ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264 and 265

[FRL-3224-6]

Liability Requirements for Hazardous Waste Facilities; Corporate Guarantee

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On August 21, 1985, 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 (TSDFs) (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 the liability coverage requirements. On July 11, 1986, EPA published an Interim Final Rule to allow use of a corporate guarantee as an additional financial responsibility mechanism (51 FR 25350). That Interim Final Rule became effective on September 9, 1986. EPA is today finalizing that rule with a number of minor revisions. The Agency is adding an explicit provision that the guarantee is in addition to and does not affect any other responsibility or liability of the guarantor with respect to the covered facilities. In addition, the Agency is allowing use of the guarantee by firms incorporated outside the United States if (1) the Attorney General or Insurance Commissioner in each State where a facility covered by the guarantee is located, and in the State in which the guarantor has its principal place of business, has advised EPA, in writing, that the corporate guarantee as specified in these regulations is a fully valid and enforceable obligation in that State; and (2) the non-U.S. corporation has identified an agent for service of process in each such State. The Agency is removing the choice of law provision from the guarantee form, in part to enable foreign firms to use the corporate guarantee, but also to allow use of a single corporate guarantee for liability coverage, closure, and post-closure care. A number of exclusions to the corporate guarantee instrument also have been added to the final version of the text. These exclusions, patterned after the existing standard exclusions used by insurers in their policies, are intended to ensure that funds assured by the corporate guarantee will be used only to pay for bodily injury or property damage suffered by third parties as a result of accidental occurrences at hazardous waste treatment, storage and disposal operations.

EFFECTIVE DATE: These regulations shall become effective December 18, 1987, in order to allow owners or operators to begin use of the revised corporate guarantee as soon as possible. Firms that, prior to the effective date of this Notice, have secured a corporate guarantee in accordance with the Interim Final Rule requirements that became effective on September 9, 1986, are not required to revise their corporate guarantees to conform to this Final Rule.

ADDRESSES: The public docket for this rulemaking is available for public inspection in Room S-212, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460 from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays. The docket number is F-86-CGIF-FFFFF. The public must make an appointment to review docket materials by calling (202) 475-9327. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline, toll free, at (800) 424-9346 or in Washington, DC at (202) 382-3000. For technical information, contact Carlos M. Lago, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460, (202) 382-4780.

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

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 (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.

On April 16, 1982, EPA promulgated regulations requiring owners or operators to demonstrate liability coverage during the operating life of the facility for bodily injury and/or property damage to third parties resulting from accidental occurrences arising from facility operations (47 FR 16554). The April 1982 regulations allowed use of liability insurance or a financial test to provide financial assurance of liability coverage. Under the liability coverage regulations (40 CFR 264.147 and 265.147), an owner or operator of a hazardous waste treatment, storage, or disposal facility must 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. An owner or operator of a surface impoundment, landfill, or land treatment facility used to manage hazardous waste is 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.

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.

B. August 21, 1985 Notice of Proposed Rulemaking

Some owners and operators have encountered difficulties in obtaining insurance necessary to comply with the liability coverage requirements. In a Notice of Proposed Rulemaking (NPRM) published by EPA on August 21, 1985 (50 FR 33902), the Agency announced that it was considering 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.

As discussed below, EPA subsequently decided to allow use of a corporate guarantee to satisfy the liability assurance requirements. EPA is continuing to study other options for assuring liability coverage and plans another rulemaking to authorize other financial mechanisms in the near future.

