ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264 and 265

[SWH-FRL-3015-3]

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

AGENCY: Environmental Protection Agency.

ACTION: Interim final rule.

SUMMARY: On August 21; 1985 (50 FR 33902), the Environmental Protection Agency (EPA or the Agency) published a notice of proposed rulemaking to amend the financial responsibility requirements concerning liability coverage for owners and operators of hazardous waste treatment, storage, and disposal facilities (50 FR 33902). The proposal set forth several regulatory options under consideration by the Agency to provide relief for owners and operators who have encountered difficulties in obtaining insurance necessary to comply with these requirements. EPA is today amending these requirements in interim final form to allow use of one additional financial responsibility mechanism: A corporate guarantee. This action will facilitate greater compliance with the liability coverage requirements. The Agency is also requesting comments on the form of the guarantee.

EFFECTIVE DATE: These regulations shall become effective September 9, 1986.

ADDRESSES: The public must send an original and two copies of their comments on the interim final rule no later than August 11, 1986, to: EPA RCRA docket, (S-212) (WH-562) U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Place the docket #F-86-CGIF-FFFFF on your comments. The comments received plus the record supporting this rulemaking are available for public inspection at the docket room from 9:30 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. The public must make an appointment to review docket materials. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424-9346 or at (202) 382-3000. For technical information, contact Carlos M. Lago, Office of Solid Waste (HW-562B), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-4780.

SUPPLEMENTARY INFORMATION:

I. Authority

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

II. Background

A. Current Liability Coverage Requirements

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

On April 16, 1982, EPA promulgated regulations requiring owners and operators to demonstrate liability coverage during the operating life of the facility for bodily injury and property damage to third parties resulting from accidental occurrences arising from facility operations (47 FR 16554). Under the liability coverage regulations (40 CFR 264.147 and 265.147), owners and operators of hazardous waste treatment, storage, and disposal facilities are required to demonstrate, on a per firm basis, liability coverage for sudden accidental occurrences in the amount of $1 million per occurrence and $2 million annual aggregate, exclusive of legal defense costs. 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; that is, the amount of any deductible must be covered by the insurer, who may have a right of reimbursement of the deductible amount from the insured. 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 according to annual dollar sales or revenue figures of the owner or operator. January 16, 1985 was the final phase-in date.

Congress has expressed its support for financial responsibility requirements in section 213 of the Hazardous and Solid Waste Amendments of 1984 (RCRA section 3005(e)). That section 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 ground water monitoring and financial responsibility requirements for liability coverage, closure, and post-closure care. Prior to the enactment of HSWA, a facility's interim status could be terminated only when final administrative disposition of the permit application was made, or if the facility failed to furnish the necessary application information.

B. August 21, 1985, Proposed Rule

Some owners and operators have encountered difficulties in obtaining insurance necessary to comply with the liability coverage requirements. In the notice of proposed rulemaking published by EPA on August 21, 1985 (50 FR 33902), the Agency considered taking one or a combination of the following five regulatory actions in response to this problem:

(1) Maintain the existing requirements;

(2) Clarify the required scope of coverage and/or lower the required levels of coverage;

(3) Authorize other financial responsibility mechanisms;

(4) Authorize waivers; and

(5) Suspend or withdraw the liability coverage requirements.

The Agency has decided at this time to authorize owners and operators to use a corporate guarantee as another mechanism to comply with the liability coverage requirements. EPA is still considering the other options proposed in the August 21, 1985, Notice of Proposed Rulemaking, and will publish its decision in the future. Comments on the proposed rule that address the corporate guarantee are discussed in Section IV of this preamble. Comments on other issues raised by the proposal

will be addressed in subsequent publications.

