxicity Characteristic. A significant consideration, however, is that this percentage contamination may exist at the majority of UST release sites, which currently average about 50,000 new release sites identified each year. EPA's studies indicate that on-site treatment of soils currently occurs at at least 20% of the UST soil remediation sites, with the trend increasing toward additional onsite treatment of soils. The situation with regard to groundwater contamination is also an important consideration. Virtually all treatment of petroleum-contaminated groundwater at UST release sites is performed on site. Although some of the groundwater treatment techniques may be exempt from RCRA permitting requirements, others would not be exempt.

Delays in UST cleanups would occur, in part, due to the tremendous increase in the number of permit applications for UST cleanups that would likely have to be handled with current Federal or State RCRA subtitle C permitting staff resources. It takes approximately one to four years, at current workload levels, to issue a RCRA subtitle C permit. Further, in States not yet authorized under subtitle C for the TC portion of the regulatory program, EPA alone would be responsible for issuance of permits. The substantial delays discussed above would allow subsurface contamination to continue and spread, increasing the costs of remediation, and increasing the potential for ground water contamination and for additional receptors to be affected.

Removal of the deferral would result in significant changes in the UST corrective action process. The current subtitle I remedial decision-making process is relatively simple and straightforward, compared to the more complex process associated with managing contaminated media and debris as hazardous waste, One example of the increased complexity of implementing remedial measures for hazardous waste would be the need to evaluate on-site versus off-site options for the management of the material. This would include identifying RCRA permitted treatment, storage, or disposal (TSD) facilities that would accept the waste, balancing transportation and offsite disposal costs with on-site management costs, and formal consideration of the risks and benefits of on-site versus off-site management.

If the TC deferral were eliminated, the flexibility EPA currently allows States in the choice of cleanup technologies would be significantly reduced. For example, based on the current subtitle C regulations, UST owners and operators would likely be limited, in practice, to a choice of three cleanup options: (1) Excavate and send contaminated soil off-site to RCRA subtitle C permitted hazardous waste treatment, storage, or disposal facilities, (2) treat soils on-site in less than go days in a tank, in accordance with subtitle C tank generator and accumulation regulations, or (3) become a permitted TSD facility, thereby allowing on-site treatment of the petroleum contaminated media and debris.

With regard to the above management scenarios under subtitle C, the Agency is not aware of any currently used cleanup technologies that would involve the treatment of large volumes of petroleum-contaminated soils on site in tanks for less than 90 days. Thus, this appears to be an unlikely management alternative. As for obtaining a RCRA TSD permit, two States have estimated owner/operator administrative costs to obtain a TSD permit for petroleum release sites ranging from $21,000 to $80,000. Because of the delays and relatively high cost of a subtitle C TSD permit, which would be required for many on-site remediations of hazardous waste, petroleum contaminated soil management and disposal is more likely to be conducted off-site if it were considered hazardous waste. Since disposal in a subtitle C landfill is generally less expensive than subtitle C incineration, the Agency believes that for the majority of sites, the practical result of regulating UST petroleum-contaminated media and debris as hazardous waste would be the excavation and disposal of these materials in subtitle C landfills. This option, however, may be limited in time. When the TC land disposal restrictions are promulgated, incineration or other forms of treatment would likely be required for these materials prior to disposal, if they were considered hazardous waste.

On the contrary, the flexibility afforded under subtitle I for managing UST petroleum-contaminated media and debris as non-hazardous allows for the use of a much broader spectrum of management options for these materials, such as aeration, low temperature thermal treatment, soil vapor extraction, and bioremediation. While there is currently variation between states in the Subtitle I soil technologies commonly used, the majority currently rely on excavation and relatively simple treatment and disposal methods. The trend during the past several years, however, and EPA's preferred approach to management of these materials, is to treat them on site, in situ, i.e., without excavation or transportation off-site.

Since the Agency believes that, in most cases, the practical result of regulating UST petroleum-contaminated media and debris as hazardous waste at this time would be the excavation and disposal of these materials in subtitle C landfills, this would adversely affect the Agency's current efforts to promote the use of innovative technologies for treatment of these materials, particularly those that can be used in situ, such as bioremediation and soil vapor extraction. In addition, EPA estimates that landfilling of these materials at subtitle C facilities would increase the amount of waste going to these facilities by 8 to 20 percent annually. Since the Agency's studies confirm that these materials are currently being managed under subtitle I State programs that are protective of human health and the environment, the Agency believes that it would be more prudent to reserve the nation's limited hazardous waste landfill capacity for those wastes that might otherwise be mismanaged, or for which no equivalent subtitle I-type program exists.

Although it is difficult to estimate the precise pace at which UST remediations would proceed when the contaminated media and debris is considered hazardous waste, EPA's studies indicate that they would take substantially longer than cleanups currently managed solely under subtitle 1. Several factors may contribute to the increased duration of cleanups, such as more extensive sampling and analysis requirements, and increased complexity of corrective action procedural requirements, as described previously.

More important, however, than the increased length of time needed to perform the actual cleanup, are the delays that would occur prior to the beginning of corrective action, particularly if the site requires permitting. For example, permit standards and conditions are established on a site-specific basis under

subtitle C. In-situ soil vapor extraction or bioremediation are treatment approaches with which the RCRA program has little permitting experience to date, so uncertainties exist as to the most appropriate permit conditions for such cleanups. This uncertainty is likely to result in further delays in issuing of permits for such sites, as well as the imposition of additional permit conditions that are beyond the conditions typically imposed by States under subtitle I.

In addition to the permitting requirements for the "regulated unit," i.e., the remediation unit where TC-hazardous waste is treated, stored, or disposed at the UST site, any existing ,$solid waste management units," or SWNWS, at the facility would have to be cleaned up in accordance with RCRA section 3004(u) corrective action authorities and EPA's corrective action guidance for permitted hazardous waste TSD facilities. SWMUs at a typical UST facility might include a used oil tank, a trash disposal area, or an old drum storage area, but include virtually any portion of the property at which solid waste has ever been managed. Cleanup for these units under a RCRA TSD permit would generally be to risk-based levels, as determined on a site-specific basis. See 55 FR 30798 (July 27, 1990). As part of the permit conditions, UST owners or operators would be required to undertake a RCRA Facility Assessment, a RCRA Facility

Investigation, a Corrective Measures Study and, finally, Corrective Measures Implementation for any SWMUs at the site. In addition, public participation requirements apply prior to issuance of each RCRA permit. This includes local notice of the proposed permit action and providing the public an opportunity for public hearings on the permit. These additional requirements add to delays in the subtitle C permitting process and are likely to severely discourage UST owners from undertaking on-site, in-situ cleanups. This result has also been corroborated by an Agency study on Corrective Action Management Units (CAMUs). See 57 FR 48195 (October 22, 1992). The study indicates that applying the hazardous waste land disposal restrictions to remediation wastes increases risks by causing less treatment, and less on-site treatment in particular, thereby increasing risks from transport of hazardous waste and leaving wastes in place without treatment.

An important consideration for UST cleanups that would require subtitle C permitting is that cleanup cannot begin until the permit is issued. The delays associated with permit issuance will allow contamination to continue unabated, increasing the costs of remediation and increasing the potential for groundwater contamination and for additional receptors to be affected.

b. Risk impacts. EPA's studies considered human health risk impacts that potentially would result if the UST petroleum-contaminated media deferral were removed. The studies evaluated three components of health risk. The first component is interim risk, which is the health risk present at an UST site prior to remediation, including drinking water risks, and risks such as fire and explosions, and inhalation of vapors. Interim risk would be expected to rise significantly without the exemption, since permitting delays prior to remediation would allow increased migration of petroleum contaminants, thereby increasing exposure potentials for populations near the site.

EPA also evaluated a second component of risk, known as residual risk. Residual risk is the health risk remaining at the site following soil and groundwater remediation. EPA's studies indicate that residual risk would likely remained unchanged, i.e., neither increased nor decreased, by removal of the deferral and regulation of UST petroleum-contaminated media and debris as hazardous waste. This is due to the fact that the Toxicity

Characteristic is not relevant to residual risk, because it is not a cleanup standard. Rather, the TC and associated subtitle C regulations impose requirements on how the waste generated from a cleanup can be managed. The soil and groundwater cleanup standards for the UST portion of the remediation is likely to be identical either with or without the exemption being proposed today.

The remaining component of risk, the treatment/disposal risk, relates to the exposure potential associated with treatment or disposal of contaminated soil and groundwater. The effect of removing the deferral on this element of risk is ambiguous. Different subtitle I and subtitle C technologies imply increased exposure potential, while others imply decreased potential. For example, in general, leak protection and subsurface monitoring at subtitle C landfills is generally superior to that at subtitle D landfills, where UST petroleum-contaminated soils may be disposed of in certain States. Thus, health risk potential is likely reduced by disposal in a subtitle C landfill versus subtitle D. In other cases, however, thermal treatment of subtitle I soils would provide more rapid contaminant destruction than subtitle C landfilling. Under this scenario, this type of treatment would likely pose less risk than subtitle C disposal.

A further risk consideration involves the transport of contaminated soils. When soils are hauled over long distances, as would more likely be the case if they required management as hazardous waste and were excavated for off-site landfilling or incineration, the potential for accidental releases of contaminants is increased. Many States lack commercial subtitle C capacity to manage these materials, so transport over long distances is likely. In contrast, subtitle I treatment often occurs on site, as indicated in EPA's studies. Off-site treatment and disposal under subtitle I is typically accomplished within the State, resulting in far less hauling distances for the contaminated soils and, thus, less risk due to transportation.

c. Cost Impacts. EPA's study findings indicate that per-site remediation costs under subtitle C would be substantially higher than those currently incurred under subtitle I. As discussed previously, as a practical matter, the techniques that would likely be used in managing UST petroleum-contaminated media and debris as hazardous waste would be more limited than those currently used under subtitle I. For the majority of cases, it is likely that excavation followed by subtitle C landfilling or incineration would occur. For sites involving soil management only, the studies indicate that typical subtitle C costs may range from two to 15 times or more higher than the costs of cleanup under subtitle 1. The primary source of this increase is the relative expense of the likely subtitle C soil management approaches compared to those currently used under subtitle I. The broad range of the increase is dependent upon the subtitle C approach selected by the UST owner or necessitated b site conditions.

For example, unit costs for subtitle I thermal treatment of soils in one State average $55 per cubic yard, compared to $1060 for subtitle C incineration and $510 for subtitle C landfills. Assuming management of 150 cubic yards of soil, subtitle I costs would be $8250, compared to $76,500 for subtitle C landfilling and $159,000 for subtitle C incineration,

As a direct result of this increase in per-site cleanup costs, the removal of the deferral would result in significant nationwide increases in annual UST remediation costs. The range of possible subtitle C management approaches and soil and groundwater remediation technologies makes it difficult to predict the size of the increases. However, based on reasonable assumptions about the likely mix of technologies selected, EPA's studies indicate national cost increases may range from $1.9 billion to $4.o billion in each of the first five years following removal of the deferral. These estimates represent an 81 percent to 108 percent increase over current subtitle I projected clean costs.

Based on the discussion of risk impacts previously, such cost increases are unnecessary in achieving adequate protection of human health and the environment. Further, if hazardous waste permitting of UST cleanups occurred, there would likely be a decrease in the protection currently provided under subtitle I UST programs, but at an increased cost.

C. Public meetings

In the preamble to the 1990 TC rule, EPA also stated its intention to convene a public forum to discuss the issues associated with regulating UST petroleum-contaminated soils and debris under subtitle C of RCRA. To fulfill this commitment, in September and December, 1991, EPA convened several meetings with various interested parties (including representatives from the States, Congressional staff, environmental groups and the waste treatment and waste generating industries) to discuss issues related to the cleanup of petroleum contamination from UST as well as non-UST sources, and the potential impacts of the TC rule on these cleanups.

The thirteen States attending these meetings expressed significant concern about the adverse environmental impacts resulting from the application of the TC rule to petroleum UST releases. The State representatives indicated that regulation of petroleum contaminated media and debris as hazardous waste would significantly increase the cost of cleanup of these releases, substantially delay cleanup, and in some cases (by delaying cleanup) negatively impact human health and the environment.

A number of States have funds that provide a significant portion of the cleanup costs for petroleum UST releases. According to these States, if petroleum contaminated media and debris are regulated as hazardous wastes, the resulting dramatic increases in costs of waste management would significantly impair the ability of the State to pay for future cleanups. Further, if there is no guarantee that payment will be forthcoming, several States believe that many responsible parties and their cleanup contractors will be much less willing to report and respond promptly to releases. The net result, according to these States, will be that fewer sites will be remediated and remediations will be delayed, thus increasing the migration of contamination off-site, and in turn negatively impacting human health and the environment.

In the view of many States, the delays associated with RCRA subtitle C management would allow for volatilization and migration of certain TC constituents, such as benzene, prior to cleanup. These States point to RCRA testing and permitting as significant sources of delay. In addition, States cautioned EPA to recognize that, because of the high costs associated with subtitle C management, there would be a significant disincentive to promptly report and undertake corrective action for petroleum releases. They explained that UST owners may instead purposely allow the waste to volatilize until it no longer exhibits the toxicity characteristic, thus rendering it non-hazardous.

Groups representing the waste generating industries (e.g., petroleum and petrochemical industries) at the meetings generally agreed with the views being expressed by the States, although several stated that the problems associated with applying subtitle C standards to remediations were not unique to petroleum contaminated media.

Environmental group representatives acknowledged the importance of these problems, but saw the issue as similar to other claims that regulations deter effective corrective actions. The environmental group representatives agreed on the merits of streamlining the subtitle C administrative processes and

procedures (e.g., RCRA subtitle C permitting, as discussed later in this notice), but felt that regulatory control was necessary to ensure environmental safety, The environmental group representatives also argued that the important benefits of a RCRA permit, particularly public involvement and facility-wide corrective action, would be lost if EPA adopted the approach suggested by the States, i.e., making the UST deferral permanent.

Certain representatives of the hazardous waste treatment industry expressed strong concerns with exemption from the TC rule as the mechanism for solving the implementation problems posed by subtitle C regulation of petroleum contaminated media and debris. According to these representatives, EPA should consider streamlining the RCRA permitting process for the cleanup and disposal of petroleum contaminated media and debris. They specifically suggested that EPA consider issuing permits-by-rule for petroleum contaminated media and debris, as well as for other cleanup wastes. They also expressed concern that the UST deferral effectively exempts petroleum contaminated media and debris from the RCRA technical standards, in particular the land disposal restrictions. Other representatives of the waste treatment industry however, supported the deferral and favored expanding it to other cleanup wastes.

A complete summary of these meetings is in the docket for this rulemaking. The various viewpoints expressed in these meetings will be considered as part of EPA's final decisionmaking concerning the deferral.

IV. Regulatory Alternatives Under Subtitle C

The studies indicate that subjecting petroleum UST cleanups to the fall range of subtitle C regulations would have significant adverse impacts. However, in the context of other previous rulemakings, EPA has explored the concept of alternative, ostensibly more streamlined, types of RCRA regulatory approaches that could be used to expedite cleanups. Some of these alternatives are discussed below. EPA is interested in comments from the public on the efficacy of using these approaches in dealing with UST petroleum-contaminated media and debris under subtitle C of RCRA as an alternative to the exemption being proposed today.

One alternative is reflected in the proposed rulemaking for mobile treatment units (52 FR 20914, June 3, 1987). Thermal treatment of UST petroleum contaminated soils, often in mobile thermal treatment units, is an innovative soil treatment technology that is increasing in use. The primary legal impediments to obtaining this type of "streamlined" permit for UST corrective actions under subtitle C are the need to provide for site specific public participation (as required under RCRA 7004), and the requirement to address facility-wide corrective action (under RCRA 3004(u)). Given that any treatment permit would have to address these statutory requirements, and that doing so would require a considerable time and resource commitment on the part of the issuing government agency(s), as well as the permittee, it may be that creating this type of permit for UST petroleum cleanup situations would actually have little "streamlining" effect.

Another approach is the use of emergency permits under Subtitle C of RCRA as an alternative to full subtitle C permitting. Emergency permits under 40 CFR 270.61 could be used in some situations involving petroleum UST releases. The problem is that these permits are of such short duration (90 days) that they would not be useful for extended cleanup operations, or for sites where cleanup is not being

conducted in response to an actual "emergency" situation, Of the 112,000 UST cleanups initiated that have been reported to EPA by the States, only 5900 were categorized as emergency responses.

The concept of permits-by-rule has been considered as a mechanism that could alleviate the administrative impacts of individually permitting petroleum UST cleanups under subtitle C, while maintaining the substantive controls and standards (including the land disposal restrictions) provided under Subtitle C. However, as noted above, Section 7004(b)(2) of RCRA specifies that permits issued under RCRA for hazardous waste facilities must undergo a local hearing process. Thus, the utility of "permits-by-rule" may be limited under RCRA. See NRDC v. EPA, 907 F.2d 1146 (DC Cir. 1990) (remanding a hazardous waste permit-by-rule).

Even if the administrative problems associated with issuing permits for petroleum UST cleanups activities could be resolved, additional problems of regulating these cleanups under subtitle C remain. For example, UST owners or operators would have to register as a hazardous waste generator and obtain a generator identification number if they are generating soils or groundwater that exhibit the toxicity characteristic. The thousands of facilities each year that may be involved in such transactions would impose additional burdens on the issuing agency, and likely add to delays in the cleanup process. In addition, generators of hazardous waste are required to prepare and submit to EPA a biennial report of their hazardous waste generation activities, resulting in an increased paperwork burden to the regulated community, and additional administrative costs to EPA to process such reports.

EPA requests comment on the legal and technical defensibility of the above regulatory alternatives for regulation of these materials under RCRA subtitle C. EPA is concerned that some of the alternatives either may present legal concerns or fail to provide sufficient flexibility to remedy the environmental problems caused by regulating these materials as hazardous waste. EPA also requests suggestions concerning other changes to the subtitle C regulations that will allow EPA to regulate these materials under subtitle C while at the same time providing the flexibility to avoid the counterproductive impacts of subtitle C regulation of UST petroleum-contaminated media and debris discussed previously. EPA is also asking for comment on these and other regulatory alternatives in a related rulemaking concerning non-UST petroleum contaminated media and debris.

V. Process for the Final Determination

EPA will review and evaluate the public comments on the studies, public meetings, and this proposed rule as part of its decisionmaking concerning the regulatory status of UST petroleum-contaminated media and debris. Following review of all the public comments submitted on these notices, EPA will publish in the Federal Register its final determination regarding the regulatory status of UST petroleum-contaminated media and debris.

VI. Relationship to Non-UST Petroleum-Contaminated Media and Debris

In a separate action (57 FR 61542t December 24, 1992) the Agency has proposed suspension of the TC rule for the 25 newly listed organic contaminants for three years for environmental media and debris contaminated by petroleum products released from sources other than RCRA subtitle I regulated USTS. This suspension has been requested by several States. During the suspension period, the Agency would collect additional data, perform additional analyses, and explore other administrative and legal

mechanisms to better tailor RCRA regulatory requirements to unique issues associated with remediation of non-UST petroleum releases.

Persons who would like to submit comments to EPA regarding the separate action for media and debris contaminated by non-UST releases must do so by submitting comments specifically addressing that action, to the appropriate RCRA docket.

The Agency believes it is appropriate to examine the application of the TC rule to petroleum contaminated media and debris from USTs and non-UST sources separately. Programs that regulate USTs and non-UST sources of petroleum contaminated media and debris can be distinct, with their own regulatory and administrative structures. Hence, the impacts of the TC rule on UST and non-UST cleanups can differ. For this reason, the ultimate determinations as to how to regulate UST and non-UST petroleum contaminated media and debris could be different.

Different exemptions, however, for very similar or identical types of waste, may be confusing to the regulated community and may pose challenges for the enforcement program. EPA is interested in obtaining comment from the public regarding whether and to what extent these two distinct exemptions should be made consistent or identical. Commenters may want to focus their attention on four differences in the non-UST proposal and today's proposal, discussed below.

First, the exemption in the non-UST proposal is limited to petroleum-contaminated media and debris generated at sites that are the subject of a site-specific enforcement order or other written approval from the State. The Agency believes a similar provision is unnecessary in today's proposal, due to the existence of the Federal corrective action regulations for USTs under subtitle I of RCRA, and the existence of active UST regulatory programs in each State that provide oversight of UST corrective action activities.

Second, the non-UST proposal limits the exemption to media and debris that are contaminated solely with petroleum product. The Agency believes a similar provision is unnecessary in today's proposal. Subtitle I of RCRA contains a well-defined universe of "petroleum UST systems" to which the exemption would apply. These petroleum UST systems are subject to the Federal UST corrective action regulations and the State programs discussed above, whether they contain petroleum product only, or other petroleum substances, such as used oil, in certain circumstances.

Third, although not a part of the preferred option, the non-UST proposal solicits comment on whether to limit that exemption to releases of less than a specified size, e.g., less than 10,000 gallons of released product. Larger spills might be subject to full subtitle C controls. While this provision may be appropriate for above ground spills where the quantity of released product can be more easily estimated, the Agency believes such a provision is unsuitable for releases from underground storage tanks, because it would be difficult, if not impossible, to ascertain the amount of material that had been released into the subsurface environment prior to the initiation of cleanup.

Fourth, both proposals limit the exemption to the 25 newly listed TC constituents. However, the non-UST proposal solicits comment on further limiting the scope of the non-UST suspension only to those TC constituents which are known to be indigenous to petroleum product. The Agency is considering three contaminants in this regard under the non-UST rule-benzene, cresols, and methyl ethyl ketone. The Agency believes such a limitation is unnecessary in today's proposal, however, because contaminated

media and debris is exempt only if it is generated from a subtitle I petroleum UST system, which is well defined. See 40 CFR part 280.12. For example, a petroleum UST to which hazardous waste had been added would no longer be a subtitle I petroleum UST system (rather, it would be subject to subtitl6 C regulations), Thus, media and debris contaminated by releases from such a tank would not be exempt under today's proposal.

VII. Effect on Subtitle C State Authorization

Since today's proposal will, when finalized, make permanent the existing temporary exemption already contained in EPA's hazardous waste regulations, there would be no impact on State subtitle C hazardous waste programs, whether authorized by EPA for the TC or not. EPA did not require States to adopt the UST temporary deferral, nor would they be required to adopt the exemption being proposed today, when final, since this provision is less stringent than subjecting UST petroleum-contaminated media and debris to the full requirements of the TC rule.

VIII. Regulatory Requirements

A. Regulatory Impact Analysis

Executive Order 12291 (46 FR 13193) requires that regulatory agencies determine whether a new regulation constitutes a "major" rulemaking and, if so, that a Regulatory Impact Analysis (RIA) be conducted, An RIA consists of the quantification of the potential benefits, costs, and economic impacts of a major rule. A major rule is defined in Executive Order 12291 as a regulation likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individuals, industries, Federal, State, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets.

As discussed elsewhere in this preamble, EPA has estimated that today's proposed rule will result indirectly in significant cost savings, by avoiding the increased costs that would otherwise be associated with regulating UST petroleum-contaminated media and debris as hazardous waste. See EPA's draft reports titled "TC Study of Petroleum UST Contaminated Media and Debris" and "The Impacts of Removing the TCLP Deferral for Petroleum-Contaminated Media at Underground Storage Tank Sites" for documentation of these cost savings.

Also, EPA does not believe the rule will significantly affect consumers, individuals, industries, Federal, State, or local government agencies, or geographic regions, or have significant adverse effects on competition, employment, investment, innovation, or international trade. Therefore, EPA has determined that today's proposed rule is not a major rule and that a Regulatory Impact Analysis is not required.

B. Regulatory Flexibility Act Under the Regulatory Flexibility Act

(RFA) of 1980 (Pub. L. 96-345), whenever a Federal agency publishes a notice of rulemaking for a proposed or final rule, it must prepare and make available for comment a Regulatory Flexibility Analysis that describes the impact of the rule on small entities, including small businesses, small organizations, and

small governmental jurisdictions, unless the Agency head certifies that the proposed action will not have a significant economic impact on a substantial number of small entities.

This proposal will provide significant regulatory relief to businesses, including many small businesses, faced with corrective action as a result of releases from petroleum USTS. Therefore, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

This rule does not impose any additional reporting, recordkeeping, or information collection requirements on any member of the regulated public;. Therefore, no estimate of public reporting burden is required for this rule.

List of Subjects in 40 CFR Part 261

Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Dated: January 20, 1993.

William K. Reilly,

Administrator.

58 FR 9026-9060 Thursday, Feb. 18, 1993 Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

9026 - 9060 Federal Register / Vol. 58, No. 31/ Thursday, February 18, 1993 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 280

[FRL-4128-9]

RIN 2050-AC67

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA, or the Agency) is promulgating financial responsibility requirements applicable to local governmental owners and operators of underground storage tanks containing petroleum. EPA promulgates these requirements under the authority of section 9003 (c) and (d) of the Resource Conservation and Recovery Act as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA). This rule establishes four alternative mechanisms for use by local governments to demonstrate financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental underground storage tank releases. The Agency is adding these local governmental financial assurance mechanisms to the existing mechanisms contained in the financial responsibility rule promulgated October 26, 1988. These additional mechanisms will allow a greater number of local governmental entities to comply with the financial assurance requirements and will result in a net cost savings to local governments estimated at approximately $32 million over a ton year period.