C. July 11, 1986 Interim Final Rule

A number of commenters on the August 21, 1985 NPRM encouraged EPA to authorize a corporate guarantee for liability coverage. A corporate guarantee is an instrument by which a firm capable of passing the financial test for liability promises to pay the obligations of the owner or operator if the owner or operator does not do so. On July 11, 1986, in order to enable more firms to comply with the liability coverage required during a facility's operating life, the Agency issued an interim final rule, revising 40 CFR 264.147, 264.151, and 265.147, to authorize, in addition to insurance and the financial test, the use of a corporate guarantee for liability coverage (51 FR 25350). Under this regulation, a parent firm that is able to pass the financial test for liability coverage issues a guarantee on behalf of its subsidiary in which the parent promises to satisfy third-party liability judgments or claims if the subsidiary does not do so. Authorization of a corporate guarantee for liability provides owners and operators with greater flexibility in complying with liability coverage requirements, while still ensuring that funds are available to pay third-party liability claims. EPA's closure and post-closure financial responsibility regulations (40 CFR 264.143(f), 264.145(f), 265.143(e) and 265.145(e)) allow use of a parent corporate guarantee. Furthermore, in the Hazardous and Solid Waste Amendments of 1984 (HSWA), Congress provided that RCRA financial responsibility for liability coverage could be established by, among other options, guarantees and self-insurance (HSWA section 205; section 3004(t) of RCRA).

D. Comments and Responses on July 11, 1986 Interim Final Rule on Corporate Guarantee

In the Preamble to the July 11, 1986 Interim Final Rule, EPA indicated that because it was authorizing the use of a corporate guarantee for liability that differed in several ways from the corporate guarantee for closure and post-closure care, it was soliciting additional comments on the liability guarantee. EPA promulgated a general guarantee designed to assure payment of tortious, rather than contractual, obligations to as-yet-to-be-determined third parties. Due to the unusual nature of the guarantee the Agency requested comments on whether any modifications to the wording of the guarantee would be desirable to facilitate the payment of claims made by injured third parties against guarantors. Few comments were received on the text of the guarantee. Although the Agency did not solicit comments on issues not raised by the Interim Final Rule, some commenters addressed the liability coverage requirements in 40 CFR 264.147 and 265.147.

A majority of the commenters endorsed the Agency's decision to allow the corporate guarantee as a mechanism to comply with third-party liability requirements. Several commenters specifically supported the text of the guarantee in the Interim Final Rule. However, in response to other comments, discussed below, and as a result of analysis conducted by EPA, the Agency has determined that certain minor changes to the guarantee form are desirable. Firms that, prior to the effective date of today's Final Rule, have secured a corporate guarantee in accordance with the requirements that became effective on September 9, 1986, will not be required to revise their corporate guarantees to conform to the guarantee form in the Final Rule. These firms, however, may wish to change the language of their guarantee to specify the "occurrence" and "annual aggregate" levels of coverage provided by the guarantee, as required in § 264.151(h)(2) paragraph 2 of today's rule.

In the July 11, 1986 Interim Final Rule, EPA noted that the corporate guarantee for liability coverage differs from the corporate guarantee for closure or post-closure care in several ways. The most important difference is that 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." Several comments addressed various aspects of this provision.

One commenter argued that the language was too broad. The commenter encouraged EPA to define "bodily injury or property damage" so that the rule specifies the risks that will be covered. The commenter argued that a safeguard is needed against the possibility that claims for payment by the guarantor will be made for third-party incidents that do not arise from the hazardous waste activities at the facility. According to the commenter, a limit on liability will not protect guarantors from this problem.

EPA is aware that pollution liability insurance policies generally exclude from coverage certain claims for bodily injury and property damage, including claims covered by workers' compensation, employers' liability claims, and claims arising from the operation of motor vehicles. The Agency believes it is appropriate to incorporate some exclusions into the corporate guarantee, in order to limit the number and scope of possible interpretations of the coverage provided by the corporate guarantee. The exclusions included in today's rule are based upon EPA's review of standard environmental impairment liability (EIL) contracts. The purpose or operation of each exclusion is explained in section III of this preamble.

In the July 11, 1986 Interim Final Rule, owners and operators were required to specify the level of coverage provided for third party liabilities arising from sudden and nonsudden accidental occurrences. In today's rule, EPA is modifying the language of the guarantee instrument to require owners and operators to specify both the "each occurrence" and "annual aggregate" levels of coverage provided. The modification was necessary to establish a limit on liability provided for an individual occurrence. Without the specified occurrence limit, a single claim could exhaust the total annual aggregate coverage.

