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The U.S. EPA 40 C.F.R. Part 258 Financial Test/Corporate Guarantee-New Environmentally Protective, Cost-Effective Mechanisms for the Demonstration of Financial Responsibility

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THE U.S. EPA 40 C.F.R. PART 258 FINANCIAL TEST/CORPORATE GUARANTEE — NEW ENVIRONMENTALLY PROTECTIVE, COST-EFFECTIVE MECHANISMS FOR THE DEMONSTRATION OF FINANCIAL RESPONSIBILITY

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INTRODUCTION

The U.S. Environmental Protection Agency (“EPA”) recently amended the 40 C.F.R. Part 258 regulations applicable to municipal solid waste landfills¹ (“MSWLFs”) by adding two new financial assurance mechanisms for the demonstration of financial responsibility pertaining to closure, post-closure maintenance, and corrective action.² This Article discusses the new mechanisms and the reasons why state environmental agencies³ should incorporate them into their regulations so as to make the mechanisms

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1. See Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. 17,706 (1998). For a general discussion of the 40 C.F.R. Part 258 regulations and their implementation by state environmental agencies, see John H. Turner, *Off to a Good Start: The RCRA Subtitle D Program for Municipal Solid Waste Landfills*, 15 TEMP. ENVTL. L. & TECH. J. 1 (1996). See also John H. Turner, *Solid Waste Regulation Under RCRA*, 9 NAT. RES. & ENV'T 6 (1994); Note, *The New Federal Standards for Municipal Solid Waste Landfills: Adding Fuel to the Regulatory Fire*, 3 VILL. ENVTL. L.J. 383 (1992).

2. The promulgation of the new mechanisms (the financial test and corporate guarantee for use by private owners/operators of municipal solid waste landfills) amended 40 C.F.R. § 258.74 (“Allowable mechanisms”) by revising paragraphs (e), (g), and (k).

3. The 40 C.F.R. Part 258 program is primarily applied by states whose regulatory programs have been approved by the EPA. See Turner, *Off to a Good Start*, *supra* note 1, at 34-63.

available to qualified private municipal solid waste landfill owners/operators.

Financial assurance requirements should be designed to ensure, through reasonable and cost-effective methods, that responsible parties assume the costs of closure and post-closure or remediation activities, and not transfer those costs to third parties (i.e., the general public) as a result of bankruptcy or insolvency.⁴

The history of the financial test under the federal legislation pertaining to waste disposal⁵ is addressed in Part I. Part II of this Article briefly describes the role of the financial assurance mechanisms under United States environmental laws and examines the importance of a cost-effective "self-assurance" mechanism, the "financial test." Part III describes the EPA corporate financial test/corporate guarantee and argues why the Part 258 EPA corporate financial test/guarantee should likewise be made available for use by qualified facility owners/operators, particularly if the EPA-endorsed financial test for local governments is incorporated into state regulations.⁶

4. See, e.g., Gary B. Cohen & Daniel L. Derkics, *Financial Responsibility for Hazardous Waste Sites*, 9 *CAPITOL U.L. REV.* 509 (1980).

5. The Resource Conservation and Recovery Act, *as amended*, 42 U.S.C. §§ 6902(a), 6907, 6912(a), 6944, 6945(c), and 6949a(c) (1994).

6. State agencies which conduct 40 C.F.R. Part 258 programs are not required by federal law or regulation to incorporate either the financial test and corporate guarantee financial assurance mechanisms or the Part 258 local government financial test into their regulations. They are, however, required to maintain a financial assurance program that is at least as stringent as the Part 258 standards. As will be noted elsewhere in this Article, several states (particularly those with financial assurance responsibility programs that pre-date the promulgation of the Part 258 standards in 1991) have existing regulatory standards that utilize the less cost-effective financial test developed by the U.S. EPA for use in the Subtitle C hazardous waste program. A few other jurisdictions have statutory impediments to the use of the new EPA mechanisms by private owners or operators of municipal solid waste landfills. Most states have incorporated the EPA Part 258 financial test for local governments.

I. THE BASIC PROVISIONS OF THE RCRA AND EPA 40 C.F.R. PART 258 FINANCIAL RESPONSIBILITY PROGRAM

A number of federal environmental statutes employ financial responsibility standards. The Clean Water Act,⁷ the Deepwater Port Act,⁸ the Surface Mining Control and Reclamation Act,⁹ the Comprehensive Environmental Response, Compensation, and Recovery Act,¹⁰ the Price-Anderson Act,¹¹ and the Motor Carrier Act of 1980¹² - all reference financial responsibility mandates.

The Resource Conservation and Recovery Act ("RCRA")¹³ also seeks to provide that adequate funds are available to close waste management facilities properly, care for them after closure, undertake necessary corrective action, and compensate for releases from those facilities. The statutory financial responsibility requirements are intended to force owners and operators of waste management facilities to recognize and "internalize" the costs of third-party liability and site closure, post-closure, and cleanup costs so that public funds will not have to be called upon to cover these costs.

A. *The RCRA Subtitle C Requirements*

The EPA first implemented RCRA-mandated regulations with regard to "Subtitle C" hazardous waste treatment, storage, and disposal facilities.¹⁴ Section 3004 of Subtitle C of RCRA requires the EPA to promulgate standards creating performance standards applicable to hazardous waste treatment, storage, and disposal fa-

7. 33 U.S.C. § 1321 (p)(1) (1982).

8. 33 U.S.C. § 1517(l) (1982).

9. 30 U.S.C. § 1257(f) (1982).

10. 42 U.S.C. § 9608(a)-(b) (1994).

11. 42 U.S.C. § 2210 (1994).

12. 49 U.S.C. § 10927 (1995).

13. See RCRA § 4010(c), 42 U.S.C. § 6949(c) (1988).

14. While the statute contains a provision mandating the EPA to require "financial responsibility" as may be "necessary or desirable" with regard to hazardous waste treatment, storage, and disposal facilities, it neither defines the term "financial responsibility" nor specifically mandates that the Agency develop and enforce minimum financial responsibility requirements under the Subtitle D (solid waste disposal) program.

cility owners/operators as may be necessary to protect human health and the environment. Section 3004(a)(6) mandates that the standards shall include requirements concerning "the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation . . . and financial responsibility . . . as may be necessary or desirable."¹⁵ Congress provided that financial responsibility may be demonstrated by a variety of mechanisms, including "any one of any combination of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer."¹⁶ The EPA has, since 1980, consistently endorsed the use of a number of different mechanisms, including a "self-assurance" financial test.¹⁷

In 1978, the EPA proposed a number of financial assurance regulations that would have implemented the statutory provision by mandating that facility owners/operators use trust funds as the sole mechanism for the demonstration of financial responsibility.¹⁸ The EPA responded to comments that the limitation of financial responsibility mechanisms to trust funds would be burdensome and unnecessary by adding a number of alternative mechanisms, including a financial test, in a revised proposal issued in 1980.¹⁹ The proposed test included several financial criteria which, if "passed," would allow an owner or operator to demonstrate financial responsibility without actually setting aside funds in a trust fund or obtaining a third-party guarantee of an available source of funds.

The 1980 proposal generated a significant number of additional responses, many of which urged the Agency to examine other possible criteria for the demonstration of financial responsibility. In response, the Agency examined several alternative financial tests and promulgated one for closure and post-closure

15. RCRA § 3004(a)(6), 42 U.S.C. § 6924(a)(6) (1994).

16. RCRA § 3004(t)(1), 42 U.S.C. § 6924(t)(1).

17. *See, e.g.*, Hazardous Waste Management System, 50 Fed. Reg. 28,702, 28,734 (1985).

18. *See, e.g.*, Financial Assurance Requirements, 43 Fed. Reg. 59,006 (proposed Dec. 18, 1978).

19. Financial Requirements for Owners and Operators of Hazardous Waste Management Facilities, 45 Fed. Reg. 33,260 (1980).

care in an interim final rule of April, 1982.²⁰ In addition, the EPA promulgated a Subtitle C financial test for third-party liability coverage.²¹

Under the Subtitle C regulations,²² owners and operators can satisfy financial responsibility requirements by several different mechanisms (or a combination thereof), including the establishment of a trust fund,²³ obtaining a surety bond from a company listed as acceptable in U.S. Treasury Circular 570,²⁴ obtaining an irrevocable standby letter of credit from a state or federally "regulated and examined" institution (i.e., a bank),²⁵ by purchasing insurance from an insurance or surplus lines company,²⁶ or by "self-insurance" (i.e., a financial test) if certain financial criteria can be satisfied.²⁷

20. See 40 C.F.R. pts. 264(h), 265 (h)(1982) (Permitted and interim status facilities respectively).

21. See 40 C.F.R. pts. 123, 264, 265 (1982); see also 40 C.F.R. pts. 264, 265, 280, 761 (1991).

22. The Hazardous and Solid Waste Amendments of 1984 ("HSWA") added Subtitle I to RCRA, regarding the creation and implementation of a regulatory program for underground storage tanks ("USTs") containing petroleum or certain other substances. Sections 9003(c) and (d) of Subtitle I were further amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") to require the EPA to promulgate financial responsibility requirements for UST owners and operators. See, e.g., *Underground Storage Tanks Containing Petroleum*, 55 Fed. Reg. 24,692 (1990).

23. See 40 C.F.R. §§ 264.143(a), (b) (closure), 264.145(a), (b) (post-closure); see also 265.143(a), (b) (closure), 265.145(a), (b) (post-closure) (1998).

24. See 40 C.F.R. §§ 264.143(c) (closure), 264.145(c) (post-closure); cf. 265.143(b) (closure), 265.145(b) (post-closure) (Note that in §§265.143(b) and 265.145(b) the surety bond is used to guarantee "payment into a closure trust fund" (§§ 265.143(b) and 265.145(b)), rather than to guarantee "performance of closure" or "performance of post-closure care" (§§ 264.143(c) and 264.145(c)); however, in both cases a standby trust fund is required.

25. See 40 C.F.R. §§ 264.143(d) (closure), 264.145(d) (post-closure); see also 265.143(c) (closure), 265.145(c) (post-closure).

26. See 40 C.F.R. §§ 264.143(e) (closure), 264.145(e) (post-closure); see also 265.143(d) (closure), 265.145(d) (post-closure).

27. See 40 C.F.R. §§ 264.143 (f) (closure), 264.145(f) (post-closure); see also 265.143(e) (closure), 265.145(e) (post-closure).

In order to satisfy the requirements of the Subtitle C financial test, a company must either have: (1) a) a net worth of \$10 million, b) a net worth and tangible net worth both at least six times the amount of coverage sought, c) satisfaction of one of three financial ratios, and d) at least 90% of assets (or six times the amount of liability coverage) located in the United States; or (2) a) a current investment quality bond rating, and b) net worth of at least \$10 million and six times the amount of liability coverage located in the United States.²⁸

B. *The 1988 EPA Subtitle D Proposed Regulations*

In 1988, the EPA proposed regulations to implement Subtitle D of RCRA by drafting design and operating requirements for municipal solid waste landfills as well as to provide financial assurance for closure, post-closure care, and corrective action.²⁹ In the proposal, the Agency did not specify particular mechanisms for the demonstration of financial assurance.³⁰ Instead, the EPA recommended a "performance standard" that any selected mechanism would be required to satisfy.³¹ The "preamble to the pro-

28. See 40 C.F.R. §§ 264.143 (f) (closure), 264.145(f) (post-closure); see also 265.143(e) (closure), 265.145(e) (post-closure).

29. Solid Waste Disposal Facility Criteria, 53 Fed. Reg. 33,314 (1988) (to be codified at 40 C.F.R. pts. 257, 258) (proposed Aug. 30 1988).

30. *Id.* at 33,314.

31. The EPA noted that:

The proposed rule would not specify the types of financial assurance mechanisms allowed. Instead, the proposal specified in Section 258.32(e) a performance standard for a financial assurance program that must be satisfied to demonstrate compliance with the financial assurance requirements under Sections 258.32(f), (g), and (h). The performance standard was designed to ensure that mechanisms allowed by the States (e.g., trust funds, letters of credit, State Funds, etc.) would satisfy the overall goals of financial assurance. As proposed, the performance standard would permit States to authorize use of financial mechanisms that met five criteria: (1) ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed; (2) ensure that funds will be available in a timely fashion when needed; (3)

posed rule noted that the financial assurance mechanisms currently authorized under Subtitles C and I, if properly drafted, would satisfy these performance criteria."³² While "[a] number of commenters agreed with the EPA's decision to not specify the types of financial assurance mechanisms that would be allowed . . . many other commenters expressed a concern that the performance standard lacked sufficient detail to guide States in the development and implementation of the financial assurance requirements with any consistency among States."³³

Some commenters³⁴ raised the possibility that states would simply incorporate mechanisms into their solid waste landfill regulations that were then approved by the EPA for use by Subtitle C facilities without consideration of the relative merits and disadvantages of those mechanisms. In particular, by 1988, experience under the Subtitle C rules had demonstrated the limited usefulness of the surety bond, letter of credit, and insurance options. For example, it was noted³⁵ that the money required for closure and post-closure care is paid into an account which creates a closure and post-closure trust fund. Payment could be made over the operating life of the facility or the life of the permit, whichever is shorter.

guarantee the availability of the required amount of coverage from the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, until the owner or operator is released from financial assurance requirements under Sections 253.32(f), (g), (h); (4) provide flexibility to the owner or operator for demonstrating compliance with the financial assurance requirements; and (5) be legally valid, binding and enforceable under State and Federal law.