EFFECTIVE DATE: This rule becomes effective on March 22, 1993.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (703) 412-9810 in Virginia, or Sammy Ng in EPA's Office of Underground Storage Tanks at (703) 308-8882.

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

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, and 9009 of the Solid Waste Disposal Act, as amended. The principal amendments to this Act have been under the Resource Conservation and Recovery Act of 1976, the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616) and the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499) (42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, and 6991h).

II. Background

This section provides the legislative and regulatory background for this rule and summarizes today's additional mechanisms for financial responsibility for local government entities.

A. Legislative and Regulatory Overview.

This section discusses the statutory authority for financial responsibility regulations for UST owners and operators, the provisions of the financial responsibility regulations promulgated on October 26,1988 and the scope of the financial responsibility regulations being promulgated today.

1. RCRA Subtitle I

The Hazardous and Solid Waste Amendments of 1984 (HSWA) extended and strengthened the provisions of the Resource Conservation and Recovery Act (RCRA). HSWA added Subtitle I to RCRA, establishing provisions for the development and implementation of a regulatory program for underground storage tanks (USTS) containing certain substances, including petroleum and other regulated substances (such nonpetroleum regulated substances are hereinafter referred to as "hazardous substances"). Section 9003(a) of Subtitle I requires the EPA Administrator to promulgate requirements for release detection, prevention, and correction as necessary to protect human health and the environment. These technical standards were promulgated at 53 FR 37082 (September 23, 1988).

The Superfund Amendments and Reauthorization Act of 1986 (SARA) amended sections 9003 (c) and (d) of Subtitle I to mandate that the Agency establish financial responsibility requirements for UST owners and operators to assure the costs of corrective action and third-party liability caused by sudden and nonsudden accidental releases from USTS. SARA also modified Subtitle I by specifying the minimum statutory levels of financial responsibility for petroleum marketers and the factors that EPA may consider in setting minimum levels for non-marketers. The objective of the financial responsibility requirements is to ensure that owners and operators can respond promptly to clean up releases and to compensate third parties for any injuries or damages associated with UST releases.

2. October 26, 1988 Rule

The final financial responsibility rule, promulgated on October 26,1988 applies to owners or operators of "petroleum UST systems" with the followings, exceptions:

(1) Federal or State entities that own or operate USTs containing petroleum; and

(2) Owners and operators of tank systems excluded from the technical standards.

To cover the potential costs of corrective action and third-party liability claims from sudden and nonsudden accidental releases from USTS, the rule requires the following parties to obtain financial assurance of at least $1 million per occurrence:

(1) All owners or operators of petroleum USTs at facilities engaged in petroleum production, refining, or marketing; and

(2) Owners or operators of USTs with an average monthly throughput of more than 10,000 gallons.

Owners or operators of USTs at facilities not engaged in petroleum production, refining, or marketing with an average monthly throughput of 10,000 gallons or less must maintain financial assurance of at least $500,000 per occurrence. All owners or operators must maintain an annual aggregate of $1 million or $2 million, depending on the number of USTs assured. The responsibility for cleanup and thirdparty

compensation in the event of UST releases was established under the technical standards published in September 1988. The October 1988 financial responsibility rule made owners and operators responsible for complying with the financial responsibility requirements, but otherwise imposed no new liability; rather, the rule was intended to verify that local government owners or operators of USTs would be able to meet their liabilities in the event of an UST release. It is important to note that exemption from the financial responsibility requirements would not exempt an owner or operator from their liabilities in the event of an UST release.

UST owners or operators may use the following mechanisms to satisfy the requirements: Insurance or risk retention group coverage, surety bond, guarantee, letter of credit, financial test of self-insurance, trust fund, a State required mechanism, or a State fund or other State assurance. (Under the October 26, 1988 rule, only private companies reporting to credit reporting agencies, publicly-held companies reporting to the Securities and Exchange Commission, and public utilities reporting to specified agencies are eligible to use the financial test of selfinsurance.) Mechanisms can be used alone or in combination to cover the costs of taking corrective action and compensating third parties as long as a mechanism or a combination of mechanisms provides the full amount of required assurance. The only combination of mechanisms that is not allowed is the financial test of selfinsurance and a guarantee where the financial statements of the owner or operator and the guarantor are consolidated.

The October 26, 1988 final rule requires owners or operators to submit documentation of financial responsibility to the implementing agency for three occurrences: (1) After a known or suspected release occurs, (2) when a provider becomes incapable of providing assurance, and (3) when a provider revokes a mechanism and the owner or operator is unable to obtain alternate coverage. Owners or operators must also submit documentation of financial responsibility if requested by the implementing agency. In addition, UST owners or operators must notify the implementing agency of their methods of demonstrating financial responsibility upon installation of new tanks. Owners or operators must also maintain records of the financial assurance mechanisms used to satisfy these requirements on-site or at their place of business.

The October 26, 1988 rule also contains provisions that require thirdparty providers of financial assurance (i.e., sureties, insurance companies, risk retention groups, guarantors, and providers of letters of credit) to provide notice of cancellation with an adequate time period for the UST owners and operators to seek alternative coverage and to determine whether there has been a release that would trigger the third-party mechanism. On November 9, 1989, EPA published an interim final rule that modified the required language of endorsements required for insurance policies as they relate to cancellation (54 FR 47077).

The State program approval objective for financial responsibility of owners and operators of petroleum UST systems was also promulgated October 26, 1988. This objective outlines two general provisions: (1) The considerations used to determine whether States' financial responsibility requirements will be considered "no less stringent" than the corresponding Federal requirements standard, and (2) the standards that must be met to demonstrate adequate enforcement of compliance.

3. Discussion of the Financial Responsibility Requirements for Governments in the October 26, 1988 Rule

Although the final financial responsibility rule (53 FR 43322, October 26, 1988) exempts those government entities whose debts and liabilities are the debts and liabilities of Federal or State governments, local government entities are required to provide financial assurance for USTs that they own or operate. Under the Agency's schedule for phased compliance with the final rule, local government entities have been given until February 18, 1994, one year from the promulgation of today's rule, to comply. In the October 1988 final rule, the Agency stated its intention to develop a financial test in the interim that would allow local governments to demonstrate that they have the requisite financial strength and stability to pay the costs associated with UST releases. After passing this financial self-test, local government entities will be allowed to demonstrate financial responsibility in a manner similar to private companies that meet the criteria of the corporate financial test of selfinsurance.

Under the compliance schedule, Indian tribes are required to comply with financial responsibility requirements under the same schedule as local governments; that is, within one year from the promulgation of today's rule (i.e., before February 18, 1994).

4. The Proposed Rule

The proposed rule was published on June 18, 1990. The Agency received comments from 23 commenters. Most supported the development of the new financial responsibility mechanisms, stating that these additional mechanisms allow more local governments to comply with the financial assurance requirements, and that they would be able to do so at lower cost. Some commenters suggested changes or additions to the mechanisms proposed. Where appropriate, the Agency has adopted these suggestions. The specific issues raised and the Agency's responses are addressed in "Summary of Comments and Responses on Proposed Additional Financial Responsibility Mechanisms for Local Governments Subject to Subtitle I of the Resource Conservation and Recovery Act. "

One commenter proposed as a new alternative mechanism that EPA issue regulations allowing implementing agencies to redirect funds from Federal or State-funded programs to pay for the expenses associated with corrective actions. The Agency rejected this suggestion because it has no statutory authority to redirect funds from other State or Federal programs.

B. Key Provisions in Rule

In today's rule, the Agency is providing additional mechanisms that will allow local governments to comply with the financial responsibility requirements. These mechanisms do not replace the existing methods; rather, they supplement them. These mechanisms are similar in intent to the corporate guarantee and the financial test of self-insurance now allowed as mechanisms for corporations. Local governments eligible to use the mechanisms may use them alone or in combination with other mechanisms, as described below.

One commenter questioned the language indicating that all local governments "may use" the now financial assurance mechanisms, since the criteria associated with using the mechanisms by definition restricts their use by certain entities. The Agency emphasizes that all local governments may seek to use all mechanisms, but only those that meet all qualifying criteria may use a specific mechanism to demonstrate financial responsibility.

EPA is promulgating four additional mechanisms for use by local government entities to demonstrate financial responsibility:

(1) Bond rating test. Local government entities with $1 million or more of total outstanding issues of general obligation bonds (excluding refunded obligations) and having investment-grade ratings would be eligible to demonstrate financial responsibility. Non-general purpose local governments (e.g., special districts and school districts) with $1 million or more of investment-grade revenue bonds may also use this mechanism if they do not have the authority to issue general obligation bonds. General obligation bonds that are backed by credit enhancement mechanisms other than bond insurance may not be included in the bond rating test. Revenue bonds that are backed by any type of credit enhancement mechanism may not be included in the bond rating test. Bonds with investment grade ratings are defined as those having a Moody's bond rating of Baa or higher (i.e., Aaa, Aa or A), or a Standard and Poor's bond rating of BBB or higher (i.e., AAA, AA, or A). Passing the bond rating test will be considered a sufficient demonstration of financial responsibility.

(2) Worksheet test. A worksheet test has been developed for use by local government entities that do not have general obligation or revenue bond ratings or that have less than $1 million in outstanding issues of investment-grade-rated general obligation or revenue bonds. (Governments meeting the requirements of both the bond rating test and the worksheet test may use either mechanism but are assumed to use the bond rating test as a matter of administrative convenience.) Local governmental entities having outstanding issues of general obligation or revenue bonds that are rated as less than investment grade are not eligible to use the worksheet test. The worksheet incorporates several financial criteria designed to measure a local government entity's financial stability. Passing the worksheet test will be a sufficient demonstration of financial responsibility.

(3) Guarantee. A local government entity can demonstrate financial responsibility by obtaining a binding guarantee from another governmental entity able to demonstrate financial responsibility assurance through the alternative mechanisms. The guarantor must have the authority to provide a guarantee to the local government entity seeking financial assurance. For example, a town may serve as the guarantor for a special district, a county may serve as the guarantor for a school district, a State may serve as the guarantor for a county, or a city may act as a guarantor to a special district (e.g., a transportation authority or a government utility). A guarantee for the entire aggregate limit for which a local government must demonstrate financial responsibility will be a sufficient demonstration of financial responsibility. A guarantee for a lesser amount may be used in combination with one or more other allowable mechanisms to demonstrate financial responsibility.

(4) Maintenance of a funded balance. Local government entities may satisfy the financial responsibility regulations by developing a self-administered emergency response fund to finance an UST corrective action and pay for thirdparty damages. A fund balance established for the entire aggregate limit for which a local government must demonstrate financial responsibility will be a sufficient demonstration of financial responsibility. A fund balance established for a lesser amount may be used in combination with one or more other allowable mechanisms to demonstrate financial responsibility.

The October 1988 rule -allows the use of combinations of financial responsibility mechanisms. This feature is extended to include the financial selftest mechanisms being promulgated today. For example, a local government entity may use the guarantee or funded balance mechanisms to satisfy the deductible

amounts of insurance policies. Local governmental entities may use the mechanisms being promulgated today in addition to the mechanisms allowed by the October 1988 rule: insurance, risk retention group (RRG) coverage, surety bond, letter of credit, State-required mechanisms, or a State fund or other State assumption of responsibility.

In contrast to the specifications for the corporate self-test, EPA does not believe that local governments will use consolidated financial statements to support both the worksheet and the guarantee mechanisms. Local governments are separate legal and financial entities from States and from each other. The situation wherein a local government will consolidate its financial statements with a State, or vice versa, and use the consolidated statements to support both the worksheet and the guarantee, cannot occur. In addition, most local governments are independently chartered. By the nature of the local government charters, local government operations that are consolidated, such as utility operations accounted for as enterprise funds, never issue standalone financial statements, because they have no independent standing. Thus, there is no potential that the consolidated entities could first use their own financial statements for the worksheet, and then rely on the consolidated financial statements for a guarantee, because they have no independent financial statements. Independent authorities (e.g., independent school districts) are independent because they have separate charters and/or articles of incorporation; they operate independently and their financial statements are never consolidated with the statements of the nearby general purpose governments. To support this rule, the Agency has prepared a Background Document, "Background Document in Support of Financial Self-Test for Local Governments Subject to the Financial Responsibility Requirements of Subtitle I of the Resource Conservation and Recovery Act," that describes in detail the methodology and analyses used to evaluate potential financial responsibility mechanisms.

C. Rationale for Agency's Approach

The Agency had four main goals in developing the additional alternatives being promulgated today for local governments to demonstrate financial responsibility under Subtitle I. First, the Agency wanted to recognize fundamental differences between governmental entities and private entities. Second, the Agency wanted to keep the rule as flexible as possible to allow local governments a variety of choices in demonstrating financial responsibility. Thus, the Agency is promulgating several financial assurance mechanisms for local governments. Third, the Agency wanted to keep the mechanisms as simple as possible to minimize the administrative burden on local governments as well as the implementing agency. Thus, the Agency is promulgating options that use data believed to be readily available to local governmental entities or that are consistent with governmental practices and is maintaining the same approach to reporting requirements adopted in the regulations published in the October 1988 rule. Fourth, the Agency wanted financial responsibility mechanisms that could realistically be used by local governments.

In the October 1988 rule, the Agency provided a mechanism whereby financially secure corporations can self-insure. The rule provided two alternatives for corporations. Under Alternative I, a firm can self-insure if it meets four criteria: (1) Tangible net worth equal to 10 times the sum of its financial responsibility amounts for undeground storage tanks, its closure, post-closure care, liability coverage, and/or corrective action costs for Subtitle C facilities, and its plugging and abandonment costs for Class I Hazardous Waste Injection Wells, (2) tangible net worth equal to at least $10 million, (3) annual filing of its financial statements with the Securities and Exchange Commission (SEC), the Rural Electrification Administration

(REA), the Energy Information Administration (EIA), or Dun & Bradstreet (which must have assigned a financial strength rating of 4A or 5A), and (4) annual reports which, if independently audited, did not include an adverse auditor's opinion or a disclaimer of opinion. Under Alternative II, a corporation can selfinsure if it meets four criteria: (1) Tangible net worth of at least $10 million, (2) tangible not worth at least six times its UST obligation, (3) U.S. assets equal to at least 90 percent of total assets, or at least six times its UST obligations, and (4) net working capital equal to at least six times the required amount of UST aggregate coverage, or a current Standard and Poor's bond rating of AAA, AA, A, or BBB, or a current Moody's bond rating of Aaa, Aa, A, or Baa. In addition, a firm using Alternative II must either report its financial information to the SEC, the EIA, or the REA or obtain a special auditor's report.

Local government entities, however, differ in several important characteristics from corporations, which makes the application of the corporate self-test mechanism in the October 1988 rule impractical for local governments. For example, "general purpose" local governments (counties, municipalities, and townships) generally use accounting systems that do not recognize assets in a manner similar to private companies. For example, municipal buildings and infrastructure (e.g., streets and utility lines) are not generally carried as assets on the local government financial statements. Thus, a test based on "tangible net worth" is, by definition, unworkable for many local governments. (It should be noted, however, that government-owned utilities that provide financial data to the Rural Electrification Administration or the Energy Information Administration are allowed to use the corporate financial test under the October 1988 rule.) Also, the accounting standards used by most local governmental entities are not the same as the Generally Accepted Accounting Principals ("GAAP") used by private entities. Most local governments use either cash basis accounting (often mandated by State law) or "modified" accrual accounting, where the recognition of revenues may be delayed. Consequently, a test based on "net working capital" may be unworkable for most local governmental entities. In addition, local governments are not generally required to report financial information to a regulatory agency similar to the Securities and Exchange Commission. Thus, it is impossible to incorporate mandatory reporting to an independent organization into a selftest.

Nevertheless, the Agency believes that a mechanism parallel to self-insurance is particularly appropriate for local government entities. The Agency has determined that local government entities are, in general, more financially stable than private companies. Most local governments, unlike private entities, have the authority to levy taxes or to independently set rates, which provide a consistent, reliable source of income. In contrast to corporations, they are less likely to dissolve or merge with other entities which means that they are less likely to have abrupt changes in financial structure. They are, by definition, geographically fixed, eliminating potential concerns that they may move and abandon their USTS. They rarely go bankrupt, suggesting that they are, as a class, more financially stable. As discussed in the background document, the available literature suggests that even bankruptcy does not allow local government entities to void their legal obligations. Additionally, unlike some private companies, local governments are generally required to make their financial data publicly available.

These factors suggest that a self-test for municipalities does not necessarily require the same level of built-in safeguards as required of private entities. Assurance that local government owners and operators will be financially responsible for their UST related obligations, therefore, can be demonstrated more easily than assurance for private entities. Consequently, the primary concern of the Agency in developing

this rule is that local governments show evidence of financial stability and prudent financial management.

D. Description of the Regulated Community

This section describes the nature of the local governmental entities that would be regulated under today's rule, including a description of their UST ownership characteristics, a brief description of their operation, and an overview of the considerations the Agency has used in developing today's rule.

The Agency estimates that about 62,000 petroleum USTs that are subject to Subtitle I jurisdiction are owned or operated by approximately 25,000 local government entities. Most of these USTs store petroleum products for purposes other than retail motor fuel sales. A local government entity may, for example, own USTs that store gasoline to fill police and fire vehicle tanks.

Local government entities include both general purpose local governments and special purpose local government entities. General purpose local government entities include municipalities, counties, townships, towns, villages, parishes, and New England towns. Special purpose local governments include entities that perform a single function or a limited range of functions. Special purpose local governments are generally designated as either public authorities or special districts such as school districts, water and sewer authorities, transit authorities, redevelopment authorities, irrigation districts, or power authorities. All local governments, both general and special purpose, are subject to this rule and are eligible to use the new financial assurance mechanisms described in today's rule. Several commenters requested an expansion or clarification of the definition of local government entities to include local public transit systems and redevelopment authorities. The Agency originally intended these types of local government entities to be included in the definition, and has clarified the definition as requested by the commenters.

The Agency's research has shown an extremely low rate of fiscal emergencies among governmental entities through the 1970s and 1980s. A 1983 study by the Advisory Council on Intergovernmental Relations (ACIR) found only three incidents of bankruptcy among general purpose governments, only one of which caused a general purpose governmental body to void a legally binding agreement. In all other cases, even local government entities that entered bankruptcy were forced to make full restitution, although sometimes over a stretched-out payment term. Since 1983, only five additional general purpose governments are known to have declared bankruptcy. There has been a similarly low rate of bankruptcy among special purpose districts. Between 1972 and 1989, 29 utility special districts, two school districts, and six other special purpose districts and hospitals filed for bankruptcy (out of a total of more than 40,000 school districts and special purpose districts).

Although bankruptcy is an extreme condition, the Agency believes this very low incidence (0.003 percent per year) reflects general stability of local government entities. In contrast, 56,423 (1.3 percent) of the 4,256,243 private companies in operation filed bankruptcy petitions in 1982. ("Statistical Abstract of the United States," 109th Edition. United States Department of Commerce, Washington, D.C., 1989; and "General Report on Industrial Organization," 1982 Enterprise Statistics. Issued October 1986.) This number increased to 88,278 in 1987. Combined with the relatively low costs of UST financial responsibility obligations (relative to other environmental obligations and most governmental activities in general), the relative stability of local governments is interpreted by EPA to indicate a general ability to meet financial obligations under Subtitle I.

In addition, the Agency's research has shown relatively few cases where releases were known to have come from local government-owned USTS. For releases that did occur, local government entities were generally able to clean up and to pay for the costs of corrective actions associated with the releases. Because of the limited data regarding local government responses to UST releases, however, the Agency has relied primarily on data and analyses regarding the overall financial health of local governments. One commenter indicated that cleanups of UST releases at airports are generally funded from operations or funds for construction projects. The Agency interprets this statement as additional support for allowing local governments to demonstrate financial responsibility based on their internal financial condition, rather than requiring the use of third-party mechanisms.

III. Section-by-Section Analysis

A. Applicability

Today's rule would apply to all non-exempt governmental owners and operators of underground storage tanks containing petroleum. 40 CFR § 280.90(c) exempted from financial responsibility requirements State and Federal government entities whose debts and liabilities are the debts and liabilities of a State or the United States. Although the October 1988 rule excluded State and Federal governments, it required local government entities to demonstrate financial assurance for USTs that are owned or operated by the government.

Data available to the Agency in preparing the Regulatory Impact Analysis for the October 1988 rule suggest that local government entities collectively own approximately 62,000 USTS. Additional analysis of the New York State tank notification data base suggests that larger local government entities are more likely to own USTs and are more likely to own multiple USTS, but a specific breakdown of how many of each type of local government own USTs is not available from the data available to EPA. Overall, EPA estimates that about approximately 25,000 local governments own USTS.

Local government entities are created under State law, and consequently vary significantly from State to State. All local government entities recognized under State law may seek to use the financial assurance mechanisms being promulgated today. As recognized by the Bureau of the Census, local government entities generally fall into the following categories:

County Governments: Organized county governments are found throughout the nation except for Connecticut, Rhode Island, the District of Columbia, and limited portions of other States. In Louisiana, the county governments are officially designated as "parish" governments, and the "borough" governments of Alaska resemble county governments in other States. In general, county governments are defined in terms of a geographical area served, rather than a specific population.

Municipal Governments: Municipal governments include active government units officially designated as cities, boroughs (except in Alaska), towns (except in the six New England States and Minnesota, New York, and Wisconsin), and villages. This concept corresponds to the "incorporated places" that are recognized in Census Bureau reporting of population and housing statistics.

Township Governments: Township governments exist to serve inhabitants of areas without regard to population concentrations. This category includes governments officially designated as "towns" in the six Now England States, Now York, and Wisconsin, some i4plantations" in Maine, and "locations" in New

Hampshire, as well as governments called townships in other areas. In Minnesota, the terms "town" and "township" are used interchangeably.

School Districts Governments: Fortyfive States have established public school systems with sufficient autonomy and fiscal authority that they can be classified as independent local government entities.

Special Purpose Districts: Special purpose districts are governmental entities created to perform a single or limited range of functions (e.g., school districts, park and recreation districts, libraries, fire protection districts, cemeteries, transit districts, redevelopment authorities, etc.). These districts may be subdivided into any of the following distinct categories: (1) Local or metropolitan districts; (2) districts dependent on or independent of a municipality for their creation or operation; and (3) districts created by State enactment or by municipal resolution. They have sufficient administrative and fiscal autonomy to qualify as separate governments.

Indian Tribes: Indian Tribes are included in the statutory definition of municipality in RCRA Section 1004(13) and are, therefore, required to comply with the financial responsibility requirements by the same compliance date as other local government entities. This rule treats Indian Lands as local government entities and allows them to use the self-test mechanisms to demonstrate financial responsibility.

Several commenters requested exemptions from the UST financial responsibility requirements for local governments. Commenters gave the following reasons for such an exemption: (1) Local governments, as a class, have sufficient financial strength and stability to pay for corrective actions without the need to demonstrate financial responsibility; and (2) the adverse effects on the ability of local governments to fund emergency services if required to divert funds to pay for assurance mechanisms. One commenter, a small rural town, indicated that it cannot qualify to self-insure and added that the financial responsibility regulations impose financial burdens with which the town, and presumably other towns, could not possibly comply.

EPA believes that commenters may have failed to distinguish between: (1) The need for local governments to pay for costs associated with UST releases, as required under the technical standards; and (2) the financial responsibility regulations, which merely require that UST owners be able to demonstrate that they will be able to meet such costs if they occur. Even if EPA were to exempt local governments from the requirement to demonstrate financial responsibility, such an exemption would not, under Subtitle I, relieve them from the legal liability to pay for the costs of UST releases and to compensate third parties for damages caused by releases.

The Agency agrees that most local government entities do have the resources and the will to meet financial responsibilities. This belief underlies the effort to develop mechanisms by which local governments can demonstrate compliance with the financial responsibility requirements without the need to obtain insurance or the use of other third-party mechanisms.

The Agency also agrees with commenters who noted that some local governments may not have the resources to meet their UST-related financial obligations. Consequently, it would not be appropriate to exempt all local governments from the need to demonstrate financial responsibility. Further, EPA believes that exempting all local governments from the requirement to demonstrate financial responsibility would not be consistent with statutory intent as discussed in 9003(d)(5).

The Agency notes the concern about the potential impact on local governmental services. The Agency believes, however, that the mechanisms provided will allow any fiscally solvent local government to demonstrate financial responsibility and continue to operate its USTS, and will do so at minimum cost to the affected local governments. EPA encourages governments unable to demonstrate financial responsibility using the worksheet, bond rating, or fund balance mechanisms to seek guarantees from neighboring jurisdictions or from county governments. EPA believes that such entities are better able to determine the strengths of the government seeking the guarantee, and to measure how essential are the services offered, than the Agency would be in developing a uniform national standard.