This modified language is consistent with the language in the Hazardous Waste Facility Liability Endorsement and the Hazardous Waste Facility Certificate of Liability in § 264.151 (i)(1) and (j)(1) respectively.

EPA noted in the preamble to the July 11, 1986 Interim Final Rule that it had modified the cancellation provision found in the corporate guarantee for

closure and post-closure care. Under the cancellation provision in the corporate guarantee for liability, a guarantor cannot terminate a liability coverage guarantee unless and until the owner or operator obtains alternative liability coverage and that coverage is approved by the EPA Regional Administrator for the Region in which the facility is located. (If facilities are located in more than one Region, the Regional Administrator of each such Region must approve.) One commenter noted that the rule allows termination of the contract upon acquisition of insurance coverage, and was concerned that, if the guarantee were replaced by a claims-made insurance policy, a gap in liability coverage could be created. The gap would consist of the period of time in which the guarantee had been in effect, because upon termination of the guarantee, the parent corporation would no longer be required to guarantee the availability of funds for injuries that had been sustained during the term of the guarantee contract and because this period also would not be covered by an ordinary claims-made policy. Since most pollution liability insurance is now provided by environmental impairment liability (EIL) policies, which are generally offered on a claims-made basis only, the Agency agrees that "claims-made" insurance policies may present special problems. EPA expects to examine them more closely in the future but does not feel the turnover from corporate guarantee to insurance will occur with such frequency as to warrant further regulatory change at this time.

Another commenter suggested that the corporate guarantee does not state clearly when the guarantee terminates, if, for example, the facility closes. The Agency does not consider this necessary within the guarantee regulations because under 40 CFR 264.147(e) and 265.147(e), general procedures exist for determining when financial assurance can be terminated. These procedures apply regardless of the assurance mechanism that is used. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator that he is no longer required to maintain liability coverage for that facility.

In the July 11, 1986 Interim Final Rule, EPA included a requirement, referred to as a "choice of law" provision, that is not found in the corporate guarantee for closure and post-closure care. A choice of law provision is a clause in a legal instrument in which the parties specify that the law of a certain State is to be applied to any dispute arising from the instrument. The choice of law provision in the Interim Final Rule required that the guarantee be interpreted and enforced in accordance with the laws of the State of incorporation of the guarantor.

Commenters expressed concern about the choice of law provision in the July 11 guarantee. A State environmental protection agency argued, regarding the choice of law provision, that by requiring a guarantee to be construed under the law of the State of the guarantor's incorporation, EPA might make it more difficult for claimants to collect funds from a guarantor than it would be if the instrument was construed according to the law of the State where the event leading to the third-party liability claim occurred. This would be true, the commenter stated, if the parent corporation, as guarantor, successfully requested removal of a liability action to the jurisdiction of its incorporation. In that circumstance, a claimant could be forced to press his claim in a court considerably distant from his home and from the site of the occurrence. Because of this possibility, the commenter asked that the law of the State where the facility operates be used to interpret the terms of the guarantee rather than the law of the guarantor's State of incorporation.

EPA is not convinced that the concern expressed by the commenter about the removal of cases from one jurisdiction to another is well-founded. Choice of law provisions in contractual agreements, like guarantees, normally are not legal grounds for the removal of claims from one jurisdiction to another. EPA agrees, however, that it is desirable for the guarantee to be interpreted according to the place where the harm occurred, if possible.

The Agency also recognizes that the choice of law provision, as it was included in the July 11, 1986 Interim Final Rule, did pose two significant problems. First, the effect of the rule on guarantees by or claims against corporations incorporated outside of the United States was unclear. The rule could have been interpreted to require application of the law of the country in which a non-U.S. parent corporation is incorporated. Alternatively, it might have been interpreted to preclude use of the corporate guarantee by non-U.S. corporations. Second, because the corporate guarantees for closure and post-closure care do not contain a choice of law provision, problems could have arisen if the coverage for closure and post-closure care and the coverage for liability were combined in one corporate guarantee instrument.

