This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264 and 265

[SWH-FRL 2865-7]

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

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Environmental Protection Agency (EPA or Agency), considering whether to revise the financial responsibility requirements in 40 CFR Sections 264.147 and 265.147, 265.151 (i) and (j), is today requesting comments on the availability of insurance to satisfy the existing liability coverage requirements for owners and operators of hazardous waste facilities and on methods for the Agency to address potential restrictions in the availability of coverage. Owners and operators reportedly have encountered difficulties in obtaining insurance necessary to comply with these requirements.

EPA is considering whether any revisions to 40 CFR Sections 264.147 and 265.147 are necessary in light of the current state of the insurance market. This rule sets forth several regulatory options under consideration by the Agency, and also requests comments on a range of subjects related to the availability of insurance policies that may be used to comply with the liability coverage requirements. [Other alternatives considered by EPA would require new legislation and are not considered in this proposal.]

DATE: Comments must be submitted on or before September 20, 1985.

ADDRESSES: Comments may be mailed to Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460. Comments received by EPA may be inspected in Room S-212, U.S. EPA, 401 M Street, SW., Washington, D.C. 20460 from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424-9346 or at (202) 382-3000. For technical information, contact Susan Hughes Office of Solid Waste [WH-562], U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460 (202) 382-4761.

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

I. Background

A. Current Liability Coverage Requirements

B. Liability Insurance for RCRA Facilities

1. Policy Types
   a. CGL Policies
   b. EIL Policies
2. Reasons for Market Conditions

II. Request for Comments

A. Current Market Situation and Reasons for Its Decline

B. What Will Improve the Market

C. "Insurability"

III. Possible Regulatory Approaches to Potential Problems

A. Maintain the Existing Requirements

B. Clarify the Required Scope of Coverage and/or Lower the Limits

C. Authorize Other Financial Responsibility Mechanisms

D. Authorize Waivers

E. Suspend or Withdraw the Liability Coverage Requirements

IV. Executive Order 12291

V. Paperwork Reduction Act

VI. Regulatory Flexibility Act

I. Background

A. Current Liability Coverage Requirements

Section 3004(a)(6) of the Resource Conservation and Recovery Act (RCRA), as amended, requires EPA to establish financial responsibility standards for owners and operators of hazardous waste management facilities as may be necessary or desirable to protect human health and the environment.

EPA promulgated the financial responsibility standards for both liability coverage and financial assurance for closure and post-closure care on January 12, 1981. On October 1, 1981, EPA deferred the effective date of the regulations governing liability coverage and announced its intent to publish a proposal to eliminate the liability requirements (46 FR 48197). The Agency at that time questioned whether those requirements were necessary or desirable to meet the requirements of RCRA. In response to that announcement EPA received considerable comment from the public, regulated industries, insurance companies, members of Congress, and State agencies. These comments indicated widespread support for a Federal liability coverage requirement for hazardous waste management facilities; there was virtually no opposition to such a requirement.

On April 16, 1982, EPA promulgated regulations requiring owners and operators to demonstrate liability coverage during the operating life of the facility for bodily injury and property damage to third parties resulting from facility operations (47 FR 16554). Under the liability coverage regulations (40 CFR 264.147 and 265.147), owners and operators of all types of TSDFs are required to demonstrate, on a per firm basis, liability coverage for sudden and accidental occurrences in the amount of $1 million per occurrence and $2 million annual aggregate, exclusive of legal defense costs. Owners and operators of surface impoundments, landfills, and land treatment facilities are also required to demonstrate, on a per firm basis, liability coverage for nonsudden accidental occurrences in the amount of $3 million per occurrence and $6 million annual aggregate, exclusive of legal defense costs. "First-dollar" coverage is required; the amount of any deductible must be covered by the insurer, with right of reimbursement from the insured. Financial responsibility can be demonstrated through a financial test, liability insurance, or a combination of the two.

The requirements for coverage of sudden accidental occurrences became effective on July 15, 1982. The requirements for nonsudden accidental occurrences were phased in gradually. Firms with annual sales or revenue of $10 million or more were required to submit evidence of this coverage by January 16, 1983. Firms with annual sales or revenue of $5 million to $10 million were required to submit evidence of coverage by January 16, 1984. All other firms were required to demonstrate such coverage by January 16, 1985.

The requirements assure that funds will be available for third parties seeking compensation for bodily injury and property damage arising from facility operations. Furthermore, insurance is a vital part of the Agency's regulatory program for improving environmental management practices of insured parties. It is also less Federally-intrusive than other approaches such as provision of insurance by the Federal Government. In addition, by offsetting a degree of activity-related risk, insurance fosters broad participation in hazardous waste management. The requirements may also instill public confidence in hazardous waste management activities and help to gain public support for the siting of new and improved facilities.