III. Authorization of the Corporate Guarantee

To enable more firms to comply with the liability coverage required during a facility's operating life, the Agency has decided to revise 40 CFR 264.147, 264.151, and 265.147 to authorize, in addition to insurance and the financial test, the use of the corporate guarantee. The Agency believes this will provide owners and operators with greater flexibility while still ensuring that funds will be available to pay third-party liability claims. Use of the corporate guarantee is consistent with EPA's closure and post-closure financial responsibility regulations (40 CFR 264.143, 264.145, 265.143 and 265.145) and with Congressional intent. In the 1984 Hazardous and Solid Waste Amendments (HSWA), Congress provides that RCRA financial responsibility for liability insurance may be established by, among other options, guarantees and self-insurance (HSWA section 205; section 3004(t) of RCRA).

A corporate guarantee is a promise by one corporation to answer for the default of another. It is a collateral undertaking and presupposes another obligation which is identified in the guarantee. There is ordinarily a contract or other agreement between the principal (obligor) and a third party creating the primary obligations. The guarantee is then a contract between the principal and the guarantor, guaranteeing payment of the primary obligation. However, in the corporate guarantee that is the subject of today's rule, the obligation between the principal and third party will generally arise out of tort liability, not contract. In any case, if the principal defaults on the primary obligation, then the guarantor is liable to the third party on the obligation created by the guarantee. As provided in §§ 264.147(g)(1) and 265.147(g)(1) of today's rule, the guarantor must be the parent corporation of the owner or operator, directly owning at least 50 percent of the voting stock of the corporation that owns or operates the facility; the latter corporation is deemed a "subsidiary" of the parent corporation.

The Agency has decided to allow use of the corporate guarantee only if the guarantor is the parent corporation of the owner or operator because it believes such a guarantee is more likely to be enforceable under state law, and because the parent corporation is interested in its subsidiaries' performance, and is in a better position than other corporate entities to ensure that the facilities in question are being operated in conformance with EPA regulations.

The corporate guarantee that is the subject of today's rule differs from the corporate guarantee for closure or post-closure care in several ways. First, and most important, the guarantee is not made to the Environmental Protection Agency, as obligee. Instead, the corporate guarantee for liability coverage is made by the corporate parent on behalf of the owner or operator "to any and all third parties who have sustained or may sustain bodily injury or property damage caused by [sudden and/or nonsudden] accidental occurrences arising from operations of the facilities covered by [the] guarantee". Unlike the corporate guarantee for closure or post-closure care, EPA cannot take action to enforce the terms of the corporate guarantee for liability coverage. Action to notify the corporate guarantor of an obligation to pay under the terms of the guarantee will have to be taken by injured parties who are covered by the guarantee.

Second, the Agency has modified the cancellation provisions. The guarantee for closure and/or post-closure care may be terminated 120 days or later, after notice is provided to the EPA Regional Administrator. In that case, the guarantor is responsible for providing alternative financial assurance if the owner or operator fails to provide such assurance. Today's rule, however, provides guarantor cannot terminate a liability coverage guarantee unless and until the owner or operator obtains alternative liability coverage that the Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located approve(s). We believe that this formulation will better provide continued assurance of financial responsibility. In addition, while the Regional Administrator can require an owner or operator to undertake closer or post-closure actions, and may decide to invoke that authority upon receipt of a cancellation notice, no comparable authority exists for third-party liability.

Finally, the Agency has added a requirement, not found in the corporate guarantee for closure or post-closure care, that the guarantee is to be interpreted and enforced in accordance with the laws of the State of incorporation of the guarantor. This clause is intended to operate in conjunction with the regulatory requirement in § 264.147(g)(2) to ensure that the corporate guarantee for liability is valid and enforceable under the relevant State law. Section 264.147(g)(2) provides that the corporate guarantee may be used to satisfy the liability coverage requirements only if the Attorney General(s) or insurance commissioner(s) of the State(s) in which the guarantor is incorporated and the State(s) in which the facility(ies) covered by the guarantee is (are) located have submitted a written statement to EPA that a corporate guarantee executed as required is a legally valid and enforceable obligation in that State. The Agency expects in this way to ensure that State limitations on the powers of corporations to undertake guarantee obligations will not affect the operation of the corporate guarantee for liability.