B. Definition of Terms

1. Bond Ratings

A bond rating is an "evaluation of the credit quality of notes and bonds usually made by independent rating services . . . Ratings generally measure the probability of the timely repayment of principal and interest of municipal bonds." [Moody's Investors Service, Inc., "Moody's on Municipals: An Introduction to Issuing Debt," 1989, p. 75.] In this rule, only ratings made by Moody's Investors Service and Standard & Poor's will be considered eligible for use in demonstrating financial responsibility.

2. Investment Grade Bonds

As defined by the Comptroller of the Currency, investment grade bonds are generally regarded as eligible for bank investment. In addition, the legal investment laws of various States may impose certain ratings or other standards for obligations eligible for investment by savings banks, trust companies, and fiduciaries generally. For purposes of this rule, investment grade bonds are considered to include bonds rated Aaa, As, A, and Baa by Moody's, or AAA, AA, A, and BBB by Standard and Poor's. [Both Standard and Poor's and Moody's recognize groupings within the major bond rating classes. Moody's signifies higher ranking bonds within a class with a "1" (e.g., Baa1), while Standard and Poor's uses a +/ - system to designate higher and lower ranking bonds. This proposed rule does not consider these groupings. Thus, a Baal rating is classified as a Baa rating for the purposes of the test, while an AA+ or AA- rating is classified as an AA rating.]

3. General Obligation Bonds

General obligation (G.O.) bonds, also known as "full faith and credit" bonds, are secured by their issuers' ability to levy ad valorem taxes or to draw from other unrestricted revenue sources, such as sales or income taxes. These bonds are important mechanisms for financing municipal capital improvements such as schools, streets, and municipal buildings. The bond issuer's ability to generate revenues is evaluated by analyzing factors in four categories: socioeconomic, finance, debt, and administration. [Standard & Poor's Corporation, "Standard & Poor's Debt Ratings Criteria: Municipal Overview," 1986.]

4. Revenue Bonds

A revenue bond is a long-term debt instrument that is issued to finance a specific public enterprise and that is payable solely from enterprise earnings or from a dedicated tax. ['Standard & Poor's Corporation, "Standard & Poor's Municipal Finance Criteria," 1989.] The Agency has determined that most revenue bonds issued by general purpose governments (i.e., counties, municipalities, and townships) are issued to

fund specific projects with dedicated revenue streams not necessarily central to the operations of that government, and that the evaluation criteria associated with these revenue bonds may not fully reflect the socioeconomic, financial, and administrative condition of a general purpose government. Instead, the ratings reflect a more limited set of criteria pertaining to the specific project financed. In contrast, the Agency has determined that revenue bonds issued by special districts are generally used to finance projects central to the operations of the special districts, so that the ratings encompass a broader view of the overall financial condition of the issuing entities. In this rule, the Agency allows only special districts and school districts that do not have the authority to issue general obligation debt to use investment-grade ratings on revenue bonds to demonstrate financial responsibility.

5. Substantial Governmental Relationship

The October 26, 1988 rule authorized owners and operators to obtain a corporate guarantee to meet their financial responsibility requirements. The corporate guarantor must: (a) Have a controlling interest in the owner or operator or in a specified related firm; or (b) issue the guarantee as an act incident to a "substantial business relationship" with the owner or operator (§ 280.96). The object of the corporate guarantee is a valid and enforceable contract. Additionally, to insure that State insurance laws will not impair the enforceability or validity of the mechanism, a corporate guarantee may be used only if it is certified for use by the Attorney General of the State in which the USTs are located.

Local governments, however, do not have "controlling interests" in one another, and their interactions may not be of an economic nature constituting a "substantial business relationship." As with the corporate guarantee, the Agency is concerned that local governmental guarantees be valid and enforceable, and that they do not conflict with State insurance laws. Thus, a municipality using a local governmental guarantee must certify that there is a "substantial governmental relationship" underlying the guarantee. Such a relationship must include a clear commonality of interests, such as common constituencies served, overlapping geographical jurisdiction, or mutual impact in the event of an UST release. In addition, a local government acting as a guarantor must have the authority to enter into such agreements.

Examples of governmental guarantees could include: (1) A guarantee offered by a county to an incorporated city located partially or entirely within the limits of the county; (2) a guarantee offered by one county to another if both counties cover a common aquifer subject to contamination by UST releases; (3) a guarantee offered by the State to a local government within the State; or (4) a guarantee offered by a general purpose local government to independent school district, water district, utility district, or other special district serving the guarantor in whole or in part. One commenter questioned what types of publicly owned utilities would be eligible to receive a guarantee. Any special district is eligible to receive a guarantee if it has its own governing body and an independent accounting system.

Additional examples of appropriate intergovernmental relationships for a governmental guarantee would be joint operating agreements for emergency responses across jurisdictional boundaries, or purchase of non-UST related services such as water or education,

One commenter asked three question pertaining to activities that constitute a "substantial governmental relationship": (1) Whether a governmental entity may act as a guarantor for more than one entity; (2) whether a contractual relationship [under an intergovernmental pooling arrangement) of a pool to provide safety and risk management services in addition to risk pooling will be recognized as a "substantial

governmental relationship"; and (3) what criteria determine that a relationship is "sufficiently non-monetary."

The Agency concludes that a local government may act as guarantor for multiple entities. A guarantee from a risk pool, however, is not considered a governmental guarantee for the purposes of establishing financial responsibility. The role of a risk pool is almost exclusively monetary, similar to that of insurance. Issuance of a guarantee would not change the nature of that relationship. The Agency recognizes that participation in a risk pool provides a means for local governments to reduce their liability for large unforeseen events. However, risk pools have not been approved as a Federal financial responsibility mechanism because no comprehensive yet manageable set of Federal guidelines could be developed to ensure that all risk pools would have adequate oversight to make them comparable to the other financial responsibility mechanisms allowed.

The Agency notes that, under § 280.100, risk pools can be adopted Federal financial responsibility mechanisms by individual States as State-required mechanisms. That is, State may allow or require local governments to demonstrate financial responsibility through participation in a risk pool if the State can demonstrate the Agency that the risk pool would be at least equivalent to the other financial responsibility mechanisms allowed.

C. Amount and Scope

The amount and scope of financial responsibility is not being changed from the requirements established in the October 1988 rule. Governmental entities owning or operating USTs at facilities with a monthly throughput of less than 10,000 gallons must demonstrate financial responsibility in the amount of $500,000 per occurrence. Governmental owners and operators owning or operating one or more USTs at facilities with a monthly throughput of 10,000 gallons or more must demonstrate financial responsibility in the amount of $1 million. In addition, owners and operators of USTs must demonstrate financial responsibility in the amount of an appropriate annual aggregate. Owners and operators of 100 or fewer USTs must demonstrate financial responsibility in the annual aggregate amount of $1 million, and owners and operators of more than 100 USTs must demonstrate financial responsibility in the annual aggregate amount of $2 million.

One commenter suggested incorporating a mechanism in the rule that would allow for reductions in the required level of assurance when tanks are replaced with intrinsically safe tank or upgraded to be intrinsically safe. The commenter believed that this proposal would result in more equitable and less burdensome requirements for assurance. The Agency disagrees with the commenter's suggestion for the reasons cited in the October 1988 final rule and the June 1990 proposed rule.

Another commenter indicated that disclosing the amount of money that will be paid per release by an assurance mechanism may adversely affect a local government's position in litigation or settlement negotiations. The comments recommended deleting this provision from the financial officer's letter. EPA believes that the commenter may have misinterpreted the intent of the financial officer's letter. The amount assured, as cited in the financial officer's letter, is not meant to be a minimum amount that must be paid in the event of a release, but rather the government must be able to pay if required to meet corrective action cost and third-party liabilities. EPA assume that governments will use all defenses and mechanisms to ensure that payments for third-party liabilities are fair and equitable. Conversely, the

amount of financial assurance to demonstrated does not limit a local government's potential liability in the event of a release. Local governments are liable for all costs resulting from a release, regardless of the amount for which they demonstrate financial responsibility. EPA requires that an amount be specified in the financial officer's letter to ensure that senior officials of the government are aware of their potential obligations as UST owners.

IV. New Mechanisms for Demonstrating Financial Responsibility

A. Description of New Mechanisms

Today's rule promulgates four additional financial assurance mechanisms for use by local government entities that own or operate USTs containing petroleum: A bond rating test, a worksheet test, a governmental guarantee, and maintenance of a funded balance. The additional mechanisms are described below. In addition to these mechanism local governments that are owners and operators of USTs may use any of the financial responsibility mechanisms authorized under 40 CFR § 280.94 (i.e., insurance, Risk Retention Group (RRG) coverage, surety bonds, letters of credit, fully-funded trust funds, State-required mechanisms, a State fund, or other State assumption of responsibility). The Background Document prepared in conjunction with this rule explains in more detail the data and methodology used to develop the new mechanisms now being finalized.

1. Bond Rating Test (§ 280.104)

In order to pass the bond rating test, local government entities must have outstanding issues of general obligation bonds that are currently rated at least "investment grade" by Moody's or Standard & Poor's. Special districts, such as school districts or airport authorities, that do not have the authority to issue general obligation bonds may substitute investment grade revenue bonds for general obligation debt to satisfy the bond rating test. In both cases, the municipality's total outstanding obligation must be $1 million or more, excluding refunded obligations. Investment grade bonds are those with a current Standard and Poor's bond ratinfg of AAA, AA, A, or BBB, or a current Moody's bond rating of Aaa, Aa, A, or Baa. If a local government has multiple outstanding issues of general obligation or revenue bonds with different ratings, or if the ratings assigned to a single class or issue of bonds by different rating agencies differ, the lowest rating must satisfy the criterion of the test.

If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within 150 days of the change in status.

The Agency is aware that municipal bonds are often insured by third-party insurance companies, and that the rating assigned to such insured bonds is established primarily by the creditworthiness of the insurer. After examining the criteria used by the rating companies to evaluate bond insurance companies, however, the Agency has concluded that the provisions for ongoing review and intervention granted to the bond insurance companies under the insurance agreements provides a level of third-party oversight comparable to that provided directly by the bond rating companies. For purposes of this rule, therefore, the Agency is not distinguishing between general obligation bonds that are uninsured or insured by a bond insurance company.

EPA has not found evidence that other providers of other methods of credit enhancement, such as letters of credit, provide a degree of oversight equivalent to that provided by bond insurers. Consequently, ratings that are supported by means of credit enhancement other than bond insurance may not be used to demonstrate financial responsibility.

The Agency has selected the existence of investment-grade bond ratings on general obligation debt as an option for demonstrating financial responsibility for several reasons. First, EPA took into consideration the use of bond ratings as a standard measure of risk by banks and other fiduciary entities. As a result of a 1938 agreement issued jointly by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System and the Executive Committee of the National Association of Supervisors of State Banks, these agencies have given municipal bonds in the first four rating categories (Aaa through Baa or AAA through BBB) privileged status as investment securities. Banks are permitted to hold only a certain number of low or unrated bonds, and they must balance such holdings with higher rated or more credit-worthy securities. Second, bond ratings serve as one of the only independent evaluations of local government entities' financial health. To perform their evaluations, the bond rating companies must consider a variety of factors that affect both local government entities' current ability to pay and the likelihood of continued ability to pay in the future. In particular, the costs of environmental obligations are included in the evaluations. Thus, the costs of underground storage tanks, solid waste landfills, hazardous waste landfills, sewage treatment plants, and associated environmental liabilities are factored into the rating analysis. [Linda Reidt Critchfield, EPA Office of Underground Storage Tanks, memorandum to the record, "Conversation with Al Medioli, Moody's Investor Services on August 29, 1989," September 15, 1989.] Third, general obligation bonds are secured by the full faith and credit of the borrower, and backed by the issuers' ability to levy taxes or make legislative appropriations. The Agency considers this underlying security equivalent to the requisite level of financial responsibility intended under Subtitle I. Fourth, bonds are rerated on a periodic basis. Local governments are required to provide current financial data annually; failure to do so can result in removal of the bond rating. Also, the rating agencies receive local newspapers from around the country to monitor local conditions . [Ibid.]

Today's rule allows the use of insured issues of general obligation bonds. Information from bond rating companies indicates that local governments do not purchase insurance as a means of earning an investment grade rating, but rather to increase the rating from a lower investment grade (e.g., Baa, Baa1, or A) to the very highest (Aaa). In exchange for the cost of the insurance, the local governments obtain a lower interest rate for the life of the bond, Analysis undertaken by Moody's of four major bond insurers shows that virtually all of the insured debt would have earned an investment grade rating without the insurance, and so would qualify under the bond rating test. [Memorandum from Kate Donaldson, James Dickson, and Tony Bansal, ICF Incorporated, to Stephanie Bergman, EPA Office of Underground Storage Tanks, "Municipal Bond Insurance," May 31.1989; memorandum from Kate Donaldson, James Dickson, and Tony Bansal, TCF Incorporated, to Stephanie Bergman, EPA Office of Underground Storage Tanks, "Municipal Bond Insurance Companies," June 22,1989.] In addition, bond insurers, unlike bond rating agencies, have a strong financial interest in the soundness of the local governments. If a local government defaults on a payment, the bond insurers must meet the payment. Consequently, bond insurers track the financial obligations of insured local governments closely and often have covenants that allow them to intervene in local government operations. Insurers, for example, may insist on more conservative fiscal policies to preserve the financial strength of a community, which in turn, lowers the

risk and cost associated with the bond insurance. Although the bond rating of insured bonds does not directly indicate a local government's financial condition, it does demonstrate both that the government has assured the insurance company of its ability to meet its debts, and that a third party has a strong confidence in the financial health of the local government.

Two commenters agreed with and endorsed the methodology of the bond rating test, stating that the test will serve as a simple method for demonstrating financial responsibility and will provide the Agency with the assurance it seeks without imposing too great a burden on the regulated community.

Several commenters suggested that the Agency expand the bond rating test to include revenue bonds and other sorts of debt instruments as well as general obligation bonds. The Agency has researched the criteria used to assign credit ratings on short-term notes, certificates of participation, lease rental debt, and revenue bonds, and examined how well the credit rating addresses the financial health and fiscal management practices of local governments. The Agency also reviewed the default rates of these types of securities.

EPA is expanding the bond rating mechanism to allow non-general purpose governments (i.e., special districts and school districts) that do not have the authority to issue general obligation bonds to demonstrate financial responsibility if they have earned an investment-grade rating on at least $1 million in outstanding revenue bond issues not backed by any form of credit enhancement.

EPA has determined that revenue bond financing is central to the operation of most special districts and that the ratings on revenue bonds issued by special districts therefore provide an adequate representation of their financial strength. Special districts are created for a specific purpose, such as to provide airport services to a community. The revenue stream underlying the strength of a special district is the same as the base underlying its associated revenue bonds. Ratings on revenue bonds are, therefore, appropriate measures of special districts' financial capabilities. (This is not the case for a general purpose government that issues revenue bonds, such as a city, because the revenue stream supporting a specific revenue bond is not equivalent to the overall tax base supporting the local government.) In addition, EPA determined that there has been a low incidence of default of investment-rated revenue bonds not enhanced by thirdparty support - e.g., bond insurance or a letter of credit. EPA examined information on revenue bond defaults between January 1989 and May 1991. Over that time period, approximately 150 issues defaulted. EPA estimates that no more than five of these issues had unenhanced investment-grade bond ratings from Moody's at the time of default, representing a default rate of less than 0.1 percent per year of rated bonds. Eight of the defaulted issues were backed by letters of credit, and two were insured by bond insurance companies.

Because the credit rating for revenue bonds issued by general purpose governments (e.g., townships, cities, and counties) would not measure the financial health and fiscal management practices of that type of government as a whole, and because revenue bonds are not usually used to finance projects central to the operation of a general purpose government, the Agency has determined that general purpose governments with the authority to issue general obligation debt may not use revenue bonds to demonstrate financial responsibility.

Similarly, because the credit rating for short-term notes, lease rental debt, and certificates of participation does not provide sufficient information on the financial strength of local governments, local governments may not use these instruments to demonstrate financial responsibility.

Two commenters asserted that the bond rating test is unavailable to many local governments simply because the amount of outstanding debt is less than one million dollars and suggested that the required amount of outstanding debt should be decreased. EPA intends the bond rating mechanism to be used by local governments that have shown their capability to sustain debts comparable in size to the minimum level of financial assurance as determined by statute. Governments that are not able to demonstrate such capability may use another mechanism to demonstrate financial responsibility. Based on the analysis conducted for the proposed rule, the Agency estimates that approximately 87 percent of general obligation bonds are issued for aggregate amounts greater than $1 million.

One commenter endorsed the bond rating test, but noted that a governmental entity will no longer qualify for the bond rating test if it reduces its total debt below $1 million. The commenter suggested that the amount of unused debt capacity may be more important than the amount of debt. Another commenter stated that the essential factor in the test should not be the dollar limit outstanding, but rather the statutory right of the authority to issue bonds and the credit ratings which have been established for that particular government entity on debt which has or could be issued. Because a local government entity does not have a credit rating from Standard and Poor's or Moody's unless it has outstanding debt, the commenter urged the Agency to devise some test, presumably a worksheet test, to measure credit worthiness if bond ratings have not been issued.

The Agency has determined that it is appropriate to require $1 million in outstanding debt as part of the bond rating mechanism. The requirement ensures that the bond rating used to demonstrate financial responsibility is based on a level of outstanding debt consistent with the amount of financial responsibility being demonstrated. Although there may be merit in the argument that the level of debt capacity is an indicator of potential financial abilities, EPA does not believe that incorporating available debt capacity would be feasible. First, calculating levels of available capacity is more difficult than applying the bond rating test as written, and is subject to greater uncertainties. Second, the fact that the local government has available debt capacity does not ensure that it will be able to issue the debt and maintain its bond rating, particularly if the amount of outstanding debt is substantially less than the amount of required financial assurance. The Agency notes that excess bond authority may be used as one part of one alternative of the fund balance mechanism.

Because bond rating information is easily obtainable, the use of bond ratings as a self-test mechanism will impose minimal administrative burden in determining a local government entity's eligibility. Many local government entities, however, do not currently have general obligation bond ratings. As of July, 1991 Moody's had ratings for a total of 7,653 investment-rated general obligation bonds issued by local government entities that were "investment grade" and were not insured. [Brenda Ramos, Moody's Investors Service, Public Finance Department, letter to Linda Critchrield, EPA, July, 1991.] (Because some local government entities may have multiple issues of general obligation bonds, the number of local governments with rated bonds may be lower.) Although Standard & Poor's rates additional entities, there is a substantial overlap - one study found that 94 percent of cities of 2,500 or more residents with a rating from Standard & Poor's also had a rating from Moody's. [Cluff, George S., and Farnham, Paul G.,

"Standard & Poor's vs. Moody's: Which City Characteristics Influence Bond Ratings?", Quarterly Review of Economics and Business, Board of Trustees of the University of Illinois, Volume 24, No. 3,1984.] In contrast, there are more than 80,000 local government entities in the United States, of which an estimated 25,000 own USTS. To provide local governments with as many compliance choices as possible to meet the requirement, the Agency has also developed additional self-test mechanisms to demonstrate financial responsibility.

2. Local Government Financial Test (§ 280.105)

As part of the underground storage tank requirements proposed on June 18, 1990, EPA included a local government financial test that could be used by local government owners and operators of USTs to satisfy the financial responsibility requirements of § 280.93. The local government financial test, or "worksheet test", was designed for local governments that cannot use the bond rating test (§ 280.104) because they have less than $1 million in outstanding investment grade bonds. As described in the preamble to the proposed rule, however, local government entities that have applicable outstanding debt rated lower than investment grade, even if this amount is less than $1 million, cannot use the worksheet test. This limitation on the use of the worksheet test applies, therefore, to the general obligation debt of general purpose local governments and to outstanding revenue bonds of those local government entities that are legally restricted from issuing general obligation bonds.

As described in the preamble to the proposed rule, the Agency designed and developed the worksheet test to capture local government variation using an index of financial strength. The index assigns a rank to each of the general purpose governments in the Census of Governments. After arraying the governments according to their rank on the index, the test establishes a cut-off point that, in the Agency's opinion, excludes that bottom fraction of local governmental entities that might not be able to meet their financial obligations in the event of an UST release. The procedures used to develop the index and establish the threshold cut-off are discussed in the preamble to the proposed rule, the background documents to this rulemaking, and in subsequent sections.

The test was designed to isolate the fraction of governmental entities that are in poor financial condition from those other governments that, in general, have sufficient resources and flexibility to respond to an UST release. Consequently, the Agency is not establishing the worksheet test as a precedent for other Agency regulations affecting local governments, because other regulations may require either larger required levels of funds or more certain cash flows.

Features of the Proposed Local Government Financial Test

The proposed worksheet test had the following features:

Using a worksheet, an eligible local governmental entity would calculate nine financial ratios using easily available financial data. The nine ratios were:

-Debt service to total revenues,

-Total funds to total expenses,

-Total revenues to total expenses,

-Debt service to population,

-Total revenues to population,

-Total expenses to population,

-Total funds to total revenues,

-Total funds to population, and

-Local revenues to current expenditures.

Each of the nine ratios was compared to the national distribution of that ratio to calculate a z-score, which is a measure of how far above or below the national average the municipality's ratio lies.

The individual z-scores for the nine ratios were then weighted and added to calculate a total score, or index.

Governments with a total score that passed the specified threshold could use the test as a mechanism for demonstrating financial responsibility for UST corrective action and thirdparty liability claims. To simplify the use of the worksheet test, the threshold value was incorporated into the calculation of the final score, so that governments achieving a final score greater than zero passed the worksheet test.

Comments on the Proposed Local Government Financial Test

EPA received several comments on its proposed financial test for local governments. The comments focused on (1) the exclusion of local governments with less than investment grade debt; (2) use of the term "self-insurance"; (3) updating the worksheet test using 1987 Census of Governments data; (4) deleting specific ratios from the test; (5) lowering the threshold level; and (6) the appropriateness of the worksheet test for non-general purpose local governments. The substance of the major comments received is briefly summarized below, followed by the Agency's rationale for accepting or rejecting the commenters' recommendations in the final worksheet test requirements.

(1) Exclusion of Local Governments with Less than Investment Grade Debt. One commenter believed the worksheet test should be available to all local governments, even those with outstanding debt rated below investment grade. The commenter reasoned that bond rating entities are not always accurate and, moreover, provide ratings that allow investors to assess a potential investment, a different purpose than assessing financial responsibility to respond to an UST release. The commenter stated that allowing use of the worksheet test would recognize these realities without undercutting the purpose of the test.

For reasons cited in the preamble to the proposed rule, however, EPA does not agree that local governments with bond ratings of less than investment grade should be eligible to use the worksheet test. The Agency notes that (1) failure to earn an investment rating is costly to local governments, (2) local governments have the incentive and ability to work with bond rating agencies to establish policies and procedures that would raise the bond ratings, and (3) the bond rating process involves a more detailed examination of local government financial condition than can be accomplished through a simple worksheet test.

(2) Use of the Term "Self-insurance." One commenter stated that State law might prohibit certain otherwise eligible government entities from using the worksheet test. The conimenter noted that New York State law authorizes specific programs for self-insurance and that, because they have not been specially authorized for this purpose, component school districts cannot use the worksheet test (or, indeed, the bond rating test) to demonstrate the ability to self-insure.

EPA understands that the term "selfinsurance" has specific legal meanings that may be limiting and has, therefore, modified the rule to delete references to "self-insurance." The modifications clarify that the use of the worksheet test mechanism is to demonstrate compliance with the financial responsibility regulations, and not to "self-insure."

(3) Updating the Worksheet Test Using 1987 Census of Governments. Although not proposing specific amendments to the worksheet, two commenters criticized the use of data from the 1982 Census of Governments in developing the worksheet test. One commenter believed that use of decade old data could introduce inaccuracies in the results of the worksheet test. As an example, the commenter pointed out that changes in the financial practices of local governments, such as an increase in the size of new debt issues, could mean that the reality of what makes a local government financially strong is different now than it was in 1982.

EPA agrees with the commenter and, in response, has updated the analyses used to develop the worksheet test using data from the 1987 Census of Governments, which was not available when this rule was proposed. As further described below and in the Background Document, the new analyses show that the ratios included in the proposed worksheet test were highly correlated with similar factors in the analyses of both the 1982 and 1987 Census of Governments data, and that incorporation of the 1987 data did not significantly alter the structure of the worksheet test. In particular, EPA confirmed that ratios incorporating population (for example, total revenues per capita) and fiscal autonomy (e.g., local revenues to current expenditures) are important indicators of the relative financial strengths of governments. In addition, EPA has updated the worksheet to reflect changes in the means, standard deviations, and weights associated with each of the ratios.

(4) Deleting Specific Ratios from the Worksheet Test. One commenter urged the Agency to delete Factor 5, "local coverage" (local revenue to current expenses), from the worksheet test as inappropriate for use in assessing a local government's level of financial responsibility. The commenter argued that Factor 5 disadvantages those local governments that rely more heavily on State funding than others. While this factor is designed to measure local autonomy and the ability of local governments to redirect funds to meet the cost of UST releases, the commenter argued that a significant proportion of the funds that local governments receive from States is not tied to specific purposes and may be used as the local government deems appropriate.