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

Congress has also expressed its support for financial responsibility requirements. Section 213 of the Hazardous and Solid Waste Amendments of 1984 (RCRA section 3005(e)) provides for the termination of interim status for all land disposal facilities by November 8, 1985, unless: (1) The owner or operator applies for a final determination regarding the issuance of a permit by that date and (2) certifies that the facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements for liability coverage, closure, and post-closure care.

Failure to comply with the liability requirements can have other significant ramifications. First, § 270.14(b)(17) requires that an owner or operator demonstrate compliance with the RCRA liability requirements in the Part B permit application. The Agency may experience extreme difficulties in issuing RCRA permits without a demonstration of compliance in accordance with the requirements in § 264.147. Second, most authorized States have liability requirements in effect that are equivalent to the existing Federal requirements. Therefore, in the absence of any action by the Agency, owners and operators are still subject to RCRA requirements in authorized States. Consequently, until the States amend their regulations, owners and operators would still be unable to certify compliance with RCRA liability requirements and they will lose interim status. Third, the owner or operator may be subject to citizen suits under RCRA section 7002 or Agency or State enforcement efforts. In addition, publicly-held firms unable to comply might be required to disclose information about their noncompliance on their Securities and Exchange Commission (SEC) 10–K and 10–Q filings. (See 17 CFR Part 229.) If the inability to comply with the RCRA liability coverage requirements might force a firm to close down a facility or plant and that fact is deemed "material" (i.e., important to a reasonable investor in securities issued by that firm), then that fact might need to be disclosed.

Also, if a firm believes that a legal proceeding might be instituted against it because of a failure to comply with the liability coverage requirements, the firm may be required to disclose that fact. Some Agency action may be desirable to forestall serious difficulties arising from a widespread failure to comply with the liability coverage requirements due to a general lack of available insurance coverage. The Agency intends to promulgate one of the options in this notice by November 8, 1985.

B. Liability Insurance for RCRA Facilities

1. Policy Types

Two basic types of liability coverage are available to cover third party bodily injury and property damage caused by RCRA facility operations: comprehensive general liability (or CGL policies) and environmental impairment liability (or EIL policies). The terms and availability of these two types of policies vary significantly. Both types of insurance are sold to a wide variety of firms in addition to owners and operators of RCRA facilities.

There are two basic distinctions in policy types: claims-made and occurence based. Under a claims-made insurance policy, coverage is triggered only when claims are made during the policy period. Insurers use the claims-made format to relieve themselves of the burden of claims brought long after the original occurrence and to reduce the difficulty of predicting the number of claims that will be made and the amount of damages that may be awarded. An occurrence based policy covers claims arising from the events that occur during the policy period, regardless of when the claim is filed.

The period of coverage under claims-made policies may be further expanded or restricted by incorporation of "discovery period" or "retroactive period" provisions. The discovery period provision in a claims-made policy provides that an insured, for the payment of an additional premium, may obtain an extension of coverage following expiration of the policy, for losses occurring during the policy period but which are not brought until after the policy's expiration. It is sometimes referred to as an extended reporting period. The retroactive date in a claims-made policy limits coverage to damages caused by occurrences that occurred subsequent to that date.

a. *CGL Policies.* CGL policies have been widely available for decades. They cover all types of third party damages, except those specifically excluded, and therefore cover many types of damages in addition to injuries caused by releases of hazardous wastes. CGL policies are generally issued on an occurrence basis. As a result of this policy feature and of uncertainty about what circumstances in the chain of events leading to third party damages constitute an "occurrence," insurers may be required to defend and/or indemnify parties they insured many years in the past. Most standard CGL policies issued since the early 1970's have excluded from coverage those damages caused by the release of a pollutant that is not "sudden and accidental." A standard version of the exclusion states that the insurance does not apply "to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

Recently, some courts have found pollution exclusion clauses ambiguous and, in accordance with accepted principles of contract law, have interpreted the ambiguity in favor of the insured. *Keene Corp.* v. *INA*, 667 F. 2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Farm Family Mutual Insurance Co.* v. *Bagley*, 64 A.D. 2d 1014, 409 N.Y.S. 2d 294 (4th Dept. 1978); *Jackson Township Municipal Utilities Authority* v. *Hartford Accident and Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982). As a result, insurers claim they are being forced to defend and/or indemnify their insureds for risks they did not knowingly assume when the policies were issued. On the other hand, some courts have interpreted the policies narrowly and accepted the exclusion. *Barmet of Indiana* v. *Security Insurance Group*, 425 N.E. 2d 201 (Ind. App. 1981); *National Standard Insurance Co.* v. *Continental Insurance Co.*, CA–3–81–1015–1 (N.D. Tex. October 4, 1983); *Great Lakes Container Corp.* v. *National Union Fire Insurance Co.*, 727 F. 2d 30 (1st Cir. 1984); and *American States Insurance Co.* v. *Maryland Casualty Co.*, Civ. No. 82–70353 (E.D. Mich. July 3, 1984).

