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Underground Storage Tanks Containing Petroleum—Financial Responsibility Requirements and State Program Approval Objective; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 280 and 281

[FRL-UST-3; 3419-3]

Underground Storage Tanks Containing Petroleum—Financial Responsibility Requirements and State Program Approval Objective

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is promulgating financial responsibility requirements applicable to owners and operators of underground storage tanks containing petroleum under Section 9003 (c) and (d) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA). This rule establishes requirements for demonstrating financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of underground storage tanks containing petroleum.

Today EPA is also promulgating, for purposes of state program approval, a federal technical objective for financial responsibility of owners and operators of petroleum UST systems. Subtitle I of RCRA allows EPA to approve state programs to operate in place of the federal UST requirements if those state programs have standards that are no less stringent than the federal requirements, and also provide adequate enforcement of compliance with those standards.

EFFECTIVE DATE: This rule becomes effective on January 24, 1988.

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

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I. Authority

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

II. Background

This section provides the legislative and regulatory background for the final rule, describes the comprehensive underground storage tank (UST) regulatory program, and summarizes today's financial responsibility rulemaking.

A. Legislative and Regulatory Background of the Rule

The Hazardous and Solid Waste Amendments of 1984 (HSWA) extended and strengthened the provisions of the Resource Conservation and Recovery Act (RCRA). HSWA created Subtitle I, which provides for the development and implementation of a regulatory program for underground storage tanks (USTs) [1] containing regulated substances, including petroleum [2] and other regulated substances [3] (such nonpetroleum regulated substances are hereinafter referred to as hazardous substances). Section 9003(a) of Subtitle I requires the EPA Administrator to promulgate requirements for release detection, prevention and correction as necessary to protect human health and the environment. These technical standards were promulgated at 53 FR 37082 (September 23, 1988).

The Superfund Amendments and Reauthorization Act of 1986 (SARA) amended sections 9003 (c) and (d) of Subtitle I to mandate that the Agency establish financial responsibility requirements for UST owners and operators to assure the costs of corrective action and third-party liability caused by sudden and nonsudden accidental releases from USTs. SARA made other changes to Subtitle I affecting financial responsibility.

(1) It established $1 million per occurrence and an appropriate annual aggregate as the minimum assurance levels for USTs at facilities engaged in petroleum production, refining, or marketing, and for USTs which handle substantial amounts of petroleum; the Administrator may set lower per-occurrence limits for USTs at other types of facilities.

(2) It authorized the Administrator to suspend enforcement of the financial responsibility requirements if financial assurance for a particular class or category of USTs is "not generally available" and steps are being taken to either form a risk retention group (RRG) or establish a state fund pursuant to § 9004(c)(1).

(3) It created a $500 million Leaking UST Trust Fund to fund certain corrective action costs for petroleum releases (including the costs of cleanup, enforcement and cost recovery).[4] Before the effective date of today's rule, Trust Fund monies can be used whenever the Administrator or state under cooperative agreement determines that such action is necessary to protect human health and the environment and when there is no owner or operator capable or willing to undertake proper action. Priority must be given to cases posing the greatest threat to human health and the environment. After the effective date of today's rule, the circumstances under which Trust Fund monies may be used are more restricted (see Section IV.B).

On April 17, 1987, the Agency proposed financial responsibility requirements for USTs containing petroleum (52 FR 12786). The Agency provided a 60-day comment period and extended it for an additional 30 days. In addition, the Agency published two Supplemental Notices modifying the initial proposal (52 FR 48638, December 23, 1987, and 53 FR 10401, March 31, 1988). Based on EPA's analysis of the comments, EPA has revised the rule and is today promulgating a final rule, which is summarized in Section C below.

EPA has also issued an Advanced Notice of Proposed Rulemaking (ANPRM) on financial responsibility requirements for USTs containing hazardous substances (53 FR 3818, February 9, 1988).

B. The Comprehensive Federal UST Regulatory Program

In addition to this financial responsibility rule for USTs containing petroleum, the Agency has promulgated technical standards for USTs containing petroleum and hazardous substances (53 FR 37082, September 23, 1988) and procedures for approval of state UST programs (53 FR 37212, September 23, 1988). The three rulemakings together establish a comprehensive program to regulate USTs, as required by Subtitle I of RCRA.