Solid Waste Disposal Facilities Criteria, 56 Fed. Reg. 50,978, 51,114 (1991) (to be codified at 40 C.F.R. pts. 257, 258) (proposed Oct. 9, 1991).

32. *Id.*

33. *Id.*

34. Rulemaking Docket Number F-91-CMLF-FFFFF, RCRA Docket Information Center, U.S. Environmental Protection Agency.

35. Solid Waste Disposal Facilities Criteria, 56 Fed. Reg. 50,978, 51,114 (1991) (to be codified at 40 C.F.R. pts. 257, 258) (proposed Oct. 9, 1991).

Money paid into the trust fund account was guaranteed to be available whenever closure occurs. The owner/operator, however, lost the "use" of that money for other purposes, such as operating costs or corporate growth. This loss of available funds could not be tolerated by many small companies. Allowing payment into the fund during the life of a site provided a diminished level of security regarding funds actually available should the trust fund be called upon to fund closure.

Although there was a high degree of assurance that funds deposited into the trust would be available, the amount of funds available prior to the close of the "pay-in" period was less than other mechanisms that guarantee the full coverage from their inception. Thus, there was an intrinsic imbalance, to the substantial, and probably unjustifiable advantage of the trust fund option in terms of when the full burden was imposed. Put simply, there was a lower level of environmental protection until the "pay-in" period was completed.

It was also noted³⁶ that it might be financially unwise to structure payments into trust funds with specified dollar targets at defined times, as a portion of the target amount. This was because the cash in the fund had value, and the fund holder might invest funds and realize a gain on the investment. It was argued that the proper pay-in calculation would discount the amounts to be paid in, in order to reach the cash target on time, recognizing the fund growth over time.

With regard to surety bonds, commenters noted³⁷ that the Subtitle C rules allowed a waste management facility to demonstrate financial responsibility by obtaining a surety bond to guarantee that either the full cost of closure and post-closure care would be paid into a trust fund upon demand or that closure and post-closure care would be performed when the bond holder (usually a government agency) so requires. Although this mechanism seemed straightforward, commenters stressed³⁸ that it was not free from difficulty. For example, it was observed that the obliga-

36. See, e.g., KEYSTONE CTR., FINANCIAL RESPONSIBILITY PROJECT, FINAL REPORT, at 6-7 (1989).

37. See *id.* at 7.

38. See *id.*

tion of the surety company under either type of bond was extensive — the time period included the operating life plus the entire closure and post-closure periods, which could have been indefinite under the proposed Subtitle D criteria. In 1988, it was very difficult to obtain a surety bond guaranteeing an obligation for more than one year. Bonds for very long-term obligations were virtually unavailable, or available only at a price that most owners/operators would not contemplate paying.

Sureties were also very reluctant to issue bonds guaranteeing commitments related to the environment.³⁹ The circumstances of the commitment were carefully examined by the surety, and bonds were awarded only at a relatively high cost. In addition, before issuing either type of bond, sureties carefully scrutinized the applicant's total liabilities.⁴⁰ Accordingly, the use of the surety bond mechanism was very limited.

The EPA also accepted letters of credit as proof of a company's ability to meet closure and post-closure care costs for Subtitle C facilities. Some states preferred the use of this mechanism.⁴¹ A letter of credit is essentially a guarantee by a financial institution (most often a bank) that it will cover an obligation for a customer. The institution, in essence, gave the owner/operator a loan in the amount of the closure/post-closure care costs, and required collateral from the owner/operator to secure the loan.

If the owner/operator had a line of credit with the institution, that line was reduced by the amount of the letter of credit. This diminished the amount of money available to the owner/operator for other purposes, such as operation of the business or new acquisitions. In some cases, the owner/operator was more financially stable than the financial institution issuing the letter of credit. The limitations associated with the letter of credit mechanism, the commenters claimed, made it of diminished utility as a financial assurance mechanism.⁴²

39. *See id.*

40. *See id.*

41. *See id.* at 6.

42. Petition of the National Solid Wastes Management Association to Initiate a Proceeding to Revise Financial Assurance Criteria and Mechanisms, at 21, Feb. 16, 1990.

In 1988, the market for commercially-issued insurance in the environmental area, including for the demonstration of closure and post-closure care costs, was barely developed.⁴³ In any event, the known costs of closure and post-closure care were not considered to be amenable to standard insurance policy writing practices. Policies are generally written to cover losses that may or may not occur — not known costs. Due to the reluctance of insurance companies to write such policies, this mechanism was likewise considered to be essentially unavailable to owners/operators. The few policies that could be obtained at that time were expensive for smaller owners/operators.⁴⁴

Commenters also emphasized that the Subtitle C financial test, as it then existed, would also be of limited utility if it were applied to Subtitle D municipal solid waste landfills.⁴⁵ For example, a comparison of costs estimated for a company with one landfill and a company with forty landfills⁴⁶ revealed that the one-landfill company would be required to possess a tangible net worth of at least \$109,800,000.00 in order to use the financial test to demonstrate financial responsibility. A company with forty landfills would have been obligated to have a tangible net worth of at least \$4,320,000,000.00.

Accordingly, commenters were concerned that in the absence of criteria developed specifically for use in the Subtitle D program, the goals of the financial assurance provisions—ensuring environmental protection through the conduct of acceptable closure and post-closure care at landfills and the avoidance of adding to the number of Superfund sites nationwide—would not be met if the requirements could effectively not be satisfied by the majority of the owners/operators of solid waste management

43. See *KEYSTONE CTR.*, *supra* note 36 at 5.

44. See, e.g., *SOLID WASTE REPORT*, Jan. 22, 1998, at 27.

45. See Petition of the National Solid Wastes Management Association to Initiate a Proceeding to Revise Financial Assurance Criteria and Mechanisms, at 8-9, Feb. 16, 1990.

46. The estimates included several assumptions, among them that only "Phase I" groundwater monitoring would be involved, that the size of the permitted landfill would be seventy-five acres, and that only 25 groundwater monitoring wells would be required for the 75 acre facility—estimates that were considered to be conservative in nature.

facilities. It was also noted that: a) it is very unlikely that one owner will have to close all, or even many, of its facilities at one time; b) costs increase as landfills grow in size up to a point, then decrease as the landfill closure is accomplished and thereafter; and c) only the very largest owners/operators could satisfy the Subtitle C financial test "tangible net worth" requirement.

C. *The Keystone Center's Financial Responsibility Project*

The following year, the Keystone Center's Financial Responsibility Project, convened as a "dialogue involving participants from diverse groups concerned with how various approaches for providing responsibility to meet Resource Conservation and Recovery Act ("RCRA") requirements can be improved,"⁴⁷ issued its final report. The Project identified several concerns regarding the Subtitle C financial test:

(1) The current financial test is not performing optimally as a financial assurance mechanism. First, it does not appear to be as good a bankruptcy predictor as anticipated by the Agency (i.e., more firms than anticipated are able to pass the test that later go bankrupt). Second, the test is not as available as the Agency predicted to viable firms (fewer firms that do not go bankrupt are able to pass the test than predicted). In its efforts to develop a new test, the Agency should consider focusing its efforts on improving the ability of the test to screen out future bankrupt firms while maximizing, to the extent possible, the usage of the test by viable firms.

(2) The degree to which the test measures the availability of funds to meet potential obligations is also an important consideration. However, the aspect of the current test intended to serve this purpose, the "six times" multiplier for net worth and net working capital, appears to have weak analytical underpinnings and, more importantly, plays a major role in reducing the availability of the test to viable firms. In assessing potential financial tests, the Agency should consider examining other levels of multipliers as well as alternative measures of availability of funds in order to improve the performance of the test.

(3) Costs are important in examining potential financial tests on two levels. First, the costs of a financial test (i.e., the private costs of purchasing other mechanisms if the test is not available, plus the public costs of covering obligations of bankrupt

47. See KEYSTONE CTR., *supra* note 36, at 1 (1989).

firms) should be taken into consideration in determining the test that best satisfies the objectives discussed in (1) and (2) above. Second, the costs of closure, post-closure care, and corrective action should be estimated as accurately as possible so that measures of availability of funds to meet these costs may be properly evaluated.

(4) In structuring the financial test, the Agency should consider the degree of consistency between programs. For example, the proposed financial test for owners and operators of underground storage tanks containing petroleum differs from the RCRA financial test. However, the Dialogue group recognized that consistency does not mean absolute similarity as the underlying rationale for the respective tests may vary with the goals of particular programs.⁴⁸

In addition, the group identified the objectives of a financial test:

(1) Minimize the availability of the financial test to firms that are likely to go bankrupt. The test should be able to predict, with a high degree of confidence, that firms that will enter into bankruptcy in the near future should not be able to pass the financial test. This objective is sometimes referred to as the "bankruptcy predictor." There are several components of the current financial test which are intended to meet this objective: several minimum financial ratios or bond ratings and a minimum level of tangible net worth must be met.

Achievement of this objective can be evaluated statistically against samples of bankrupt and non-bankrupt firms. The accuracy of any specific financial test is measured in terms of the percent of bankrupt firms which are able to pass the financial test.

(2) Maximum availability to firms least likely to go bankrupt. Firms that are viable, ongoing, and financially secure and stable operations should be able to assure their financial responsibility obligations based on their internal resources. This objective may conflict with the bankruptcy prediction objective in that maximizing availability increases the risk that bankrupt firms may pass the test. Achievement of this objective can also be evaluated statistically against historic information and assumed obligations, and measured as a percentage of non-bankrupt firms which are able to pass the financial test.

(3) Ensure availability of funds. Even if the bankruptcy predictor achieves a high level of confidence in screening out

48. *Id.* at 10.

bankrupt firms, an additional measure of availability of funds may be needed.

(4) The financial test must be simple and relatively easy to implement. This should be true both from the perspective of the regulators and the regulated community. This objective can be met not only by decreasing the degree of detail in the tests, but also by simplifying the format of the test and/or using standard forms.⁴⁹

While the Keystone report did not directly give rise to regulatory initiatives, it helped to establish criteria for evaluation of the Subtitle C test and emphasized the need for a more cost-effective and available, yet predictive, standard.⁵⁰

49. *Id.* at 11-13.

50. The Keystone report also noted that the use of financial ratios, which "are often used in the financial community to evaluate firms because they reveal the performance of the firm relative to other firms in a particular industry," *id.* at 13, might include but not be limited to leverage ratios and profitability ratios.

Leverage ratios generally compare debt, particularly long-term debt, to equity. Such ratios may also compare cash from operations to interest expense. These ratios provide a longer term look at whether a firm can meet its obligations and/or whether or not it is profitable enough to generate sufficient capital from equity and/or debt. This is also important in predicting bankruptcy, particularly when the underlying financial responsibility obligations are of a long-term nature. . . . Profitability ratios generally compare net or pre-tax income to revenue, assets, or equity. The goal of these ratios is to determine how profitable a firm is. How successful a firm is in generating profits, particularly in comparison to prior years, is also important in establishing that a firm will remain solvent and in business.

Id. at 14. The Report emphasized that "[t]he financial test may include a combination of some or all of the various types of ratios. Having various combinations of ratios will also help meet the objective of maximizing availability to non-bankrupt firms by avoiding placing too much emphasis on any one ratio or type of ratio." *Id.* at 15. The Report also noted the important role of bond ratings, stating that:

[t]hese ratings are fairly reliable for several reasons. The financial institutions making the ratings are very knowledgeable and have access to a great deal of information, the ratings take into account a wide variety of information, and the ratings are updated on a timely basis as the firm's financial condition changes.