The insurance industry has responded to these interpretations in several ways. First, standard CGL policy forms are being rewritten to exclude all damages causd by pollution. A new CGL form developed by the Insurance Services Office (ISO) will exclude all pollution liabilities. This form has been filed for approval with many State insurance commissions. "Buy-backs" of coverage for damages caused by sudden and accident releases are expected to be available under these policies. Buy back is a type of coverage excluded under the basic terms of the policy which can be included for the payment of an additional premium. Second, pending the approval of a revised CGL form, many insurance companies are issuing some CGL policies with a restrictive

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

endorsement excluding all coverage of damages caused by pollution. Third, the insurance industry has also considered issuing CGL policies on a claims-made basis, rather than an occurrence basis. This change will generally require amending the standard CGL policy forms and approval by State insurance commissions. Fourth, insurers are responding by reducing the availability of coverage. The CGL policies that cover sudden and accidental releases have reportedly been difficult to obtain and costly for firms that manage hazardous wastes or toxic substances.

b. *EIL Policies.* Environmental impairment liability (EIL) policies are designed specifically to cover third party damages caused by pollution, and therefore are narrower in scope than CGL policies. Virtually all EIL policies are issued on a claims-made basis. EIL policies can be purchased to cover third party damages caused by either nonsudden incidents only or both sudden and nonsudden incidents

EIL policies are a relatively recent phenomenon. Between the early 1970's and 1981, coverage was generally unavailable for nonsudden releases. Only a few excess and surplus lines insurers offered such coverage. Excess and surplus lines are a designation that a State gives to insurance companies that provide insurance that is not readily available from companies licensed or "admitted" to transact busines in that State. Because such companies are not regulated directly, States often control their ability to transact businesss by regulating brokers and agents. By 1981, a market for nonsudden pollution liability coverage developed because of increasing public awareness of injuries caused by toxic substances and the Agency's proposed RCRA liability coverage requirements.

Many insurance companies entered the initial pollution liability market. The Pollution Liability Insurance Association (PLIA), a reinsurance pool, was established in October 1981 with 37 member companies. The PLIA now has 42 members. At least a dozen other U.S. insurance companies and several London-based insurers also marketed EIL policies.

The market for EIL policies reportedly has changed dramatically in the last year or two. The number of insurers offering coverage has apparently declined significantly. Some of the largest EIL insurers such as Shand, Morahan and Co. Inc., and Stewart Smith Mid-America, Inc. withdrew from the market. Based on anecdotal evidence, the cost of coverage has apparently increased singificantly while policy limits have declined. For example, a company reported to EPA that it recently purchased a policy with limits of $3 million per occurrence and $6 million annual aggregate, the minimum acceptable limits for nonsudden accidental occurrences under the RCRA requirements, for $99,000. A year earlier they purchased a policy with limits of $20 million per occurrence and $20 million annual aggregate for about the same price.

2. Reasons for Market Conditions

A wide variety of explanations have been given for the apparent reduced availabililty and increased cost of EIL coverage for RCRA facilities and other installations. These reasons include: losses due to low premiums and large claims (reducing the availability and increasing the price of reinsurance); difficulty of setting premiums based on risk; judicial interpretation of policies favoring insureds; lack of compliance with liability requirements; and the tragedy in Bhopal, India. Also, some insurers have suggested that another possible factor bearing on the availability of EIL coverage is the apparent lack of demand for such coverage because of the lack of compliance with RCRA liability coverage requirements.

In addition, over the past four years, both the primary insurance and reinsurance industries have incurred large underwriting losses throughout the property and casualty market sector. In 1984, property and casualty insureres suffered a net loss of $3.55 billion, the first net loss for the insurance industry since 1906, the year of the San Francisco earthquake.

One reason for the insurance industry losses is declining interest rates. When interest rates were high in recent years, the insurance industry was willing to write policies at a "loss" in order to obtain money that could then be invested for a net profit. Consequently, a highly competitive insurance industry often accepted premiums that apparently did not adequately reflect accepted policy risks. However, declining interest rates have reduced investment income and insurers are no longer able to offset policy "losses."

It is important to note that insurance industry profits, like the stock market, are subject to changing economic conditions that are often cyclical. During periods when economic conditions result in large insurance industry losses, the insurance industry may respond by curtailing their riskiest policies. This response is due in part to the insurance industry's need to maintain a sufficient ratio of premiums to reserves. In this case, RCRA insurance is among the curtailed policies.

Reinsurance is a mechanism which spreads losses and risks by broad participation. Reinsurers provide coverage to insurance companies for excess losses sustained in a certain line or lines of coverage. Reinsurance acts as an incentive for insurance companies to continue writing policies in "tight" markets. Therefore, conditions in the reinsurance marketplace significantly affect the price, amount and type of primary insurance available to potential insureds. The abundance of inexpensive reinsurance in recent years was a major factor fueling competition among primary and excess insurers. Reinsurers have decided to raise rates and restructure major factor fueling competition among primary and excess the risks they will underwrite because the primary insurers have not adequately screened the risks they underwrite. The result of tighter control by reinsurers is a decrease in the availability of policies written by primary insurers in the affected lines of coverage. For example, the Hartford Steam and Boiler Inspection and Insurance Company and Environmental Risk Assessement Service (International) Ltd., a major London-based pool of 15 EIL insurers, stopped writing pollution coverage last year when they could not find reinsurance.