The technical standards require UST owners and operators to meet standards for tank operation and design, release detection and reporting, corrective action, and closure. The operation and design standards require that USTs be protected from corrosion and equipped with devices to prevent spills and overfills. The release detection and reporting standards require owners and operators to install leak detection systems and report actual and suspected releases. These requirements pertain to new USTs on the effective date of the rule. Some operational requirements pertain to USTs currently in use on the effective date. USTs currently in use become subject to the tank operation and design requirements over a ten-year phase-in period and the release detection requirements over a five-year phase-in period. The corrective action standards, which apply to all tanks on the effective date, require owners and operators to clean up releases from UST systems. In the short run, one effect of the technical standards will be to

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

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

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

(C) Septic tank,

(D) Pipeline facility (including gathering lines), regulated under—

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

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

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

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

(F) Storm water or waste water collection system,

(G) Flow-through process tank,

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

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

The term 'underground storage tank' shall not include any pipes connected to any tank which is described in subparagraphs (A) through (I)." These terms are further defined by regulation under the technical standards published at (CITE-TS).

[2] Under section 9001(8), petroleum is defined as "petroleum, including crude oil or any fraction thereof," which is liquid at standard conditions of temperature (60 degrees Fahrenheit) and pressure (14.7 pounds per square inch absolute).

[3] Under section 9001(2), "regulated substances" are defined as "(A) any substance defined in section 101(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under Subtitle C), and (B) petroleum."

[4] The Trust Fund may not be used to compensate third parties.

increase detection of releases; over the long run, the standards will reduce the likelihood that new releases will occur.

The financial responsibility rule requires that UST owners or operators demonstrate financial responsibility for the costs of corrective action and compensation of third parties arising from release of petroleum from underground storage tanks. The financial responsibility requirements will help ensure that owners and operators can respond promptly to clean up releases and to compensate third parties for any injuries or damages associated with the releases. Because the providers of financial assurance mechanisms may require UST owners and operators to install leak detection and corrosion protection systems as a condition of coverage, the financial responsibility requirements may accelerate compliance with the technical standards.

The state program approval objectives (53 FR 37212, September 23, 1988) enable states whose programs are no less stringent than the federal program and which provide for adequate enforcement of compliance to administer the UST regulatory program. EPA has designed the approval criteria to provide flexibility consistent with statutory requirements to encourage states to adopt the UST program. EPA believes that regulation of the large and varied UST population is best implemented by state and local agencies, which can oversee and enforce the UST program more effectively than EPA.

Finally, the last major component of the federal UST regulatory program, establishing financial responsibility requirements for USTs containing hazardous substances, will be proposed in the future.

C. Program Objectives and Summary of Today's Rule

1. Program Objectives and Major Changes in the Final Rule

The Agency had three guiding objectives in considering the comments received on the proposed rule and in adopting the changes for the final rule. First, the financial responsibility program for petroleum USTs must require adequate and reliable financial assurance for the costs of UST releases, based on the following considerations:

(1) The certainty that funds will be available;

(2) The sufficiency of funds to cover the costs of releases; and

(3) The availability of funds for corrective action and third-party liability.

Second, while requiring adequate and reliable financial assurances, the rule must provide flexibility, where possible, to increase the feasibility of compliance by the regulated community. Subtitle I specifically allows flexibility in establishing per-occurrence levels of assurance for USTs at facilities not engaged in petroleum production, refining, or marketing, and for aggregate levels of assurance. The Agency has carefully considered where to allow flexibility in the financial responsibility program while ensuring adequate protection for covering the costs of petroleum UST releases.

Finally, to the extent possible, this rule should promote expansion of existing assurance mechanisms and development of new ones to achieve maximum compliance by UST owners and operators. The Agency recognizes the current limited availability of financial assurance mechanisms and the difficulty many owners and operators will have in complying with the requirements, at least initially. However, insurance coverage is available now to some UST owners and operators, and a number of states have either adopted or are taking steps to adopt state funds. The Agency has constructed the final rule to promote timely compliance by all owners and operators and to encourage development of additional assurance mechanisms.