D. *The National Solid Waste Management Association's Petition for Rulemaking*

The National Solid Wastes Management Association ("NSWMA"), in a rulemaking petition⁵¹ filed with the Agency in 1990, prompted the EPA's review⁵² of the Subtitle C financial test and facilitated the development of a Subtitle D-specific mechanism. NSWMA noted that the Subtitle C test required an excessive margin of safety, and acted as an unnecessary constraint on fiscally-sound firms.⁵³ The Association proposed a new financial test that would apply to both Subtitle C and D facilities. The petition also pointed out that certain modifications should be made to the trust fund and letter of credit mechanisms in order to make them truly cost-effective alternatives.

NSWMA commissioned the firm of Meridian Research, Inc. to conduct a review of the Agency's financial assurance criteria and

Id. at 16-17.

51. Petition of the National Solid Wastes Management Association to Initiate a Proceeding to Revise Financial Assurance Criteria and Mechanisms, Feb. 16, 1990.

52. For various discussions of the NSWMA petition and the recommendations contained therein, *see, e.g.*, Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 56 Fed. Reg. 30,201 (1991); Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 57 Fed. Reg. 42,832 (1992); Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities and Hazardous Waste Treatment, Storage, and Disposal Facilities, 59 Fed. Reg. 51,523 (1994); Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. 17,706 (1998).

53. NSWMA argued that:

- (1) the present financial assurance criteria, in practice, require far more financial assurance than is reasonably necessary;
- (2) deficiencies in the financial test and the failure of the EPA to consider the time value of money promise to render the corporate guarantee virtually unavailable to even the strongest companies in the solid waste business; and
- (3) the problems with the financial test, if uncorrected, will cause many companies to rely more heavily on trust funds, the least cost-effective financial assurance mechanism.

Id. at 4-5.

mechanisms.⁵⁴ One of the Association's concerns was that the "proliferation of state financial assurance programs"⁵⁵ justified an EPA requirement that "state programs should not be allowed to set assurance requirements that deviate from federal limits."⁵⁶

In response, on July 1, 1991, the EPA proposed a revised Subtitle C financial test that represented a significant improvement.⁵⁷ The regulated community's comments to the EPA on the Agency's proposed revisions to the Subtitle C test voiced general support for the Subtitle C revision proposal; in particular, the commenters strongly supported the Agency's determination to delete the currently utilized "six times" multiplier for net worth and net working capital. The six times multiple requirement had proven to be not only expensive but inefficient. It had forced financially secure firms to provide assurance for highly improbable

54. MERIDIAN RESEARCH, INC., FINAL REPORT, FINANCIAL ASSURANCE FOR WASTE MANAGEMENT FIRMS, (1989)[hereinafter MERIDIAN REPORT](included as part of the record for the NSWMA petition).

55. NSWMA Petition, *supra* note 51, at 11; MERIDIAN REPORT, *supra* note 54, at 5-3, 5-4.

56. NSWMA Petition, *supra* note 51, at 11. The Petition noted that: The second major problem facing waste management companies, especially those with facilities in more than one state, is the proliferation of state financial assurance programs. It is estimated that there will soon programs under state and federal regulations. The growth be more than 100 different financial responsibility in state programs will significantly increase costs for waste management firms because states may require demonstration of assurance dedicated exclusively to facilities in their state and/or establish assurance levels or mechanisms different from those required by other states and by the federal programs. As a result, companies will be required to provide overlapping financial assurance for highly improbable combinations of events at great costs without compensating environmental benefit. Also, in some states a firm may be able to use a financial test for a particular level of assurance. In another state, the company may not be able to use a financial test at all or may only be able to use it to assure a lower level of obligations.

Id.

57. Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 56 Fed. Reg. 30,201 (1991).

levels of contingent costs. It had compelled excessive "internalization" of costs and needlessly restricted the ability of financially secure firms to expand or to maintain existing waste management capacity.

Those commenters⁵⁸ disagreed, however, with the EPA's proposal to the extent that it would retain the requirement that the owner or operator demonstrate that it has assets in the United States that amount to at least 90% of total assets. They could discern no justification, either in theory or practice, for the inclusion of a restriction that inequitably and adversely affected multinational firms. The "domestic assets" provision took on additional importance given that, in light of several important (and appropriate) proposed changes to the financial test, the provision would stand as perhaps the most prohibitive aspect of the mechanism. The commenters argued that retention of the current domestic asset provision in a Part 258 financial test would lead to a significant reduction in the average level of financial responsibility obligations that multi-national firms can self-assure.

The Agency was also urged to further consider the financial test developed by NSWMA as an alternative to the EPA proposal. The commenters emphasized the fact that the NSWMA test, unlike the EPA's recommended approach, contained neither a bias against multi-national firms nor a prohibitive hurdle for small firms. In response, the EPA stated that it was deferring a final Subtitle C rule on the subject because it was "continuing to evaluate comments received on the proposed revisions to the financial tests"⁵⁹

E. *The 1991 40 C.F.R. Part 258 Subtitle D Regulations*

In a final rule promulgated in October of 1991, the EPA issued standards for municipal solid waste (i.e., household waste) disposal sites pursuant to Subtitle D of RCRA.⁶⁰ While the EPA established in the 1991 40 C.F.R. Part 258 rulemaking a number of

58. *See, e.g.*, Comments of National Solid Waste Management Association; Comments of Browning-Ferris Industries.

59. Financial Responsibility Standards, 57 Fed. Reg. 42,832 (1992).

60. Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978 (1991) (amending 40 C.F.R. pt. 257 and establishing a new pt. 258).

general financial assurance requirements,⁶¹ the Agency determined that in light of the issues raised by the Keystone Project Report and the NSWMA rulemaking petition, and its determination that it would not employ a “performance standard”, it would subsequently fashion Subtitle D-specific financial tests for use by the public and private sectors. The Agency accordingly “reserved” those subsections of Subpart G of Part 258.⁶²

In response to arguments that the “necessity of financial assurance requirements for protecting human health and the environment from threats posed by MSWLFs” had not been demonstrated so as to justify the imposition of financial responsibility requirements, the Agency emphasized that:

EPA believes it has ample authority to require financial assurance demonstrations under today’s rule. Sections 1008(a)(3), 4004(a), and 4010 of RCRA, as amended by HSWA, direct the Agency to develop criteria to protect against potential adverse impacts to human health and the environment from solid waste disposal activities. The Agency has determined that financial responsibility is a necessary component of the regulatory program and is essential to protecting human health and the environment.

61. The financial assurance requirements are codified in Subpart G of Part 258, 40 C.F.R. § 258.70-.74 (1997).

62. The EPA set an effective date of April 9, 1994 for Subpart G, 40 C.F.R. § 258.70(b), with the understanding that while it “reserved” the financial test mechanisms for the public and private sectors (§ 258.74(e)-(h)), it “plan(ned) to propose part 258 requirements that include these requirements in 1992. The Agency anticipates that these four requirements would take effect concurrently.” 56 Fed. Reg. 50,978, 51,118 (1991). The EPA did not propose the local government and corporate financial test mechanisms until December 27, 1993 (local government test, see 58 Fed. Reg. 68,353 (1993)) and October 12, 1994 (see 59 Fed. Reg. 51,523 (1994)), and did not promulgate the local government test until November of 1996 (see 61 Fed. Reg. 60,328 (1996)). While the EPA announced in late 1996 that it “expects to promulgate the final corporate test in the spring of 1997,” *id.* at 60,329, it postponed promulgation of the corporate financial test until April of 1998. The EPA ultimately delayed the general financial assurance date until April 9, 1997, except for remote, small landfills (those facilities had a compliance deadline of October 9, 1997). See 60 Fed. Reg. 17,649 (1995).

The Agency has long maintained that financial responsibility requirements are an important component of any regulatory scheme, such as today's Part 258 criteria. In establishing the regulatory framework for the management of municipal solid waste, the Agency believes that inclusion of the financial responsibility requirements will promote the overall statutory and regulatory goals of RCRA by encouraging the development and implementation of sound solid waste management practices both during and at the end of active facility operations. Specifically, the requirements will ensure that adequate funds are available to cover the costs of closure, post-closure care, and corrective action activities which, if not planned for, often are left unfunded. Additional governmental expenditures would then be necessary to ensure continued protection of human health and the environment.⁶³

Significantly, the EPA determined that it agreed

with commenters that the performance standard, as proposed, did not provide sufficient guidance to ensure that financial mechanisms obtained in compliance with the rule would be adequate. This lack of specificity in the proposed performance criteria could have resulted in significant inconsistencies among State programs. The Agency, therefore, has adopted a modified performance standard approach to financial assurance in the final rule. This approach consists of a revised set of financial mechanisms that may be used to demonstrate financial assurance. The rule also specifies minimum provisions of each mechanism that must be satisfied to be considered an acceptable mechanism, including minimum qualifications for providers of assurance.⁶⁴

While the 1991 regulation included several specific financial as-

63. Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 51,104-05 (1991) (preamble to Part 258 regulations).

64. *Id.* at 51,114.

While the Agency continues to believe that a performance standard-based approach is most appropriate to allow States sufficient flexibility to select and tailor their financial assurance programs to allow as many options for compliance as possible, the performance criteria should ensure that all allowable financial mechanisms will provide for adequate financial assurance. All of the mechanisms currently allowed under subtitle C are authorized to be used to comply with the financial assurance requirements [in Part 258].

Id. at 51,114-15.

insurance demonstration mechanisms (trust fund,⁶⁵ surety bond guaranteeing payment or performance,⁶⁶ letter of credit,⁶⁷ insurance,⁶⁸ state-approved mechanisms,⁶⁹ and state assumption of responsibility⁷⁰), the Agency deferred issuance of a financial test/corporate guarantee on the basis that it was "considering revising the criteria of the corporate financial test currently available to Subtitle C hazardous waste facilities,"⁷¹ and intended

to propose that this revised corporate test also be available to owners or operators of MSWLFs, thus allowing financially strong firms to demonstrate that setting aside funds in a trust fund or obtaining third-party assurance of their closure, post-closure care and corrective action costs is unnecessary. The cost of such a test should be minimal, amounting only to the cost of making the required demonstrations.⁷²

The Agency also committed to "proposing a financial test developed specifically for local governments. The Agency anticipates that the effective date of both these new tests will concur with the effective date [then April 9, 1994] of today's financial responsibility requirements."⁷³ Moreover, the EPA made clear that it did not believe that utilization of the then-applicable Subtitle C financial test would be a reasonably available mechanism for owners/operators of municipal solid waste landfills.⁷⁴

65. See, 40 C.F.R. § 258.74(a) (1997).

66. See *id.* § 258.74(b).

67. See *id.* § 258.74(c).

68. See *id.* § 258.74(d).

69. See *id.* § 258.74(i).

70. See *id.* § 258.74(j).

71. Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 51,105 (1991).

72. *Id.*

73. *Id.*

74. See *id.* at 51,115. The Agency stated that:

In addition to the instruments specified in the performance standard, EPA is currently re-evaluating, and will consequently propose revisions to, the subtitle C corporate financial test as part of a separate rulemaking. The Agency would anticipate proposing at the same time conforming changes to the part 258 financial responsibility performance standard to allow this revised corporate test to be used as a compliance option for demonstrating financial responsibility for MSWLFs. These changes to the corporate financial test would be proposed on a timeframe similar to the local gov-

The EPA emphasized that:

Given the minimum requirements specified, the Agency believes that it is not necessary to limit allowable mechanisms, as some commenters suggested, to cash, surety bonds or certificates of deposit. The Agency tailored these minimum qualifications to the particular characteristics and industry practices of the providers of the financial mechanisms (e.g., sureties, banks, insurers, etc.) in order to ensure the effectiveness of the mechanism as well as the stability of the provider. The Agency believes this approach is preferable to applying the same criteria to all types of providers. In particular, the Agency believes that it would be inappropriate to require all providers of financial assurance mechanisms to satisfy the Subtitle C financial test, which was designed to assess a private corporation's ability to meet certain costs, not to evaluate the ability of a financial service's firm to carry out its business.⁷⁵

The 1991 Subtitle D rules establish financial responsibility obligations for closure of the facility, post-closure care, and the necessary corrective action. They require that the municipal solid waste landfill owner or operator must "have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the largest area of all MSWLF units requiring a final cover . . . at any time during the active life [of the facility] in accordance with the closure plan."⁷⁶ The cost estimate must "equal the cost of closing the largest area of all MSWLF units ever requiring a final cover at any time during the active life when the extent and manner of operation would make closure the most expensive, as indicated by its closure plan."⁷⁷ Then, the owner or operator must establish "continuous coverage for closure until released from financial assurance requirements"⁷⁸ using one of the methods specified in § 258.74 until released upon a demonstration of compliance with § 258.60 (h) and (i). "During the active life of the MSWLF unit, the owner or operator must annually adjust the closure cost estimate for inflation."⁷⁹

ernment financial test.