As we understand it, the insurance industry contends that RCRA insurance is a high risk proposition for several reasons. First, there is a lack of actuarial data to establish realistic premiums that adequately reflect risk. Second, there is a lack of acceptable and universally applied risk analysis methods. Third, there is a social perception that hazardous waste has not been and cannot be adequately managed. The insurance industry contends that this perception will ultimately lead to several costly effects: third party claims for virtually all policies that they underwrite; a subsequent duty to defend against these claims; resultant high litigation costs; and policy losses due to court rulings in favor of the insured for coverage that the insurer did not intend to provide.

Litigation costs and court rulings on coverage of hazardous waste related claims, at present, appear to be two factors of great concern to the insurance industry. As noted above, some recent court rulings have narrowly interpreted the standard "pollution exclusion" in the standard CGL form, following the judicial tradition of interpreting ambiguities in insurance contracts against the insurer. In several rulings,

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

coverage was held to apply to third party off-site bodily injury and property damage claims. The courts have also frequently ruled that the statute of limitations does not begin in a hazardous waste tort case until a victim knew or reasonably should have known of his or her injury. Therefore, where CGL policies allows occurrence made claims, coverage may be provided long after the policy has expired.

While the narrow judicial interpretations of policy *exclusions* for nonsudden pollution do not explain the insurance industry's reluctance to issue nonsudden policies, the industry is concerned that such rulings, in effect, force insurers to assume liability for obligations they allegedly never knowingly agreed, by contract, to assume, and for which they collected no premium. Thus, insurers claim they cannot rely on the terms and conditions of their policy contracts to estblish the scope of coverage from which insurers ultimately estimate potential liability risks and establish policy premiums.

The insurance industry places a large portion of the responsibility for insurance industry losses on a legal system that encourages suits against "deep pockets" and Federal and State liability provisions. However, this problem may also be attributed to ambiguous insurance contracts that created high potential exposure to insurers. In fact, when the pollution exclusion was inserted into the CGL policy in the 1970's, some insurers argued that the pollution exclusion language did not clarify coverage, but rather only confused the definition of an occurrence warranting coverage. In addition, hazardous waste management was not a high profile public issue during the early 1970's. Therefore, it is possible that the insurance industry inserted the pollution exclusion clause into the CGL policy aware of its potential ambiguity but unaware of the magnitude of its potential implication.

This explanation finds further corroboration in current insurance industry efforts to eliminate policy ambiguities. More restrictive CGL policies are now being drafted. Pollution coverage for both sudden and nonsudden events will be offered through EIL policies on a claims-made basis. However, it may be some time before the insurance industry has recovered from its current economic condition and is willing to provide sufficient EIL coverage.

Finally, the recent tragedy in Bhopal, India, has further heightened insurers' concerns about the riskiness of toxic substances. Insurers are concerned about being required to pay for cleanup costs under the strict, joint and several liability standard of the Comprehensive Environmental Reponse, Compensation, and Liability Act of 1980 (CERCLA). The insurers' concerns regard future liabilities at CERCLA sites for which they had written liability coverage policies when the facilities were managed under RCRA.

Despite the recent publicity about the lack of insurance for owners and operators of hazardous waste management facilities and other firms that handle toxic substances, the Pollution Liability Insurance Association (PLIA) has reported to the Agency a recent increase in its sales of EIL policies. During the first quarter of 1985, PLIA sold more EIL policies and collected more premiums than in the previous year. In addition, American Home/National Union Insurance Companies in the American International Group, and The Travelers Insurance Company are still writing RCRA liability coverage. However, Travelers and PLIA apparently only write coverage for firms which carry other insurance with their company.

II. Request for Comments

This section of the notice requests comments in four areas: (1) The current market for insurance policies that may satisfy RCRA liability coverage obligations and reasons for the present state of the insurance market, particularly with regard to availability and rates; (2) what actions or events might improve the market; (3) what types of firms, facilities, and risks are not insurable; and (4) alternative regulatory approaches that the Agency may adopt in addressing possible problems. In answering the questions that follow, commenters are requested to distinguish, where possible, the different types of insurance policies: CGL policies that cover sudden and accidental releases, EIL coverage for sudden and accidental releases, and EIL coverage for nonsudden and accidental releases. Although the primary focus of the Agency is on coverage for operating RCRA facilities, relevant comments on the insurance market for other types of firms and facilities will also be appreciated.