The major changes in the rule and the way in which they further these objectives are summarized below:

- *Phased schedule of compliance.* The final rule phases in compliance in four stages for different categories of UST owners. The Agency has adopted this approach to allow adequate time for compliance and to promote development of financial assurance mechanisms in the following ways:
  - —Owners most able to comply, based on financial strength, must do so 3 months after the promulgation date.
  - —Most owners in the next two groups have or can obtain insurance. The phase-in allows time for processing insurance applications (which may take several months per application). It also provides time for insurance providers to conform their policies to the requirements of this rule, as well as to decide whether to extend their policies to new segments of the regulated community. Some owners in these groups may also be able to rely on state funds.
  - —Owners scheduled for compliance 24 months after the date of promulgation of the rule, e.g., single station owners and non-marketers, will rely primarily on state funds and expansion of insurance and RRGs beyond currently available programs. The schedule provides time for these mechanisms to become available.
  - —Phasing in compliance also provides UST owners and operators time to invest in technical improvements or replacement of tanks to make them insurable, as well as to comply with the UST technical standards.
- *$500,000 per occurrence level of assurance allowed for non-marketers with monthly throughput of 10,000 gallons of gasoline or less.* The Agency has determined that this amount should be sufficient to cover about 99 percent of all claims at these facilities—a key criterion in deciding the coverage amounts. At the same time, this lower coverage amount reduces the burden on individual owners or operators. In addition, allowing a lower level of assurance may increase the number of policies insurers are able to write and may provide an incentive to extend coverage to non-marketers.
- *Lower aggregate level of assurance.* The final rule requires a maximum aggregate of $2 million and raises the number of tanks qualifying for the $1 million aggregate to 100. These aggregate levels achieve the Agency's goal that releases at UST facilities not exceed the aggregate more than one percent of the time. At the same time, the lower levels significantly reduce the burden on owners and operators. More firms will be able to use existing insurance programs (which currently provide maximum aggregate coverage of $2 million). The lower aggregate will also make it easier to capitalize RRGs and state funds.
- *Suspension of enforcement.* Today's rule does not contain suspension of enforcement procedures. The Agency has chosen to defer the promulgation of these procedures. The Agency hopes to gain experience with implementation of the program on which to base a process that minimizes the administrative burden of suspension of enforcement on owners and operators as well as on the Agency.

2. Summary of Today's Rule

This section briefly summarizes EPA's financial responsibility rule for petroleum USTs. Section III of this preamble describes the final rule, some of the major comments that were made on the proposed rule, and the rationale for the changes. The Comment/Response Document ("Summary of Comments and EPA's Response to Comments on the April 17, 1987, Proposed Financial Responsibility Rule for Petroleum Underground Storage Tanks") in the docket contains a detailed summary of all comments on the proposed rule and the Agency's response to those comments.

Today's financial responsibility requirements are applicable to owners or operators of "petroleum UST systems" with the following exceptions: (1) Federal or state entities that own or operate USTs containing petroleum; and (2) owners and operators of USTs excluded from the technical standards (Section III.A.6 below). For purposes of covering costs of corrective action and third-party liability, EPA requires all owners or operators of petroleum USTs

at facilities engaged in petroleum production, refining, or marketing and owners or operators of USTs with an average monthly throughput of more than 10,000 gallons to obtain financial assurance of at least $1 million per occurrence. Owners or operators of USTs at facilities not engaged in petroleum production, refining, or marketing with an average monthly throughput of 10,000 gallons or less must maintain financial assurance of at least $500,000 per occurrence. All owners or operators must maintain an annual aggregate of $1 million or $2 million, depending on the number of USTs assured.

UST owners or operators may satisfy the requirements using the following mechanisms: insurance or risk retention group coverage, surety bond, guarantee, letter of credit, financial test of self-insurance, trust fund, a state-required mechanism, or a state fund or other state assurance. Mechanisms can be used alone or in combination to cover the costs of taking corrective action and compensating third parties as long as a mechanism or combination of mechanisms provides the appropriate amount of assurance. The only combination of mechanisms that is not allowed is the financial test of self-insurance and a guarantee where the financial statements of the owner or operator and the guarantor are consolidated.

The final rule does not contain procedures for obtaining a suspension of enforcement of the requirements. The Agency will promulgate suspension of enforcement procedures at a later date.

The final rule requires owners or operators to submit documentation of financial responsibility to the implementing agency after a known or suspected release occurs; when a provider becomes incapable of providing assurance; and when a provider revokes a mechanism and the owner or operator is unable to obtain alternate coverage. Owners or operators must also submit documentation of financial responsibility if requested by the implementing agency. In addition, UST owners or operators must notify the implementing agency of their methods of demonstrating financial responsibility upon installation of new tanks. Owners or operators must maintain records of the financial assurance mechanisms used to satisfy these requirements on-site or at their place of business.