Because EPA recognizes that a subsidiary's assets and liabilities are usually consolidated into the balance sheet of parent corporations, the Agency has decided not to allow a corporate subsidiary to use the financial test in combination with the corporate guarantee. However, an owner or operator may use insurance in combination with either the financial test or the corporate guarantee to comply with the liability requirements (§ 264.147(a)(3) and § 265.147(a)(3)).

EPA has decided to allow use of the corporate guarantee because it may provide relief for some owners and operators who are unable to obtain insurance. However, the Agency has concerns about the enforceability of the guarantee under State insurance law. This is a major reason why the guarantee is restricted to parents. In addition, because the validity of the corporate guarantee will depend on applicable state law, the guarantee will be allowed only for facilities in States where the State Attorney General or State insurance commissioner has certified to EPA that the guarantee is fully valid and enforceable by third-parties who are injured by accidents arising from the operations of the facility involved. EPA has sent requests to the Attorney General in each State for an opinion on this subject. A list of non-authorized States where the parent corporate guarantee is fully valid and enforceable will then be compiled by the Agency to be published in the **Federal Register** in the near future.

IV. Summary of and Response to Comments on Corporate Guarantee

In the August 21, 1985 notice of proposed rulemaking, the Agency requested comments on whether the corporate guarantee should be authorized as an alternative mechanism for demonstrating financial assurance for liability coverage. The Agency previously considered authorizing the corporate guarantee as an alternative

financial assurance mechanism for liability coverage, but had major questions about the validity and enforceability of such an arrangement, especially with respect to State insurance laws (47 FR 16547 (April 16, 1982)).

The Agency requested comments on the potential advantages and disadvantages of authorizing owners and operators to use a corporate guarantee to demonstrate financial assurance for liability coverage. In particular, comments were requested on the validity and the enforceability of this mechanism with respect to State laws. Most commenters on the proposed rule strongly endorsed the corporate guarantee as an additional financial responsibility alternative for satisfying liability coverage requirements.

Commenters stated that the corporate guarantee is a common commercial instrument and that most States' general corporation laws authorize corporations to enter into guarantee contracts. The commenters who provided information about State insurance laws generally stated that the corporate guarantee for liability coverage would be valid under their State's statutes. For example, one commenter from North Carolina said that initial research showed that the corporate guarantee would be a valid and enforceable obligation under North Carolina law. In addition, a commenter noted that Colorado and Montana currently allow the corporate guarantee for liability coverage. One commenter in Kentucky said that normal transporters, including hazardous waste transporters, are allowed to self-insure through their parent corporations to satisfy the Kentucky Department of Transportation's requirements for transporters.

Several commenters stated that if a corporate guarantee were allowed as an alternate mechanism, they would take advantage of that option. One commenter suggested that allowing the corporate guarantee to demonstrate financial assurance for liability coverage could increase compliance with the liability coverage requirements. Louisiana strongly supported the use of the corporate guarantee, stating that preliminary analysis showed that it would allow medium-sized companies and commercial hazardous waste disposers to comply with the liability coverage rules.

Several commenters noted that use of the corporate guarantee might simplify the task of preparing financial assurance documentation, which would result in increased compliance with the regulations. Because many subsidiaries consolidate their financial statements with parent corporations, they do not have separately audited financial statements. According to some commenters, requiring each subsidiary to comply with the financial test greatly increases the cost of compliance and generates significant quantities of duplicate documentation.

Commenters also offered various other arguments in support of use of the corporate guarantee for liability coverage. Several said that the guarantee is consistent with existing business practices. Financial institutions have used corporate guarantees to assure repayment of debt by a subsidiary. The commenters believed that corporate guarantees would provide a cost-effective alternative to obtaining insurance. One commenter suggested that the corporate guarantee would better achieve the goal of the liability coverage regulations, because, unlike many insurance policies, it would provide financial assurance for liability exposure from pre-existing contamination.