Id. at 51,115.

75. *Id.*

76. 40 C.F.R. § 258.71(a) (1997).

77. *Id.* § 258.71(a)(1).

78. *Id.* § 258.71(b).

79. *Id.* § 258.71(a)(2).

The owner or operator is further required to "increase the closure cost estimate and the amount of financial assurance provided . . . if changes in the closure plan or MSWLF unit conditions increase the maximum cost of closure at any time during the remaining active life."⁸⁰ Alternatively, the closure cost estimate and the amount of financial responsibility provided may be reduced "if the cost estimate exceeds the maximum cost of closure at any time during the remaining life of the MSWLF unit."⁸¹ The owner or operator is also required to notify the State Director that the detailed closure cost estimate, as required by § 258.71(a), and "the justification for the reduction of the closure cost estimate and the amount of financial assurance has been placed in the operating record."⁸²

The EPA rules provide similar requirements for the demonstration of financial assurance for post-closure obligations.⁸³ The owner or operator must prepare "a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct post-closure care for the MSWLF unit in compliance with the post-closure plan."⁸⁴ The costs must account for "the total costs of conducting post-closure care, including annual and periodic costs as described in the post-closure plan over the entire post-closure care period."⁸⁵ The cost estimate must "be based on the most expensive costs of post-closure care during the post-closure care period."⁸⁶ Owners/operators must then establish continuous financial assurance for post-closure care using one of the methods specified in § 258.74 until released through the demonstration of compliance with § 258.61 (e).⁸⁷ The cost estimate and corresponding financial assurance must be adjusted yearly during the active site life⁸⁸ as well as during the post-closure care period for both inflation and for any changes in either the landfill conditions or the post-closure plan that would increase the maximum cost.⁸⁹

80. *Id.* § 258.71(a)(3).

81. *Id.* § 258.71(a)(4).

82. *Id.*

83. *See id.* § 258.72.

84. *Id.* § 258.72(a).

85. *Id.*

86. *Id.* § 258.72(a)(1).

87. *See id.* § 258.72(b).

88. *See id.* § 258.72(a)(2).

89. *See id.* § 258.72(a)(3).

The owner may reduce the post-closure care estimate and the amount of financial responsibility if the cost estimate exceeds the maximum cost at any time during the remaining financial responsibility period.⁹⁰ The owner must notify the State Director that the justification and amount of financial responsibility has been placed in the operating record.⁹¹ In addition, owners/operators must provide financial responsibility for corrective action (for known releases only) until released.⁹²

Ten different mechanisms for the demonstration of financial responsibility are authorized by the Subtitle D rules. Owners/operators of facilities may select any mechanism, or mix of mechanisms, to demonstrate financial responsibility. The mechanisms endorsed by the EPA are the following:

1. Trust fund⁹³
2. Surety bond⁹⁴
3. Letter of Credit⁹⁵
4. Insurance⁹⁶
5. Corporate Financial Test (issued April, 1998)⁹⁷
6. Local Government Financial Test (issued November, 1996)⁹⁸
7. Corporate Guarantee (issued April, 1998)⁹⁹
8. Local Government Guarantee¹⁰⁰
9. State Approved¹⁰¹ Mechanism¹⁰²

90. *See id.* § 258.72(a)(4).

91. *See id.*

92. *See id.* § 258.72(b).

93. *See id.* § 258.74(a).

94. *See id.* § 258.74(b).

95. *See id.* § 258.74(c).

96. *See id.* § 258.74(d).

97. *See id.* § 258.74(e).

98. *See id.* § 258.74(f).

99. *See id.* § 258.74(g).

100. *See id.* § 258.74(h).

101. The EPA stated that:

Any State-approved mechanism must meet the performance criteria specified may choose to approve individual mechanisms submitted by owners or operators on a case-by-case basis. In either case, a State should develop a process for approval to ensure that mechanisms meet the performance standard. In addition, States may wish to specify mechanism language and include provisions regarding qualification of

10. State Assumption of Financial Responsibility¹⁰³

A number of states (particularly those that lacked financial assurance programs or whose programs were not as stringent as the Part 258 criteria) adopted—generally, by reference—the Part 258 financial assurance program. That meant that the financial test/corporate guarantee and the local government financial test/guarantee were “reserved” for future rulemakings as set forth in the 1991 version of the EPA Part 258 regulations.

II. THE PART 258 LOCAL GOVERNMENT FINANCIAL TEST/ GUARANTEE

In late 1996, the EPA promulgated a financial test and guarantee for use by qualified local government¹⁰⁴ owners and operators

providers and limiting cancellation. . . . The Agency expects a mix of instruments provided by third parties and State-approved mechanisms to be developed under this section. States may wish to take into account a variety of factors, such as the financial capability of lower owners and operators, when developing new mechanisms. Depending on the State's financial resources and on the population of owners and operators, a State may wish to institute and subsidize a loan or grant program to assure that closure, post-closure care, and corrective action obligations will be met. Other mechanisms might include certificates of deposit, escrow accounts, enterprise funds, and enforced local government planning requirements. As a further example, the establishment of a financial assurance fund organized by the State and paid for by participating MSWLFs may prove to be an attractive alternative in many states.

Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 51,105 (1991).

102. *See* 40 C.F.R. § 258.74(i) (1997).

103. *See id.* § 258.74(j):

If the State Director either assumes legal responsibility for an owner or operator's compliance with the closure, post-closure care and/or corrective action requirements of this part, or assures that the funds will be available from State sources to cover the requirements, the owner or operator will be in compliance with the requirements of this section.

Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 51,032.

104. The preamble to the 1991 Subtitle D regulations notes that

“(l)ocal governments include both general purpose local governments (e.g., municipalities, counties, cities, townships, towns, and villages) and special purpose local governments. Special purpose local governments, generally designated as either public authorities or special districts, may perform a single function or a limited range of functions.” Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 51,106. Municipal solid waste landfills owned or operated by State or federal entities “whose debts and liabilities are the debts and liabilities of a State or the United States” are not subject to the Part 258 financial responsibility requirement. 40 C.F.R. § 258.70(a). The EPA refused, however, to exclude municipalities, counties and other political subdivisions of states from the financial responsibility program. The Agency agreed with commenters who supported its proposal to require local governments to demonstrate financial assurance:

Commenters supporting the Agency’s proposal argued that local governments may be unable to raise the necessary funds through their taxing powers and that local governments may not be able to make long-term advance commitments of future funds necessary to provide adequate assurance. Commenters argued further that because of these limitations on the availability of funds, all owners and operators, including local governments, need to factor the cost of closure and post-closure care into the management of an MSWLF in order to ensure that the site is not abandoned. Several commenters suggested that many MSWLFs operated by local governments could become future Superfund sites if financial assurance is not required of local governments.

Solid Waste Disposal Facility Criteria, 56 Fed. Reg. at 51,106. The Agency agreed

with commenters who asserted that local governments may be unable to raise sufficient funds through taxation and that local governments may not be able to make long-term commitments of future funds. While several commenters contended that local governments would have the ability to raise funds in a timely manner sufficient to cover the costs of closure, post-closure care and corrective action, these commenters did not supply the Agency with evidence that this was generally true for all local governments. While the Agency recognizes that many local governments, like Federal and State governments, are permanent entities that act to secure the well-being of their citizens, there is substantial variation among local governments in terms of size, financial capacity, and functions performed. It is therefore likely that there is substantial variation among these governments in

of municipal solid waste landfills. The local government financial test consists of a) a bond rating requirement,¹⁰⁵ b) alternative liquidity and debt service ratios that may be satisfied if the local government does not possess any outstanding general obligation

terms of their ability to meet their closure, post-closure care and corrective action obligations in a timely manner. Exempting all local governments from the requirements would provide insufficient protection of human health and the environment. Furthermore, although local governments are unlikely to abandon their MSWLFs even in the event of bankruptcy, studies of the probability of bankruptcy among local governments indicate that (relative to Federal and State governments) they are generally (1) more limited in terms of financial resources and less flexible in their annual budgets, thereby making reallocation of a substantial amount of funds for a specific purpose in a given year more difficult; (2) less able to obtain their traditional sources of financing (e.g., bond issues, taxes, and intergovernmental transfers) quickly enough to ensure funding in a timely manner; and (3) more prone to fiscal emergencies than Federal and State governments. Also, while localities in bankruptcy may be able to meet their obligations over the long term, obligations such as closure and corrective action may require immediate financing to ensure adequate protection of human health and the environment. In light of the need to ensure that all owners and operators meet their environmental obligations in a timely manner, combined with the variability among municipalities, the Agency believes that a uniform set of applicable requirements is necessary. Therefore, the Agency has decided against allowing States to decide whether to exempt their own local governments.

Id. at 51,107. Moreover,

(w)hile the Agency recognizes that local governments may vary in their ability to meet the costs of closure, post-closure care, and corrective action, the Agency is unable to support a variance for any type of local government (e.g., cities, counties). The same concerns that prompted the Agency to include local governments generally apply to these special categories as well. Requiring all local governments to demonstrate financial assurance should encourage appropriate advanced planning for the costs of closure, post-closure care, and corrective action for known releases by these entities.

Id.

105. 40 C.F.R. § 258.74(f)(1)(i)(A).

bonds, or only has unrated general obligation bonds,¹⁰⁶ c) use of financial statements prepared in conformance with Generally Accepted Accounting Principles ("GAAP") when the financial ratios alternative is selected,¹⁰⁷ and d) a disqualification in the event that 1) the local government is currently in default on any outstanding general obligation bond,¹⁰⁸ 2) has any outstanding general obligation bonds rated lower than Baa by Moody's or BBB by Standard and Poor's,¹⁰⁹ 3) has operated at a deficit equal to five percent or more of total annual revenue in each of the past two fiscal years,¹¹⁰ or 4) has received an adverse opinion, disclaimer of opinion, or other qualified opinion from an independent certified public accounting (or appropriate State agency) auditing its financial statement.¹¹¹

The final rule also requires a local government that uses the financial test to:

disclose in its annual budget or financial report the estimated costs of its closure, post-closure and corrective action obligations, including the years when such costs are expected to be incurred. Closure, post-closure, and corrective action costs that are to be incurred during a local government's current budget period must be included as line items in that budget; those costs that are to be incurred in future budget periods need only be disclosed in a supplemental section to a local government's budget or financial report.¹¹²

106. *Id.* § 258.74(f)(1)(i)(B).

107. *Id.* § 258.74(f)(1)(ii).

108. *Id.* § 258.74(f)(1)(iii)(A).

109. *Id.* § 258.74(f)(1)(iii)(B).

110. *Id.* § 258.74(f)(1)(iii)(C).

111. *Id.* § 258.74(f)(1)(iii)(D).

112. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. 60,328, 60,329 (1996); 40 C.F.R. § 258.74(f)(2):

Disclosure must include the nature and source of closure and post-closure care requirements, the reported liability at the balance sheet date, the estimated total closure and post-closure care cost remaining to be recognized, the percentage of landfill capacity used to date, and the estimated landfill life in years. A reference to corrective action costs must be placed in the CAFR [comprehensive annual financial report] not later than 120 days after the corrective action remedy

The facility operating record must include the following:

(1) A letter from the local government's chief financial officer stating that the local government satisfies the requirements of the financial test for those costs for which financial assurance is being demonstrated through the financial test¹¹³;

(2) The local government's independently audited year-end financial statement prepared in accordance with GAAP¹¹⁴;

(3) The opinion prepared by the auditor of the local government's year-end financial statement¹¹⁵; and

(4) An evaluation by the local government's auditor or by the appropriate state agency that the information in the chief financial officer's letter to the operating record is consistent with the local government's year-end financial statement.¹¹⁶

The rule also requires that local governments that use the test review their financial condition each year in order to determine whether the requirements of the test are satisfied. A local government which concludes that it no longer qualifies for use of the test must obtain alternative financial assurance within 210 days of the close of the fiscal year.¹¹⁷

has been selected in accordance with the requirements of § 258.58. For the first year the financial test is used to assure costs at a particular facility, the reference may instead be placed in the operating record until issuance of the next available CAFR if timing does not permit the reference to be incorporated into the most recently issued CAFR or budget.

Id.

113. 40 C.F.R. § 258.74(f)(3)(i)(A)(1).

114. *Id.* §258.74(f)(3)(i)(B).

115. *Id.* §258.74(f)(3)(i)(C).

116. *Id.* § 258.74(f)(3)(i)(B).

117. *See* 40 C.F.R. § 258.74(f)(3)(v). In addition,

(t)he Director of an approved State, based on a reasonable belief that the local government owner or operator may no longer meet the requirements of the local government financial test, may require additional reports of financial condition from the local government at any time. If the Director of an approved State finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of the local government financial test, the local government must provide alternate financial assurance in accordance with this section.