The Agency initially included the choice of law provision because of concern that conflict might develop where one guarantee is used to cover facilities in more than one State. Absent a choice of law provision, guarantors and third-party claimants could disagree about what State's law should be used to interpret the terms of the guarantee. In addition, the terms of a single guarantee might be interpreted in conflicting ways by different States.

The Agency has decided, however, that these potential problems are outweighed by the difficulties discussed above that may arise from requiring application of the law of the guarantor's State of incorporation. Therefore, in order to resolve the problems discussed above, and to help to ensure that one guarantee can be used for closure, post-closure and liability, the Agency has decided to eliminate the choice of law clause from the corporate guarantee form for liability coverage.

The second problem raised by the State commenter was that the rule did not clearly specify whether a State with a delegated RCRA program will be required to modify its program in order to permit use of the proposed mechanism if it is deemed valid and enforceable in the State. The commenter suggested that if a State did not find the use of the parent corporate guarantee to be a prudent financial responsibility mechanism in a particular situation, the State should be allowed the discretion to reject the parent guarantee despite its conformity with the final rule.

As EPA explained in the Interim Final Rule, the rule will be automatically applicable only in those States that do not have final authorization. In authorized States, the corporate guarantee for liability requirements will not be applicable unless and until the State revises its program to adopt equivalent requirements under State law. Furthermore, because these corporate guarantee requirements are considered to be less stringent than the existing Federal requirements, authorized States are not required to modify their programs to adopt equivalent or substantially equivalent provisons.

In the July 11, 1986, Interim Final Rule, EPA provided that the corporate guarantee could be used to fulfill liability coverage requirements only if the Attorney General or Insurance Commissioner of the State in which the guarantor is incorporated and of each

State in which a facility covered by the guarantee is located have submitted written statements to EPA that a corporate guarantee executed as required is a legally valid and enforceable obligation in those States.

A commenter on this requirement stated that the corporate statutes of almost all States specifically empower corporations to enter into guarantee agreements. (The commenter attached a list of the pertinent provisions of State corporate statutes.) The commenter, therefore, saw no need for EPA to limit use of the corporate guarantee to 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 agrees that State corporation law is not likely to present substantial obstacles to the use of the corporate guarantee for liability coverage. The Agency is concerned, however, that State insurance law may preclude use of the corporate guarantee. At least one State has notified EPA that a corporation seeking to use the guarantee for liability coverage will be required to qualify as an insurer under State law. Therefore, EPA is continuing to require that certification be obtained from the State Attorney General or State Insurance Commissioner before the guarantee may be used in that State.

In connection with certification, a commenter urged EPA to make efforts to ensure the cooperation of the States in authorizing the corporate guarantee. EPA has sought in several ways to obtain information from the States concerning the validity and enforceability of the guarantee. Letters were sent to the Attorneys General of all States and Territories asking for an opinion on the guarantee. In addition, all State Attorneys General have been contacted by telephone to encourage their response to EPA's questions. Finally, in States where the law mandates that the Attorney General may respond only to a request for an opinion from a member of the State's government, EPA has encouraged State environmental officials to obtain such an opinion.

As of October 5, 1987, EPA has obtained responses from the following 28 States indicating that the corporate guarantee for liability would be valid and enforceable:

Arkansas	Delaware
California	District of Columbia
Colorado	Florida
Connecticut	Georgia
Hawaii	Montana
Idaho	Nevada
Illinois	New Hampshire
Iowa	New Mexico
Kansas	New York
Kentucky	South Carolina
Louisiana	Vermont
Maine	Virginia
Maryland	Virgin Islands
Missouri	Wyoming

EPA will update this list periodically and furnish the updated lists by means of publication in the **Federal Register** and through the RCRA Hotline at (800) 424–9346 or in Washington, DC, at 382–3000.