The final rule also requires that UST owners or operators receive a notice of cancellation before terminating coverage to allow them sufficient time to procure alternate assurance and to determine whether there are existing releases.

Owners and operators must comply with these financial responsibility requirements over a phased-in compliance period lasting up to 24 months from the promulgation date of this rule.

The state program approval objective for financial responsibility of owners and operators of petroleum UST systems is also promulgated today. This objective outlines the financial responsibility requirements that owners and operators of petroleum UST systems must meet in order to be "no less stringent" than the corresponding federal technical standard, and to demonstrate adequate enforcement of compliance.

D. Availability of Mechanisms

The Agency received many comments suggesting that the mechanisms allowed to demonstrate compliance with today's rule are generally unavailable. The Agency recognizes that, for several reasons, including cost, company size, or lack of qualified providers, some of the mechanisms proposed in the rule might have a limited availability at this time. Some mechanisms, such as surety bonds and letters of credit, are likely to be available and affordable to only a few owners and operators. However, in deciding to allow a wide variety of mechanisms to be used to demonstrate financial responsibility, the Agency did not want to preclude the use of any mechanism that might be used and that would provide an adequate degree of assurance that funds will be available if needed. The guarantee, for example, was included because some UST owners and operators have business relationships with firms who might be willing and able to provide them guarantees. Not all owners and operators, however, will have that option.

The Agency recognizes that insurance and state financial assurance programs are likely to be the most feasible mechanisms for most owners and operators to comply with today's rule. Currently, however, pollution liability insurance for USTs is not widely available for a number of reasons. Foremost is the fact that such pollution liability insurance is now and is likely to continue to be offered by a limited number of specialized providers. Second is the unpredictability of the risks involved for unprotected tanks that have not been subject to regular leak detection. In addition, it is unclear to insurers how the new UST technical requirements, especially for corrective action, may change the number and cost of claims. This current uncertainty also affects the amount of reinsurance that is available for insurance policies written for USTs and thereby limits the number of policies that insurers are able to issue.

Despite its limited availability, a number of UST owners and operators have been able to find coverage. Commenters indicated that several insurers are already covering some USTs or are planning to offer such coverage in the future. While a substantial number of petroleum marketers are currently insured, the Agency recognizes that many smaller motor fuel marketers and UST owners not engaged in motor fuel marketing have had difficulty in obtaining coverage.

Implementation of the technical standards rule is likely to increase the availability of insurance over the long term. As old, unprotected tanks are removed and/or fitted with release detection systems, the number of leaks that are detected should increase significantly. As these leaks are detected and corrected, the requirements for upgrading or replacing tanks, combined with regular monitoring, should significantly reduce both the occurrence of leaks and their duration prior to detection. Over the long term, implementation of the technical standards should make UST risks more predictable and, therefore, insurers should be more willing to provide coverage.

Owners and operators who cannot secure traditional insurance coverage may also have alternatives. For some owners and operators, RRGs will offer an alternative to insurance. One such RRG has been formed and offers coverage to petroleum marketers. Several other commenters indicated an interest in forming RRGs.

State funds may also be available to UST owners and operators. In fact, Congress specifically recognized the important role that state funds may play in providing financial assurance by including attempts to form a state fund as a basis for suspension of enforcement and by explicitly allowing such funds to meet financial responsibility requirements for state program approval under RCRA section 9004(c)(1). Although not widely available at present, state funds have already been established in several states. The Agency recognizes that, in most cases, state funds may only supply a portion of the financial assurance required. Some currently available funds cover corrective action but not third-party liability costs; others cover both.

Generally, these funds do not supply coverage in the full amount required in today's rule. State funds may need to be used in combination with other mechanisms to meet the requirements of today's rule. Depending on their structure, state funds can provide an important means for compliance with financial responsibility requirements at the onset of the program and encourage development of insurance and RRGs over the longer term.

The Agency realizes that the mechanisms allowed in today's rule may be difficult to obtain at present. However, the phased-in schedule for compliance with the rule will provide insurers more time to develop and expand lines of insurance and states more time to establish state funds. In addition, the Agency expects to promulgate final procedures for suspension of enforcement in the near future. Following promulgation of that rule, those owners and operators unable to obtain a financial assurance mechanism by their compliance date may form classes and apply for a suspension of enforcement.

III. Section-by-Section Analysis

A. Applicability (§ 280.90)

The rule promulgated today applies to owners and operators of all underground storage tank systems containing petroleum, with certain exemptions or deferrals. Commenters raised several issues concerning the applicability of this rule.