EPA believes that, because local governments do not control and cannot assure the continuance of State or Federal aid, local governments with a high dependence on non-local sources are less assured of the ability to respond to UST releases, whether the funds are dedicated to specific programs or not. The Agency notes that a local government may be weak in a particular variable but still pass the worksheet test. For example, a government with a high reliance on intergovernmental aid may still pass the worksheet test if its overall financial situation is predominantly sound as measured by the remaining variables. The selection of factors was developed through extensive statistical analysis of local

government financial conditions. For reasons described below, however, the Agency has modified the proposed worksheet test to replace the ratio of local revenues to current expenditures with the ratio of local revenues to total revenues, an alternate ratio representative of "local coverage".

(5) Lowering the Threshold Level. One commenter recommended that the threshold value should be reduced from 15 to a maximum of 10 percent. The commenter argued that EPA's own statements in the preamble that local governments rarely go bankrupt, are not permitted to void obligations through bankruptcy, and generally possess the ability to meet financial obligations through taxation were inconsistent with the finding that 15 percent of local governments should be disqualified from using the worksheet test to demonstrate financial responsibility. In addition, the commenter believed that the worksheet analysis exaggerated the actual impacts likely to occur by not including consideration of incidence of UST ownership. The commenter reasoned that small local governments, the ones that are most likely to rely on a worksheet test, are much less likely to own USTs than larger local governments, Thus, the average impacts assumed exaggerate actual impacts likely to occur. The commenter concluded that these factors suggested that a 15 percent failure rate was too stringent, but that a maximum cutoff of 10 percent would recognize the reality of the financial strength of local governments

The Agency notes that costs associated with clean-ups can range widely and that different standards cannot be applied to different owners, In fact, if standards were based on size of the local government, proportionately fewer smaller governments would be able to demonstrate financial responsibility because of the more limited total resources of small local governments. As shown in the background document, however, EPA believes that smaller governments are more likely to pass the worksheet test than are their larger counterparts. Consequently, the Agency believes its overall approach used to set the threshold is appropriate.

Two commenters pointed out that the difference between the 10 and 15 percent cutoffs in the Agency's analysis was not great. Another commenter stated that the threshold should be reconsidered or justified because the commenter did not believe the preamble or supporting documents contained evidence that 15 percent of local government entities are, in fact, financially unstable and, even if they are generally unstable, that they will be incapable of meeting their UST obligations.

As described below, the Agency has updated the worksheet test using the 1987 Census of Governments, including updated means, standard deviations, and weights for each ratio, as well as a reevaluation of the threshold level. Based on its review of the updated information, the Agency has determined that a threshold level that allows 90 percent of local governments to demonstrate financial responsibility based on the worksheet test represents a reasonable balance between the statutory requirement that UST owners demonstrate financial responsibility and the demonstrated stability of most local governments. Consequently, the Agency agrees with the commenters that a 10 percent threshold offers adequate safeguards.

(6) Appropriateness of the Worksheet Test for Non-general Purpose Local Governments. Two commenters stated that a financial test, such as the worksheet, designed to measure the financial strength of general purpose governments, is unsuitable for special purpose organizations such as airports, bridge and toll road authorities, and publicly-owned utilities. Unlike general purpose governments, one commenter argued, these so-called "proprietary" government entities conform to generally accepted accounting procedures similar to accounting systems employed in the private sector, rather than the

modified accrual accounting terms and criteria appropriate to measure the success of a traditional government. Because the corporate test is similarly inappropriate for these special-purpose entities, the commenter requested that the Agency develop an alternative financial test for government entities required to use accrual accounting. The commenter suggested that the corporate test in 40 CFR 280.95, based on the accrual method, might be modified to take into account the substantially greater financial stability of publicly-owned utilities.

The Agency recognizes that specific data requirements preclude most special districts from using the worksheet test. In limited cases, however, some special districts (e.g., school districts that serve a specific population) may have the information necessary to complete the worksheet test (e.g., they can measure population). EPA believes that the new mechanisms, particularly with the inclusion of revenue bonds issued by special districts using the bond rating test, will allow most UST-owning governments to demonstrate financial responsibility without the need for an additional financial test targeted specifically at special districts.

Update of Worksheet Test Using 1987 Census of Governments

Although its basic features have not been modified, the Agency has updated the worksheet test using the 1987 Census of Governments. The procedures used to conduct the new analyses were the same as for the proposed rule, as documented in the preamble to the proposed rule and the background documents to this rulemaking, and as summarized below.

Starting with 78 different financial ratios and variables commonly used in financial analysis, the Agency used a statistical technique called "factor analysis" to group the variables. Factor analysis serves two purposes. First, it identifies underlying characteristics, or factors, that differentiate between the members of a population (in this case, between different counties, municipalities, and townships). Second, it tells how much of the difference (the "percent of variance explained") between the members of the population is accounted for by each factor. The Background Document contains a more detailed explanation of the statistical analyses performed, including the factor analysis.

The factor analysis identified a total of 15 factors that distinguish between local government entities. Based on its review of the results of the factor analysis, the Agency identified six factors that (1) captured the variation in financial performance of local governments and (2) appeared appropriate for the UST financial test. As with the proposed worksheet test, the final worksheet test includes the following six factors: (1) Debt burden, (2) funds coverage, (3) outlays per capita, (4) funds per capita, (5) local coverage, and (6) revenues to expenses. In selecting the factors and variables to be included in the worksheet test, however, the Agency rejected size, because the Agency did not wish to exclude financially strong smaller local government entities simply because of size.

After selecting the factors to be represented in the worksheet, it was necessary to select the specific ratios to represent the factors. In choosing ratios, the Agency wished to (1) keep the total number of ratios to a manageable level, while (2) retaining as large a number of specific indicators as feasible. The final worksheet uses nine ratios, which include the variables (1) debt service, (2) total revenues, (3) total expenditures, (4) population, (5) total funds, and (6) local revenues. The ratios selected and the factors that they represent are presented below.

Factor 1-debt burden: debt service to total revenues.

Factor 2-funds coverage: total funds to total revenues; total funds to total expenses.

Factor 3-outlays per capita: total revenues per capita; total expenses per capita.

Factor 4-funds per capita: total funds per capita; debt service per capita. Factor 5-local coverage: local revenues to total revenues.

Factor 6-revenues to expenses: total revenues to total expenses.

EPA found that, in general, the same ratios included in the proposed worksheet test were important in the factor analyses of both the 1982 and 1987 Census of Governments data. There is, however, one change to the worksheet test ratios as a result of the updated factor analysis. Factor 5, "local coverage", is now represented by the ratio of local revenues to total revenues rather than the ratio of local revenues to current expenses. The factor analysis of 1987 Census of Governments data found that the ratio of local revenues to total revenues was very highly correlated with Factor 5, while the ratio of local revenues to current expenses was correlated less highly and was also correlated with several different factors. The preamble to the proposed rule provides a detailed description of the importance of each of these factors. One other minor addition to the final test is inclusion of payments for retirement of debt principal (not just interest payments) in the calculation of total expenses. This was inadvertently omitted from the proposed rule. (EPA has modified the parameters of the test to reflect the revised definition of total expenses.)

Together, these factors provide a balanced view of the stability and financial strength of a local government entity. The Agency does not believe that any single factor or variable can provide a sufficient indication of overall financial stability. Specifically, EPA does not believe a focus on funds alone, without adequate safeguards, would provide as good an indication of the ability of local government entities to provide financial assurance for an UST release.

These factors serve to achieve the Agency's goal of identifying and eliminating those local government entities that have overall financial characteristics that are in the bottom fraction of all local government entities, and that may, therefore, be at sufficient risk of experiencing financial distress that would prevent them from meeting their UST obligations.

As described at proposal, in developing the worksheet the Agency determined that performance on the specific ratios selected to represent the six factors should be standardized so that all ratios are placed on an equal basis. This is done by calculating the "z-score" for each of the ratios in the test. The z-score of an individual ratio is calculated by first subtracting the mean, and then dividing by the standard deviation:

z = (ratio-mean) / (standard deviation)

The distribution of the z-scores will always have a mean of 0 and a standard deviation of 1, thereby placing each variable in the index on a common level. To calculate a single index value, the z-scores are then weighted and added together; the weights are based on the percentage of variance explained by the underlying factors.

Selection of the Final Threshold Value

Having updated the financial index, the Agency then examined different threshold levels to determine a cut-off for selecting those local governments that have fiscal characteristics adequate to demonstrate financial responsibility to meet UST obligations. As described in the preamble to the proposed rule, EPA evaluated the impacts of a $1 million release to determine an appropriate threshold for allowing local governments to demonstrate financial responsibility through the worksheet test. In selecting a threshold, the Agency was guided by two important considerations: (1) most local governmental entities are expected to be able to meet their financial obligations under Subtitle I, so a cut-off threshold in the lower range (i.e., 1 to 30 percent) is appropriate, and (2) local governmental entities on the margin of the selected threshold should clearly be able to pay the emergency response and corrective action costs of an average UST release.

For purposes of the evaluation, EPA assumed that the release costs would be financed by a mortgage-type loan over a 20 year period at an interest rate of 10 percent. This interest rate is meant to be illustrative; local governments may be able to borrow at rates lower than 10 percent. Under a mortgage-type loan, repayment is made in equal annual installments consisting of both interest payments and principal repayment. The annual payment of a $1 million loan over 20 years at an interest rate of 10 percent is $117,459; the first year's payment consists of $100,000 interest and $17,459 principal repayment.

To evaluate whether a -debt of $1 million would be too burdensome, the Agency considered the post-release performance on the nine ratios used to develop the index. The Agency paid specific attention to two financial parameters that financial institutions regularly use to evaluate prospective debtors: Debt service capability and accumulated funds. The Agency felt that it is important to consider the potential debtor's debt servicing capability because excessive debt would require excessive funds for debt servicing, which could result in a negative cash flow (expenditures greater than revenues) for weak debtors. Continuous negative cash flows increase the risk of financial instability in the short run and financial insolvency in the long run. It is important to consider the amount of accumulated funds available to a prospective debtor because a reserve of accumulated funds provides an extra "cushion" for those emergencies when routine cash flows are disrupted as a result of unforeseen circumstances. As long as a local government that is on the margin of the cut-off threshold being evaluated can demonstrate that it can service its debts and has a "cushion" of accumulated funds for emergencies, the Agency feels comfortable that it will be able to perform its routine business when faced with an UST release.

In its evaluation, however, the Agency did not use a precise yardstick for evaluating the impacts of a $1 million release. It is the Agency's belief that proposing a cut-off threshold that is applicable to the majority of local governments with diverse size, demographic, and financial characteristics is more a matter of informed judgment than one of precise measurement.

Impacts were evaluated on the bottom 30 percent of all general purpose local governments in the 1987 Census of Governments with data sufficient to calculate the index score (11,487 governments). For each government, the following adjustments were made to 1987 financial performance in accordance with the definitions of terms used in calculating the index:

Total expenses were increased by $117,459 (total incremental debt service);

Current expenses were increased by $117,459 (total incremental debt service);

Total debt was increased by $982,451 (loan amount of $1 million minus first-vear principal repayment);

Total funds were reduced by $117,459 (total incremental debt service); and

Debt service was increased by $117,459 (total incremental debt service).

In essence, the evaluation was made as if the release had been incurred in 1987 and reflected in end-of-year financial data, with no adjustments made by the local government to redirect funds or to increase revenues.

After adjusting the financial values, each of the nine ratios in the index test was recalculated. Impacts were examined by looking at the "marginal" local governments at each threshold in one percent increments. That is, to evaluate the effects of selecting a threshold of -6.425 (the index value exceeded by 95 percent of all general purpose local governments), EPA examined the 383 local governments scoring between -6.425 and -6.043 (the index value exceeded by 94 percent of all local governments). The remainder of this discussion presents results of the "post-release" ratios for each of five different threshold levels: -6.425, -4.937, -3.990, -3.242,and -2.586. Details of the results are provided in the Background Document supporting this rule.

It should be noted that no attempt was made to weight the potential impacts in terms of the likelihood of UST ownership. That is, although only about 2,764 of the 26,189 general purpose local governments serving fewer than 2,500 residents are believed to own USTS, the release costs were imposed on all local governments. [EPA, "Economic Impact Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks, November 1992.] Consequently, the average impacts shown exaggerate the actual impacts likely to occur. (Nevertheless, an individual government experiencing an UST release may experience the full effects assumed in estimating the average impacts.) Also, the results assume that the local governments make no efforts to mitigate the financial impacts, either through increasing taxes and fees or reducing other expenditures.

Because the index ranks local governments in terms of a smooth array, there is unlikely to be a single value at which clear differences in performance appear. Instead, an evaluation of impacts is likely to show increasing performance and ability to accommodate the costs of an UST release with increasing threshold value.

Evaluation of Threshold of -6.425.

The marginal local governments meeting a threshold of -6.425 (those between the fifth and sixth percentiles on the index test) have an average post release fund balance of about $3,052,000 and a median post-release fund balance of about - $49,000. [A threshold value set at the 5 percentile would exclude the local governments with index values in the lowest five percent and would include the remaining 95 percent. A threshold value set at the 10 percentile would be more stringent-it would exclude the local governments with index values in the lowest 10 percent, and allow only those local governments with index values in the upper 90 percent to pass the worksheet test.] [The median value is the value for which half of the local governments have a higher value, and half have a lower value.] About 62 percent of the marginal local governments have a negative fund balance, with the median of total funds per capita equal to -$46. The median debt service per capita is $167. The median ratio of local revenues to total revenues

equals 32 percent. For the median local government, total revenues are about 47 percent of total expenditures.

Evaluation of Threshold of -4.937.

With an increase in threshold to -4.937 (corresponding to the 10 percentile value), the average post-release fund balance of the marginal local governments is $1,673,000 and the median post-release fund balance increases to -$34,400. The percentage of local governments with negative cash balances improves to about 56 percent. The median ratio of total funds per capita improves marginally to -$25. The median annual debt service per capita decreases to $131. The median ratio of locally derived revenues to total revenues increases to 40 percent, whereas the median ratio of total revenues to total expenses increases slightly to about 49 percent.

Evaluation of Threshold of -3.990.

When the minimum score is changed to -3.990 (corresponding to the 15 percentile value), the average post release fund balance is $4,180,000 and the median fund balance decreases slightly to about -$35,000. The percentage of local governments with negative fund balances increases slightly, to about 58 percent, while the median ratio of funds per capita improves slightly to -$24. The median ratio of debt service per capita decreases to $127. The median ratio of local revenues to revenues increases to 47 percent, whereas the median of total revenues to total expenses decreases slightly to 48 percent.

Evaluation of Threshold of -3.242.

At a threshold of -3.242 (corresponding to the 20 percentile value), the average post-release fund balance is $5,693,000 and the median post-release fund balance increases to about - $20,000. The percentage of local governments with negative fund balances decreases to 55 percent, while the median fund balance per capita increases to - $14. The median ratio of debt service per capita decreases to $119. The median ratio of local revenues to total revenues increases to 52 percent, whereas the ratio of total revenues to total expenses remains steady at 48 percent.

Evaluation of Threshold at -2.586.

At a threshold of -2.586 (corresponding to the 25 percentile value), the average post-release fund balance is $6,651,000 and the median post-release fund balance improves to about - $15 000. The percentage of local governments with negative fund balances decreases to 52 percent. The median ratio of fund balance to population improves to $10. The median value of debt service per capita increases slightly to $123. Local governments show increasing coverage of their expenses, including an increase in the median ratio of local revenues to total revenues to 57 percent and in the median ratio of total revenues to total expenses to about 54 percent.

Analysis of Impacts on Households.

EPA has considered the impacts of tank closures that may be caused by the inability of local governments to demonstrate financial responsibility. EPA estimated the impacts on households of compliance with the financial responsibility requirements for the median size, marginal government at each threshold examined. EPA estimates that the median "marginal" general purpose government (by population) at the

5 percentile threshold serves approximately 1,011 residents, or 389 households. EPA's analysis of UST ownership patterns suggests that governments of this size own an average of 1.1 USTS. Based on an average present value cost per UST closure of $7,000, the residents would incur an estimated present value cost of $19.80 per household. [14 As discos in the EIA, the present value cost of closure includes the costs of closure associated with the technical standard3 (e.g., tank excavation and removal, product removal, and site assessment), plu3 the present value of the incremental co3t of fuel purchased at retail service stations, minus the present value of the expected cost of corrective action for UST releases if the USTs were not closed.] The present value of closure costs are estimated to range from $18-00 to $54.00 per household for residents served by median governments owning one to three USTS, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 10 percentile, the costs to governments required to close their USTs are estimated to be $15.81 per household. Costs may range from $14.37 to $43.11 per household for residents served by median governments owning one to three USTS, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 15 percentile, the costs to governments required to close their USTs are estimated to be $16.81 per household. Costs may range from $15.28 to $45-86 per household for residents served by median governments owning one to three USTS, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 20 percentile, the costs to governments required to close their USTs are estimated to be $14.95 per household. Cost may range from $13.59 to $40.78 per household for residents served by median governments owning one to three USTS, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 25 percentile, the costs to governments required to close their USTs are estimated to be $13.90 per household. Costs may range from $12.64 to $37.91 per household for residents served by median governments owning one to three USTS, respectively.

These estimates tend to exaggerate the costs per household, because they use the total estimated aggregate cost over a ten-year period. Consequently, they represent the cost to households if the entire cost associated with closing USTs were incurred and levied in a single year, rather than paid out over time.

Summary. Based on its review, the Agency has concluded that there are significant improvements in the "postrelease" financial conditions of governments as the threshold is increased to about the 10 percentile, modest improvements as the threshold is increased from about the 10 percentile to the 20 percentile, and further increases beyond the 20 percentile. Because the extent of the increases from the 10 to the 15 percentile is minor, the Agency has determined that a threshold level of 10 percent provides adequate safeguards, and is consistent with statutory intent.

3. Governmental Guarantee (§ 280.106)

In today's rule, EPA is providing for the use of a guarantee mechanism for governmental entities. This mechanism, although not strictly a "self-test" mechanism, provides local government entities with a financial assurance mechanism comparable to the corporate guarantee allowed for private owners and

operators of USTS. To be eligible to act as a guarantor, a local government entity must pass the bond rating or worksheet test.

The governmental guarantee differs in several respects from the current corporate guarantee. Under the governmental guarantee, local governments would be allowed to choose between a guarantee with or without a standby trust requirement. Under the corporate guarantee, firms are required to use a standby trust. If a local government chooses the governmental guarantee without the standby trust option, it is required to pay for corrective actions as needed and as directed by the implementing agency. Under the standby trust option, local governments will be required to fund a separate trust fund to the full amount of coverage upon discovery of a release. Again, the Agency's decision to allow local governments the option of a guarantee without the standby trust fund is based on local governments' history of meeting obligations and on their ability to consistently raise revenue through taxation. In addition, the governmental guarantee requires that the local governments entering into the agreement demonstrate a 4 4 substantial governmental relationship." This parallels the requirement in the corporate guarantee for a "substantial business relationship," while recognizing that the types of relationships between governments is fundamentally different than business relationships and that they are primarily based on common or overlapping constituencies.

The requirement of a "substantial governmental relationship" reflects two concerns of the Agency. First, EPA wishes to ensure that the guarantee contract is founded on a sufficient basis to be held valid and enforceable. Second, EPA seeks to avoid conflict with State insurance laws and regulations. The existence of a "substantial governmental relationship" should provide sufficient nonmonetary consideration to address these concerns.

One commenter supported the requirement for a substantial governmental relationship, stating that the governmental guarantee mechanism needs to be based on a substantial governmental relationship, and that the relationship should incorporate the full faith and credit of the guaranteeing agency.

One commenter asked whether, in States that allow intergovernmental risk pooling, the contractual relationship of a pool to provide safety and risk management services in addition to risk pooling would be recognized as a "substantial governmental relationship," thereby allowing existing pools to act as guarantors to their members. EPA does not believe that a risk pool should be allowed to operate as a guarantor, because the nature of the relationship is strictly monetary and does not necessarily involve a substantial governmental relationship. It should also be noted that risk pools can be included as compliance mechanisms on a state-by-state basis as state-required mechanisms.

Another commenter claimed that EPA should explicitly recognize the relationship between a "joint action agency" and its member publicly-owned utilities as a "substantial governmental relationship", thus allowing these entities to qualify for use of the governmental guarantee mechanism. The commenter reasoned that these agencies, not-for-profit entities created by State law to allow publicly-owned utilities to combine resources for various purposes, could include the provision of a guarantee of UST financial responsibility within their operation. EPA has concluded that because joint action agencies are nonprofit organizations and not governmental entities, they are not el ble to act as guarantors.

A guarantee is a promise by one party (the guarantor) to pay specified debts or satisfy the specified obligations of another party (the principal) in the event that the principal fails to satisfy its debts or

obligations. In the corporate guarantee, if the owner or operator fails to perform corrective action or satisfy third-party claims, the guarantor agrees to fund a standby trust from which the implementing agency will direct the payment of corrective action costs or third-party claims.

EPA believes that the guarantee mechanism would work well for governments, and is establishing two possible constructions for such a mechanism (discussed below). Using this mechanism, a municipality, for example, might obtain a guarantee from the State, a town might obtain a guarantee from the surrounding county or parish, or a special district might obtain the guarantee of the sponsoring local government entity. Guarantors must demonstrate that they are qualified to provide financial assurance by satisfying the bond rating test under 40 CFR 280.104, the worksheet test under 40 CFR 280.105, or the fully_funded fund balance test under 40 CFR 280.107.

Several commenters supported the inclusion of the governmental guarantee mechanism, although some also noted specific cases where the mechanism might not be applicable. Two commenters did not believe that the mechanism would be used by certain classes of government entities, arguing that special districts would be unable to obtain guarantees from local governments and that local governments would be unable to obtain guarantees from their State governments.

EPA believes that the guarantee is likely to be used primarily by governments with close and long-standing ties. The Agency emphasizes that the guarantee mechanism was developed to allow governments with common interests to cooperate to keep necessary USTs in operation. The mechanism is not intended to require any government to act as a guarantor. Nevertheless, if even a small number of governments are able to qualify using this mechanism, it will serve the purpose intended.

Commenters agreed that the guarantor should not be required to fund a standby trust, arguing that (1) a standby trust is not appropriate for local governments, given their strong history of meeting their financial obligations and their ability to raise revenue consistently, (2) a standby trust was unnecessary for guarantees among governmental entities, and would add unnecessary paperwork and administrative costs that were contrary to the Agency's goal of reducing the burden on local government, and (3) the governmental guarantee would not necessarily be similar to a corporate guarantee because of State-by-State differences in statutory restrictions. EPA agrees with the commenters and has allowed for use of a governmental guarantee with or without a stand-by trust fund.

One commenter stated that certification by a State Attorney General was necessary because some States could presumably prohibit or restrict the ability of of a municipal government to make such a guarantee. Another commenter supported the Agency's decision not to require a State Attorney General's certificate attesting to the legality of the governmental guarantee. The commenter agreed with the Agency that the added degree of certainty provided by this requirement was appropriate in the case of a corporate guarantee, but was unnecessary for guarantees among governmental entities, and would burden local governments with unnecessary paperwork and costs.

The Agency is not requiring certification by the State Attorney General prior to offering the guarantee. Local governments have strictly defined and enforced limitations on abilities to enter into contracts. These limitations are codified in State law and constitution and vary by State. The Agency believes that these restrictions imposed on local government entities should, in general, act as a sufficient check to

prevent local governments from entering into invalid guarantees, and that the nature and purpose of local governments will prevent the issuance of guarantees unless there is a clear governmental interest.

Because the Agency wants to avoid unnecessary paperwork and burden on the part of local governments, EPA intends to keep the rule as proposed. EPA encourages governments wishing to use the guarantee to seek clarification of their authority if they are unsure of whether they may issue guarantees.

EPA solicited comments on whether passing the fund balance test should qualify governmental entities to act as guarantors. The sole commenter on this issue stated that a government passing the fund balance test should qualify to act as a guarantor, assuming that State statute permitted a governmental entity to be a guarantor. After further review, EPA has decided that allowing governments using the fund balance mechanism to act as guarantors would be consistent with the overall approach taken in the development of the new e mechanisms. The Agency has, therefore, modified the proposed rule to allow the fully-funded fund balance mechanism to serve as the basis for a governmental guarantee.

Government Guarantee With Standby Trust

The first alternative governmental guarantee parallels the corporate guarantee, in that it must include a pledge to fund a standby trust in the event of failure by the UST owner or operator to pay corrective action or third-party liability claims. In today's rule, the guarantor must have legal authority to issue the guarantee. The Agency anticipates that most guarantees will be based on a clear and significant governmental relationship such as overlapping geographical boundaries, taxing or service constituencies, or shared impact from an UST release.

Government Guarantee Without Standby Trust Requirements

In a governmental guarantee without a standby trust requirement, the guarantor agrees to provide funds for corrective action and third-party compensation as directed by the implementing agency on an on-going basis, up to the limits of the guarantee. Rather than fully funding a standby trust, the guarantor would make the payments directly as funds are required.