In the July 11, 1986, Interim Final Rule, the Agency announced that it would allow use of the corporate guarantee only if the guarantor is the parent corporation of the owner or operator. Parent corporations are defined for this purpose by 40 CFR 264.141(d) as directly owning at least 50 percent of the voting stock of the firm that owns or operates the facility; the latter firm is deemed a "subsidiary" of the parent corporation.

Two commenters objected to the Agency's decision regarding the parent corporation. One commenter endorsed the use of the corporate guarantee, but urged that the rule be expanded to allow the guarantee to be given by any "affiliate" of the owner or operator. The commenter also suggested that the guarantee should be available in multiple ownership situations (i.e., to allow joint and several guarantees by two or more corporate owners). A second commenter disputed the Agency's rationale that an immediate parent will have a stronger interest in ensuring the obligations of a subsidiary than an indirect parent in another tier of the corporate structure. The commenter urged the Agency to approve the use of the corporate guarantee by other firms in the corporate structure in States where the legal requirements could reasonably be met. This commenter urged, for example, that a firm that shares a common parent with the owner or operator be allowed to provide a guarantee.

In development of a separate rulemaking, EPA is examining issues related to allowing affiliated corporations that do not qualify as parent corporations under 40 CFR 264.141(d) to provide financial assurance for liability coverage. For today's rulemaking, however, the Agency is retaining the requirement that only corporate parents may provide the guarantee.

Another commenter requested that the rule be modified to ensure that a parent corporation that is incorporated abroad is subject to enforcement proceedings and execution of judgment in the U.S. To subject a non-U.S. corporate guarantor to U.S. State court jurisdiction and enforcement proceedings, the rule requires that the non-U.S. corporation identify a registered agent within each State where a facility covered by the guarantee is located. EPA is also adding a requirement that the non-U.S. corporate guarantor appoint an agent in the State in which it has its principal place of business. The function of the agents is to accept service of process for the guarantor corporation for legal actions in a given State. The Agency believes that under current case law the presence of the firm's agent in combination with the activities of the firm in the State will subject it to the jurisdiction of the States' courts.

The Agency does not think that requiring a non-U.S. corporate guarantor to appoint a registered agent to accept service of process for legal actions in a given State is an onerous requirement. The use of registered agents is a common business practice for out-of-state firms. To ascertain the cost of such a practice, a number of firms that act as registered agents for companies domiciled out-of-state were contacted. An overwhelming majority of firms contacted charge a minimal flat fee which, in the Agency's view, has a minor financial impact on non-U.S. firms planning to provide this corporate guarantee.

In addition, the financial test that must be passed by every corporation seeking to become a guarantor requires the corporation to demonstrate that it has assets in the United States amounting to either: (1) At least 90 percent of its total assets, or (2) at least six times the amount of liability coverage that must be demonstrated through the financial test. The Agency believes that this provision adequately ensures that substantial assets are available in the United States to be levied against if a judgment is entered against the non-U.S. guarantor corporation. Assessing this provision together with the registered agent requirement, the Agency considers it unnecessary to add regulatory language to ensure the coverage of non-U.S. corporations by U.S. legal processes.

The Agency's Interim Final Rule did not allow a corporate subsidiary to use the financial test for part of the required liability coverage and to rely on the corporate guarantee for the balance of the required coverage. EPA noted that separately audited financial statements are not ordinarily prepared for subsidiaries. Two commenters addressed this issue, urging the Agency to allow this combination. One of the

commenters argued that problems of double-counting of the subsidiary's assets could be avoided if the subsidiary prepared a separately audited financial statement. EPA continues to believe, however, that the problem of potential double-counting of assets makes such combinations unreliable. Therefore, the Agency is not revising the Interim Final Rule to allow them.

One commenter asked that EPA allow companies the flexibility of providing either a single guarantee addressing both closure/post-closure care costs and third-party liability, or using separate documents. Another commenter suggested that the Agency amend the "Letter from the Chief Financial Officer" required under 40 CFR 264.151(g) to identify the highest limit of the liability coverage imposed by any regulation.