Id. § 258.74(f)(3)(vi).

Perhaps the most important qualification of the financial test is the provision that limits the amount of closure, post-closure, and corrective action costs for which a local government may demonstrate financial responsibility through the financial test. "A local government may only use the financial test to demonstrate financial assurance for the costs of its total environmental obligations up to a maximum amount that does not exceed 43 percent of the local government's total annual revenues" ¹¹⁸ If the local government does not assure other federally-established environmental obligations for which financial assurance is required through a financial test, it may assure closure, post-closure, and corrective action costs that equal up to 43 percent of the local government's total annual revenue. ¹¹⁹

If, however, the local government assures other environmental obligations through a financial test, including those associated with underground injection control facilities,¹²⁰ petroleum underground storage tank facilities,¹²¹ PCB storage facilities,¹²² or hazardous waste treatment, storage, and disposal facilities¹²³ it must add those costs to the closure, post-closure, and corrective action costs it seeks to assure [under the financial test]. The total that may be assured must not exceed 43 percent of the local government's total annual revenue.¹²⁴

The EPA determined that a 43 percent limit was appropriate based on an examination of "the public financial literature"¹²⁵ regarding the "percent of total revenues [that] . . . a local government could devote annually to meet environmental obligations over a typical bonding period"¹²⁶ and not experience undue fi-

118. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. 60,328, 60,329 (1996) (codified at 40 C.F.R. § 278.74(f)(4)).

119. *See* 40 C.F.R. § 258.74(f)(4)(i).

120. *See id.* § 144.62.

121. *See id.* pt. 280.

122. *See id.* pt. 761.

123. *See id.* pts. 264-65.

124. *See id.* § 278.74(f)(4)(ii).

125. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 58 Fed. Reg. 68,353, 68,359 (1993) (to be codified at 40 C.F.R. pt. 258).

126. *Id.* The preamble to the proposed regulation sheds light on the EPA's methodology:

First, the Agency assumed that the local government would

nancial difficulty. In rejecting the argument that a 43 percent threshold should apply with regard to all environmental obligations and not simply those the local government is self-assuring, the Agency stated that:

The 43 percent threshold limit on a local government's ability to "self-insure" its environmental obligations ensures that a local government's environmental obligations, for which a local government proposes to demonstrate financial assurance on the basis of its financial ability, are not disproportionate to its relative financial capability to fulfill those obligations. EPA has determined that a local government may reasonably be expected to be able to pay the costs of its environmental obligations that it is "self-assuring" at any one time up to 43 percent of its total annual revenues. To the extent that the anticipated costs of a local government's environmental obligations that are being deferred at any one time were to exceed 43 percent of its total annual revenues, EPA believes that it would be substantially less likely that a local government would be financially able to, in fact, fulfill those obligations at the time that they were to become due. Since EPA believes that a community may safely "self-insure" its environmental obligations up to 43 percent of its total annual revenues, it is not necessary to disqualify a community from using the financial test if its total environmental financial assurance costs are greater than 43 percent of its total annual revenues. In such a case, a community should be able to realize the same cost savings as other communities by self-insuring at least a portion of its environmental obligations and obtaining third-party financial assurance instruments for any costs that exceed the 43 percent threshold.¹²⁷

spread the costs over 20 years. Using the same calculations that a bank would use to calculate the monthly payments on a homebuyer's mortgage, the Agency calculated the annual payment a local government would have to make on a 20-year loan at a 10 percent rate of interest to meet its assured costs. The Agency then assumed that those annual payments should be equal to a maximum of 5 percent of total annual revenue. Based on these assumptions, a local government could borrow an amount equal [or] up to 43 percent of its total annual revenue, without unreasonable financial stress.

Id.

127. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. 60,328, 60,334 (1996) (to be codified at 40 C.F.R. pt. 258).

The final rule also included a "guarantee" provision whereby a local government could guarantee the costs of closure, post-closure care and corrective action associated with a municipal solid waste landfill owned by another government or by a private party.¹²⁸ The local government guarantor is required to assume responsibility for the obligations of the facility owner or operator if the owner or operator fails to do so—by either performing the activity itself,¹²⁹ utilizing a third-party to do so,¹³⁰ or establishing a fully funded trust fund,¹³¹ and provide proof that it passes the financial test requirements.¹³² However, "[e]ven if a local government guarantee is not precluded by state law, a state may nevertheless disallow the use of the guarantee if it determines that there is the potential for abuse."¹³³ If the guarantee is subsequently canceled, or the guarantor no longer meets the requirements of the financial test, the owner or operator of the landfill must obtain alternative financial assurance within 90 days after notice of cancellation¹³⁴ or "the determination that the guarantor no longer meets the requirements."¹³⁵ "If the owner or operator fails to provide alternate financial assurance within the 90-day period, the guarantor must provide that alternate assurance"¹³⁶ within 120 days of the notice of cancellation¹³⁷ or determination¹³⁸ that the guarantor no longer meets the requirements.

The EPA intended that the financial test be available and cost-effective. It estimated that fully "91 percent of all local governments that own or operate a MSWLF would be able to use the test for at least some amount of their subtitle D obligations, while 54 percent of all local governments would be able to use the financial test for at least all of their subtitle D obligations."¹³⁹

128. *See* 40 C.F.R. § 258.74(h).

129. *See id.* § 258.74(h)(1)(i)(A).

130. *See id.*

131. *See id.* § 258.74(h)(1)(i)(B).

132. *Id.* § 258.74(h).

133. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. 60,328, 60,334 (1996) (to be codified at 40 C.F.R. pt. 258).

134. 40 C.F.R. § 258.74(h)(1)(iii).

135. *Id.* § 258.74(h)(2)(iii).

136. *Id.* § 258.74(h)(1)(iii).

137. *See id.* § 258.74(h)(1)(iii).

138. *See id.* § 258.74(h)(2)(ii).

139. Financial Assurance Mechanisms for Local Government Own-

Those few communities that lack general obligation bonds or whose bonds are unrated and accordingly cannot utilize the bond rating requirement are nonetheless allowed to qualify for the financial test by satisfying one of the financial assurance ratios.¹⁴⁰ The EPA expected that the vast majority of local governments would be able to qualify for use of the financial test solely on the basis of having an investment grade bond rating on all outstanding general obligation bonds. The Agency rejected the arguments of some commenters that “general obligation bond ratings are not good indicators of the financial health of the local government that issues the bonds, because the ratings indicate the risk associated with the bonds themselves rather than any risk associated with the financial capability of the issuing local government.”¹⁴¹

In addition, the Agency defended the selection of alternative liquidity¹⁴² and debt service¹⁴³ ratios¹⁴⁴ by declaring that fully “96

ers and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. 60,328, 60,330 (1996) (to be codified at 40 C.F.R. pt. 258).

140. *See id.* at 60,331.

141. *Id.*

142. *See* 40 C.F.R. § 258.74(f)(1)(i)(B)(1).

143. *Id.* § 258.74(f)(1)(i)(B)(2). The regulation requires that the owner or operator, on the basis of the most recent audited annual financial statement, satisfy a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05. The EPA concluded that a liquidity ratio, though derived from a local government’s balance sheet and subject to being “manipulated to reach a particular result,” Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. at 60,332, does “provide a measure of a local government’s ability to meet current and expected obligations.” *Id.* It concluded that a requirement that the local government maintain more than a five percent cash balance was unnecessary because it was not reasonable to assume that the entity be required to “respond to all of its potential MSWLF closure, post-closure care and corrective action obligations at any one time.” *Id.* The purpose of the ratio requirement is, instead, to ensure that the government has “the financial flexibility to be able to respond to some unexpected obligations in addition to fulfilling its planned or anticipated obligations.” *Id.*

144. The EPA responded to concerns that a proposed “borrowed funds ratio” (Proposed § 258.74(f)(1)(i)(B)(2)) would not have been satisfied by many communities, *id.*, and did not include the ratio in the final regulation. *See* Financial Assurance Mechanisms for Local Govern-

percent of all local governments that own or operate MSWLFs maintain . . . a minimum cash balance and would satisfy the liquidity ratio"¹⁴⁵ and by suggesting that all but the most impecunious local governments would meet the debt service ratio.¹⁴⁶

States moved promptly to incorporate the local government financial test/guarantee into their regulations. Indeed, in several instances (most notably North Carolina and Ohio), state environmental agencies proposed the adoption of the *proposed* version of the federal regulation. The promulgation of the standards by the EPA and their prompt inclusion into state implementing regulations made even more clear the need for a similar cost-effective yet protective criterion for private owners/operators.

A. *The Part 258 Financial Test/Corporate Guarantee*

The EPA's recently promulgated financial test/corporate guarantee is an important step forward that should be incorporated into state regulations and made available to qualified, financially sound private owners/operators of municipal solid waste landfills. The mechanisms will provide protective, yet economical tools for the demonstration of financial responsibility. In estab-

ment Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. at 60,332.

145. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 61 Fed. Reg. at 60,332.

EPA also does not expect that local governments, which must maintain a balanced budget under state law, would have to specifically budget a five percent cash balance in order to satisfy the liquidity ratio. . . . EPA's research shows that the vast majority of local governments already maintain enough of their assets in cash and in current investments to pass the liquidity ratio.

Id.

146. In the preamble to the proposed regulation, the EPA noted that its analyses concluded that "of all local governments that own or operate MSWLFs, 89.4 percent passed the debt service ratio, 96.5 percent passed the liquidity ratio, and 91.4 percent passed the use of borrowed funds ratio. The Agency estimates that 80 percent of all local governments pass all three ratios." Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 58 Fed. Reg. 68,353, 68,357 (1993).

lishing the regulatory standards, the EPA "endeavored to reasonably minimize the requirements associated with the mechanisms and thereby promote private cost savings while at the same time limiting the public costs."¹⁴⁷ The new Part 258 amendments set forth a financial test and corporate guarantee for use by qualifying private landfill owners/operators. The criteria listed in the new standards are consistent with those established in the Part 258 local government financial test/guarantee. The corporate financial test consists of: (a) a minimum size requirement; (b) a bond rating/financial ratio provision; and (c) a domestic assets requirement.¹⁴⁸

B. *Corporate Financial Test*

1. Minimum Size Requirement

The EPA standard requires firms using the financial test to possess a tangible net worth at least equal to the sum of the costs they seek to ensure through a financial test, plus \$10 million.¹⁴⁹ The firm would also need to assure the minimum sum of closure, post-closure care, and known corrective action costs.¹⁵⁰

In addition, owners/operators are required to include cost estimates for obligations required under other regulatory programs, namely the injection well, underground storage tank, and hazardous waste treatment, storage and disposal (Subtitle C) programs.¹⁵¹ The Agency believes that these criteria will act as "an initial screen for corporations in demonstrating financial respon-

147. Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. 17,706, 17,715 (1998) (codified at 40 C.F.R. pt. 258).

148. See Corporate Financial Test, 63 Fed. Reg. 17,729 (1998) (codified at 40 C.F.R. § 258.74(e)).

149. Obviously, "a firm with more landfills and a correspondingly higher level of assets will also have a higher level of net worth than the \$10 million minimum." Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,716.

150. See Corporate Financial Test, 63 Fed. Reg. 17,729 (to be codified at 40 C.F.R. § 258.74(e)(1)(ii)).

151. See Corporate Financial Test, 63 Fed. Reg. at 17,729 (to be codified at 40 C.F.R. § 258.74(e)(1)(iii)).

sibility for the very large costs of closure, post-closure care, and corrective action."¹⁵²

2. Bond Rating/Financial Ratio Alternatives

In addition to meeting the minimum size requirement¹⁵³ and the domestic asset test,¹⁵⁴ the EPA standard authorizes corporations to satisfy the remaining test requirements in one of two ways:

a) Investment Grade Bond Ratings¹⁵⁵—a most recent rating of senior unsecured bonds “of AAA, AA, A or BBB as issued by Standard and Poor’s or Aaa, Aa, A, or Baa as issued by Moody’s;”¹⁵⁶ or

152. Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,708 (to be codified at 40 C.F.R. pt. 258).

153. See *supra* text accompanying notes 149-52.

154. See *infra* text accompanying note 160.

155. The Agency has long recognized that bond ratings are a “good demonstration of financial strength because [they] reflect[] the expert opinion of the bond rating service and the financial community,” and have been a “reasonably good indicator for predicting default.” Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Responsibility, 56 Fed. Reg. 30,201, 30,204 (1991). For example, EPA data showed that none of the private firms which became bankrupt between 1966 and 1979 had an investment grade rated bond issuance. *Id.* Bond ratings “reflect the expert opinion of bond rating services, which are organizations that have established credibility in the financial community for their predictions.” *Id.* at 30,212. “While not infallible, bond ratings are excellent predictors of whether bonds will be repaid with more highly rated bonds having lower default rates than bonds with lower ratings.” Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,721; “[B]ond ratings have been excellent predictors of bankruptcy . . .” *Id.* at 17,722.