The current corporate guarantee requires the establishment of a standby trust, and requires a guarantor to fund the trust (1) after notification that a guarantee will be canceled if a release has been detected and no alternate coverage has been obtained, or (2) when a release has occurred and the owner or operator has failed to perform corrective action or payment of a settlement or judgment for third-party liability. The corporate guarantee requires funding of a standby trust for several reasons. First, the issuance of a guarantee is founded on the existence of a substantial business relationship; such relationships are subject to change over time. Second, the underlying mechanism used by the guarantor depends primarily on the existence of readily liquidated assets, rather than ongoing financial strength. Consequently, the Agency wishes to insure that the funds are made available before adverse events can occur. Third, the Agency wishes to reduce the potential delay involved in enforcing first against the UST owner or operator, and then against the guarantor for payment.

These concerns are mitigated under the governmental guarantee. First the agency believes that the governmental relationships that are likely to lead to the issuance of guarantees will be founded on geographical proximity and service to a common constituency. These relationships are not subject to rapid change. Second, the Agency recognizes in this rule that local government entities, as a class, have

greater financial stability than private corporations. It is, therefore, less critical to obtain funds immediately to pay for contingent liabilities (such as payment of third-party claims) that may not occur. Third, the Agency recognizes the difference in purpose between governmental and private organizations, specifically the role of local governments to serve the public. This service orientation may make local governments more likely to fulfill their financial obligations. Consequently, the Agency has less concern that the absence of a standby trust will result in a delay in securing cleanup actions by local government owners or operators. With its modified structure, the mechanism permits a "pay-as-you-go" approach. These provisions allow a guarantor to fund corrective action costs as they are incurred, instead of requiring the guarantor to fund the standby trust fully in advance of anticipated expenditures.

Commenters on this issue agree that the governmental guarantee provides adequate safeguards without the need for creation of a standby trust fund.

4. Maintenance of a Fund Balance (§ 280.107)

Under this option, the UST owner or operator would create a dedicated fund specifically for UST releases or general catastrophic events. The dedicated fund must meet the local Government's aggregate financial responsibility requirements (or such amount needed to fulfill gaps in financial responsibility from other mechanisms used in combination with the funded balance). Use of the fund balance mechanism requires local governmental entities to establish irrevocable trusts pledged to use for UST response or use in responding to catastrophic events, including UST releases.

Control of the fund would continue to rest with the local government entity. Control and accounting for these funds would be administered following the standards appropriate for other insurance trusts already maintained by local government entities, including pension trusts and worker's compensation funds.

The fund balances must be held as cash or investment securities that will be available in the event of an UST release and must be irrevocably dedicated to use for UST response or for responding to catastrophic events, including UST releases. As discussed below, the Agency is providing three alternatives that may be used in establishing the fund.

Based on an analysis of Census data and data on Minnesota cities, the Agency believes that the fund balance mechanism is unlikely to be used widely by general purpose governments, because few who require an alternative mechanism to the bond rating and worksheet tests have adequate funds. [State Auditor of Minnesota, "Report of the State Auditor of Minnesota on the Revenues, Expenditures, and Debt of the Cities in Minnesota for the Fiscal Year Ended December 1987," November 1988.] The fund balance mechanism may prove more useful for special districts and school districts that may not be able to use the worksheet test. The inclusion of a fund balance mechanism as a financial assurance option should increase the flexibility provided owners and operators in demonstrating financial assurance. Today EPA is providing the following three sub-options, any one of which may be used to demonstrate financial responsibility.

Fully-Funded Dedicated Fund

Under this alternative, the local government would establish a separate fund, dedicated to payment of UST corrective actions and third-party liability claims, in the amount of its aggregate financial responsibility requirements. The fund balance must be established as an irrevocable fiduciary or trust

account, with proceeds invested in cash or readily marketable securities. This mechanism would be the most similar to the corporate trust fund option (§ 280.102 of subpart H) and is intended to be similar to "trust accounts" and "insurance accounts "held by local governments for pensions and insurance. Although there are currently no restrictions to local governments using the trust fund option under § 280.102, the fully-funded dedicated fund option would not require the local government to establish a third-party trustee for the fund. Instead, the fund would be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

Catastrophic Events Contingency Fund

Under this option, a municipality would be able to use a dedicated fund used for general emergency response and third-party liability (e.g., flood relief, hurricane relief, or other environmental cleanups) as evidence of UST financial responsibility. In the proposed rule, EPA required that a fund used to cover both UST costs and other emergency costs incurred by local governments be funded in the amount of $10 million to qualify as a mechanism for demonstrating financial responsibility. Numerous commenters requested that EPA reduce the required size of a combined emergency response fund. EPA conducted a limited survey of nine governments to determine the prevalence and typical size of emergency response funds. [Memorandum from James Dickson, Rebecca Holmes, and William Driscoll, ICF Incorporated, to Andrea Osborne, EPA Office of Underground Storage Tanks, "Local Government Emergency Response Funds," October 13, 1992.] The Agency found that most funds are relatively small (less than $5 million). Based on those findings, EPA has reduced the required size of a combined emergency response fund to $5 million. In making this determination, the Agency considered that, when a local government draws upon its emergency response fund, it must replenish the fund in order to be prepared to meet the costs of the next emergency that may arise. It should be noted that local governments may establish a dedicated fund equal to their aggregate annual UST liability if doing so requires sequestering less money.

A combined fund balance of $5 million will equal or exceed five times the aggregate financial assurance level for most local government entities, based on the number of USTs owned and operated. This requirement is analogous to the requirement in the corporate self-test that firms must have tangible net worth equal to at least ten times their aggregate financial assurance level. The fund balance must be established as an irrevocable fiduciary or trust account, with proceeds invested in cash or readily marketable securities. The fund may be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

In establishing this option, the Agency recognizes that States often permit local governments to administer fiduciary and trust accounts, such as pension funds and workers' compensation funds, while requiring private companies to establish thirdparty trustees or to subscribe to State-maintained funds. EPA believes the distinction between local government entities and private companies reflects differences in State oversight (e.g., State requirements that local government entities submit budgets or financial statements), differences in purpose (i.e., companies exist to make profits, whereas local government entities are created to provide a public service), and differences in financial stability.

The Agency is including this option to allow municipalities flexibility in establishing emergency response funds while ensuring that adequate funds are available to respond to an UST release. Although the Agency lacks data on municipal expenditures for general emergency response and third-party liability, it believes the $5 million requirement will assure the availability of funds for any number of UST releases

should other catastrophic events occur in the same year. Thus, although the fund would not be solely dedicated to responding to UST releases, the required fund balance of five times the requirement for a dedicated UST fund will assure adequate resources to respond to an UST emergency. (UST clean-up costs currently average between $100,000-$l50,000.)

Three commenters criticized the $l0 million fund balance that would have been required in the proposed rule, arguing that (1) the funding level required by the catastrophic events contingency fund was too inflexible for local governments to use the option, (2) only a handful of existing utility funds that are or can be used to respond to releases currently meet the $10 million requirement, and (3) a fund balance level of $10 million would be infeasible for most transit systems. Some commenters argued that a lesser amount (e.g., three times the requirement for a dedicated UST fund) would be adequate for a general catastrophic events contingency fund.

The Agency emphasizes that the combined fund balance alternative was developed as an administrative convenience for those governments that already maintain large contingency funds. The Agency's primary concern is to ensure that funds will be available to meet the costs associated with UST releases. The Agency notes that a government able to reserve only three times the required amount (i.e., $3 million), as suggested by one commenter, could establish a $1 million UST emergency response fund and a separate $2 million catastrophic events fund. If commenters are correct that a combined $3 million fund would be adequate to meet all requirements of the catastrophic events fund while reserving the $1 million necessary to demonstrate financial responsibility, then a $2 million fund reserved for catastrophic events other than UST releases would be adequate to meet those costs. As discussed below, the Agency has determined that local governments have minimal financial incentives to commingle funds designated for UST-related costs with other funds.

Incrementally Funded Trust Fund Combined With Unused Bonding Authority

Under this option, a municipality would be required to fund a dedicated fund for UST releases incrementally, making payments equal to at least one-seventh of the aggregate liability each year. A municipality using this alternative must fully fund the trust fund by the beginning of the seventh year. The fund balance must be established as an irrevocable fiduciary or trust account, with proceeds invested in cash or readily marketable securities. The fund may be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

In addition, until the dedicated fund is fully funded, the municipality is required to demonstrate the authority to issue a specified amount of general obligation bonds to respond to an UST release. The authority may consist of either a voter-approved bond referendum specifically targeted for payment of the costs associated with an UST release, or certification from the State Attorney General that the government has the authority to issue the bonds without voter approval and that the proceeds of these bonds can be used to respond to an UST release. The Agency is requiring the unused bonding authority to ensure that municipalities have resources to respond to UST releases while allowing them to develop a dedicated fund over time.

The Agency believes this mechanism is appropriate for local government entities, but not private companies, for several reasons. First, local governments operate under statutory and constitutional limitations on debt issuance. By requiring prior voter approval or certification that such approval is not

necessary, the Agency is relying on safeguards that do not exist for private companies. Second, local government entities exist to provide public services, whereas private companies do not. Third, local government entities have historically been much more stable than private companies. Fourth, local government entities have an ability to levy taxes or raise fees and charges that is not available to private companies.

In developing this option the Agency learned that local government entities will frequently obtain a bond referendum before incurring costs related to specific projects, such as construction projects, and will delay the issuance of the bonds until the funds are needed. The Agency was also informed that New York law allows local governments to issue debt to pay certain obligations without passing a bond referendum. The Agency is also considering that the Tax Reform Act of 1986 penalizes local government entities for investing the proceeds of tax exempt bond issues. Thus, the Agency recognizes that there is both a precedent for having unused bonding authority and an incentive not to issue bonds unless necessary for actual payment of debts.

Commenters support the option of allowing use of a funded balance. One commenter noted that the availability of this option would give public entities greater flexibility in meeting their responsibilities under the financial responsibility requirements. Another commenter favored an incrementally funded trust fund as a possible financial assurance mechanism for local governments.

Two commenters identified particular situations in which local governments could be prohibited by State law from using a funded balance as a financial assurance mechanism. The Agency reiterates that it has provided multiple financial responsibility mechanisms to increase the options available to local governments so that each governmental entity can choose the mechanism most appropriate to its needs. EPA believes that State laws prohibiting the use of any of the mechanisms is consistent with the State Program Approval process, which allows States to set more stringent standards. EPA recognizes that limitations imposed by some States may act to disallow some or all of the mechanisms provided in the rule.

One commenter requested the Agency to clarify that an order or resolution of the governing body of a publicly-owned electric utility satisfies the requirement for an "order dedicating the fund." The commenter noted that this governing body would be the same entity which, for the vast majority of publicly-owned utilities, sets customer rates (e.g., a board of directors, commissioners or supervisors, or a city council).

EPA has determined that the legal authority of a municipal utility or other municipal corporation is specified in the State charter establishing the municipal corporation. Therefore, a dedicated fund for UST corrective actions may be established through a local government order by any municipal utility, or other municipal corporation, or special district whose State charter grants the authority to issue an order establishing such a fund. In their State charters, municipal corporations are granted express powers to conduct their primary business, and implied powers to carry out those

actions that are incidental and essential to the conduct of their business. Because meeting statutory and regulatory requirements are both incidental and essential to the operation of a municipal utility, it would appear that, in general, the board of directors of a municipal utility would have the legal authority to establish an UST trust fund. Because the specific authorities of municipal utilities may vary from State to

State, however, and because within a State, each charter may be unique, it may be appropriate for the board of a municipal utility to obtain the advice of legal counsel before voting to establish a dedicated fund for UST corrective actions. The Agency notes, for example, that public comments on the proposed rule claim that a New York statute expressly prohibits the creation of emergency response funds by school districts and Boards of Cooperative Education.

One commenter requested clarification of the requirement that dedicated funds cannot be commingled or otherwise used in normal operations, presumably because the term "normal operations" is not defined or described in the rule or preamble. The commenter also points out that, while the commingling requirement appeared in the preamble, it was not written into the rule itself.

EPA's intent in allowing local governments to establish a dedicated fund for UST corrective actions was to reduce the burden on and cost to local governments by not requiring a third-party trust fund. Whereas a third-party trust fund was authorized for use by non-governmental owners and operators, a third-party requirement for local governments was not considered necessary because of the experience of local governments in establishing and administering such funds. Nevertheless, EPA is concerned that funds reserved for meeting the costs of corrective actions and third-party liabilities associated with UST releases be easily identifiable and readily available.

On the issue of commingling funds, EPA has found that the investment options typically available to local governments offer minimally higher returns with larger deposits. Moreover, deposits larger than $100,000 would not be insured by the Federal Deposit Insurance Corporation, exposing a commingled fund to the risk of bank failure unless alternative insurance were obtained (e.g., from an agency or State government). Commingling funds may not be practical for local governments that seek to obtain higher returns on deposits by having a bank's trust department actively manage their assets, because the timing of cash needs from an operational fund and from a trust fund are so widely divergent that a prudent manager would select a different mix of investment instruments for the two funds, and consequently would establish separate funds.

Because of the minimum income gains potentially available through commingling funds, as well as insurance and asset management considerations, EPA has concluded that the potential gains from commingling accounts do not outweigh the associated costs. EPA has modified the language in the rule to reflect this concern: money held for the purposes of demonstrating financial responsibility must be held in a separate account dedicated either to UST responses in particular or to emergency and catastrophic events in general.

5. Combinations of Mechanisms

The mechanisms being provided today may be used by themselves or in combination with other mechanisms. Local governments qualifying for use of the bond rating or worksheet test mechanisms are not required to obtain additional evidence of financial responsibility, but may do so if they so choose. A guarantee or dedicated fund balance may be used to demonstrate financial responsibility for amounts not assured by other mechanisms.

B. Reporting by Owner or Operator

Each government demonstrating financial assurance using the mechanisms promulgated today must notify the implementing agency at the times specified in § 280.110.

C. Recordkeeping

Owners and operators are required to maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subpart until the tank has been properly closed or, if corrective action is required, until corrective action has been completed and the tank has been properly closed as required by 40 CFR Part 280, Subpart G. In general, the recordkeeping requirements for the mechanisms being promulgated today are equivalent to those required for the mechanisms promulgated in the October 1988 rule. Because local governments are not uniformly required to submit data to third-party agencies, however, local governments using the worksheet test must maintain a copy of the underlying financial statements or other data used to support the use of the worksheet test. Also, local government owners and operators must maintain evidence of the authority that is used to establish dedicated funds for use in responding to UST releases. An owner or operator using the mechanisms promulgated today is required to maintain at his UST site or his office the following types of evidence for mechanisms used to demonstrate financial responsibility:

Bond Rating Test. Each local government using the bond rating test must maintain

(1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the eligibility to use the bond rating test, and

(2) Originally signed and dated transmission from Moody's or Standard & Poor's, showing the amount, the type of bond and the bond rating assigned.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Worksheet Test. Each local government using the worksheet test must maintain

(1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the accuracy of the calculations and the underlying data,

(2) A copy of the completed worksheet, and

(3) A copy of the underlying financial data (e.g., year-end financial statements) used to compute the worksheet.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Guarantee. Each local government using the guarantee must maintain

(1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the use of the guarantee,

(2) An originally signed and dated guarantee contract, showing the addresses of all tanks for which financial assurance is guaranteed, the nature of the guarantee (third-party liability, corrective action, or both), and the limits of the guarantee,

(3) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) of the guarantor certifying (1) the eligibility to use the bond rating test (unless the guarantor is a State), (2) the eligibility to use the worksheet test (unless the guarantor is a State), or (3) the existence of a dedicated UST or emergency response trust fund meeting the requirements of § 280.107,

(4) For guarantors other than States, a copy of the documentation supporting the bond rating or worksheet test, including (a) a copy of the originally signed and dated transmission from Moody's or Standard & Poor's to the guarantor, showing the issue size, the type of bond and the bond rating assigned, or (b) a copy of the completed worksheet and underlying financial data, and (5) Originally signed duplicates of the standby trust funds worded as specified in this rule for guarantees, surety bonds, or letters of credit (as necessary).

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Fund Balance. Each local government using the fund balance mechanism must maintain

(1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the use of the fund balance mechanism,

(2) Originally-signed letter certification from the comptroller or treasurer worded as specified in the rule and letters or certificates from municipalities regarding coverage by municipal funds or other municipal assurances,

(3) A copy of the authorizing statute or resolution that clearly restricts use of the funds to the designated purposes, (4) A financial statement showing the balance of cash or liquid investments in the fund, and

(5) A copy of either (a) the authorized bond resolution in an amount equalling or exceeding the unfunded portion of the fund or (b) State Attorney General's opinion showing that such authorization is unnecessary.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

One commenter asserted that the proposed recordkeeping provisions were generally reasonable and did not represent an undue hardship to local government entities. Another commenter stated that the recordkeeping requirements of the proposed rule would be burdensome. The commenter indicated that requiring local government entities to be able to present evidence of financial capability upon request would be a suitable substitute for the proposed recordkeeping and reporting requirements.

The Agency emphasizes that there is no routine reporting requirement, but that the need to determine compliance with the requirements on an annual basis is considered to be a fundamental part of the rule. Records are to be retained by local governments and must be provided only when (1) a release occurs, (2)

the local government becomes ineligible for a financial responsibility mechanism that it is using, (3) the local government installs a new tank, or (4) records are requested by the implementing agency.

D. Bankruptcy or Other Incapacity of the Owner or Operator

Any owner or operator named as a debtor in voluntary or involuntary bankruptcy proceedings (under Title 9 of the U.S. Code) is required to notify the Regional Administrator or the implementing agency within 10 days after commencement of such proceeding. In addition, any guarantor or indemnitor is required to notify the owner or operator by certified mail within 10 days after commencement of a voluntary or involuntary proceeding under Title 9 (Bankruptcy) of the U.S. Code that names such guarantor or indemnitor as debtor. Any owner who demonstrates financial responsibility using a third-party mechanism will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of a provider to issue the mechanism relied upon (e.g., guarantee, indemnity contract, surety bond, insurance policy, risk retention group coverage policy, letter of credit, or State-required mechanism). Finally, municipalities are required to notify the Director of the implementing agency within 30 days of being notified that a provider of financial assurance (e.g., a guarantor) has declared bankruptcy or is otherwise incapable to cover assured costs, unless they are able to obtain alternative coverage.

V. Economic Impact Analysis

In conjunction with this rule, the Agency has performed three impact analyses: an Economic Impact Analysis, a Federalism Assessment, and a Paperwork Reduction Act estimate. Summaries of these analyses are presented below:

A. Economic Impact Analysis

This section describes the methodology and results of an Economic Impact Analysis of the rule. EPA estimates that about 2,300 local governmental entities will be able to demonstrate financial responsibility using the mechanisms promulgated today that would not be able to demonstrate financial responsibility using only the mechanisms allowed by the October 1988 rule. The Agency estimates that the use of these mechanisms will result in approximately 5,700 fewer USTs being closed because of a lack of financial assurance. The Agency estimates the total annualized cost savings to be about $4.5 million, with a present value of about $32 million over ten years, in constant 1987 dollars.

1. Compliance With Executive Order 12291

Executive Order 12291 (46 FR 13193, February 19, 198 1) requires that a regulatory agency examine the potential impact of regulations. The regulatory agency must determine whether a new regulation will be "major." If it is, the regulatory agency must conduct a regulatory impact analysis (RIA). A major rule is defined as one that is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in the costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has analyzed the local government financial responsibility rule. Based on this analysis, the Agency has concluded that this regulation will have an annual effect of less than $100 million. The rule is expected to reduce costs to the regulated community; these reductions are estimated to be less than $100 million on an annual basis. Accordingly, the regulation being promulgated today is not a major rule, as defined by Executive Order 12291. Nonetheless, the Agency is interested in the potential economic effects of the regulation and has developed an Economic Impact Analysis (EIA) to examine them. The following four sections summarize the results of the EIA: Section 2 describes the regulated community affected by this regulation; Section 3 presents some of the methods and assumptions used to produce the EIA; Section 4 discusses the regulation's cost impacts; and Section 5 describes its environmental impacts.

2. The Affected Community

EPA estimates that approximately 25,000 local government entities own more than 62,000 petroleum-containing USTS. For the purpose of this analysis, the regulated community is divided into eight categories: very large, large, medium, and small general purpose governments (i.e., cities, counties, and townships); and very large, large, medium, and small special purpose districts (including, for example, independent school districts and water districts). General purpose governments were grouped according to population: very large governments serve more than 50,000 persons; large governments serve more than 10,000 and fewer than 50,000 persons; medium governments serve more than 2,500 and fewer than 10,000 persons; and small governments serve fewer than 2,500 persons. These population categories are the same categories used in other EPA economic impact analyses, and have been used here at the suggestion of one commenter.

For this analysis, school districts were categorized by estimated population, assuming that the enrollment of a school district is one-sixth of the total population. Other special districts, which do not always have well-defined populations, were grouped according to annual revenues: very large districts have annual revenues of more than $100 million; large districts have annual revenues of more than $5 million and less than $100 million; medium districts have revenues of more than $200,000 and less than $5 million; and small districts have revenues of less than $200,000.

Table 1 shows the estimated total number of governments in each category, the number of UST-owning governments in each category, and the number of USTs owned. (A summary of the method used to develop these estimates is provided below.)

TABLE 1. - PROFILE OF LOCAL GOVERNMENTS

Category	Number of entities	Number of entities owning USTs	Total USTs owned
Very large governments	1,360	1,360	13,813
Large Governments	4,351	3,643	5,126
Small Governments	26,189	92,764	42,921

Very large special districts	862	840	3,148
Medium special districts	12,558	6,617	9,399
Small special districts	26,480	1,360	13,813
Total	83,784	24,525	62,000

Source: EPA Analysis.

EPA estimates that 1,360 very large general purpose local governments own approximately 13,800 USTS, 4,350 large general purpose governments own approximately 9,580 USTS, approximately 7,000 medium general purpose governments own approximately 5,100 USTS, and more than 26,000 small governments collectively own fewer than 3,000 USTS. That is, most small governments are not estimated to own any USTS. EPA estimates that about 860 very large districts (including school districts) own about 3,100 USTS, approximately 4,900 large districts own about 17,000 USTS, about 12,500 medium districts own roughly 9,400 USTS, and more than 26,000 small districts own about 650 USTS. All very large local government entities are assumed to own at least one UST. The Agency used probability theory and an estimate of the total number of USTs owned by all UST-owning entities to calculate the percentage of large, medium, and small government entities that own USTS.

3. Assumptions and Methodology Used in the EIA

The analysis uses several key assumptions to estimate the costs and other impacts of this regulation:

- The baseline used to estimate incremental costs and economic impacts of the self-test rule is the cost of complying with the financial responsibility rule published on October 26, 1988. EPA assumes that local government entities will comply using the options available under the October 1988 rule in the absence of the alternative mechanisms. Local governments unable to use the financial mechanisms available under the October 1988 rule are assumed to close their USTS, in compliance with the regulations.

- Cost impacts were evaluated on an annualized basis. To develop annual costs for insurance and UST closure, EPA calculated the equivalent annual payment having the same "present value" as the cost estimates developed for the UST technical standards regulations, using a ten-year period and a real discount rate of 7 percent.

- The estimated number of USTs owned by local governments is based on a derived relationship between the annual revenues of local governments and the number of USTs owned.

- The 1985 "Summary of State Reports on Releases From Underground Storage Tanks" provides data on the percentage of releases occurring in places of different populations. -EPA assumes that release incidents are not biased towards places of different size and that the distribution of release incidents is the same as the distribution of USTs among local government entities, - The analysis assumes that there are about 62,000 local government USTS, as estimated in the financial responsibility rule published in October 1988.

- The analysis uses budget data obtained from the 1982 Census of Governments to develop a relationship between budget and population and then between budget and number of USTS. (EPA used population statistics and budgets from 1982 to develop relationships between UST ownership, population, and budget, because these data provided information consistent with the UST ownership data used in this report. Estimated ownership patterns were not updated to reflect 1987 data. First, the relationship between population and UST ownership was assumed to remain stable from 1982 to 1987. Second, the relationship between constant-dollar budgets and UST-ownership was also assumed to remain stable. Third, the estimates of total UST ownership are based on 1987 data.)

- All local governments using insurance or mandatory State assurance funds to meet financial responsibility requirements for corrective action and compensation of third parties in the baseline are assumed to continue to use those mechanisms to comply with the financial responsibility requirements, rather than using the mechanisms promulgated today.

- All other local government entities that qualify for financial responsibility using the new mechanisms are assumed to incur costs ranging from $75 (for the bond rating test) to $253 (for the guarantee) per government per year to develop and maintain the required records and reports.

- Because local governments that do not qualify for financial responsibility under the worksheet test are assumed to be unable to obtain insurance or otherwise demonstrate financial responsibility, the analysis assumes that they close their UST systems and purchase fuel from retail petroleum dealers.

EPA estimated the fraction of local government entities that will be able to demonstrate financial assurance under the promulgated rules by assuming that governments not able to obtain insurance and not required to use State mechanisms will use the least onerous method for which they qualify:

- Local governments able to obtain insurance under the baseline are assumed to do so, rather than use the mechanisms being promulgated today, in order to minimize their exposure t potentially large UST-related costs.