EPA, as noted above, has deleted the choice of law provision from the corporate guarantee for liability in order to help to ensure that a single corporate guarantee covering closure, post-closure care, and liability coverage can be used. Existing regulations, particularly 40 CFR 264.151(g), require parent corporations who make a corporate guarantee to disclose all the financial assurance requirements the corporate guarantee covers. They must also disclose any financial assurance obligations they have in regard to any hazardous waste facilities the parent corporation owns and operates directly. This information must be contained in the letter from the chief financial officer required by 40 CFR 264.151(f) or (g) in support of an application to pass the financial test. Therefore, no rule change was considered necessary.

One commenter requested that the Agency exercise its prosecutorial discretion in taking enforcement actions against facilities that lost interim status on November 8, 1985, if they were unable to meet financial responsibility requirements. The commenter noted that some of those firms might now be able to come into full compliance by use of the corporate guarantee and recommended that EPA issue Interim Status Compliance Letters to such owners or operators.

EPA cannot issue Interim Status Compliance Letters to owners or operators of land disposal facilities that lost interim status because they could not certify liability coverage. In accordance with section 3005(e)(2), the interim status of these facilities was terminated if the facilities were not in compliance with all ground-water monitoring and financial responsibility requirements by the statutory deadline of November 8, 1985. Because the interim status of these facilities was terminated by operation of the law, EPA cannot exercise enforcement discretion such as the commenter requested. However, such facilities may apply for a permit subsequently, and if they are granted a permit, may begin to operate again as soon as it is issued.

Finally, one commenter recommended that while the guarantee may be for a specific sum, it should be made clear that the guarantee should not be considered to operate as a limitation of liability under established concepts of strict liability and corporate responsibility. EPA agrees with the commenter, and does not intend the existence of the corporate guarantee to serve as a defense for a corporate parent to claims brought under established principles of law and not related to the guarantee. The text of the guarantee, therefore, is being amended to state that the guarantee is a separate and distinct obligation that does not affect or limit any other responsibility or liability of the guarantor with respect to the covered facilities.

A number of commenters recommended actions for EPA that in the Agency's opinion are outside the scope of the July 11, 1986, request for comments, but afford EPA an opportunity to present useful information.

Two commenters, who expressed support for the corporate guarantee, also urged EPA to consider additional mechanisms such as indemnity contracts, surety bonds, and trust funds and to allow combinations of various mechanisms. EPA agrees that a broad selection of liability coverage mechanisms could help to ensure that owners or operators are able to satisfy the coverage requirements, and is currently developing a rule to authorize additional options for liability coverage.

Two other commenters added that the Agency should adjust the "six times multiplier" requirement in the financial test to make the test more available to the regulated community. The Agency is currently analyzing certain aspects of the financial test for liability.

III. Changes From the July 11, 1986, Interim Final Rule

EPA is making the following changes in the corporate guarantee form contained in the July 11, 1986, Interim Final Rule:

(1) The statement of coverage provided in the corporate guarantee instrument in § 264.151(h)(2), paragraph 2 is being modified to include spaces for the guarantor to specify "each occurrence" and "annual aggregate" levels of coverage.

(2) The choice of law provision formerly contained in 40 CFR 264.151(h)(2) paragraph 10 of the guarantee form is being removed and the subsequent paragraphs of the form are being renumbered to reflect the change;

(3) In § 264.151(h)(2), a new paragraph 11 is being added in which the guarantor stipulates that the guarantee is in addition to and does not affect any other responsibility of the guarantor for liability with respect to the covered facilities; and

(4) In § 264.151(h)(2), a new paragraph 12 is being added that provides that the guarantee does not apply to certain categories of damages or obligations. These exclusions are patterned on the existing standard exclusions used by insurers in their comprehensive general liability (CGL) policies, and are intended to ensure that the coverage is not exhausted by the payment of claims that are covered by other compensation systems or that are otherwise not intended to be included within the scope of coverage.