A. Market Situation

To determine if need exists for modification of federal requirements due to limitations in the availability of third party liability insurance covering the operation of RCRA facilities, the Agency needs a clear and detailed understanding of the current availability of insurance. Among the questions that must be addressed are the following:

What insurance companies are currently offering EIL and/or CGL coverage for RCRA facilities? How many insurance companies that previously offered EIL coverage have withdrawn from the market either completely or selectively? Why did they withdraw? What amounts of coverage (per occurrence and annual aggregate) are available and what amounts are commonly sought for RCRA facilities? Are the current liability limits adequate? How do the amounts of coverage purchased vary by the number of facilities covered, process types, wastes managed, and other factors? Is first-dollar coverage available? Is coverage exclusive of legal defense costs available?

What has been the experience of insurers and insureds under these policies? How many policies have been canceled by the insurer? Why have these policies been canceled? How many claims based on events at RCRA facilities have been paid? What amount has been paid out in these claims? How does this amount compare to the premiums collected? Do the policies and premiums create an effective incentive for facility owners to reduce the risks they present?

How much are the premiums? How have they changed in the last three years? What is the cost for the minimum acceptable amount of first-dollar coverage? What are the costs of higher levels of coverage? What are the most important factors influencing the cost of coverage (e.g., facility age, design, process types, safety record, wastes handled)?

What limitations are there in the availability of reinsurance? What companies offer reinsurance in this line of insurance? Why have the reinsurers withdrawn from the market? Are any captive insurance companies providing coverage for RCRA facilities? A captive insurance company is an insurance company set up by a company or group of companies to insure their own risks, or risks common to the group. Are any efforts underway to establish new captive insurance companies? What limits the establishment of such captives?

What are the major effects of any limitations in the availability of coverage for RCRA facilities? Have any facilities closed solely because of the lack of insurance at an affordable price? How will the availability and cost of insurance influence decisions of owners and operators of interim status facilities about whether to seek Part B permits? Are generators seeking greater liability coverage because of a lack of coverage

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

by the commercial facilities that handle their wastes?

If sudden accidental occurrence coverage and/or nonsudden accidental occurrence coverage is difficult or excessively expensive to obtain, why? What are the most important causes of the limited availability of coverage? How important are the following factors: lack of demand for coverage; court decisions that broadly interpret policies in favor of the insured; the difficulty of predicting the likelihood of claims, the cost of defense, and the cost of judgments against the insured; the fear of being liable for cleanup costs under CERCLA or other laws; the capacity shortage in the property and casualty insurance market; the lack of reinsurance for environmental risks; and recent concern aroused by the tragedy in Bhopal, India.

B. What Will Improve the Market

The Agency recognizes that it has a limited ability to influence the availability of insurance for RCRA facilities. In this regard, the Agency solicits comments addressing what events or actions will increase the availability of coverage for owners and operators of RCRA facilities. What actions by the Agency, if any, would increase the availability of coverage that would satisfy the intent of the liability coverage requirements? For example, what would be the impact of: increased Agency and State enforcement efforts to ensure compliance with the rules, which might stimulate demand for coverage; and/or clarification by EPA of the term "sudden accidental occurrences," so that it is expressly narrower than the interpretation some courts have applied to that phrase in the CGL pollution exclusion?

C. "Insurability"

One of the purposes of the liability coverage requirements is to encourage owners and operators of RCRA facilities to manage hazardous waste in an environmentally sound manner. Thus, the regulations may be judged successful if poorly designed or improperly managed facilities are forced to close because the risk of accidents they present prevents them from obtaining insurance coverage at an affordable price. However, if low risk facilities that comply with all RCRA statutory and regulatory requirements are unable to obtain insurance coverage at a reasonable price, the liability coverage regulations may merit reconsideration.

To better understand the relationship between risks presented by RCRA facilities and the availability of insurance, the Agency requests comments on the following issues:

What types of firms and facilities can obtain CGL and EIL coverage? Who cannot obtain coverage at any price? What types of firms, facilities, or risks are reinsurers most hesitant to cover? Does it matter whether a facility has interim status or a permit? On what basis do insurers decide whether a facility or firm will be offered coverage and the cost of coverage? What is a "reasonable" range for premiums? How do these premiums compare to those set for parallel risks (e.g., product liability coverage)? How do these factors differ for different types of policy coverage? What risk assessments are required before a CGL or EIL policy will be issued for a RCRA facility? How does the market distinguish between disposal and nondisposal facilities for sudden and accidental coverage? Does the market distinguish among land treatment facilities, surface impoundments, and landfills for nonsudden coverage? How does the market distinguish among on-site facilities serving only the owner or operator? How does the market distinguish among off-site commercial facilities?

III. Possible Regulatory Approaches to Potential Problems

The Agency believes that requiring insurance or other liability coverage is desirable to protect human health and the environment. However, in light of the present and potential difficulties encountered by some TSDF owners and operators in obtaining insurance coverage, the Agency is considering taking one or a combination of the following five regulatory actions in response to the problem of possible limited insurance availability. These five responses are neither exhaustive nor mutually exclusive, and the Agency is soliciting both comments on these approaches and suggestions for alternative responses. The Agency will find especially useful comments that specify which alternative or combination of alternatives is preferred and why, the predicted benefits and costs of each alternative, and the extent to which each alternative will assist the regulated community in obtaining liability coverage.