- Local governments in States with mandatory assurance programs are assumed to use them rather than the mechanisms being promulgated today.

- Local governments with outstanding issues of investment grade bonds in amounts greater than $1 million (about 87 percent of all governments with investment grade ratings) are assumed to use the bond rating test. Analysis of data on Minnesota cities suggest that virtually all cities with populations of more than 10,000 have investment-rated general obligation bonds, and that virtually n cities with populations less than 2,00 have such bonds.

- Local governments not eligible t use the bond rating test are assumed use the worksheet test, if they qualify The Agency used the 1987 Census of Governments to estimate the fraction governments with populations less t 200,000 or annual revenues less than $100 million (i.e., those that may not qualify to use the bond rating test) that qualify at the 10 percentile threshold.

- The Agency assumes that local governments with total fund balances greater than $4 million that do not qualify to use the worksheet test will establish a dedicated fund meeting the requirements. Data from the

1987 Census of Governments were used to estimate the percentage of governments having more than $4 million in funds e that would not qualify under the worksheet test.

- The Agency assumes that 90 percent of school districts unable to demonstrate financial responsibility will obtain guarantees from surround general purpose governments. This assumption is based on the assumption that education will be deemed to be sufficient importance that the general purpose governments served by school districts will act to insure that the USTs remain in operation.

- The Agency also assumes that half of all other special districts unable to otherwise demonstrate financial responsibility will be able to obtain guarantees from the general purpose governments served by the districts.

- All other general purpose governments and districts not able to demonstrate financial responsibility are assumed to close their USTs and purchase fuel from retail petroleum stations.

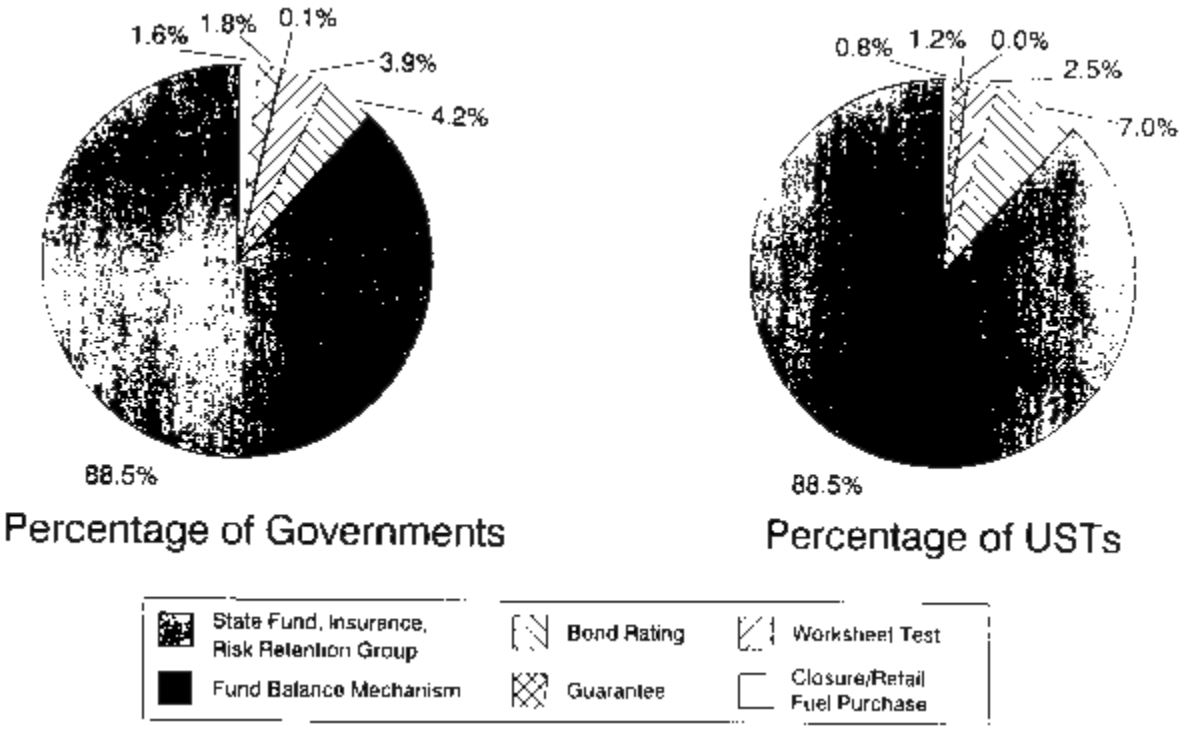
Figure 1 shows the estimated fraction of local governments using each financial assurance mechanism under today's rule. It should be noted that assumed availability of guarantees represents just one of many plausible outcomes. Other possible outcomes range from (1) all governments failing to obtain insurance or qualify using one of the self-test mechanisms will be able continue to operate their USTS, either by obtaining guarantees or by transferring ownership of their USTs to the State or to local governments able to demonstrate financial responsibility, (2) some other fraction of all governments without regard to purpose, will be able to obtain guarantees, or (3) no governments will be able to obtain guarantees. The EIA discusses the sensitivity of the results to alternative assumptions about the availability of guarantees.

Figure 1

Estimated Use of Financial Assurance Mechanisms

(Counties, Municipalities, Townships, School districts, and Special Districts)

[Percentages may not add up to 100 percent due to rounding]



[Source: EPA, "Economic Impact and Regulatory Flexibility Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks. " EPA Office of Underground Storage Tanks, 1992]

Table 2

Summary of Results of Economic Impact Analysis

	General Purpose Governments				Special Districts			
	Very Large	Large	Medium	Small	Very Large	Large	Medium	Small
Number of UST-Owning Governments	1,360	3,870	3,643	2,764	840	4,785	6,617	646
Response Under October 1988 Rule								
Number of Governments Demonstrating Financial Responsibility	1,259	3,452	3,249	2,447	778	4,269	5,902	568
Number of USTs Covered By Financial Responsibility	12,791	8,546	4,573	2,585	2,915	15,485	8,384	575
Number of USTs Closed	1,022	1,034	553	336	233	1,874	1,015	80
Annual Cost ($ millions)	2.2	1.6	1.0	0.4	0.7	2,7	1.8	0.0
Response Under This Rule								
Additional Governments Demonstrating Financial Responsibility	101	396	365	283	62	509	501	47
Additional USTs Remaining in Operation	1,022	977	517	298	230	1,856	715	47
Annual Cost Savings ($ millions)	1.0	0.7	0.5	0.1	0.4	1.2	0.7	0.0

[Source: EPA, "Economic Impact and Regulatory Flexibility Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks. " EPA Office of Underground Storage Tanks, 1992]

4. Cost Impacts

The cost impacts of the rule are measured as the difference between the costs of complying with the October 1988 financial responsibility rule and with this rule. Table 2 shows the estimated change from the baseline by type and size of local government.

The annualized total costs of complying with the October 1988 financial responsibility rule are estimated to be about $10 million, whereas the costs of complying with this rule are about $5.9 million. The rule, therefore, is estimated to result in an annual net savings of approximately $4.5 million. [The estimated costs for a municipal government using a state fund to demonstrate financial responsibility may not accurately reflect the true costs to society for providing state fund coverage. Most state funds impose a mandatory per gallon fee on all petroleum products used in the state. Thus, all users of petroleum products in the state share in paying the costs associated with the state fund.] Most of the savings result from fewer mandatory closures under the rule than in the baseline, with additional savings earned from the difference between wholesale and retail prices for fuel. [The only entities that save under the rule are those that would have closed their USTs in the baseline and choose the self-test under the rule and those entities that use a third party mechanism in the baseline (other than insurance and state funds) and the less

costly alternative mechanisms under the rule. Far more entities are in the former category than the latter.] EPA estimates that the average annualized savings per local government entity (irrespective of UST ownership) will be about $54, with an average saving of about $185 per USTowning government. Most of the total savings will be realized in the first year, because the revised compliance schedule requires that local governments without financial assurance close their USTs within one year of promulgation of this rule. The Agency estimates that very large general purpose governments will save about $1.0 million and very large special districts will save approximately $445,000 under the rule. Very large UST-owning governments are expected to realize savings of more than $700 each, or about 0.001 percent of their typical annual budgets. The Agency expects that all very large entities estimated to close their USTs in the absence of the rule will be able to demonstrate financial responsibility through the alternative mechanisms promulgated under today's rule.

Small general purpose governments save more relative to their budgets for two reasons: (1) The costs of closure are a larger percentage of their budgets; and (2) those entities with USTs spend proportionately more on fuel than medium and large entities and, therefore, save proportionately more by reduced fuel costs. [In general, small entities do not own USTS; the Agency estimates that fewer than 3,600 of the more than 50,000 small entities own USTS. EPA infers from this that those entities that do own USTs use them intensively, incurring fuel costs as high as seven percent of their annual budgets.] In the absence of the rule, EPA estimates that 85 percent of small governments and 90 percent of small districts would be unable to demonstrate financial responsibility and would be forced to close their USTS: under the rule, only an estimated one percent of small general purpose governments and five percent of small special districts are estimated to be forced to close their USTS.

5. Environmental Impacts

The rule has potential environmental impacts as well as economic impacts. As a result of the rule, more local governments may be able to demonstrate financial responsibility through the alternative mechanisms and more tanks may remain in operation. All local government USTS, however, are subject to the requirements established by the UST technical standards rule, which is designed to minimize the human health and environmental risks from underground storage tank operations. In addition, the rule requires local governments to demonstrate the ability to respond to UST releases to minimize potential environmental damages. EPA believes, therefore, that any negative human health and environmental effects resulting from the rule will be minimal.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires all Federal agencies to review the impact of their regulations to determine whether they will have a significant economic impact on a substantial number of small entities. If so, the Agency must prepare a regulatory flexibility analysis. As discussed in the economic impact analysis, EPA has determined that this rule will provide a net benefit to small local governments by reducing their costs of compliance with the financial responsibility provisions of Subtitle I. For this reason, the Agency has concluded that a regulatory flexibility analysis is not necessary.

Nevertheless, EPA, as part of its ongoing effort to be responsive to small entities affected by its regulations, has expanded its analysis of the economic effects associated with this rule. The additional findings support EPA's conclusions that local governments benefit from the mechanisms promulgated

today. The analysis shows, in fact, that small local governments receive an even greater benefit as compared with their larger counterparts.

The Agency estimates that this rule will result in a net savings for local governments of $4.5 million per year. Most of the savings realized by local governments will be due to a significant decrease in the number of UST closures. In developing this rule, the Agency has sought to reduce the impacts on all governments regardless of size. The worksheet test, however, was specifically designed to recognize that even small local governments may be able to demonstrate the requisite financial strength needed to pay for an UST release. Based on an analysis presented in the EIA, approximately 89 percent of all small general purpose governments (including 98 percent of small counties, 91 percent of small municipalities, and 87 percent of small townships) will be able to demonstrate financial responsibility using the worksheet test.

The use of the governmental guarantee is also particularly suited to small local governments, such as school districts, which often have a substantial governmental relationship with a nearby city or county. EPA has estimated that approximately 59 percent of small school and special districts will be able to obtain guarantees.

Overall, the proportion of USTs owned by small local governments which will be unable to meet the financial responsibility requirement drops from about 12 percent to 2 percent as a result of the additional mechanisms promulgated today.

EPA is also considering adoption of another rule which would provide even more flexibility to small local governments. As described in the Federal Register on December 23, 1991 (56 FR 66369), an option considered but not yet proposed would extend the financial responsibility compliance date to 1998 for certain facilities that meet Federal economic criteria. This rule would be designed to benefit the small, possibly rural local governments which provide essential emergency or community services and which may be most in need of an additional extension. Despite these efforts, the Agency recognizes that some small local governments may still have difficulty complying with the financial responsibility and other requirements for underground storage tanks. Therefore, the Agency plans to conduct a study of the overall costs of these requirements and the potential impact of these costs on the ability of small local governments to retain their USTS. The study would also look into the feasibility of alternative methods of providing fuel (for essential public services) without requiring the ownership of USTs by these governments. In addition, the study would assess the continued availability of State financial assistance and assurance funds and their effects on local governments that own USTS. EPA will use the findings from this study to help monitor the effects of the UST requirements on local governments and to help assess the need for any further Agency guidance or action.

It should be noted that UST closures do not necessarily result in a loss of availability of fuel. Local governments have several means of assuring a continuing fuel supply: Purchase of fuel from retail outlets, use of above-ground tanks (where fire codes permit), and "pooling" of fuel sources with neighboring governments (local or State) that are able to demonstrate financial responsibility. The concern expressed by local governments is the availability of fuel for emergency vehicles when retail stations may be closed. EPA understands that some local governments are participating in "cardlock" arrangements. Under a card-lock arrangement, participants are issued magnetic cards that can then unlock the fuel pump; fuel withdrawal is monitored and charged to the card owner. With this arrangement, no attendant is necessary,

and there is 24hour access to fuel. Some of these alternatives have the added benefit of removing the costs and liability of maintaining USTs from local governments.

One commenter contended that EPA's rationale for not developing a regulatory flexibility analysis for the proposed rule is flawed, arguing that because the proposed rule simply amends the financial responsibility requirement, which initially imposed a burden on the regulated community, the benefits of the proposed rule cannot be accurately assessed in isolation of these requirements. As discussed above, the Agency has used this rule to provide additional flexibility to local governments, and particularly small local governments.

EPA does not, however, consider a baseline of no financial responsibility requirement to be a reasonable baseline for analyzing this rule. After review with regard to the 1988 financial responsibility rule, the Agency determined that although most local governments have adequate stability and financial strength to respond to an UST release, not all local governments have the resources to meet their UST-related obligations. Given these concerns, EPA believes that exempting all local governments from the financial responsibility requirement would not be consistent with statutory intent.

C. Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and have been assigned control number 2050-0066. An Information Collection Request document has been prepared by EPA (ICR No. 1359.04) and a copy may be obtained from Sandy Farmer, Information Policy Branch, EPA, 401 M Street, SW. (PM-223Y), Washington, D.C. 20460 or by calling (202) 260-2740. The information collection requirements were approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and assigned OMB control number 2050-0066. The Agency estimated the total annual burden on the regulated community of local governments to be 28,518 hours. The Agency estimated the burden on local government entities for reading the requirements to be 24,188 hours, the reporting or disclosure burden to be 218 hours, and the total recordkeeping burden to be 4,112 hours. The average burden for reading the requirements was estimated to be one hour. The average burden for reporting or disclosure was estimated to be two hours, while only 0.45 percent of all local government UST owners and operators were expected to be required to report each year. The average annual burden to maintain records of the alternative mechanisms was estimated to be 0.17 hours. These burden estimates included all aspects of the collection effort and included time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM223Y, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503t marked "Attention: Jonathan Gledhill."

VI. Supporting Documents

In addition to supporting material found in the rulemaking docket, EPA has prepared the following supporting documents to support this rule:

EPA, "Background Document in Support of Financial Self-Test for Local Governments Subject to the Financial Responsibility Requirements of Subtitle I of the Resource Conservation and Recovery Act," U.S. Environmental Protection Agency, Office of Underground Storage Tanks (November, 1992).

EPA, "Economic Impact Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks (November, 1992).

EPA, "Response to Comments on the June 18, 1990 Proposed Rule to Provide Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks (November, 1992).

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Hazardous substances, Insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control, Water supply.

Dated: January 15, 1993. William K. Reilly,

Administrator.

For the reasons set forth in the preamble, part 280 of title 40 of the Code of Federal Regulations is amended as follows:

PART 280-TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 699le, 6991f, and 6991h.

2. Section 280.92 is amended by removing the paragraph designations (a) through (a) and adding in alphabetical order three definitions reading as follows:

§ 280.92 Definition of terms.

Chief Financial Officer, in the case of local government owners and operators, means the individual with the overall authority and responsibility for the collection, disbursement, and use of funds by the local government.

Local government shall have the meaning given this term by applicable state law and includes Indian tribes. The term is generally intended to include: (1) Counties, municipalities, townships, separately

chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and (2) Special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.

Substantial governmental relationship means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from a clear commonality of interest in the event of an UST release such as coterminous boundaries, overlapping constituencies, common ground-water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

3. § 280.94 is amended by revising paragraphs (a) and (b) to read as follows:

§280.94 Allowable machanisms and combinations of mechanisms.

(a) Subject to the limitations of paragraphs (b) and (c) of this section,

(1) An owner or operator, including a local government owner or operator, may use any one or combination of the mechanisms listed in §§ 280.95 through 280.103 to demonstrate financial responsibility under this subpart for one or more underground storage tanks, and

(2) A local government owner or operator may use any one or combination of the mechanisms listed in §§ 280.104 through 280.107 to demonstrate financial responsibility under this subpart for one or more underground storage tanks.

(b) An owner or operator may use a guarantee under § 280.96 or surety bond under § 280.98 to establish financial responsibility only if the Attorney(s) General of the state(s) in which the underground storage tanks are located has (have) submitted a written statement to the implementing agency that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in that state.

4. The following sections are redesignated according to the following table:

Old section no.	New section no.
§280.104	§280.108
§280.105	§280.109
§280.106	§280.110
§280.107	§280.111
§280.108	§280.112
§280.109	§280.113
§280.110	§280.114
§280.111	§280.115
§280.112	§280.116

5. Newly designated §§ 280.109, 280.110, 280.111, 280.112, 280.114, and 280.115 are revised to read as follows:

§280.109 Cancellation or nonrenewal by a provider of financial assurance.

(a) Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.

(1) Termination of a local government guarantee, a guarantee, a surety bond, or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(2) Termination of insurance or risk retention coverage, except for nonpayment or misrepresentation by the insured, or state-funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for non-payment of premium or misrepresentation by the insured may not occur until a minimum of 10 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(b) If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in § 280.114, the owner or operator must obtain alternate coverage as specified in this section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator must notify the Director of the implementing agency of such failure and submit: (1) The name and address of the provider of financial assurance;

(2) The effective date of termination; and

(3) The evidence of the financial assistance mechanism subject to the termination maintained in accordance with § 280.107(b).

$280.110 Reporting by owner or operator.

(a) An owner or operator must submit the appropriate forms listed in § 280.111(b) documenting current evidence of financial responsibility to the Director of the implementing agency:

(1) Within 30 days after the owner or operator identifies a release from an underground storage tank required to be reported under § 280.53 or § 280.61;

12) If the owner or operator fails to obtain alternate coverage as required by this subpart, within 30 days after the owner or operator receives notice of:

(i) Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a provider of financial assurance as a debtor,

(ii) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism,

(iii) Failure of a guarantor to meet the requirements of the financial test,

(iv) Other incapacity of a provider of financial assurance; or

(3) As required by § 280.95(g) and § 280.109(b).

(b) An owner or operator must certify compliance with the financial responsibility requirements of this part as specified in the new tank notification form when notifying the appropriate state or local agency of the installation of a new underground storage tank under § 280.22,

(c) The Director of the Implementing Agency may require an owner or operator to submit evidence of financial assurance as described in § 280.111 (b) or other information relevant to compliance with this subpart at any time.

(The information requirements in this section have been approved by the Office of Management and Budget and assigned OMB control number 2050-0066).

§280.111 Recordkeeping.

(a) Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subpart for an underground storage tank until released from the requirements of this subpart under § 208.113. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of work. Records maintained off-site must be made available upon request of the implementing agency.

(b) An owner or operator must maintain the following types of evidence of financial responsibility:

(1) An owner or operator using an assurance mechanism specified in §§ 280.95 through 280.100 or § 280.102 or §§ 280.104 through 280.107 must maintain a copy of the instrument worded as specified.

(2) An owner or operator using a financial test or guarantee, or a local government financial test or a local government guarantee supported by the local government financial test must maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. Such evidence must be on file no later than 120 days after the close of the financial reporting year.

(3) An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(4) A local government owner or operator using a local government guarantee under § 280.106(d) must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(5) A local government owner or operator using the local government bond rating test under § 280.104 must maintain a copy of its bond rating published within the last twelve month by Moody's or Standard & Poor's.

(6) A local government owner or operator using the local government guarantee under § 280.106, where the guarantor's demonstration of financial responsibility relies on the bond rating test under § 280.104 must maintain a copy of the guarantor's bond rating published within the last twelve month by Moody's or Standard & Poor's.

(7) An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate

of insurance and any amendments to the agreements (8) An owner or operator covered by a state fund or other state assurance must maintain on file a copy of any evidence of coverage supplied by or required by the state under § 280.101(d)

An owner or operator using a local government fund under § 280.107 must maintain the following documents:

(i) A copy of the state constitutional provision or local government statute, charter, ordinance, or order dedicating the fund, and

(ii) Year-end financial statements for the most recent completed financial reporting year showing the amount in the fund. If the fund is established under § 280.107(a)(3) using incremental funding backed by bonding authority the financial statements must show the previous year's balance, the amount funding during the year, and the closing balance in the fund.

(iii) If the fund is established under § 280.107(a)(3) using incremental funding backed by bonding authority, the owner or operator must also e maintain documentation of the required bonding authority, including either results of a voter referendum (under § 280.107(a)(3)(i)), or attestation by the State Attorney General as specified under § 280.107(a)(3)(ii).

(10) A local government owner or operator using the local government guarantee supported by the local government fund must maintain a copy of the guarantor's year-end financial statements for the most recent completed financial reporting year showing the amount of the fund.

(11)(i) An owner or operator using assurance mechanism specified in §§ 280.95 through 280.107 must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Financial Responsibility

[Owner or operator] hereby certifies that it is in compliance with the requirements of subpart H of 40 CFR part 280.

The financial assurance mechanisms used to demonstrate financial responsibility under subpart H of 40 CFR part 280 is (are) as follows: [For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases."]

[Signature of owner or operator]

[Name of owner or operator]

[Title]

[Date]

[Signature of witness or notary]

[Name of witness or notary]

[Date]

(ii) The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).

(The information requirements in this se have been approved by the Office of Management and Budget and assigned OMB control number 2050-0066.)

§ 260.112 Drawing on financial assurance mechanisms.

(a) Except as specified in paragraph (d) of this section, the Director of the implementing agency shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the Director, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

(1)(i) The owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanism; and

(ii) The Director determines or suspects that a release from an under-ground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the Director pursuant to subparts E or F of a release from an underground storage tank covered by the mechanism; or

(2) The conditions of paragraph (b)(1) or (b)(2) (i) or (ii) of this section are satisfied.

(b) The Director of the implementing agency may draw on a standby trust fund when:

(1) The Director makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrective action as required under 40 CFR part 280,subpartF;or

(2) The Director has received either:

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

Certification of Valid Claim

The undersigned, as principals and as legal representatives of [insert: owner or operator] and [insert: name and address of third-party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by any accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of $[----------].

[Signatures]

Owner or Operator

Attorney for Owner or Operator

(Notary)

Date

[Signatures]

Claimant(s)

Attorney(s) for Claimant(s)

(Notary)

Date

or (ii) A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under this subpart and the Director determines that the owner or operator has not satisfied the judgment.

(c) If the Director of the implementing agency determines that the amount of corrective action costs and third-party liability claims eligible for payment under paragraph (b) of this section may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The Director shall pay third-party liability claims in the order in which the Director receives certifications under paragraph (b)(2)(i) of this section, and valid court orders under paragraph (b)(2)(ii) of this section.

(d) A governmental entity acting as guarantor under § 280.106(e), the local government guarantee without standby trust, shall make payments as directed by the Director under the circumstances described in § 280.112 (a), (b), and (c).

§280.114 Bankruptcy or other incapacity of owner or operator or provider of financial assurance.

(a) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming an owner or operator as debtor, the owner or operator must notify the Director of the implementing agency by certified mail of such commencement and submit the appropriate forms listed in § 280.111 (b) documenting current financial responsibility.

(b) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in § 280.96.

(c) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a local government owner or operator as debtor, the local government owner or operator must notify the Director of the implementing agency by certified mail of such commencement and submit the appropriate forms listed in § 280.11l(b) documenting current financial responsibility.

( ) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing a local government financial assurance as debtor, such guarantor must notify the local government owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in § 280.106.

(e) An owner or operator who obtains financial assurance by a mechanism other than the financial test of selfinsurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in this subpart within 30 days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within 30 days after such notification, he must notify the Director of the implementing agency.

(f) Within 30 days after receipt of notification that a state fund or other state assurance has become incapable of paying for assured corrective action or third-party compensation costs, the owner or operator must obtain alternate financial assurance.

§280.115 Replenishment of guarantees, letters of credit or surety bonds.

(a) If at any time after a standby trust is funded upon the instruction of the Director of the implementing agency with funds drawn from a guarantee, local government guarantee with standby trust, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:

(1) Replenish the value of financial assurance to equal the full amount of coverage required, or

(2) Acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

(b) For purposes of this section, the full amount of coverage required is the amount of coverage to be provided by § 280.93 of this subpart. If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

6. New § 280.104 is added to read as follows:

§280.10.4 Local government bond rating test.