Exclusion (i), for bodily injury or property damage for which the owner or operator is obligated to pay damages by reason of the assumption of liability in a contract or agreement, is intended to exclude liabilities assumed by contract that do not involve the hazardous waste treatment, storage, and disposal facility or facilities of the owner or operator. It does not exclude settlements or other agreements to pay damages in connection with accidental occurrences resulting in bodily injury or property damage caused by hazardous waste.

Exclusion (ii), for obligations under workers' compensation, disability benefits, or unemployment compensation law or similar law, is intended to ensure that the corporate guarantee for liability is available for third parties and does not duplicate coverage provided under these other programs or forms of assurance.

Exclusion (iii), for bodily injury to the employees, or the immediate family of employees, of the owner or operator, is also intended to ensure that the corporate guarantee is available for third parties and does not duplicate coverage provided under other forms of assurance.

Exclusion (iv), for bodily injury or property damage arising out of the ownership or use of any aircraft, motor vehicle, or watercraft, is to prevent use of the guarantee for routine accidents that are not directly related to management of hazardous waste.

Exclusion (v) for property damage to property owned, occupied, rented, or in

the care, custody, or control of the owner or operator, is intended to ensure that the guarantee will be available to compensate third parties, and not the owner or operator, for property damage as a result of activities at TSDFs.

The Agency did not adopt all the standard comprehensive general liability (CGL) exclusions. Only those exclusions the Agency considered relevant to the corporate guarantee for liability were included.

IV. 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.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

A. Effect on State Authorizations

Today's rule promulgates standards that are not effective in authorized States since the requirements are not being imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. Thus, the requirements will applicable only in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. The deadline by which the State must modify its program to adopt today's rule is 7/1/89. These deadlines can be extended in certain cases (40 CFR 271.21(e)(3)). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those in today's rule. These State regulations have not been assessed against the Federal regulations being promulgated today to determine whether they meet the tests for authorization. Thus, a State is not authorized to carry out these requirements in lieu of EPA until the State program modification is submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law.

States that submit their official application for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, the State must modify its program by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements a State must meet when submitting its final authorization application.

It should be noted that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program. 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. See 40 CFR 271.1(k).

The standards promulgated today are 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. However, authorized States that have already adopted the July 11, 1986, Interim Final Rule must revise their program and adopt today's rule, since today's rule is more stringent in some respects than the Interim Final Rule.

V. Executive Order No. 12291

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order No. 12291. Under Executive Order No. 12291, the Agency must judge whether a regulation is "major" and thus subject to the requirement of a Regulatory Impact Analysis. The notice published today is not major because the rule will not result in an effect on the economy of $100 million or more, will not result in increased costs or prices (but is likely to decrease costs), will not have significant adverse effects on competition, employment, investment, productivity, and innovation, and will not significantly disrupt domestic or export markets. Therefore, the Agency has not prepared a Regulatory Impact Analysis under the Executive Order.

VI. 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.

VII. 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). This rule relaxes the existing insurance requirements and thus 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.

VIII. Supporting Documents

Supporting documents available for this Final Rule include comments on the August 21, 1985 Proposed Rule, a summary of the comments on the July 11, 1986 Interim Final Rule, and background documents on the financial test for liability coverage. In addition, background documents prepared for previous financial assurance regulations are also available, as are the letters received from the State Attorneys

General concerning the corporate guarantee for liability.

All of these supporting materials are available for review in the EPA public docket (RCRA docket #F-87-CGF-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.

Date: November 6, 1987.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, the interim rule amending 40 CFR Parts 264 and 265 which was published at 51 FR 25350-25356 on July 11, 1986, is adopted as a final rule with the following changes:

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

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

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

2. In § 264.147, paragraph (g)(2) is revised to read as follows:

§ 264.147 Liability requirements.

(g) * * *

(2)(i) In the case of corporations incorporated in the United States, a corporate guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (A) the State in which the guarantor is incorporated, and (B) each State in which a facility covered by the guarantee is located have submitted a written statement to EPA that a corporate guarantee executed as described in this section and § 264.151(h)(2) is a legally valid and enforceable obligation in that State.