156. Corporate Financial Test, 63 Fed. Reg. at 17,729 (to be codified at 40 C.F.R. § 258.74(e)(1)(i)(A)). The EPA rejected the use of collateralized bonds, which are permitted by the local government financial test, on the basis that:

a collateralized bond can receive a rating that is not indicative of the overall strength of the firm that issues it, but rather of the collateral backing it. In fact, a firm under fi-

b) Ratio Alternative—either a leveraged ratio of 1.5 based on the ratio of total liabilities to tangible net worth,¹⁵⁷ or a profitability ratio of greater than 0.10 based on the ratio of the sum of net income plus depreciation, depletion and amortization, minus the \$10 million, to total liabilities.¹⁵⁸ The ratios were selected because they were deemed to be “particularly good discriminators of financial health.”¹⁵⁹

3. Domestic Assets Requirement

Finally, the EPA standard requires that all firms using the financial test have assets in the United States that are at least equal to the costs they seek to assure through a financial test.¹⁶⁰

financial distress may only be successful in issuing a bond if it pledges assets to back it.

Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,709.

The EPA has emphasized that revisions in ratings (upward or downward) are of no consequence as long as the rating on the senior unsecured bond is investment grade. Accordingly, “most of these changes will be within a ratings category (e.g., A to A-) or from one investment grade rating to another (BBB to A) and [will] be inconsequential for purposes of the financial test.” *Id.* at 17,721.

157. Corporate Financial Test, 63 Fed. Reg. at 17,729 (to be codified at 40 C.F.R. § 258.74(e)(1)(i)(B)).

158. *See id.* (to be codified at 40 C.F.R. § 258.74(e)(1)(i)(C)).

159. Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,709.

160. Corporate Financial Test, 63 Fed. Reg. 17,729 (codified at 40 C.F.R. § 258.74(e)(1)(iii)). The EPA rejected the notion that the Part 258 financial test should incorporate the six-times multiple which the EPA proposed to delete from the Subtitle C financial test in 1994 (Financial Assurance Mechanisms Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities and Hazardous Waste Treatment, Storage, and Disposal Facilities, 59 Fed. Reg. 51,523, 51,527 (1994)). Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,723. It stressed that a six times multiplier requirement would “have the effect of potentially reducing the availability of the financial test, and thereby increasing private costs, without a demonstration of how [such a requirement] would make the test less available to firms which would enter bankruptcy, and thereby decrease the public costs.” *Id.*

4. Reporting and Recordkeeping Requirements

The Agency regulation provides that the following three items be placed in the facility operating record (either before the receipt of waste, or on the effective date of the rule and within 120 days following the selection of a corrective remedy).¹⁶¹

5. Chief Financial Officer Letter

The Chief Financial Officer of the firm is required to submit a letter demonstrating compliance with the financial test.¹⁶² The Agency expects that the letter will include a worksheet that explains how the firm's financial data satisfies the regulatory requirements.¹⁶³

6. Independent Certified Public Accountant's Opinion

An opinion from an independent certified public accountant regarding the firm's financial statements for the latest completed fiscal year must be placed in the facility operating record.¹⁶⁴ Unless the opinion is unqualified, the firm cannot utilize the financial test.¹⁶⁵ The rule does, however, provide that in states with approved Part 258 programs the State Director may, on a case-by-case basis, accept "qualified" opinions.¹⁶⁶

The effect of a more stringent domestic asset requirement would have limited the amount of obligations that a firm qualifying for the financial test can cover. This would potentially have increased the private cost of the test, but not have made the test a better predictor of bankruptcy. Only in the unlikely event of a bankruptcy would this more stringent requirement have had an impact by having reduced the amount of costs covered.

Id.

161. *See* Corporate Financial Test, 63 Fed. Reg. 17,729 (codified at 40 C.F.R. § 258.74(e)(2)).

162. *See id.* (codified at 40 C.F.R. § 258.74(e)(2)(i)).

163. *See id.* (codified at 40 C.F.R. § 258.74(e)(2)(i)-(iii)).

164. *See id.* (codified at 40 C.F.R. § 258.74(e)(2)(i)(B)).

165. *See id.*

166. *See id.*

Generally, an adverse opinion, disclaimer of opinion, or any qualification in the opinion would automatically disqualify the owner or operator from using the corporate financial

7. Special Report from the Independent Certified Public Accountant

The CPA is required to submit a special report confirming that the data in the CFO's letter were appropriately derived from the audited, year-end financial statements.¹⁶⁷ The report is not required when the firm utilizes financial test data obtained directly from the annual financial statement provided to the Securities and Exchange Commission.¹⁶⁸

8. Annual Updates and Placement of Financial Test Documentation

Each of the above-referenced items of documentation are, under the federal regulation, subject to annual updating.¹⁶⁹ Documents would have to be placed into the facility operating record within ninety (90) days of the close of the firm's fiscal

test. The one potential exception is that the State Director of an approved State may evaluate qualified opinions on a case-by-case basis, and accept such opinions if the matters which form the basis for the qualified opinion are insufficient to warrant disallowance of the test.

Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. 17,706, 17,710 (1998) (to be codified at 40 C.F.R. pt. 258).

167. See Corporate Financial Test, 63 Fed. Reg. at 17,729-30 (codified at 40 C.F.R. § 258.74(e)(2)(i)(C)).

168. See *id.* A separate CPA statement is not required where the CFO simply takes figures directly from an audited financial statement. This is a straight forward process. On the other hand, where the CFO "derives" the figures—for example, by using different accounting procedures to determine . . . liabilities—the process may require a high level of financial expertise. In these cases, EPA believes review by an independent auditor is appropriate. Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfill Facilities, 63 Fed. Reg. at 17,710.

Likewise, the special report is required "if the CFO letter uses data that are derived from and are not identical to the data in the audited annual financial statements or other audited financial statements filed with the Securities and Exchange Commission (SEC)." *Id.*

169. See Corporate Financial Test, 63 Fed. Reg. at 17,729-30, (codified at 40 C.F.R. § 258.74(e)(2)(iii)).

year.¹⁷⁰

9. Demonstrating Compliance With an Alternative Financial Assurance Mechanism

The rule provides that if a firm no longer meets the requirements of the financial test, the owner/operator of the facility must notify the State Director and obtain alternative financial assurance within 120 days of the close of the firm's fiscal year.¹⁷¹

10. Current Financial Test Documentation

Similarly, the Director of an approved state may, based on a reasonable belief that the owner or operator no longer meets the requirements of the financial test, require the owner/operator to provide current documentation demonstrating compliance.¹⁷²

11. Corporate Guarantee

The EPA regulation permits three types of qualified guarantors:

(1) The parent corporation or principal shareholder of the owner/operator;¹⁷³

(2) "[A] firm whose parent corporation is also the parent corporation of the owner or operator,"¹⁷⁴ (a corporate sibling); and

(3) Other related or non-related firms "with a 'substantial business relationship' with the owner or operator" (including subsidiaries of the owner or operator).¹⁷⁵

Guarantors must meet the conditions of the financial test or any financial instrument authorized by the Part 258 financial as-

170. *See id.*

171. *See id.* (codified at 40 C.F.R. § 258.74(e)(2)(v)).

172. *See id.* (codified at 40 C.F.R. § 258.74(e)(2)(vi)).

173. *See id.* (codified at 40 C.F.R. § 258.74(g)(1)).

174. *Id.*

175. *See id.* "If the guarantor is a firm with a 'substantial business relationship' with the owner or operator, [the proposed guarantor] must describe this 'substantial business relationship' and the value received in consideration of the guarantee." *Id.*

insurance regulations.¹⁷⁶ In cases where the guarantor is not a corporate parent, grandparent, or sibling, the letter from the CFO would have to explain how a "substantial business relationship" exists.¹⁷⁷ A guarantor may cancel a guarantee, but the cancellation could not become effective until 120 days after receipt of such notice by both the State Director and the owner/operator.¹⁷⁸ In addition, a guarantor that seeks to cancel the guarantee must provide an alternative method of financial assurance if the owner/operator cannot provide such alternative mechanism within 90 days following receipt of the notice of cancellation.¹⁷⁹

Only one state commented in opposition¹⁸⁰ to the proposed financial test/corporate guarantee.¹⁸¹ The EPA, while noting that RCRA authorizes state agencies to establish requirements more stringent than the federal mandates, believes that the final Part 258 financial test/corporate guarantee regulations are sound¹⁸²

176. *See id.* § 258.74(g)(3)(i).

177. *See id.* § 258.74(g)(1).

178. *See id.* § 258.74(g)(3)(ii).

179. *See id.* § 258.74(g)(3)(iii).

180. Several surety and insurance companies, along with the Solid Waste Association of North America, also commented in opposition to part or all of the proposed regulations. *See Insurers Split with Waste Companies over EPA Proposal on Financial Tests*, SOLID WASTE REPORT, Jan. 22, 1998, at 27.

181. Financial Assurance Mechanisms for Corporate Owners and Operators of Municipal Solid Waste Landfills, 63 Fed. Reg. 17,706, 17,725 (1998). The state claimed that "a financial test does not provide a State or (the) EPA access to funds to complete closure, post-closure, or corrective action should the financially responsible corporation refuse to take the needed action." *Id.* The EPA responded that "this circumstance does not distinguish itself from others where EPA or a State must undertake enforcement to obtain compliance. The likelihood of a financially sound firm nevertheless being reluctant to fulfill its obligations is not affected by today's final rule." *Id.* at 17,725-26.

182. *See id.* at 17,714. The EPA stated:

[I]t encourages States to adopt the additional flexibility for financial assurance mechanisms reflected in these final rules. EPA believes that these mechanisms will result in significant cost savings for owners and operators subject to financial assurance requirements. At the same time, EPA believes the financial assurance mechanisms adopted today effectively delineate eligible owners and operators who have a low

and that private firms will save at least \$65.8 million annually through use of the mechanisms.¹⁸³ Likewise, the Agency expects that local governments will save approximately \$138 million annually¹⁸⁴ through the use of the Part 258 financial test.

III. THE ABSENCE OF A CORPORATE FINANCIAL TEST/CORPORATE GUARANTEE MECHANISM AS OPTIONS FOR THE DEMONSTRATION OF FINANCIAL RESPONSIBILITY WOULD RESULT IN AN UNFAIR AND BURDENSOME SYSTEM

The need for the incorporation into state regulations of the cost-effective, yet protective, mechanisms developed by the EPA for the demonstration of financial responsibility by private owners/operators of municipal solid waste landfills is clear and uncontroverted. Indeed, two conclusions can be drawn from the U.S. EPA's efforts to revise the current RCRA Subtitle C test and from the history of financial responsibility programs. First, it is essential that states utilize a financial/self-assurance test as an option available to *all* owners/operators. Second, the financial test must be an accurate and reliable indicator of financial strength and long-term viability. The final report of the Keystone Center Financial Responsibility Project, drawing upon the consensus of government, public, and public and private waste industry members, stressed that:

[t]he financial test provides certain significant advantages over the other mechanisms. First, the financial test is the most cost effective financial responsibility mechanism. It eliminates the need for a third party financial mechanism and the resultant tangible costs of transaction charges (premium for insurance policies, fees for letters of credit, etc.) as well as the intangible opportunity cost of funds (cash or collateral is tied up in a trust fund or letter of credit).

probability of business failure from owners and operators that are unable to meet their obligations. By restricting the financial test and guarantee to viable firms, the mechanisms in today's rule avoid undue public costs.

Id.

183. *See id.* at 17,727.

184. Financial Assurance Mechanisms for Local Government Owners and Operators of Municipal Solid Waste Landfill Facilities, 58 Fed. Reg. 68,353, 68,363 (1993).

Second, the financial test provides an option to the other financial mechanisms. This is particularly important because market constraints may have an adverse effect upon the availability of the other instruments (e.g., insurance).¹⁸⁵

Likewise, the EPA has also stressed the need for a financial test/self-assurance mechanism and pointed out that the failure to include such a mechanism would result in a "burdensome" program.¹⁸⁶

The EPA standards assure that the general public will not be responsible for the costs of facility closure, post-closure monitoring, and corrective action. The new mechanisms are excellent predictors of a private firm's fiscal health—they are reflective both of a firm's current financial condition and as an accurate and reliable indicator of long-term viability. A number of states have indicated that they will incorporate the EPA mechanism into their regulations, yet several jurisdictions (among them Florida, Pennsylvania, Wisconsin, Michigan, California, and Ohio) either do not authorize the use of any "self-assurance" mechanism (such as a financial test) or, to date, insist upon utilization of the more stringent, less available Subtitle C test (indeed, the Subtitle C based test is incorporated in part from the 1980 EPA RCRA regulations and does not reflect the improvements made to that mechanism as a result of the NSWMA Petition and the EPA's subsequent rulemakings).