A. Maintain the Existing Requirements

If the Agency does not take any action designed to address the problem of possible insurance availability, then the liability requirements contained in 40 CFR 264.147 and 265.147 remain in full effect. Owners and operators of disposal facilities who are unable to procure insurance or satisfy the financial test, will, under the new amendments, lose interim status.

Of course, not all firms that are unable to procure insurance will fail to meet the RCRA financial responsibility requirements; many firms will instead demonstrate financial responsibility by passing the financial test specified in 40 CFR 264.147 or 265.147. Some owners and operators who are owned by corporations that satisfy the financial test may wish to transfer ownership or operation to the parent corporation. If the parent corporation can pass the financial test for the facility's financial responsibility requirements, the facility would then be in compliance with the liability requirement. (A transfer of ownership or operational control should be accompanied by a revised Part A). However, it is possible that some facilities that follow environmentally sound operating procedures and are, in some sense, "insurable," may nonetheless be unable to retain interim status or obtain a RCRA permit, because the owners and operators can neither pass the financial test nor obtain insurance.

The Agency has adopted a short term enforcement policy in response to the depressed state of the insurance market. The Agency will consider placing an owner or operator on a schedule of compliance to get insurance if: (1) The Agency finds that providing for such a schedule is consistent with the facility's compliance with other RCRA requirements, and (2) the facility can substantiate good faith attempts at securing insurance. Failure to exercise the obligation to obtain insurance or unsubstantiated good faith claims will result in appropriate enforcement actions; compliance orders will be issued and penalties will be assessed when the owner or operator fails to make a good faith effort in accordance with specified criteria.

Several factors are used to define good faith including: submittal of a complete application to insurance companies in a timely fashion, allowing for the insurance companies to process and issue the policy; submittal of an application to "known" suppliers of EIL insurance; submittal of evidence of attempts to acquire insurance with known insurers by documenting the contracts made and the reasons given by the insurance companies for denying or delaying the applications

This enforcement approach was established as an interim measure, pending a more detailed analysis of the issue. The policy does not apply after

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

November 8, 1985, and will not (as presently stated) affect the requirement that interim status facilities certify compliance with the financial responsibility requirements as of that date.

B. Clarify the Required Scope of Coverage and/or Lower the Required Levels of Coverage

Limited insurance availability may be caused by the unwillingness of the insurance industry to issue policies with the scope of coverage specified by the regulations. If this is the case, the Agency could address these concerns by clarifying the scope of coverage, and/or revising the regulations to lower the minimum amounts of liability coverage required both per occurrence and on an annual aggregate basis, and/or allow modest deductibles.

The meaning of the terms "sudden and accidental occurrences" and "nonsudden and accidental occurrences" could be specified in a manner that is still conducive to protecting human health and the environment but also clarifies what type of liabilities must be covered. For example, the term "sudden and accidental occurrences" could be defined to be narrower than some recent judicial interpretations of the phrase "sudden and accidental" in CGL policies. However, a clarification of terms by the Agency may not preclude continued judicial interpretation of policy coverage.

The Agency could also address the acceptability of claims-made policies, retroactive dates in claims-made policies, and certain exclusions (e.g., cleanup costs, legal defense costs) in policies used to demonstrate liability coverage. The Insurance Services Office (ISO) announced that it is considering rewriting its new CGL form to include legal defense costs within the policy limits. ISO is considering the change because of concern among both direct insurers and reinsurers over growing defense costs associated with CGL policies. ISO indicated that defense costs often exceed 30% of the cost of a claim paid under a CGL policy. A summary of a study conducted by the Rand Corporation Institute for Civil Justice states that plaintiffs received an average of 37% of the total payout by defendants after deducting plantiffs' and defendants' litigation expenses.

EPA requires owners or operators to obtain liability coverage exclusive of legal defense costs. This was done because allowing defense costs to be included within the policy limits might defense costs to be included within the policy limits might severely restrict the amount of insurance coverage available to compensate third parties. Unusually large legal defense costs could result in a significant erosion in the compensation available. This is a special problem for liability suits arising out of the operation of hazardous waste management facilities, as this is an area of expanding liability involving potentially complex issues related to causation and damage. However, insurers could place limits on defense costs as long as the policies specify that the levels of coverage required by EPA are guaranteed before defense costs are absorbed.

In addition, premiums could more accurately reflect potential liability by providing mechanisms for apportioning costs based on risks. For RCRA facilities, the most effective mechanism could involve conducting insured-specific environmental audits based on existing scientific, engineering, and medical data. EPA could facilitate this approach by providing insurers with comprehensive technical data compiled over the past decade. This data may serve as an actuarial basis from which to calculate premiums related to policy coverage. EPA could also provide technical assistance as appropriate.