Commenters who opposed use of the corporate guarantee as an alternative mechanism for demonstrating financial assurance for liability coverage made several arguments. First, some commenters were concerned that the guarantee would not be valid or enforceable. The Agency shares that concern, and is thus requiring that before a corporate guarantee can be used to demonstrate financial assurance, the State Attorney General(s) or insurance commissioner(s) in the State(s) where the guarantor is incorporated and where the facility(ies) is (are) located must issue a written statement that under the laws of that (these) State(s) such a guarantee is valid and enforceable.

Second, some commenters suggested that the corporate guarantee would not be an effective financial assurance mechanism in the long run because parent corporations eventually would find themselves in the situation currently faced by some private insurance companies, that is, subject to extensive litigation and clean-up expenses. The Agnecy believes that a parent will have a strong interest in ensuring that a guaranteed subsidiary has sufficient pollution monitoring and safety measures to prevent and minimize accidential releases and third party damages from occurring at the subsidiaries' TSDFs. In addition, where third party damages occur, the parent guarantor's financial liability will be limited to the amount of the guarantee, exclusive of legal defense costs.

One commenter asked whether it was advisable for a corporate parent to advance a guarantee to a company that cannot obtain liability insurance, and wondered if that opened the door to a lawsuit against the parent's directors and officers. Parent corporations should use good judgment about the guarantees that they provide to subsidiaries. Nevertheless, the inability of a subsidiary to obtain liability insurance is not necessarily an indication that the subsidiary's facilities are likely to cause damages to third parties and should be closed.

Commenters argued that a parent corporation might guarantee subsidiaries for which the parent did not have the funding to provide liability coverage. The Agency disagrees. The requirement that a parent corporation seeking to provide a corporate guarantee must satisfy the requirements of the financial test will provide assurance that the parent corporation has sufficient financial strength to issue the guarantee.

Commenters who were concerned about the November 8, 1985, deadline for certifying compliance with the liability coverage requirements suggested combining the corporate guarantee with another alternative, such as waivers. Commenters suggested that the Agency should grant waivers to those facility owners and operators who could not certify compliance with the financial responsibility requirements for liability coverage, closure, and post-closure care on November 8, but who could use the corporate guarantee once it is authorized. The Agency cannot adopt this suggestion. Under section 3005(e) of RCRA, facilities who did not certify compliance with the liability coverage regulations by November 8, 1985, lost interim status. The Agency does not have authority to nullify that event.

One commenter suggested that the following concerns should be addressed in developing any corporate guarantee: (1) Whether funds would be required to be set aside or otherwise available for third party claims; and (2) whether, because of the complexity of the guarantee, third parties would be inhibited from obtaining access to "legitimate" compensation funds or whether inordinate time and resources would be required to enforce the guarantee. The Agency has considered these issues in promulgating the corporate guarantee. Although the guarantor is not required to set aside funds for third party compensation, it must pass the financial test and thereby demonstrate that it has sufficient funds to implement its guarantee, if necessary. Second, as discussed in detail in Section

III, the Agency has attempted to design the corporate guarantee to allow for the easiest possible enforcement by third parties.

In summary, the Agency disagrees with those commenters who opposed use of the corporate guarantee as an alternative mechanism. Although certain State laws may not authorize use of the corporate guarantee for liability coverage, the Agency believes that in most States the guarantee will be valid and enforceable. Under a corporate guarantee, the parent corporation guarantees its subsidiary's obligations and therefore has a direct financial stake in its subsidiaries' actions. The strict requirements of the financial test will deter a parent corporation from issuing a guarantee for a subsidiary when it does not have adequate financial strength to assure the availability of funds for third party liability claims. The Agency believes that expanding the number of available options is desirable, given the present state of the insurance market and the high level of assurance provided by the corporate guarantee.

V. Effective Date

This regulation is being published in "interim final form". This means that although the regulation will be effective in 60 days, the Agency solicits comments on the regulation (in particular the form of the corporate guarantee), and may modify it in response to additional public comment.