It is clear that overly stringent financial responsibility requirements can have profoundly adverse consequences. Inflexible or unavailable financial responsibility mechanisms could conceivably either prompt firms to abandon facilities before closing them or may unnecessarily restrict the availability of needed waste management capacity. Likewise, firms that cannot utilize a financial/self-assurance test to satisfy their financial responsibility obligations because of their size or the nature of their operations often cannot build new environmentally protective state-of-the-art facilities.

Moreover, unnecessarily restrictive financial responsibility rules may also either discourage private-firm ownership of waste management facilities or encourage the use of financial assurance

185. KEYSTONE CTR., *supra* note 36, at 9.

186. *See, e.g.*, Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Responsibility, 56 Fed. Reg. 30,201, 30,202 (1991).

mechanisms that have long build-up periods. The final report of the Keystone Center Financial Responsibility Project recognized that while owners and operators of waste management facilities should be forced through financial assurance programs to "internalize costs of clean-ups and third-party damages," financial responsibility requirements should "not be counterproductive to the overall goals and objectives of responsible waste management."¹⁸⁷

IV. THE PROMULGATION OF THE NEW FINANCIAL ASSURANCE MECHANISMS BY STATE AGENCIES IS IMPORTANT TO ENSURE CONSISTENCY WITH THE FEDERAL RCRA STATUTE AND THE 40 C.F.R. PART 258 SUBTITLE D REGULATIONS

Congress sought to ensure the development of new and uniformly applied management regulations for municipal solid waste landfills through the 1984 amendments to RCRA. Until the enactment of the amendments, the solid waste program under RCRA had largely consisted of a requirement that states should be the ones to develop such plans. A state that initiated a federally approved plan gained the benefits of the Act—financial and technical assistance to the state and protection for facility operators from citizen suits during the process of upgrading facilities from "open dumps" to sanitary landfills.

Section 4003 of the 1976 RCRA legislation described the following minimum requirements for state plans: (1) identifying the relative responsibilities of governmental bodies for the plan's implementation; (2) prohibiting the establishment of open dumps and providing that solid waste be disposed of in an environmentally protective manner; (3) closing or upgrading open dumps; (4) establishing state regulatory powers to carry out the plan; (5) granting local governments the authority to enter into long-term contracts for the supply of solid waste to resource recovery facilities; and (6) the use of "environmentally sound" disposal techniques.¹⁸⁸ Section 4002(a) required that the EPA promulgate regulations governing the development of these plans.¹⁸⁹ None of

187. KEYSTONE CTR., *supra* note 36, at 4.

188. See 42 U.S.C. § 6943(a) (1998).

189. See *id.* § 6942(b).

the planning provisions suggested that it would be appropriate to treat facilities differently on the basis of ownership.¹⁹⁰

The 1976 version of RCRA also provided for the EPA to develop criteria for the disposal of solid waste. A sanitary landfill was defined as one in which "there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."¹⁹¹ Accordingly, an "open dump" was defined as any facility that does not meet the criteria for a sanitary landfill.¹⁹² The act of open dumping was, in turn, directly prohibited.¹⁹³ The EPA was also charged under § 1008(a) with the obligation of developing criteria to provide precise regulatory controls for solid waste landfills.¹⁹⁴

Not one word of the 1976 version of RCRA hints at Congressional approval of distinctions between public and private disposal facilities. Indeed, then-Representative David Stockman made clear the reach of the statute, noting that "the scope of this bill[] is plenary. It covers every waste site, every junkyard, every municipal dump in the country, including those on private property."¹⁹⁵ Similarly, Congress specifically provided that municipalities that generate and either collect or transport municipal solid waste, or act as owners or operators of solid waste landfills, must comply with all applicable RCRA requirements.¹⁹⁶ Direct federal

190. See H.R. 14496, 94th Cong. § 407(b)(1)(1976); See *id.* at § 407(b)(2); 122 CONG. REC. H11,166 (daily ed. Sept. 27, 1976) (statement of Sen. Stafford).

191. The Resource Conservation and Recovery Act (RCRA) of 1976 § 4004(a), 42 U.S.C. 6944(a) (1994); See Roger W. Anderson, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 Wis. L. REV. 635, 664-73.

192. See RCRA § 4005, 42 U.S.C. § 6945.

193. See RCRA § 4005(a), 42 U.S.C. § 6945(a).

194. See RCRA § 1008(a), 42 U.S.C. § 6907(a); See also 42 U.S.C. § 6944(a); Criteria for Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. pt. 257 (1990).

195. 126 CONG. REC. H26,759 (1980) (statement of Rep. Stockman). See also 122 CONG. REC. S11,069 (daily ed. June 30, 1976) (statement of Sen. Randolph); *id.* at S11,085 (remarks of Sen. Muskie); 122 CONG. REC. H11,148 (daily ed. Sept. 27, 1976) (remarks of Rep. Rooney and Rep. Skubitz); H.R. Rep. No. 94-1491, at 36 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6274-78.

196. See *infra* text accompanying notes 198-99.

enforcement was also authorized by the 1976 legislation—the EPA may act against any “person” determined to be in violation of any provision of the Act.¹⁹⁷ The term “person” was, in turn, defined to include any “political subdivision of a State.”¹⁹⁸ Accordingly, the Act *applied to all municipalities*, i.e., to every

city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and . . . any rural community or unincorporated town or village or any other political entity for which an application for assistance is made by a State or political subdivision thereof.¹⁹⁹

In 1984, Congress determined that solid waste disposal sites were deserving of increased federal attention:

Subtitle D facilities are the recipients of unknown quantities of hazardous waste and other dangerous materials from the disposal of household waste, small quantity generator wastes and illegal dumping. Since construction, siting, and monitoring standards for these facilities are either non-existent or far less restrictive than those governing hazardous waste disposal facilities, environmental and health problems caused by Subtitle D facilities are becoming increasingly serious and widespread.²⁰⁰

The 1984 amendments required, in § 4010(c),²⁰¹ that:

Not later than March 31, 1988, the Administrator shall promulgate revisions of the criteria promulgated under paragraph (1) of section [4004(a)] and under section [1008(a)(3)] for facilities that may receive hazardous household waste or hazardous wastes from small quantity generators under section [3001(d)]. The criteria shall be those necessary to protect human health and the environment and may take into account the practicable capability of such facilities. At a minimum such revisions for facilities potentially receiving such wastes should require ground water monitoring as necessary to detect contamination, establish criteria for the acceptable location of new or existing facili-

197. RCRA § 3008, 42 U.S.C. § 6928.

198. RCRA § 1004(15), 42 U.S.C. § 6903(15).

199. RCRA § 1004 (13), 42 U.S.C. § 6903(13).

200. H.R. CONF. REP. NO. 98-1133, at 17 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5688.

201. 42 U.S.C. § 6949a(c) (1994).

ties, and provide for corrective action as appropriate.²⁰²

Nor can the “practicable capability” language of § 4010 justify a distinction between how private and public landfills demonstrate financial responsibility. The actual language utilized by Congress is of critical importance. Congress specified that the revised criteria must create standards “necessary to protect human health and the environment,” although the Agency (and, in turn, States with approved Part 258 programs) “may” consider the “practicable capability” of solid waste disposal facilities.²⁰³ At a minimum, the Congress insisted that environmental controls similar to those contained in the Subtitle C regulations—groundwater monitoring, locational requirements, financial responsibility and corrective action measures—be specified.

The reference to “practicable capability” arose in the context of the development by the EPA of *uniform* national standards—standards that were to “avert serious disruptions of the solid waste disposal industry,”²⁰⁴ rather than the *implementation* or *subsequent revision* of the regulations by the EPA or by an approved state. Although the term was not defined by Congress, it is clear that the unambiguous mandate upon the EPA—and hence upon any state that seeks to obtain or retain approval of a Subtitle D program—is to promulgate standards necessary to protect human health and the environment. To the extent that “practicable capability” enters into the equation at all, the EPA has al-

202. *Id.* The primary rule of statutory construction is that “the legislative purpose is expressed by the ordinary meaning of the words used.” *United States v. Locke*, 471 U.S. 84, 95 (1985). Generally, the “plain meaning of legislation should be conclusive. . . .” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). *See also* *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990). When the plain meaning of statutory language is evident, the court’s inquiry is at an end and the Agency “must give effect to the unambiguously expressed intent of Congress.” *Id.* *See also* *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 36 (D.C. Cir. 1986) (en banc) (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)). Here, the intent of Congress was clear—EPA was to promulgate and ensure the implementation of Part 258 criteria within a specified time frame and apply the requirements to all municipal solid waste landfills.

203. *See supra* note 202 and accompanying text.

204. 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984) (statement of Sen. Randolph).

ready addressed the issue by creating limited exceptions (which are discussed below) to the otherwise uniform regulations.

The requirement that the EPA's determinations not be "arbitrary and capricious"²⁰⁵ also supports the view that the Agency and approved states may not create disparate financial responsibility demonstration procedures. Under § 7006(a), the standard of review is the same as under § 10(e) of the Administrative Procedure Act.²⁰⁶ This review requires a "searching and careful inquiry" to ensure that the Agency engaged in reasoned decision-making based on consideration of relevant factors.²⁰⁷

Even if the EPA and approved states otherwise possessed the statutory authority to create differential financial responsibility programs, demonstration requirements or "tests" that are available for one sector only would both contradict § 4010(c) and be arbitrary and capricious. The terms of § 4010(c) clearly mandate that the EPA standards be "those necessary to protect human health and the environment."²⁰⁸

Section 4010(c) of RCRA provides that if a particular form of regulatory control is *necessary* "to protect human health and the environment," reduced levels of protection cannot be tolerated simply on the basis of the economic impact of compliance upon any class of facilities.²⁰⁹ Congress emphasized that "[t]he underlying standard for facilities subject to this amendment to Subtitle D remains protection of human health and the environment."²¹⁰

205. RCRA § 7006(a), 42 U.S.C. § 6976(a).

206. *See* 5 U.S.C. § 706(2)(a) (i.e., whether agency action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law").

207. *See, e.g.,* *International Ladies' Garment Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983); *Specialty Equip. Mkt. Ass'n v. Ruckelshaus*, 720 F.2d 124, 132 (D.C. Cir. 1983).

208. 42 U.S.C. § 6949a(c). *See also* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) (if agency fails to provide a "reasoned analysis" for its decision, the court may not supply one); *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (agency must supply "reasoned basis" for its actions); *International Ladies Garment Union v. Donovan*, 722 F.2d 795, 814, 815 n.35, 817 (D.C. Cir. 1983) (same).

209. *See* John H. Turner, *Solid Waste Regulation Under RCRA*, 9 NAT. RESOURCES & ENV'T. 6, 9, 42 (1994).

210. 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984) (statement of Rep. Randolph).

The Senate Report on the 1984 Amendments expressly provided that:

EPA must . . . consider the appropriate standards to protect human health and the environment, taking into account the size of the facility, its location relative to populated areas and the degree of industrialization, the proximity of ground and surface water, the disposal method, and the amounts and characteristics of the waste received.²¹¹

These factors concern the relative degree of risk presented by facilities, not the economic ability of a class of owners/operators to act, or the governmental nature of certain facilities. Congress clearly did not desire that the revised Subtitle D criteria impose unnecessary extensive retroactive requirements—but the statute also unmistakably provides that the governmental status of the owner or operator may not be considered in determining whether a particular form of control is “necessary” to protect human health and the environment.