This approach would provide several benefits. First, the insurance industry could enter the market having determined limits of liability to their satisfaction. Second, a source of defined compensation to pollution victims would be available through the private sector, minimizing Federal intrusion. Third, such insurance would provide an effective market force mechanism to help regulate and reduce the risk of environmental damage by an insured facility or organization by demanding responsible environmental management as a condition and cost or insurance. Improved operations could result from the incentive of lower premiums and insurer oversight. Fourth, this approach would consider environmental risk as a condition of financial responsibility. This consideration should lead, for example, to RCRA permitting of environmentally sound and financially responsible facilities of varying size.

Lowering the minimum level of coverage or narrowing the scope of coverage may lessen the protection of human health and the environment. However, since there are insurance companies currently writing policies below the required limits for RCRA, this option would allow some additional owners and operators to comply with the liability requirements. The Agency solicits comments on the appropriate levels of coverage, how the scope of coverage should be defined, and the potential effects of these changes, including the effects on the availability of liability coverage.

C. Authorize Other Financial Responsibility Mechanisms

To enable more firms to meet the liability coverage required during a facility's operating life, the Agency could revise 40 CFR 264.147 and 265.147 to authorize, in addition to insurance and financial tests, the use of the corporate guarantee. The EPA regulations requiring financial assurance for closure and post-closure care allow the use of a corporate guarantee by the owner or operator's parent corporation. (See 40 CFR 264.143, 264.145, 265.143, and 265.145.) In addition, the Agency could authorize indemnity contracts as an alternative mechanism.

The corporate guarantee is a promise to answer for the debt or default of another. It is a collateral undertaking and presupposes another contract or transaction, which is identified in the guarantee. There is ordinarily a contract or other agreement between the principal and a third party creating the primary obligation and a contract between the principal and the guarantor creating the guarantee, which supports the primary obligation. If the principal defaults on the primary obligation, then the gaurantor is liable to the third party on the obligation created by the guarantee. An indemnity contract is not a collateral undertaking, but rather a two-party agreement that provides that one party, the indemnitor, will reimburse the other party for losses that he may incur because of the occurrence of a specified event.

In the past, the Agency has not approved the use of the corporate guarantee as an alternative mechanism for liability coverage because of concern about the validity and enforceability of the guarantee under State insurance laws. However, if a parent (or unrelated firm) were allowed to provide a subsidiary (or unrelated firm) with a corporate guarantee or an indemnity contract that would assure coverage for third-party damages, a larger number of firms and facilities may be able to comply with the financial responsibility requirements for liability coverage.

In most States, insurance is controlled under State law, with limitations on who may engage in the business of insurance and detailed regulation of business practices. Carrying on the business of insurance without appropriate licenses or certificates of authority can subject companies to fines or other penalties. In addition, corporate guarantees, such as

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

those for liability coverage could be found void under State laws.

Precisely what constitutes the "business of insurance" varies from State to State. Many States, however, either by statute or common law, exempt from their insurance regulations actions by a firm that might otherwise be covered by the insurance laws, if those actions are incidental to or connected with other business activities of the firm. Thus, a corporate guarantee or indemnity by a corporate parent to its subsidiary that is considered to be incidental to the ownership of the subsidiary by the parent might, in at least some states, be exempt on that basis.

Another question is whether a guarantee provided by one firm to another firm that is not a corporate subsidiary of the guarantor would be considered incidental to the business activities of the guarantor. A single guarantee contract for liability coverage, undertaken exclusively for profit, would probably be subject to most State insurance requirements. If, however, the guarantee was given to ensure that hazardous waste management would continue to be provided to the guarantor, the guarantee might be viewed as incidental to the guarantor's business activities, and thus exempt from some State insurance laws.

The Agency requests comments on the relative merits and disadvantages of allowing either the corporate guarantee or the indemnity contract to be used as a liability coverage mechanism and on their respective likelihood of creating a valid and enforceable obligation under State laws. The Agency will consider amending its regulations to allow use of this mechanism in States where the State Attorney General certifies that the corporate guarantee would be valid and enforceable. In addition, the Agency requests information on the extent to which these alternative mechanisms have been used to demonstrate financial responsibility under other, non RCRA programs.

D. Authorize Waivers.

The Agency could amend its regulations to authorize case-specific waivers of the liability coverage requirements if the owner or operator can demonstrate that it failed to obtain coverage despite a "good faith effort." "Good faith effort" is described in option A. The waiver would be given on a case-by-case basis and would operate for a limited time, to be specified by the Agency (e.g. November 8, 1986). The waiver might be subject to other conditions; for example, a waiver might not be granted to a facility that is owned or operated by a subsidiary of a corporation that passes the financial test.

This approach would promote environmental protection by maintaining the general liability coverage requirements, allowing the insurance industry additional time to develop needed insurance policies, and allowing regulated facilities that genuinely attempt to comply with the regulations to continue operation. On the other hand, this approach may have the disadvantage of giving firms that obtain a waiver an unfair economic advantage over those that purchase insurance, and of allowing the continued operation of facilities that may be unable to obtain coverage because of the great health and environmental risks they pose. In addition, by decreasing the demand for insurance, widespread use of waivers may actually suppress the development of the needed insurance policies. Finally, the Agency would face a potentially heavy administrative burden of reviewing waiver requests and determining whether a "good faith effort" was made.