Section 3010(b) of RCRA provides that EPA's hazardous waste regulations and revisions thereto generally take effect six months after their promulgation. The purpose of this requirement is to allow sufficient lead time for the regulated community to prepare to comply with major new regulatory requirements. The statute allows for a shorter period prior to the effective date, however, for "good cause" (among other reasons), which the Agency believes exists here. The Agency believes that an effective date six months after promulgation for the amendment promulgated today, would cause substantial and unnecessary disruption in the implementation of the existing regulations and would be contrary to the interest of the regulated community and the public.

Today's amendment adopts the corporate guarantee as another mechanism for complying with third-party liability coverage requirements and thus makes it easier for some owners and operators to act in accordance with the RCRA liability coverage regulations. The Agency believes that it makes little sense to delay needed relief to owners or operators by an additional four months. However, because the Agency may wish to revise the form of the guarantee on the basis of public comment, the amendments to §§ 264.147, 264.151 and 265.147 promulgated in this rulemaking action will not be effective until 60 days from the date of this **Federal Register** notice.

VI. State Authority

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Today's announcement will be automatically applicable only in those States that do not have final authorization. In authorized States, the requirements will not be applicable unless and until the State revises its program to adopt equivalent requirements under State law.

It should be noted that authorized States are required to modify their programs only when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. This is a result of section 3009 of RCRA, which allows States to impose standards in addition to those in the Federal program.

The standards promulgated today are considered to be less stringent than the existing Federal requirements. Therefore, authorized States are not required to modify their programs to adopt requirements equivalent or substantially equivalent to the provisions listed above.

VII. Request for Public Comment

Although the use of a corporate guarantee was proposed August 21, 1985, the Agency did not specify what form the guarantee would take. We believe that the guarantee form included in § 264.151 of today's rule will generally be valid and enforceable. At a minimum, section 3004(t) of RCRA provides for a right of direct action against guarantors in the event of bankruptcy of the owner or operator, or if a court's jurisdiction cannot be obtained over an owner or operator likely to be insolvent at the time of judgment. Moreover, we believe that a right of action under the guarantee set forth in today's rule will lie against the guarantor whenever a judgment has been obtained against the owner or operator or a settlement agreement has been executed.

However, due to the unusual nature of the guarantee (i.e., it is a general guarantee designed to assure payment of tortious, rather than contractual, obligations to unidentified third parties), the Agency would appreciate public comments *on the form itself.* In particular, the Agency requests comments on whether any modifications to the form would be desirable to facilitate claims by injured third parties against the guarantor. We do *not* solicit comments on the § 264.147 and § 265.147 requirements themselves.

Two copies of all comments should be sent, no later than 30 days after the date of this notice to: EPA public docket, room S–212, U.S. EPA, 401 M Street SW., Washington, DC 20460, where they may be inspected by all interested parties.

VIII. 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 coverage requirements are not "major rules". The options under consideration will not likely result in a significant increase in costs (but are likely to decrease costs) and thus are not a major rule; no Regulatory Impact Analysis has been prepared.

IX. Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, and have been assigned OMB control number 2050–0036.

X. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1950 (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 option under consideration relaxes the existing insurance requirements and thus commonly reduces costs associated with compliance.

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

XI. Supporting Documents

Supporting documents available for this interim final rule include comments on the August 21, 1985 proposed rule, summary of the comments, and background documents on the financial test for liability coverage. In addition, background documents prepared for previous financial assurance regulations are also available.

All of these supporting materials are available for review in the EPA public docket (RCRA docket #F-86-CGIF-FFFFF), Room S-212, Waterside Mall, 401 M Street SW., Washington, DC 20460.

List of Subjects

40 CFR Part 264

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

40 CFR Part 265

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

Dated: July 3, 1986.

Lee M. Thomas,

Administrator.

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

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

40 CFR Part 264 is amended as follows:

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

Authority: Secs. 1006, 2002(a), 3004 and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

2. In § 264.147, paragraph (g) is redesignated as paragraphs (h), paragraph (a)(3), (b)(2), (a)(2), and (b)(3) are revised, and a new paragraph (g) is added, to read as follows:

§ 264.147 Liability requirements.