(a) A general purpose local government owner or operator and/or local government serving as a guarantor may satisfy the requirements of § 280.93 by having a currently outstanding issue or issues of general

obligation bonds of $1 million or more, excluding refunded obligations, with a Moody's rating of Aaa, As, A, or Baa, or a Standard & Poor's rating of AAA, AA, A, or BBB. Where a local government has multiple outstanding issues, or where a local government's bonds are rated by both Moody's and Standard and Poor's, the lowest rating must be used to determine eligibility. Bonds that are backed by credit enhancement other than municipal bond insurance may not be considered in determining the amount of applicable bonds outstanding.

(b) A local government owner or operator or local government serving as a guarantor that is not a general-purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of § 280.93 by having a currently outstanding issue or issues of revenue bonds of $1 million or more, excluding refunded issues and by also having a Moody's rating of Aaa, A, A, or Baa, or a Standard & Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard & Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.

(c) The local government owner or operator and/or guarantor must maintain a copy of its bond rating published within the last 12 months by Moody's or Standard & Poor's.

(d) To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or operator and/or guarantor must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount) per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this bond rating test:

[List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard and Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of $1 million. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or

Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR Part 280.104(d) as such regulations were constituted on the date shown immediately below.

[Date]----------

[Signature] ----------

[Name] ----------

[Title] ----------

(e) To demonstrate that it meets the local government bond rating test, the chief financial officer of local government owner or operator and/or guarantor other than a general purpose government must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor). This letter is in support of the use of the bond rating test to demonstrate financial resl!6nsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s). This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard and Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of $1 million. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR Part 280.104(e) as such regulations were constituted on the date shown immediately below.

[Date]----------

[Signature] ----------

[Name] ----------

[Title] ----------

(f) The Director of the implementing agency may require reports of financial condition at any time from the local government owner or operator, and/or local government guarantor. If the Director finds, on the basis of such reports or other information, that the local government owner or operator, and/or guarantor, no longer meets the local government bond rating test requirements of § 280.104, the local government owner or operator must obtain alternative coverage within 30 days after notification of such a finding.

(g) If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within 150 days of the change in status.

7. New § 280.105 is added to read as follows:

§280.105 Local government financial test.

(a) A local government owner or operator may satisfy the requirements of § 280.93 by passing the financial test specified in this section. To be eligible to use the financial test, the local government owner or operator must have the ability and authority to assess and levy taxes or to freely establish fees and charges. To pass the local government financial test, the owner or operator must meet the criteria of paragraphs (b)(2) and (b)(3) of this section based on year-end financial statements for the latest completed fiscal year.

(b)(1) The local government owner or operator must have the following information available, as shown in the year-end financial statements for the latest completed fiscal year:

(i) Total revenues: Consists of the sum of general fund operating and nonoperating revenues including net local taxes, licenses and permits, fines and forfeitures, revenues from use of money and property, charges for services, investment earnings, sales (property, publications, etc.), intergovernmental revenues (restricted and unrestricted), and total revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity. For purposes of this test, the calculation of total revenues shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers), liquidation of investments, and issuance of debt.

(ii) Total expenditures: Consists of the sum of general fund operating and nonoperating expenditures including public safety, public utilities, transportation, public works, environmental protection, cultural and recreational, community development, revenue sharing, employee benefits and compensation, office management, planning and zoning, capital projects, interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues. For purposes of this test, the calculation of total expenditures shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers).

(iii) Local revenues: Consists of total revenues (as defined in paragraph (b)(1)(i) of this section) minus the sum of all transfers from other governmental entities, including all monies received from Federal, state, or local government sources.

(iv) Debt service: Consists of the sum of all interest and principal payments on all long-term credit obligations and all interest-bearing short-term credit obligations. Includes interest and principal payments on general obligation bonds, revenue bonds, notes, mortgages, judgments, and interest bearing warrants. Excludes payments on non-interest-bearing short-term obligations, interfund obligations, amounts owed in a trust or agency capacity, and advances and contingent loans from other governments.

(v) Total funds: Consists of the sum of cash and investment securities from all funds, including general, enterprise, debt service, capital projects, and special revenue funds, but excluding employee retirement funds, at the end of the local government's financial reporting year. Includes Federal securities, Federal agency securities, state and local government securities, and other securities such as bonds, notes and mortgages. For purposes of this test, the calculation of total funds shall exclude agency funds, private trust funds, accounts receivable, value of real property, and other non-security assets.

(vi) Population consists of the number of people in the area served by the local government.

(2) The local Government's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion or a disclaimer of opinion. The local government cannot have outstanding issues of general obligation or revenue bonds that are rated as less than investment grade.

(3) The local government owner or operator must have a letter signed by the chief financial officer worded as specified in paragraph (c) of this section.

(c) To demonstrate that it meets the financial test under paragraph (b) of this section, the chief financial officer of the local government owner or operator, must sign, within 120 days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter From Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator]. This letter is in support of the use of the local government financial test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating [an] underground storage tank[s].

Underground storage tanks at the following facilities are assured by this financial test [List for each facility: the name and address of the facility where tanks assured by this financial test are located, If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test by the tank identification number provided in the notification submitted pursuant to 40 CFR Part 280.22 or the corresponding state requirements.)

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, As, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

Worksheet for Municipal Financial Test

Part I: Basic Information

1. Total Revenues

a. Revenues (dollars)----------

Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and non-operating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.

b. Subtract interfund transfers

(dollars) ----------

c. Total Revenues (dollars) ----------

2. Total Expenditures

a. Expenditures (dollars) ----------

Value consists of the sum of general fund operating and non-operating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues.

b. Subtract interfund transfers

(dollars) ----------

c. Total Expenditures (dollars) ----------

3. Local Revenues

a. Total Revenues (from 1c) (dollars) ----------

b. Subtract total intergovernmental transfers (dollars) ----------

c. Local Revenues (dollars) ----------

4. Debt Service

a. Interest and fiscal charges

(dollars) ----------

b. Add debt retirement (dollars) ----------

c. Total Debt Service (dollars) ----------

5. Total Funds (Dollars) ----------

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds)

6. Population (Persons) ----------

Part 11: Application of Test

7. Total Revenues to Population

a. Total Revenues (from 1c) ----------

b. Population (from 6) ----------

c. Divide 7a by 7b----------

d. Subtract 417----------

e. Divide by 5,212----------

f. Multiply by 4.095----------

8. Total Expenses to Population

a. Total Expenses (from 2c) ----------

b. Population (from 6) ----------

c. Divide 8a by 8b----------

d. Subtract 524----------

e. Divide by 5,401----------

f. Multiply by 4.095----------

9. Local Revenues to Total Revenues

a. Local Revenues (from 3c) ----------

b. Total Revenues (from lc) ----------

c. Divide 9a by 9b----------

d. Subtract .695----------

e. Divide by .205----------

f Multiply by 2.840----------

10. Debt Service to Population

a. Debt Service (from 4d) ----------

b. Population (from 6) ----------

c. Divide l0a by 10b----------

d. Subtract 51----------

e. Divide by 1,038----------

f. Multiply by - 1.866 ----------

11. Debt Service to Total Revenues

a. Debt Service (from 4d) ----------

b. Total Revenues (from 1c) ----------

c. Divide 1la by 1lb ----------

d. Subtract .068 ----------

e. Divide by .259 ----------

f Multiply by - 3.533 ----------

12. Total Revenues to Total Expenses

a. Total Revenues (from 1c) ----------

b. Total Expenses (from 2c) ----------

c. Divide 12a by 12b ----------

d. Subtract .910 ----------

e. Divide by .899 ----------

f. Multiply by 3.458

13. Funds Balance to Total Revenues

a. Total Funds (from 5) ----------

b. Total Revenues (from lc) ----------

c. Divide 13a by 13b ----------

d. Subtract .891 ----------

e. Divide by 9.156 ----------

f. Multiply by 3.270 ----------

14. Funds Balance to Total Expenses ----------

a. Total Funds (from 5) ----------

b. Total Expenses (from 2c) ----------

c. Divide 14a by 14b ----------

d. Subtract .866 ----------

e. Divide by 6.409 ----------

f. Multiply by 3.2 70 ----------

15. Total Funds to Population

a. Total Funds (from 5) ----------

b. Population (from 6) ----------

c. Divide 15a by 15b ----------

d. Subtract 270 ----------

e. Divide by 4,548 ----------

f. Multiply by 1.866 ----------

16. Add 7f + 8f + 9f + 10f + 1lf + 12f + 13f + 14f + 15f + 4.937 ----------

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in 40 CFR Part 280.105(c) as such regulations were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

(d) If a local government owner or operator using the test to provide financial assurance finds that it no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(e) The Director of the implementing agency may require reports of financial condition at any time from the local government owner or operator. If the Director finds, on the basis of such reports or other information, that the local government owner or operator no longer meets the financial test requirements of § 280.105 (b) and (c), the owner or operator must obtain alternate coverage within 30 days after notification of such a finding.

(f) If the local government owner or operator fails to obtain alternate assurance within 150 days of finding that it no longer meets the requirements of the financial test based on the yearend financial statements or within 30 days of notification by the Director of the implementing agency that it no longer meets the requirements of the financial test, the owner or operator must notify the Director of such failure within 10 days.

8. New § 280.106 is added to read as follows:

§280.106 Local government guarantee.

(a) A local government owner or operator may satisfy the requirements of § 280.93 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be either the state in which the local government owner or operator is located or a local government having a "substantial governmental relationship" with the owner and operator and issuing the guarantee as an act incident to that relationship. A local government acting as the guarantor must:

(1) demonstrate that it meets the bond rating test requirement of § 280.104 and deliver a copy of the chief financial officer's letter as contained in § 280.104(c) to the local government owner or operator; or (2) demonstrate that it meets the worksheet test requirements of § 280.105 and deliver a copy of the chief financial officer's letter as contained in § 280.105(c) to the local government owner or operator; or

(3) demonstrate that it meets the local government fund requirements of § 280.107(a), § 280.107(b), or § 280.107(c) and deliver a copy of the chief financial officer's letter as contained in § 280.107 to the local government owner or operator.

(b) If the local government guarantor is unable to demonstrate financial assurance under any of §§ 280.104, 280.105, 280.107(a), 280.107(b), or 280.107(c), at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or non-renewal of the guarantee, notice to the owner or operator. The guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in § 280.114(c).

(c) The guarantee agreement must be worded as specified in paragraph (d) or (a) of this section, depending on which of the following alternative guarantee arrangements is selected:

(1) If, in the default or incapacity of the owner or operator, the guarantor guarantees to fund a standby trust as directed by the Director of the implementing agency, the guarantee shall be worded as specified in paragraph (d) of this section.

(2) If, in the default or incapacity of the owner or operator, the guarantor guarantees to make payments as directed by the Director of the implementing agency for taking corrective action or compensating third parties for bodily injury and property damage, the guarantee shall be worded as specified in paragraph (a) of this section.

(d) If the guarantor is a state, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee With Standby Trust Made by a State

Guarantee made this [date] by [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor is a state.

(2) [Local government owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and addresses of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR Part 280 or the corresponding state requirement, and the name and address of the facility.] This guarantee satisfies 40 CFR Part 280, Subpart H requirements for assuring funding for [insert: "taking corrective actionive action" s for bodily by or r s different icate the type of coverage applicable to ach tank or location] arising from operating the aboveidentified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.

(3) Guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the [Director] shall fund a standby trust fund in accordance with the provisions of 40 CFR part 280.112, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines erator] has for of the ce with 40 CFR part 280, subpart F, the guarantor upon written instructions from the [Director] shall fund a standby trust fund in accordance with the provisions of 40 CFR part 280.112, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"I accidental releases arising from the operation of the aboveidentified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall fund a standby trust in accordance with the provisions of 40 CFR part 280.112 to satisfy such judginent(s), award(s), or settlement agreements up to the limits of coverage specified above.

(4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within 10 days after commencement of the proceeding.

(5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of (owner or operator] pursuant to 40 CFR part 280.

(6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of 40 CFR part 280, Subpart H for the above identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator], as evidenced by the return receipt.

(7) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaded to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(a) Bodily damage or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR part 280.93,

(8) Guarantor expressly waives notice of acceptance of this guarantee by [the implementing agency), by any or all third parties, or by [local government owner or operator],

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR part 280.106(d) as such regulations were constituted on the effective date shown immediately below.

Effective date:----------

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

If the guarantor is a local government, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee With Standby Trust Made by a Local Government

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of 40 CFR Part 280.104, the local government financial test requirements of 40 CFR Part 280.105, or the local government fund under 40 CFR Part 280.107(a), 280.107(b), or 280.107(c)].

(2) [Local government owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR Part 280 or the corresponding state requirement, and the name and address of the facility.] This guarantee satisfies 40 CFR Part 280, Subpart H requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert: dollar amount] annual aggregate.

(3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [local government owner or operator] fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the [Director] shall fund a standby trust fund in accordance with the provisions of 40 CFR Part 280.112, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 40 CFR Part 280, Subpart F, the guarantor upon written instructions from the [Director] shall fund a standby trust fund in accordance with the provisions of 40 CFR Part 280.112, in an amount not to exceed the coverage limits specified above.

If (owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"I accidental releases arising from the operation of the aboveidentified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall fund a standby trust in accordance with the provisions of 40 CFR Part 280.112 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) Guarantor agrees that, if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph (1), guarantor shall send within 120 days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.

(5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within 10 days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to 40 CFR Part 280.

(7) Guarantor agrees to remain bound under this guarantee for so long as (local government owner or operator] must comply with the applicable financial responsibility requirements of 40 CFR Part 280, Subpart H for the above identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator], as evidenced by the return receipt.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [local government owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily damage or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR Part 280.93.

(9) Guarantor expressly waives notice of acceptance of this guarantee by [the implementing agency], by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(d) as such regulations were constituted on the effective date shown immediately below.

Effective date:----------

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

(e) If the guarantor is a state, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee Without Standby Trust Made by a State

Guarantee made this (date) by [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor is a state.

(2) [Local government owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this incident, list the tank identification number provided in the notification submitted pursuant to 40 CFR Part 280 or the corresponding state requirement, and the name and address of the facility.) This guarantee satisfies 40 CFR Part 280, Subpart H requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount) annual aggregate.

(3) Guarantor guarantees to [implementing agency] and to any and all third parties and obliges that:

In the event that [local government owner or operator) fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the [Director] shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the (Director] determines that [local government owner or operator] has failed to perform collective action for releases arising out of the operation of the above-identified tank(s) in accordance with 40 CFR Part 280, Subpart F, the guarantor upon written instructions from the [Director] shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

(4) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within 10 days after commencement of the proceeding.

(5) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to 40 CFR Part 280.

(6) Guarantor agrees to remain bound under this guarantee for so long as [local government owner or operator] must comply with the applicable financial responsibility requirements of 40 CFR Part 286-, Subpart H for the above identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 12o days after receipt of such notice by [owner or operator), as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

(7) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [local government owner or operator] under a workers' compensation disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaded to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily damage or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR Part 280.93.

(8) Guarantor expressly waives notice of acceptance of this guarantee by (the implementing agency], by any or all third parties, or by [local government owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(e) as such regulations were constituted on the effective date shown immediately below.

Effective date:----------

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

If the guarantor is a local government, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee Without Standby Trust Made by a Local Government

Guarantee made this [date] by [name of guaranteeing entity], a local government organized under the laws of [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of 40 CFR part 280.104, the local government financial test requirements of 40 part CFR 280.105, the local government fund under 40 CFR part 280.107(a), 280.107(b), or 280.107(c).

(2) [Local government owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR Part 280 or the corresponding state requirement, and the name and address of the facility.] This guarantee satisfies 40 CFR part 280, subpart H requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert: dollar amount] per occurrence and [insert: dollar amount) annual aggregate.

(3) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties and obliges that:

In the event that [local government owner or operator] fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon written instructions from the [Director] shall make funds available to pay

for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 40 CFR part 280, Subpart F, the guarantor upon written instructions from the [Director] shall make funds available to pay for corrective actions in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidental releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

(4) Guarantor agrees that if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph (1), guarantor shall send within 120 days of such failure, by certified mail, notice to [local government owner or operator], as evidenced by the return receipt.

(5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within 10 days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to 40 CFR part 280,

(7) Guarantor agrees to remain bound under this guarantee for so long as (local government owner or operator] must comply with the applicable financial responsibility requirements of 40 CFR Part 280, Subpart H for the above identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator], as evidenced by the return receipt. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [local government owner or operator] under a workers' compensation disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert: local government owner or operator] arising from, and in the course of, employment by [insert: local government owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft; (d) Property damage to any property owned, rented,

loaded to, in the care, custody, or control of, or occupied by [insert: local government owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(a) Bodily damage or property damage for which [insert: owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR Part 280.93.

(9) Guarantor expressly waives notice of acceptance of this guarantee by [the implementing agency), by any or all third parties, or by [local government owner or operator],

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(e) as such regulations were constituted on the effective date shown immediately below.

Effective date:----------

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

9. New § 280.107 is added to read as follows:

§280.107 Local government fund.

A local government owner or operator may satisfy the requirements of § 280.93 by establishing a dedicated fund account that conforms to the requirements of this section. Except as specified in paragraph (b), a dedicated fund may not be commingled with other funds or otherwise used in normal operations. A dedicated fund will be considered eligible if it meets one of the following requirements:

(a) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks and is funded for the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining coverage; or

(b) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order as a contingency fund for general emergencies, including taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, and is funded for five times the fall amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage. If the fund is funded for less than five times the amount of coverage required under § 280.93, the amount of financial responsibility demonstrated by the fund may not exceed one-fifth the amount in the fund; or

(c) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance or order to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. A payment is made to the fund once every year for seven years until the fund is fully-funded. This seven year period is hereafter referred to as the "pay-in-period." The amount of each payment must be determined by this formula:

(TF-CF)/Y

Where TF is the total required financial assurance for the owner or operator, CF is the current amount in the fund, and Y is the number of years remaining in the pay-in-period, and;

(1) The local government owner or operator has available bonding authority, approved through voter referendum (if such approval is necessary prior to the issuance of bonds), for an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund. This bonding authority shall be available for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, or

(2) The local government owner or operator has a letter signed by the appropriate state attorney general stating that the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws. The letter must also state that prior voter approval is not necessary before use of the bonding authority.

(d) To demonstrate that it meets requirements of the local government fund, the chief financial officer of the local government owner or operator and/or guarantor must sign a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount) annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this local government fund mechanism: [List for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: "The local government fund is funded for the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage." or "The local government fund is funded for ten times the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanisms(s) that provide the remaining coverage," or "A payment is made to

the fund once every year for seven years until the fund is fully-funded and [name of local Government owner or operator) has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund" or "A payment is made to the fund once every year for seven years until the fund is fully-funded and I have attached a letter signed by the State Attorney General stating that (1) the use of the bonding authority will not increase the local Government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority"].

The details of the local government fund are as follows:

Amount in Fund (market value of fund at close of last fiscal year):----------

[If fund balance is incrementally funded as specified in § 280.107(c), insert:

Amount added to fund in the most recently completed fiscal year:----------

Number of years remaining in the pay-in period: ----------]

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 280.107(d) as such regulations were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

58 FR 55066-55069 Monday, Oct. 25, 1993 Evaluation of the Potential for External Corrosion and Review of Cathodic Protection Monitoring Associated With sti-P3 Underground Storage Tanks Data Availability

55066-55069 Federal Register / Vol. 58, No. 204 / Monday, October 25, 1993 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

[FRL-34791-5]

Evaluation of the Potential for External Corrosion and Review of Cathodic Protection Monitoring Associated With sti-P3 Underground Storage Tanks Data Availability

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of data availability.

SUMMARY: The Environmental Protection Agency (EPA) is today publishing a notice of data availability regarding a report completed by Tillinghast, a Towers Perrin Company, on behalf of the Steel Tank Institute (STI). The Tillinghast report examines the potential for external corrosion of sti-P3 underground storage tanks (USTs) as well as owners' and operators' corrosion monitoring practices for USTs. The Agency's current regulations for corrosion monitoring require periodic post-installation monitoring of cathodically protected steel underground storage tanks. The Steel Tank Institute approached EPA in 1992, requesting it alter the mandated monitoring frequency for cathodic protection monitoring of steel USTs, and specifically, USTs manufactured by STI members under the "sti-P3" specification. EPA responded by agreeing to consider data supplied by an independent, third-party examination of STI's initial findings, as part of an overall data collection process. This notice summarizes the methodology, findings, and conclusions of the study. EPA encourages public review and comment on the Tillinghast report, as it may be used in arriving at a final determination regarding STI's request for EPA to modify the current requirements for cathodic protection monitoring for steel underground storage tanks.

DATES: Written comments on this notice must be submitted on or before December 27, 1993.

ADDRESSES: Written comments on today's supplemental notice should be addressed to the docket clerk at the following address: U.S. Environmental Protection Agency, RCRA Docket (OS-305), 401 M Street, SW., Washington, DC 20460. One original and two copies of comments should be sent and identified by regulatory docket reference number UST 2-9. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Docket materials may be reviewed by appointment by calling (202) 260-9327. Copies of docket materials may be made at no cost, with a maximum of 100 pages of material from any one regulatory docket. Additional copies are $0.15 per page. For a copy of the Tillinghast report, contact the EPA RCRA Docket.

FOR FURTHER INFORMATION CONTACT: For general information about this supplemental notice, contact the RCRA/Superfund/OUST Hotline, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency Washington, DC 20460, (800) 424-9346 (toll-free) or (703) 412-9810 (local). For the hearing impaired, the number is (800) 553-7672 (toll-free). For further information, contact Amy Hazeltine in the Office of Underground Storage Tanks at (703) 308-8898.

SUPPLEMENTARY INFORMATION:

I. Background

A. Technical Requirements for Underground Storage Tanks

Final regulations for Underground Storage Tanks (USTs) containing regulated substances were promulgated by the Agency in September and October, 1988 and became effective in December, 1988 and January, 1989. The regulations include technical requirements for new and existing underground storage tanks and piping, financial responsibility requirements for UST owners and operators, and state program approval requirements. In order to prevent releases, EPA included in the technical requirements four important categories of preventative measures: (1) Tank design and installation, (2) release detection, (3) corrosion protection, and (4) spill and overfill control. All UST systems installed after December 22, 1988 must meet Federal requirements immediately. Owners of tank systems installed on or before that date have until December 22, 1998 to either upgrade their tanks with corrosion protection and spill and overfill devices, replace them with new tank systems, or close them in accordance with the regulatory requirements.

According to a study conducted for EPA in 1987, corrosion of tanks and piping was a major cause of UST system releases. At that time, most installed USTs and piping were constructed of "bare steel"--steel without corrosion protection. When buried in the ground, steel without corrosion protection can be destroyed by external corrosion, resulting in leaks. One type of corrosion protection is cathodic protection, which is a technique to prevent corrosion of a surface by making that surface the cathode of an electrochemical cell. For UST systems, this can be done by applying either galvanic anodes or impressed electric current.

The UST regulations include requirements for the operation and maintenance of corrosion protection of steel UST systems. As part of these requirements, owners and operators of steel UST systems equipped with cathodic protection must ensure that all cathodic protection systems are tested within 6 months of installation and at least every 3 years thereafter, or according to another reasonable time frame established by the implementing agency. See 40 CFR 280.31(b)(1). The Preamble to the rule noted that, after consultation with groups of industry experts during the public comment period, EPA now agrees with the commenters who recommended that all cathodic protection systems should be tested at the same frequency and the Agency is now requiring in the final rule that all cathodic protections systems be tested within 6 months of installation and at least every 3 years thereafter. These intervals are sufficient to detect any damage of failure of the system and to take remedial action in time to prevent structural failures due to corrosion. EPA understands that this time interval is consistent with sound practice as is now recommended in the recently revised NACE (National Association of Corrosion Engineers) code and by major tank manufacturers. See 53 FR 37137.

B. Steel Tank Institute Request and Study Report

The Steel Tank Institute (STI) is a trade organization comprised of steel tank manufacturers. STI members manufacture pre-engineered underground storage tanks built to the "sti-P3" specification, for storage of liquids at atmospheric pressure. Tanks meeting the sti-P3 specification employ three types of corrosion protection: (1) Dielectric coating, (2) electrical isolation, and (3) cathodic protection through factory-installed anodes. More than 200,000 sti-P3 tanks have been fabricated and placed in use since 1969, the vast majority since 1985, and they are commonly installed today.

Single-wall sti-P3 tanks in service for storage of Federally regulated substances are covered by the cathodic protection monitoring requirements outlined above. Those tank owners who installed sti-P3 tanks in Federally regulated service between late 1988 and February of 1993 were eligible to enroll in STI's "Watchdog" cathodic protection monitoring service. The Watchdog service, performed through STI, provides cathodic protection monitoring in compliance with the EPA requirements. Since February of 1993, a simplified, user-friendly cathodic protection monitoring test system with a buried reference cell is installed with new sti-P3 tanks subject to Federal UST regulations. Those sti-P3 systems installed prior to 1988 have been operated without cathodic protection monitoring in most cases.

In the spring of 1992, STI requested that EPA alter the frequency of cathodic protection monitoring from the current requirements, to monitoring within 6 months of installation and subsequently only after any disturbance of the excavation (e.g., retrofit of Stage II vapor recovery systems). Periodic monitoring would therefore not be required. STI provided data on the performance of sti-P3 tanks and on potential costs for cathodic protection monitoring of sti-P3 tanks in support of its request.