(ii) In the case of corporations incorporated outside the United States, a corporate guarantee may be used to satisfy the requirements of this section only if (A) the non-U.S. corporation has identified a registered agent for service of process in each State in which a facility covered by the guarantee is located and in the State in which it has its principal place of business, and (B) the Attorney General or Insurance Commissioner of each State in which a facility covered by the guarantee is located and the State in which the guarantor corporation has its principal place of business, has submitted a written statement to EPA that a corporate guarantee executed as described in this section and § 264.151(h)(2) is a legally valid and enforceable obligation in that State.

* * * * *

2. Section 264.151 is amended by revising paragraph (h)(2) 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 [if incorporated within the United States insert "the State of ——" and insert name of State; if incorporated outside the United States insert the name of the country in which incorporated, the principal place of business within the United States, and the name and address of the registered agent in the State of the principal place of business], herein referred to as guarantor. This guarantee is made 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; and if guarantor is incorporated outside the United States list the name and address of the guarantor's registered agent in each State.] 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 coverage in the amount of [insert dollar amount] for each occurrence and [insert dollar amount] annual aggregate.

3. For value received from [owner or operator], guarantor guarantees 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] accidental 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 guarantee 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. Guarantor hereby expressly waives notice of acceptance of this guarantee by any party.

11. Guarantor agrees that this guarantee is in addition to and does not affect any other responsibility or liability of the guarantor with respect to the covered facilities.

12. Exclusions

This corporate guarantee does not apply to:

(i) Bodily injury or property damage for which the owner or operator is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the owner or operator would be obligated to pay in the absence of the contract or agreement.

(ii) Any obligation of the owner or operator under a workers' compensation, disability benefits, or unemployment compensation law or any similar law.

(iii) Bodily injury to:

[A] An employee of the owner or operator arising from, and in the course of, employment by the owner or operator; or

[B] The spouse, child, parent, brother or sister of that employeee as a consequence of, or arising from, and in the course of, employment by the owner or operator.

This exclusion applies:

[1] Whether the owner or operator may be liable as an employer or in any other capacity; and

[2] To any obligation to share damages with or repay another person who must pay damages because of the injury to persons identified in paragraphs [A] and [B].

(iv) Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle or watercraft.

(v) Property damage to:

[A] Any property owned, rented, or occupied by the owner or operator;

[B] Premises that are sold, given away or abandoned by the owner or operator if the property damage arises out of any part of those premises;

[C] Property loaned to the owner or operator;

[D] Personal property in the care, custody or control of the owner or operator;

[E] That particular part of real property on which the owner or operator or any contractors or subcontractors working directly or indirectly on behalf of the owner or operator are performing operations, if the property damage arises out of these operations.

I hereby certify that the wording of the 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

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

Authority: 42 U.S.C. 6905, 6912(a), 6924, and 6925.

2. In § 265.147, paragraph (g)(2) is revised to read as follows:

§ 265.147 Liability requirements.

* * * * *

(g) * * *

(2)(i) In the case of corporations incorporated in the United States, a corporate guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (A) the State in which the guarantor is incorporated, and (B) each State in which a facility covered by the guarantee is located have submitted a written statement to EPA that a corporate guarantee executed as described in this section and § 264.151(h)(2) is a legally valid and enforceable obligation in that State.

(ii) In the case of corporations incorporated outside the United States, a corporate guarantee may be used to satisfy the requirements of this section only if (A) the non-U.S. corporation has identified a registered agent for service of process in each State in which a facility covered by the guarantee is located and in the State in which it has its principal place of business, and if (B) the Attorney General or Insurance Commissioner of each State in which a facility covered by the guarantee is located and the State in which the guarantor corporation has its principal place of business, has submitted a written statement to EPA that a corporate guarantee executed as described in this section and § 264.151(h)(2) is a legally valid and enforceable obligation in that State.

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