(a) * * *

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

(3) An owner or operator may demonstrate the required liability coverage through use of the financial test, insurance, the corporate guarantee, a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance. The amount of coverage demonstrated must total at least the minimum amounts required by this paragraph.

(b) * * *

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

(3) An owner or operator may demonstrate the required liability coverage through use of the financial test, insurance, the corporate guarantee, a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance. The amounts of coverage demonstrated must total at least the minimum amounts required by this paragraph.

* * * * *

(g) Corporate guarantee for liability coverage.

(1) Subject to subparagraph (2), an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "corporate guarantee." The guarantor must be the parent corporation of the owner or operator. The guarantee must meet the requirements for owners or operators in paragraphs (f)(1) through (7) of this section. The wording of the corporate guarantee must be identical to the wording specified in § 264.151(h)(2). A certified copy of the corporate guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. The terms of the corporate guarantee must provide that:

(i) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Regional Administrator(s). This guarantee may not be terminated unless and until the EPA Regional Administrator(s) approve(s) alternate liability coverage complying with section 264.147 and/or 265.147.

(2) A corporate guarantee may be used to satisfy the requirements of this section only if the Attorney General(s) or insurance commissioner(s) of the State in which the guarantor is incorporated *and* the State(s) in which the facility(ies) covered by the guarantee is (are) located has (have) submitted a written statement to EPA that a corporate guarantee executed as described in this section and Section 264.151(h)(2) is a legally valid and enforceable obligation in that State.

* * * * *

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

§ 264.151 Wording of the instruments.

* * * * *

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

Letter From Chief Financial Officer

[Address to Regional Administrator of every Region in which facilities for which financial responsibility is to be demonstrated through the financial test are located.]

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

[Fill out the following paragraphs regarding facilities and liability coverage. If there are no facilities that belong in a particular paragraph, write "None" in the space indicated. For each facility, include its EPA Identification Number, name, and address.]

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

The firm identified above guarantees, through the corporate guarantee specified in Subpart H of 40 CFR Parts 264 and 265, liability coverage for [insert "sudden" or "nonsudden" or "both sudden and nonsudden"] accidental occurrences at the following facilities owned or operated by the following subsidiaries of the firm:———.

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

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

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

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

4. The firm identified above owns or operates the following hazardous waste management facilities for which financial assurance for closure or, if a disposal facility, post-closure care, is not demonstrated either to EPA or a State through the financial test or any other financial assurance mechanisms specified in Subpart H of 40 CFR Parts 264 and 265 or equivalent or substantially equivalent State mechanisms. The current closure and/or post-closure cost estimates not covered by such financial assurance are shown for each facility:_____.

5. This firm is the owner or operator of the following UIC facilities for which financial assurance for plugging and abandonment is required under Part 144. The current closure cost estimates as required by 40 CFR 144.62 are shown for each facility:_____.

This firm [insert "is required" or "is not required"] to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year.

The fiscal year of this form ends on [month, day]. The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended [date].

* * * * *

4. In § 264.151, introductory paragraph (h) is redesignated as paragraph (h)(1) and a new paragraph (h)(2) is added to read as follows:

§ 264.151 Wording of the instruments.

* * * * *

(h)(2) A corporate guarantee, as specified in § 264.147(g) or § 265.147(g) of this Chapter, must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Corporate Guarantee for Liability Coverage

Guarantee made this [date] by [name of guaranteeing entity], a business corporation organized under the laws of the State of [insert name of State], herein referred to as guarantor, on behalf of our subsidiary [owner or operator] of [business address], to any and all third parties who have sustained or may sustain bodily injury or property damage caused by [sudden and/or nonsudden] accidental occurrences arising from operation of the facility(ies) covered by this guarantee.

Recitals

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 40 CFR 264.147(g) and 265.147(g).