One possible way to avoid the problem of allowing uninsured, "high-risk" facilities to continue to operate is to grant waivers only if the owner or operator demonstrates not only a "good faith effort," but also that the facility is "insurable." This approach, however, entails the additional difficulty of determining which facilities are "insurable." An assessment of "insurability" may impose significant administrative burdens on the Agency by requiring it to perform risk analyses on the facilities of each firm that applies for a waiver. The Agency solicits comments on appropriate standards for "good faith effort" and "insurable."

E. Suspend or Withdraw the Liability Coverage Requirements

To the extent that any limited availability of insurance is cause by a temporary depression in the insurance industry, it may be desirable to suspend by regulation the liability coverage requirements for all firms in the regulated community. This approach would avoid the possibility of enforcing requirements which currently may not be attainable. Owners and operators of RCRA facilities would not face potential citizen suits for noncompliance with regulations. Also, a suspension would give the Agency, the regulated community, the insurance industry more time to develope appropriate methods of financial responsibility for liability coverage at RCRA facilities.

However, the approach has several disadvantages. Until the liability coverage requirements are reactivated, adequate protection may not be provided to human health and the environment. Currently insured firms may terminate their coverage as a result of the suspension. Furthermore, the likelihood that the required environmental insurance would become more available at some point in the future remains unclear. To date, the insurance industry and the regulated community have had several years to develop the required liability insurance. In addition, suspending the requirements for liability coverage would also suspend much of the demand for such insurance, reducing incentives for carriers to provide insurance policies for RCRA facilities. If the insurance market for RCRA facilities is presently depressed, some measure would be needed to determine when the market has recovered sufficiently to reinstate the liability coverage requirements. The Agency requests comments on the present state of the insurance market and on whether insurers will be better able to offer the required liability coverage at some point in the near future.

Finally, the Agency may consider rescinding the liability coverage requirements permanently. The Agency solicits comments on whether human health and the environment would be sufficiently protected in the absence of these requirements.

One obstacle to realizing practical benefits from this approach is that State regulations requiring financial responsibility assurances analogous to the Federal program will remain in effect unless and until a State revises its regulations to parallel EPA's newly amended regulations. Absent some action by EPA, it could be argued that such State regulations would still be regarded as EPA-authorized Subtitle C requirements even though there is no longer a corresponding EPA Subtitle C requirement. Thus, under this theory, facilities in authorized States would obtain no relief from this rulemaking.

EPA's current view is that such a result is inconsistent with the purposes of State authorization under the statute. The general objective of section 3006 is to allow EPA to suspend its implementation of the RCRA program in those States where the State's program (including its substantive standards) satisfies the statutory and regulatory objectives of the RCRA program. Where EPA removes a particular regulatory requirement from the RCRA program, it no longer makes sense for EPA to view the State analog to that requirement as

This information is reproduced with permission from HeinOnline, under contract to EPA. By including this material, EPA does not endorse HeinOnline.

part of the "RCRA authorized" State program.

Accordingly, if EPA suspends the financial responsibility requirements, EPA would also modify its regulations to indicate that the State's analog to those requirements would no longer be RCRA requirements. It is important to note, however, that the State regulations remain valid requirements enforceable by the State even though they would no longer be Subtitle C requirements. Under section 3009 and 40 CFR 271.1(i) and 271.1(ii), authorized States are allowed to impose more stringent requirements than EPA. Consequently, while EPA would no longer have the authority to enforce the state regulations, the State would remain free to enforce its own law.

Such a modification of the scope of the RCRA State program, would have a direct impact on the responsibilities of owners and operators under section 3005(e)(2)(B) to certify compliance with the "applicable financial responsibility requirements." If State law analogous to the Federal insurance requirements have been removed from the RCRA State program, then they are no longer the *applicable* requirements for purposes of the certification responsibilities.

IV. Executive Order 12291

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. The regulatory amendments being considered today to the liability requirements are not "major rules". The options under consideration are not likely to result in a signficant increase in costs and thus are not a major rule, no Regulatory Impact Analysis has been prepared.

V. Paperwork Reduction Act

There are no information collection requirements associated with this rule.

VI. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), Federal agencies must, in developing regulations, analyze their impact on small entities (small businesses, small government jurisdictions, and small organizations). The options under consideration either maintain the existing regulations and thereby impose no additional costs, or relax the existing insurance requirements and thus reduce costs associated with compliance.

List of Subjects

40 CFR Part 264

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

40 CFR Part 265

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

Accordingly, I certify that this proposed regulation will not have a significant impact on a substantial number of small entities.

Dated: August 16, 1985.

Lee M. Thomas,

Administrator.

[FR Doc. 85-20108 Filed 8-20-85; 8:45 am]

BILLING CODE 6560-50-M