STI and its members believe that the mandated frequency for cathodic protection monitoring should be changed for the following reasons:

- The sti-P3 tank has a very good performance record;
- The much more frequent monthly leak detection checks required by the UST regulations supersede the need for cathodic protection monitoring;
- There is inequity in that thousands of existing steel tanks without corrosion protection, which are much more likely to fail before phase-out in 1998, are not subject to the cathodic protection monitoring requirement;
- Periodic tank deflection monitoring for fiberglass-reinforced plastic (FRP) tanks was not required in EPA's UST regulations due to the low incidence of failure in FRP tanks (less than 0.5 percent), and sti-P3 tanks have similarly low failure rates;
- UST buyers consider cathodic protection monitoring and the associated recordkeeping required with steel tanks to be an inconvenience, and this affects buyer's choices among UST technologies;
- There is a high cost of compliance to industry; and
- Regulatory enforcement efforts are directed at clean-ups and leak detection, not cathodic protection --an indicator that monitoring cathodic protection is not an essential activity towards protecting human health and the environment.

The Agency took no regulatory action in response to STI's request and the supporting information. STI asked Tillinghast, an international risk management and actuarial consulting firm with experience in underground storage issues, to conduct an independent, third-part audit of STI's data. In May of 1993, STI

provided the Agency with a report prepared by Tillinghast titled "Evaluation Of The Potential For External Corrosion And Review Of Cathodic Protection Monitoring Associated With sti-P3 Underground Storage Tanks." An abstract of the report follows.

The pollution prevention components of the UST regulations (including corrosion protection) are very important to the UST program. Therefore, the Agency has decided to publish this Notice of Data Availability and solicit public comment on the report to ensure a more complete understanding of the issue at hand. This Notice includes several questions to help guide public discussion. The Agency is interested in responses to any of the questions listed below, and other issues the public may identify, such as the costs/benefits of the monitoring requirement itself.

II. Abstract

In May 1993, Tillinghast completed a study on behalf of the Steel Tank Institute (STI) which surveyed tank owners, tank installers, and regulators to identify any instances of failures of sti-P3 tanks attributed to external corrosion and to obtain experience information on cathodic protection monitoring practices. A summary of Tillinghast's methodology, findings, and conclusions follows.

Methodology

Tillinghast telephone-surveyed randomly selected sti-P3 underground storage tank (UST) owners and tank installers as well as Federal and State UST regulators about the condition and general maintenance of sti-P3 tanks. These individuals, along with data from the STI Watchdog program (a corrosion monitoring program initiated by STI in 1988 to assist tank owners in complying with EPA corrosion monitoring requirements) provided information on the frequency, conditions, and other aspects of the cathodic protection monitoring practices for sti-P3 tanks. In addition, the survey sought performance history on sti-P3 tanks which were not subject to cathodic protection testing. Tillinghast also examined environmental impairment, warranty, and product liability insurance claims from the Steel Tank Insurance Company (STICO, a captive insurance company formed by steel tank manufacturers).

Tillinghast selected a sample of owners and installers through STI's computer data base containing over 200,000 registered tanks. The sample covered the following nine states: Washington, Virginia, Vermont, South Dakota, Colorado, Florida, Texas, Missouri and Kentucky. The nine states represented a variety of climates, tank environments, saturation periods, water tables, and soil conditions. Tillinghast's sample also included a variety of tank sizes (from 500 to 20,000 gallons) and contained petroleum marketers and non-marketers. Tillinghast examined the following registration periods: 1970-75, 1980-81, 1985, and 1990. The examined registration periods began in 1970 when sti-P3 tanks first became well known to owners/operators and continued to the present.

Tillinghast successfully contacted 110 owners with immediate supervision over 385 sti-P3 tanks and secondary responsibility for approximately 2500 sti-P3 tanks at other locations. In addition, researchers contacted 37 installers throughout the geographic sample who had experience in over 5000 sti-P3 tank installations. Finally, Tillinghast contacted the Environmental Protection Agency's ten Regional UST offices as well as each of the nine State UST regulatory offices included in the state sample.

Tillinghast obtained summary information on 103 environmental impairment and product liability insurance closed claims for sti-P3 tanks from STICO to identify any instances where payment was made

de to a product release. Tillinghast also randomly selected eight of the 103 claims to specifically review the "cause of incident" data.

Findings

Tillinghast identified findings related to the following areas: Testing of cathodic protection systems, cathodic protection monitoring practices, environmental and product liability claims, and understanding of and compliance with EPA's technical requirements.

Tillinghast's survey of tank owners and installers covered over 8,000 sti-P3 tanks. Within the surveyed population, respondents reported three instances of sti-P3 tank external corrosion--one of which involved a product release. Of the regulators Tillinghast surveyed, those who had witnessed the removal of sti-P3 tanks reported that the tanks and sacrificial anodes were in "excellent condition upon removal." Regulators did not provide information on the ages of the tanks that were considered to be in "excellent condition upon removal."

Tillinghast reported that corrosion monitoring requirements (and the technical basis for those requirements) are not well understood by most tank owners, installers, or regulators. Furthermore, Tillinghast reported that unless an sti-P3 owner/installer signed up for STI's Watchdog program, cathodic protection monitoring for sti-P3 tanks installed since the promulgation of EPA's technical regulations was generally not being performed, although some large sti-P3 tanks users did perform independent testing.

Tillinghast's review of data from STI and from owners' research indicated that test variability can be high for corrosion monitoring tests conducted on any given site. Watchdog participants and major oil companies (many of whom conduct their own corrosion monitoring) reported few readings less than the 850 millivolt compliance point for corrosion monitoring. Tillinghast identified human error (in tank installation or testing) as one cause for obtaining disreputable corrosion monitoring results. Unusually dry soil conditions and other physical factors also influenced the accuracy of cathodic protection system testing.

Tillinghast obtained data from installers, tank owners, and major oil companies on the annual cost of corrosion monitoring. The data showed the annual cost of corrosion monitoring to range from $130 to $500 per location (each location having an average of 3.2 tanks). The impact of these costs was greatest on small, single location owners due to the necessity of hiring a contractor to travel to the site to perform the monitoring.

Tillinghast's investigation of STICO limited warranty and environmental and product liability insurance closed claims revealed that most of the sti-P3 claims that entailed both administrative and investigative costs involved improper installation techniques or errors in tank manufacturing workmanship. Fifty-six of the 103 claims incurred administrative expense but no claims costs or expenses, leaving 47 others which incurred some sort of investigative cost (e.g., tightness test). Only four of the 47 incidents in which investigative cost was incurred actually involved a claims payment. Tillinghast's review of eight randomly chosen closed claims for "cause of incident" data demonstrated that a pattern of faulty workmanship, bad installation, or a combination of both resulted in corroded sti-P3 tanks.

Conclusions

Tillinghast found no instances of external corrosion of sti-P3 tanks that had been properly fabricated, transported, and installed. Of the more than 8000 sti-P3 tank installations represented by owners and installers, only three instances of external corrosion were reported, a frequency of 0.04%, and only one involved a product release. Tillinghast did not have enough corrosion monitoring data to statistically determine an optimum monitoring frequency for cathodic protection. Tillinghast's survey concluded that less than 10% of the Watchdog participants or major oil companies who maintain their own corrosion monitoring programs and installed sti-P3 tanks in 1990, reported readings below the 850 millivolt compliance point for corrosion monitoring. Finally, Watchdog monitoring data from 1991, 1992, and the first quarter of 1993 indicate that based on cathodic protection monitoring readings, the number of sti-P3 tanks with cathodic protection readings of --850 millivolts or greater is increasing.

III. Public Comments

EPA is interested in any comments that the public may have on the content of this report, and is especially interested in any additional quantitative data commenters may provide. In particular, the Agency is interested in receiving answers to the questions listed below.

- What data are available that confirm or refute the report's findings on corrosion protection of sti-P3 USTs? In particular, have problems with corrosion protection (such as external corrosion) on sti-P3 tanks been observed? If so, what were the numbers, types, severity, and impacts of these problems? What were the ages of any sti-P3 tanks with problems with corrosion protection, and were these problems caused during, before, or after installation? What are the sti-P3 label numbers, if available, for verification purposes?
- For any sti-P3 tanks observed to have problems with corrosion protection, including tanks and piping, did cathodic protection monitoring indicate a lack of protection? If so, when was a lack of protection found --within 6 months of installation or during a later test? If monitoring was not performed, would it have indicated a lack of protection if it had been done?
- What data are available addressing the above issues for cathodically protected steel USTs that are not sti-P3 USTs? If problems were observed, were they observed with field installed or with factory installed cathodic protection systems?
- What information is available confirming or refuting the study's representation of the costs and benefits of cathodic protection monitoring of UST systems?
- How does the simplified, permanently installed cathodic protection monitoring system, now installed with new Federally regulated sti-P3 tanks, change cathodic protection monitoring practices and its costs and benefits?
- If the study were performed 10 years later and again 20 years later, would the findings be expected to be the same? Why or why not?
- What experience or studies in other applications of cathodic protection may provide insights into the long-term performance of cathodic protection on USTs and the costs and benefits of cathodic protection monitoring?

IV. Schedule for Final Determination

After review and evaluation of the public comments on this notice, EPA will conduct internal deliberations to arrive at a final determination of the Agency's position on the required frequency of cathodic protection monitoring. the Agency plans to reach a determination within 120 days after the conclusion of the comment period. This determination may take the form of no action, guidance, changes to the technical regulations, or some other regulatory action.

Dated: September 20, 1993

Richard J. Guimond,

Acting Assistant Administrator.

[FR Doc. 93-26160 Filed 10-22-93; 8:45 am]

BILLING CODE 6560-50-P

58 FR 58624-58627 Tuesday, Nov. 2, 1993 40 CFR Part 282, Underground Storage Tank Program; Approved Program for New Hampshire; Rule

58624-58627 Federal Register / Vol. 58, No. 210 / Tuesday, November 2, 1993 / Rules and Regulations ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[FRL-4794-8]

Underground Storage Tank Program; Approved Program for New Hampshire

AGENCY: Environmental Protection Agency (EPA)

ACTION: Immediate final rule.

SUMMARY: The Resource Conservation and Recovery Act of 1976, as amended (RCRA), authorizes the U.S. Environmental Protection Agency to grant approval to states to operate their underground storage tank programs in lieu of the federal program. This action establishes part 282 for codification of the decision to approve a state program and for incorporation by reference of those provisions of state statutes and regulations that will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions. As part of this initial action, part 282 codifies the prior approval of New Hampshire's underground storage tank program and incorporates by reference appropriate provisions of state statutes and regulations.

DATES: This regulation is effective January 3, 1994, unless EPA publishes a prior Federal Register rule withdrawing this immediate final rule. All comments on this regulation must be received by the close of business December 2, 1993. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register, as of January 3, 1994, in accordance with 5 U.S.C. 552(a).

ADDRESSES: Comments may be mailed to the Docket Clerk (Docket No. UST 4&endash;5) Office of Underground Storage Tanks (OS-305), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Comments received by EPA may be inspected in the public docket, located in room 2616 (Mall), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free at (800) 424-9346 or in Washington, DC at (202) 382-3000. For technical questions on the part 282 rule, consult Jerry Parker, U.S. EPA, Office of Underground Storage Tanks, at (703) 308-8884. For technical questions on the New Hampshire codification, consult Susan Hanamoto, Underground Storage Tank Program, U.S. EPA Region I, JFK Federal Building, Boston, MA 02203-2211. Phone: (617) 573-5748.

SUPPLEMENTARY INFORMATION:

Background

Section 9004 of the Resource Conservation and Recovery Act of 1976, as amended, (RCRA), 42 U.S. C. 6991c, allows the U.S. Environmental Protection Agency (EPA) to approve state underground storage tank programs to operate in the state in lieu of the federal underground storage tank program. EPA published a Federal Register rule announcing its decision to grant approval to New Hampshire (56 FR 28089, June 19, 1991). Approval was effective on July 19, 1991.

EPA will codify its approval of state programs in a new 40 CFR part 282 and incorporate by reference therein the state statutes and regulations that will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions. Today's rule establishes part 282, reserves sections within part 282 for each state, and codifies EPA's approval of the New Hampshire underground storage tank program. This codification reflects the state program in effect at the time EPA granted New Hampshire approval under section 9004(a), 42 U.S.C. 6991c(a), for its underground storage tank program. The establishment of part 282 is an Agency procedure exempt from the notice and comment requirements of 5 U.S.C. 533, as is the codification of the New Hampshire UST program. Notice and opportunity for comment were provided earlier on the Agency's decision to approve the New Hampshire program, and EPA is not now reopening that decision nor requesting comment on it.

This effort provides clear notice to the public of the scope of the approved program in each state. By codifying the approved New Hampshire program and by amending the Code of Federal Regulations whenever a new or different set of requirements is approved in New Hampshire, the status of federally approved requirements of the New Hampshire program will be readily discernible. Only those provisions of the tank program for which approval has been granted by EPA will be incorporated by reference for enforcement purposes.

To codify EPA's approval of New Hampshire's underground storage tank program. EPA has added § 282.79 to title 40 of the CFR. Section 282.79 incorporates by reference for enforcement purposes the State's statutes and regulations. Section 282.79 also references the Attorney General's Statement, Demonstration of Adequate Enforcement Procedures, the Program Description, and the Memorandum of Agreement, which are approved as part of the underground storage tank program under subtitle I of RCRA.

The Agency retains the authority under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on federal sanctions, federal inspection authorities and federal procedures, rather than the state authorized analogs to these provisions. Therefore, the approved New Hampshire enforcement authorities will not be incorporated by reference. Section 282.79 lists those approved New Hampshire authorities that fall into this category.

The public also needs to be aware that some provisions of the State's underground storage tank program are not part of the federally approved state program. These non-approved provisions are not part of the

RCRA subtitle I program because they are "broader in scope" than subtitle I of RCRA. See 40 CFR 281.12(a)(3)(ii). As a result, state provisions which are "broader in scope" than the federal program are not incorporated by reference for purposes of enforcement in part 282. Section 282.79 simply lists for reference and clarity the New Hampshire statutory and regulatory provisions which are "broader in scope" than the federal program and which are not, therefore, part of the approved program being codified today. "Broader in scope" provisions cannot be enforced by EPA; the State, however, will continue to enforce such provisions.

Certification Under the Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the EPA hereby certifies that this action will not have any economic impact on any small entities. It established a new part 282 in 40 CFR and codifies the decision already made to approve the New Hampshire underground storage program and has no separate effect on owners and operators of underground storage tanks or upon small entities. This rule, therefore, does not require a regulatory flexibility analysis.

Compliance With Executive Order 12291

This immediate final rule has been submitted to OMB for review under Executive Order 12291. The Agency has determined that it is a non-major rule because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets.

The Office of Management and Budget has exempted individual state codifications from the requirements of section 3 of Executive Order 12291.

Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., federal agencies must consider the paperwork burden imposed by any information request contained in a proposed or final rule. This rule will not impose any information requirements upon the regulated community.

Lists of Subjects in 40 CFR Part 282

Environmental protection, Hazardous substances, Incorporated by reference. Intergovernmental relations, State program approval. Underground storage tanks, Water pollution control.

Dated: October 13, 1993.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended by adding a new part 282 to read as follows:

PART 282--APPROVED UNDERGROUND STORAGE TANK PROGRAMS

Subpart A--General Provisions

Sec.

Subpart B--Approved State Programs

Appendix A to Part 282--State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

PART 282--APPROVED UNDERGROUND STORAGE TANK PROGRAMS

Subpart A--General Provisions

§ 282.1 Purpose and scope.

This part sets forth the applicable state underground storage tank programs under section 9004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6991C AND 40 CFR PART 281. "State" is defined in 42 U.S.C. 1004(31) as "any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands."

§ 282.2 Incorporated by reference.

(a) Material listed as incorporated by reference in part 282 was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(A) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the Federal Register.

(b) Copies of materials incorporated by reference may be inspected at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies of materials incorporated by reference may be obtained or inspected at the EPA OUST Docket, 401 M Street, SW., Washington, DC 20460, and at the library of the appropriate Regional Office listed below:

(1) Region 1 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont): JFK Federal Building, Boston, MA 02203-2211.

(2) Region 2 (New Jersey, New York, Puerto Rico, Virgin Islands): Federal Office Building, 26 Federal Plaza, New York, NY 10278.

(3) Region 3 (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia): 841 Chestnut St. Building, Philadelphia, PA 19107

(4) Region 4 (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee): 345 Courtland St., NE, Atlanta, GA 30365.

(5) Region 5 (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin): 77 West Jackson Boulevard, Chicago, IL 60604.

(6) Region 6 (Arkansas, Louisiana, New Mexico, Oklahoma, Texas): 1445 Ross Avenue, Dallas, TX 75202-2733.

(7) Region 7 (Iowa, Kansas, Missouri, Nebraska): 726 Minnesota Avenue, Kansas City, KS 66101.

(8) Region 8 (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming): 999 18th Street, Denver, CO 80202-2405.

(9) Region 9 (Arizona, California, Hawaii, Nevada, Guam, American Samoa, Commonwealth of the Northern Mariana Islands): 75 Hawthorne Street, San Francisco, CA 94105.

(10) Region 10 (Alaska, Idaho, Oregon, Washington): 1200 Sixth Avenue, Seattle, WA 98101.

(c) For an informational listing of the state and local requirements incorporated in part 282, see appendix A to this part.

§§ 282.3 through 282.49 [Reserved]

Subpart B--Approved State Programs

§§ 282.50-282.78 [Reserved]

§ 282.79 New Hampshire

(a) The State of New Hampshire is approved to administer and enforce an underground storage tank program in lieu of the federal program under subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 et seq. The State's program, as administered by the New Hampshire Department of Environmental Services, was approved by EPA pursuant to 42 U.S.C. 6991c and part 281 of this Chapter. EPA's approval was effective on July 19, 1991.

(b) New Hampshire has primary responsibility for enforcing its underground storage tank program. However, EPA retains the authority to exercise its enforcement authorities under sections 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, as well as under other applicable statutory and regulatory provisions.

(c) To retain program approval, New Hampshire must revise its approved program to adopt changes to the federal subtitle I program which make it more stringent, in accordance with section 9004 of RCRA, 42 U.S.C. 6991c, and 40 CFR part 281, subpart E. If New Hampshire obtains approval for the revised requirements pursuant to section 9004 of RCRA, 42 U.S.C. 6991c, the newly approved statutory and regulatory provisions will be added to this section and notice of any change will be published in the **Federal Register**.

(d) New Hampshire has final approval for the following elements submitted to EPA in New Hampshire's program application for final approval and approved by EPA on June 19, 1991, becoming effective on July 19, 1991. Copies may be obtained from the Underground Storage Tank Program, New Hampshire Department of Environmental Services, 6 Hazen Drive, Concord, NH 03302-0095.

(1) *State statutes and regulations.* (i) The provisions cited in this paragraph are incorporated by reference as part of the underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 et seq.

(A) New Hampshire Statutory Requirements Applicable to the Underground Storage Tank Program, 1993.

(B) New Hampshire Regulatory Requirements Applicable to the Underground Storage Tank Program, 1993.

(ii) The following statutes and regulations are part of the approved state program, although not incorporated by reference herein for enforcement purposes.

(A) The statutory provisions include: New Hampshire Revised Statutes Annotated (Supplement 1988) Sections 146--C:9a, 146--C:10, and 146--C:10a; 147 A:1 through 147--A:13; 541--A:1 through 541--A:10; 91--A:1 through 91--A:8.

(B) The regulatory provisions include: New Hampshire Code of Administrative Rules (1990) Part Env. C--602.08; Part He--P 1905.

(iii) The following statutory and regulatory provisions are broader in scope than the federal program, are not part of the approved program, and are not incorporated by reference herein for enforcement purposes.

(A) The statutory provisions include: New Hampshire Revised Statutes Annotated (Supplement 1988) Section 146--C:1.XII, insofar as it refers to heating oil for consumptive use on the premises where stored.

(B) The regulatory provisions include: New Hampshire Code of Administrative Rules (1990) Sections Env--Ws 411.01 and 411.02, insofar as they refer to heating oil for consumptive use on the premises where stored.

(2) *Statement of legal authority.* (i) "Attorney General's Statement for Final Approval", signed by the Attorney General of New Hampshire on November 1, 1990, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 et seq.

(ii) Letter from the Attorney General of New Hampshire to EPA, November 1, 1990, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 et seq.

(3) *Demonstration of procedures for adequate enforcement.* The "Demonstration of Procedures For Adequate Enforcement" submitted as part of the original application in December 1990, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 et seq.

(4) *Program description.* The program description and any other material submitted as part of the original application in December 1990, though not incorporated by reference, are referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 et seq.

(5) *Memorandum of agreement.* The Memorandum of Agreement between EPA Region I and the New Hampshire Department of Environmental Services, signed by the EPA Regional Administrator on August 8, 1991, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq*.

§§ 282.80--282.105 [Reserved]

Appendix A to Part 282--State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

The following is an informational listing of the state requirements incorporated by reference in part 282 of the Code of Federal Regulations:

New Hampshire

(a) The statutory provisions include New Hampshire Revised Statutes Annotated 1955, 1990 Replacement Edition, and 1992 Cumulative Supplement, Chapter 146--C, Underground Storage Facilities:

Section 146--C:1 Definitions, except for the following words in 146--C:1. XII, "heating or."

Section 146--C:2 Discharges Prohibited.

Section 146--C:3 Registration of Underground Storage Facilities.

Section 146--C:4 Underground Storage Facility Permit Required.

Section 14--C:5 Records Required; Inspections.

Section 146--C:6 Transfer of Ownership.

Section 146--C:6--a Exemption.

Section 146--C:7 New Facilities.

Section 146--C:8 Prohibition Against Reusing Tanks.

Section 146--C:9 Rulemaking.

Section 146--C:11 Liability for Cleanup Costs; Municipal Regulations.

Section 146--C:12 Federal Assistance and Private Funds.

(b) The regulatory provisions include:

(1) New Hampshire Code of Administrative Rules (November 1990) Part Env-Ws 411. Control of Underground Storage Facilities:

Section 411.01 Purpose, except for the following words, "heating oils."

Section 411.02 Applicability, except for 411.02(d).

Section 411.03 Definitions.

Section 411.04 Registration.

Section 411.05 Change in Use.

Section 411.06 Information Required for Registration.

Section 411.07 Permit to Operate.

Section 411.08 Transfer of Facility Ownership.

Section 411.10 Financial Responsibility.

Section 411.11 Inventory Monitoring.

Section 411.12 Regulated Substance Transfers.

Section 411.13 Tightness Testing.

Section 411.14 Certification of Technicians Performing Tightness Tests.

Section 411.15 Tightness Test Failures.

Section 411.16 Unusual Operating Conditions.

Section 411.17 Temporary Closure.

Section 411.18 Permanent Closure.

Section 411.19 Prohibition Against Reusing Tanks.

Section 411.20 Requirements for Approval of Underground Storage Systems.

Section 411.21 Tank Standards for New Underground Storage Systems.

Section 411.22 Piping Standards for New Underground Storage Systems.

Section 411.23 Secondary Containment for New Tanks.

Section 411.24 Secondary Containment for New Pressurized Piping.

Section 411.25 Spill Containment and Overfill Protection.

Section 411.26 Leak Monitoring for New Tanks.

Section 411.27 Leak Monitoring for New Underground Piping Systems.

Section 411.28 Installation of New Underground Storage Systems.

Section 411.29 Release Detection for Tanks Without Secondary Containment and Leak Monitoring, except for the following words in Section 411.29(a), "With the exception of on premise use heating oil systems"

Section 411.30 Release Detection for Piping.

Section 411.31 Operation of Leak Monitoring Equipment.

Section 411.32 Corrosion Protection for Steel Tanks.

Section 411.33 Corrosion Protection for Piping.

Section 411.34 Submissions of Corrosion Protection Plan.

Section 411.35 Relining Steel Tanks.

Section 411.36 Repair of Fiberglass-Reinforced Plastic Tanks.

Section 411.37 Repair and Replacement of Piping Systems.

Section 411.38 Field Fabricated Tanks.

Section 411.39 Secondary Containment for Hazardous Substance Systems.

Section 411.40 Waivers.

(2) New Hampshire code of Administrative Rules (November 1990) Part Env-Ws 412, Reporting and Remediation of Oil Discharges:

Section 412.01 Purpose.

Section 412.02 Applicability.

Section 412.03 Definitions.

Section 412.04 Notification.

Section 412.05 Initial Response Action.

Section 412.06 Abatement Measures.

Section 412.07 Free Product Removal.

Section 412.08 Initial site Characterization.

Section 412.09 Investigation Due to Discovery of Discharges from Unknown sources.

Section 412.10 Site Investigation.

Section 412.11 Site Investigation Report.

Section 412.12 Remedial Action Plan.

Section 412.13 Public Notification.

Section 412.14 Waivers.

[FR Doc. 93-26409 Filed 11-01-93; 8:45 am]

BILLING CODE 6560-50-P