2. [Owner or operator] owns or operates the following hazardous waste management facility(ies) covered by this guarantee: [List for each facility: EPA Identification Number, name, and address.] This corporate guarantee satisfies RCRA third-party liability requirements for [insert "sudden" or "nonsudden" or "both sudden and nonsudden"] accidental occurrences in above-named owner or operator facilities for [insert dollar amount] of coverage.

3. For value received from [owner or operator], guarantor gurarantees to any and all third parties who have sustained or may sustain bodily injury or property damage caused by [sudden and/or nonsudden] accidental occurrences arising from operations of the facility(ies) covered by this guarantee that in the event that [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] acidential occurrences, arising from the operation of the above-named facilities, 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 will satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage identified above.

4. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator] that he intends to provide alternate liability coverage as specified in 40 CFR 264.147 and 265.147, as applicable, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the guarantor shall establish such liability coverage unless [owner or operator] has done so.

5. The guarantor agrees to notify the EPA Regional Administrator 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 that within 30 days after being notified by an EPA Regional Administrator of a determination that guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a guarantor, he shall establish alternate liability coverage as specified in 40 CFR 264.147 or 265.147 in the name of [owner or operator], unless [owner or operator] has done so.

7. Guarantor reserves the right to modify this agreement to take into account amendment or modification of the liability requirements set by 40 CFR 264.147 and 265.147, provided that such modification shall become effective only if a Regional Administrator does not disapprove the modification within 30 days of receipt of notification of the modification.

8. Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable requirements of 40 CFR 264.147 and 265.147 for the above-listed facility(ies), except as provided in paragraph 9 of this agreement.

9. Guarantor may terminate this guarantee by sending notice by certified mail to the EPA Regional Administrator(s) for the Region(s) in which the facility(ies) is (are) located and to [owner or operator], provided that this gurarantee may not be terminated unless and until [the owner or operator] obtains, and the EPA Regional Administrator(s) approve(s) alternate liability coverage complying with 40 CFR 264.147 and/or 265.147.

10. This guarantee is to be interpreted and enforced in accordance with the laws of [State of incorporation of guarantor].

11. Guarantor hereby expressly waives notice of acceptance of this guarantee by any party.

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR 264.151(h)(2).

Effective date: _____

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

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

40 CFR Part 265 is amended as follows:

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

Authority: Secs. 1006, 2002(a), 3004 and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6908, 6912(a), 6924 and 6925).

2. In § 265.147, paragraph (g) is redesignated as paragraph (h), paragraphs (a)(2), (a)(3), (b)(2), and (b)(3) are revised, and a new paragraph (g) is added, to read as follows:

§ 265.147 Liability requirements.

(a) * * *

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

(3) An owner or operator may demonstrate the required liability coverage through use of the financial test, insurance, the corporate guarantee, a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance. The amounts of coverage demonstrated must total at least the minimum amounts required by this paragraph.

(b) * * *

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

(3) An owner or operator may demonstrate the required liability coverage through use of the financial test, insurance, the corporate guarantee, a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance. The amounts of coverage demonstrated must total at least the minimum amounts required by this paragraph.

* * * * *

(g) Corporate guarantee for liability coverage.

(1) Subject to subparagraph (2), an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "corporate guarantee." The guarantor must be the parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (7) of this section. The wording of the corporate guarantee must be identical to the wording specified in § 264.151(h)(2). A certified copy of the corporate guarantee must accompany the items sent to the Regional Administrator as specified in paragraph (f)(3) of this section. The terms of the corporate guarantee must provide that:

(i) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Regional Administrator(s). This guarantee may not be terminated unless and until the EPA Regional Administrator(s) approve(s) alternate liability coverage complying with § 264.147 and/or 265.147.

(2) A corporate guarantee may be used to satisfy the requirements of this section only if the Attorney General(s) or insurance commissioner(s) of the State in which the guarantor is incorporated *and* the State(s) in which the facility(ies) covered by the guarantee is (are) located has (have) submitted a written statement to EPA that a corporate guarantee executed as described in this section and Section 264.151(h)(2) is a legally valid and enforceable obligation in that State.

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