Moreover, Congress clearly contemplated—indeed, it looked forward to—the closure of substandard facilities. As then-Senator Randolph noted, individual facilities might suffer hardship—and possibly close—if they cannot meet requirements deemed necessary and practicable for the industry as a whole: “New statutory requirements for Subtitle D facilities may hasten the closure of many solid waste facilities that have only a few years of remaining capacity. The requirements could also precipitate the closure of facilities with substantial capacity, but that are either unable or unwilling to accept new regulatory costs.”²¹² While Senator Randolph did refer to the possible “phasing” of new requirements, neither he nor any other member of Congress singled out any particular class of facilities as deserving of differential treatment. Referring to the revised criteria, the Senator stated that:

They may be phased in over time, as the Administrator deems appropriate, to take account of the practicable capability of the facilities covered The Administrator could phase in new requirements other than groundwater monitoring and corrective action over time. *Phasing may be tailored to the characteristics of broad categories of facilities.* Such phasing might include, for example, imposing requirements first on large facilities which have the greatest potential for affecting human health and the

211. S. REP. NO. 98-284, at 49 (1983).

212. 130 CONG. REC. S13,814 (daily ed. Oct. 5, 1984).

environment in the absence of added regulatory controls. Phasing also might *include imposing some requirements immediately on existing units but giving time to meet other requirements so that facilities are not faced with all major new requirements at once.*²¹³

While Senator Randolph spoke of “broad categories of facilities,” neither he nor any other member of Congress sought to *permanently* insulate any class of facility from the reach of Subtitle D or otherwise mitigate the impacts of the revised federal criteria on the basis of the nature of their ownership. The congressional history simply suggests that while a temporary “phase-in” period may be appropriate, the “necessary” long-term protection of human health and the environment may not be compromised. The cornerstone of the revised criteria was the impact of new and existing facilities upon health or the environment; thus the EPA simply had no choice but to avoid distinctions based on the purported “economic” capability of owners or operators. Instead, any “categorization” of facilities was clearly intended by Congress to be based *solely* upon the statute’s “necessity” requirement—and the plain language of § 4010 cannot justify a different approach for any class of facilities.

Indeed, except for the limited exception discussed above, the Agency made clear that any variation in the application of the revised criteria by states must be based—in accordance with § 4010 of RCRA—upon site-specific factors relating to the risks posed to human health and the environment, rather than generically based on the public or private ownership of the facility:

EPA believes that variation in the control[s] applied to landfills in different States is appropriate to account for site-specific factors (e.g., hydrology, precipitation). Therefore, today’s rule sets performance standards that allow consideration of site-specific conditions. EPA agrees that while the Federal standards are flexible to allow different site-specific controls in different States, the Federal performance standards should be consistently interpreted from State to State. To ensure that these provisions are consistently interpreted, EPA plans to develop technical guidance for MSWLF owners and operators and State regulatory officials to enhance uniformity in interpretation of the revised Criteria.²¹⁴

213. *Id.* (emphasis added).

214. Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,995 (1991).

Similarly, the EPA noted that while it was “sensitive” to the concerns raised by some municipalities, the final regulations had fully taken into account those concerns in setting minimum federal standards. The section of the preamble to the final rules referred to above makes clear that any further “distinctions” between facilities must be within the confines of site-specific conditions rather than based on the nature of the ownership of the facility. The preamble clearly demonstrates the Agency’s conviction that it had, on the basis of a four-year administrative record, included the maximum degree of “flexibility” authorized by Congress. Accordingly, the Agency’s own statements support the argument that any further dilution of the regulations is not supported by the “practicable capability” provision in § 4010(c).

For example, the Agency clearly accommodated the concerns of small landfill operators by establishing phased-in compliance deadlines governing such things as groundwater monitoring and financial assurance requirements. Deadlines that were intended to be applied to facilities without regard to their size or ownership status:

The municipal solid waste crisis comes at a time when local governments and Indian Tribes are faced with a wide range of competing demands for their limited financial and technical resources. Schools, roads, social programs, public health and environmental programs, including solid waste management, and other programs draw on limited local resources, forcing cities and Tribes to make tough budget decisions. EPA recognizes and is very sensitive to these difficult conditions that local governments and Indian Tribes face and is carefully considering the impacts of its environmental programs on local governments and Indian Tribes.

As part of this effort, EPA *carefully considered* the concerns of local government and Indian Tribes in today’s rule for municipal solid waste landfills. *Within the constraints established by Congress*, EPA has provided in this rule extensive flexibility to States, Indian Tribes, and local governments to facilitate implementation. For example, today’s rule sets forth a set of *flexible, national performance standards that allow owners and operators, including local governments and Indian Tribes, to consider site-specific conditions in designing and operating their landfills to comply with the rule*. Today’s rule also establishes a flexible compliance schedule, including the phase-in of ground-water monitoring requirements over a five-year period from the date of publication of today’s rule. Finally, as discussed later in this preamble, today’s rule provides *special relief to small communities and Indian Tribes. Municipal solid*

*waste landfills that serve small communities and Indian Tribes which meet certain criteria are exempted from certain high-cost requirements.*²¹⁵

The Agency also noted that:

As a general matter, some of the changes in today's rule that are applicable to all MSWLFs will benefit small landfills. For example, today's rule allows all MSWLF owners and operators time to comply with the more costly provisions of the revised Criteria by phasing in ground-water monitoring requirements over a five-year period beginning on the date of publication of today's rule. In addition, EPA is delaying the effective date of the financial assurance requirements until 30 months after publication of this rule, which should benefit small communities. Finally, today's rule provides that States with approved programs may shorten the MSWLF post-closure care period on a case-by-case basis. EPA believes that all these measures benefit small MSWLFs.²¹⁶

The nature of the "special relief" afforded to "small communities and Indian Tribes" in § 258.1(f) merits additional scrutiny. A review of the EPA's determinations leads to the inescapable conclusion that the narrow exceptions carved out by the Agency—in conjunction with the *site-specific* flexible approach endorsed by the EPA—cannot be squared with a subsequent determination that many public facilities should, as a *class*, be entitled to use of a financial responsibility demonstration mechanism that is not available to the private sector. The so-called "small community" exception was narrowly drawn to ensure that facilities not obtain a permanent and total exemption. The EPA noted that it "tried to strike a balance between granting relief to the appropriate small communities versus exempting all small landfills."²¹⁷ In the preamble to the final rule, the EPA stressed the criteria for qualifying for an exemption:

To qualify for this exemption, the landfill must meet the following criteria: (1) The landfill receives less than 20 tons per day of solid waste on an annual average, (2) there is no evidence of existing ground-water contamination from the landfill, and (3) one of the following conditions exists: (A) The landfill serves a community that experiences an annual interruption of at least three consecutive months of surface transportation, which prevents access to a regional waste management facility, or (B) the

215. *Id.* at 50,980 (emphasis added) (citation omitted).

216. *Id.* at 50,990.

217. *Id.*

landfill serves a community for which there is no practicable waste management alternative and the landfill is located in an area that annually receives 25 inches or less of precipitation.²¹⁸

Each of the exemption's criteria was developed through careful consideration of the statutory mandate and the "practicable capability" of small landfill owners/operators. For example,

EPA decided to limit the exemption . . . to small landfills so long as there is no evidence of ground-water contamination from the facility because the Agency sees no justification for providing relief to landfills that are contaminating ground water. . . . In the Agency's view, owners and operators of these landfills should be responsible for taking appropriate corrective action if contamination is present. . . . Furthermore, today's rule requires that if contamination is discovered at some future date, the owner or operator must notify the State Director and, thereafter, comply with the design, ground-water monitoring, and corrective action provisions in today's rule.²¹⁹

Similarly,

EPA set the 25-inch cap on annual precipitation to ensure that the exemption would be available only to small MSWLFs where the risk of ground-water contamination is reduced because of lessened leachate generation and slower contaminant migration. . . . EPA considered precipitation cut-off values greater than 25 inches per year, but rejected them because EPA believes that the risk of ground-water contamination is too great in these areas.²²⁰

The Agency justified the conditional exemption by emphasizing the exemption's discrete applicability:

EPA believes that exempting small landfills from the ground-water monitoring and corrective action requirements of today's rule comports with the statute (i.e., section 4010(c)) and the Congressional intent for a number of reasons. First, to address Congressional concern for ground-water contamination, EPA has narrowly drawn the exemption such that only those small MSWLFs for which there is no evidence of ground-water contamination are eligible for the exemption (in addition to one of the other two criteria). Second, as stated above, the exemption is a conditional one such that the owner/operator is no longer eligible for the exemption when there is evidence of

218. *Id.* See 40 C.F.R. pt. 258.1(f)(1).

219. *Id.*

220. *Id.* at 50,991.

ground-water contamination associated with the facility. As such, the facility cannot escape corrective action for known releases. Third, the 25-inch cap on annual precipitation contained in the second criterion ensures that this exemption will be limited to those small MSWLFs where the risk of ground-water contamination is considerably reduced. Finally, both the surface transportation difficulties and the "no practicable waste management alternatives" criteria for obtaining the exemption reflect the "practicable capabilities" evaluation that the statutory language of section 4010(c) and the legislative history indicate Congress intended EPA to conduct when revising the criteria under section 4004(a).²²¹

Moreover, the Agency refused, in several other instances, to grant particular classes of facilities a complete exemption—or even a variation—from several of the Part 258 requirements. For example, the EPA declined to define "existing unit" as "the entire, originally permitted landfill area (inclusive of areas not yet receiving waste on the effective date)."²²² Likewise, the Agency refused to tolerate the recirculation of leachate into a unit that lacks a composite liner.²²³ Finally, the EPA rejected the notion that existing facilities should be exempt from financial assurance requirements²²⁴ on the basis that "[t]he Agency does not believe that owners and operators will be unreasonably burdened by the costs of obtaining financial assurance mechanisms."²²⁵

Indeed, the EPA has emphasized that both public and private municipal solid waste landfills must be subject to Part 258 financial responsibility requirements:

The Agency decided not to exempt any special category of local governments from today's final rule (with the exception of small landfills qualifying for an exemption in approved states as discussed above). While the Agency recognizes that local governments may vary in their ability to meet the costs of closure, post-closure care, and corrective action, the Agency is unable to support a variance for any type of local government (e.g., cities, counties). The same concerns that prompted the Agency to include local governments generally apply to these special categories as well. Requiring all local governments to demonstrate financial assurance should encourage appropriate advanced

221. *Id.*

222. *Id.* at 51,041.

223. *See id.* at 51,056.

224. *See id.* at 51,104.

225. *Id.* at 51,105.

planning for the costs of closure, post-closure care, and corrective action for known releases by these entities.

The Agency does not believe that the requirements will generally be burdensome to local governments. As discussed above, the cost of the financial assurance requirements are a relatively small part of the total cost of compliance with today's rule. Because the requirements will be applied to all MSWLF owners and operators, regardless of whether they are local governments or private companies, the Agency does not believe that the requirements will cause a shift from public to private ownership of solid waste management facilities.²²⁶

Similarly, the Agency stated that it did not believe that Part 258 permitting programs should exclude financial tests:

The provisions of today's rule are intended to ensure the reliability of each mechanism relative to the overall performance standard. Given the minimum requirements specified, the Agency believes it is not necessary to limit allowable mechanisms, as some commenters suggested, to cash, surety bonds or certificates of deposit. The Agency tailored these minimum qualifications to the particular characteristics and industry practices of the providers of the financial mechanisms (e.g., sureties, banks, insurers, etc.) in order to ensure the effectiveness of the mechanism as well as the stability of the provider. The Agency believes this approach is preferable to applying the same criteria to all types of providers. In particular, the Agency believes it would be inappropriate to require all providers of financial assurance mechanisms to satisfy the subtitle C financial test, which was designed to assess a private corporation's ability to meet certain costs, not to evaluate the ability of a financial service's firm to carry out its business.²²⁷

In promulgating the Part 258 criteria, the Agency indicated that it anticipated that the corporate and local government financial tests "would take effect concurrently" and be available for adoption by states for use in approved programs.²²⁸

In addition, the promulgation by state regulatory agencies of a new or revised financial test/corporate guarantee for private solid waste facility owners/operators that is based on the EPA mechanism—particularly in instances in which the Part 258 local government test based on the EPA mechanism is approved for

226. *Id.* at 51,107.

227. *Id.* at 51,115.

228. *Id.* at 51,115, 51,118.

use — will ensure that the financial responsibility requirements for private facilities are not significantly more stringent than those for non-private landfills.²²⁹

CONCLUSION

The EPA's Part 258 financial test and guarantees for public and privately owned or operated landfills were developed with careful consideration of the goals of the RCRA financial responsibility program. The test and guarantees will help to ensure that financially viable facility owners/operators have access to cost-effective mechanisms for the demonstration of financial responsibility while avoiding the necessity for the costs of closure, post-closure care, and necessary corrective action to be borne by others. The EPA mechanisms should be incorporated into state environmental regulations and made available for use by qualified owners/operators.

229. The need to prevent discrimination in the application of the regulatory requirements to private facilities is another justification for state agency promulgation of the federal rules. The Equal Protection Clause of the fourteenth amendment of the U.S. Constitution provides that "(n)o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In particular, inconsistent standards for public and privately-owned facilities are at variance with, and cannot rationally be justified in light of, the standard for review of state and local regulation pursuant to the Equal Protection Clause of the U.S. Constitution.