1. Owners and Operators (§ 280.90(a))

The final rule applies to owners and operators of all petroleum UST systems (as defined in § 280.12 of the technical standards rule). If the owner and operator are separate persons, only one person is required to demonstrate financial responsibility although the Agency will hold each responsible if the financial responsibility requirements are not complied with by either party. While the Agency's intention with respect to this issue was explicitly stated in the preamble to the proposed rule (52 FR 12795, April 17, 1987), the rule also conveyed the Agency's intention by using the phrase "owner *or* operator" instead of "owner *and* operator" in all but the applicability section.

The Agency retains this approach and expliticly states it in the rule, as well as in the preamble, to avoid possible confusion. For this reason, the Agency has added the following language to § 280.90 *Applicability:*

If the owner and operator of a petroleum UST system are separate persons, only one person is required to demonstrate financial responsibility.

Some commenters supported the Agency's approach to applicability when the owners and operators are separate persons; however, other commenters believed that EPA should designate which person should comply with the rules. Of these commenters, some supported a rule that required only the owners to comply with the requirements while other commenters believed only operators should be held responsible. Some commenters suggested that the person with responsibility for a particular activity, e.g. tank installation, maintenance or daily operation, should demonstrate financial responsibility.

The commenters who urged EPA to designate only one responsible person when the owners and operators are separate persons believed that the proposal left owners and operators to "fight it out" to determine who will demonstrate financial responsibility and that problems would occur when they do not agree who should obtain coverage. The commenters who urged EPA to hold only operators responsible pointed out that in many cases owners will have only minimal or nominal control over the operation of the tanks (e.g., passive lessors of property such as oil jobbers or marketers ordinarily do not control day-to-day tank operations). On the other hand, one commenter who supported holding only owners responsible pointed out that, when oil jobbers and marketers own tanks, they have usually assumed responsibility for tank replacement and maintenance.

The Agency has decided not to designate a single party, either the owner or operator, as responsible for compliance with the rules because the statute requires the UST standards to be applicable to "all owners and operators," and a determination of which person should assume these costs could only be made on a cases by case basis. Under the technical requirements, both persons are responsible for corrective action; however, the liability of owners and operators to third-party claimants will vary depending on the circumstances of each case and on the applicable state law. Making financial assurance the responsibility of only the person engaged in a particular activity would also be inappropriate because the liability of an owner or operator is not limited to the results of particular activities. In some cases the person responsible for one activity may have allowed a release to occur and therefore incur liability to third parties, while in another case, the person responsible for a different activity may be liable. Under theories of strict liability and negligence, even passive lessors could be liable for third-party damages in some situations. Moreover, the person responsible for maintenance and installation will vary depending on the individual arrangements between owner and operator.

The Agency recognizes that in some instances owners and operators will have difficulty agreeing which one of them will comply with the rules. Nonetheless, the Agency believes that owners and operators are in the best position to decide between themselves, as part of their ongoing business relationships, which one of them should demonstrate financial responsibility. Owners and operators may decide that the person most responsible for particular activities should obtain financial assurance, or they may decide that the person most able to demonstrate financial responsibility should do so. EPA believes this approach will allow for greater flexibility, yet avoids the considerable expense of requiring both parties to secure financial assurance.

Other commenters expressed concern about other applicability issues. Some commenters objected to requiring current owners and operators to obtain financial assurance when past owners and operators might be responsible for contamination. Another commenter pointed out that tank testers may be responsible for releases and urged that they should be subject to financial responsibility requirements.

Current owners and operators are responsible under the regulation for obtaining financial assurances for their tanks even if previous owners or operators are responsible for contamination. In situations where a current owner or operator is faced with claims for contamination that occurred under a previous owner or operator, he may pursue appropriate legal remedies against the previous owner or operator. Similarly, damage to tanks and releases which result from tank testing activity are subject to tort claims under applicable state law. Moreover, the statute does not authorize the imposition of financial responsibility requirements on tank testers, only UST owners and operators.

Finally, one commenter requested that the Agency clearly define owners and operators to exclude corporate parents or affiliates. Parents and affiliates generally would not be subject to today's rule. Parents, for example, may serve as guarantors for owners and operators, thereby enabling the owner or

operator to satisfy financial responsibility requirements, but would not be directly responsible themselves for complying with these requirements. The Agency might, however, hold parents or affiliates subject to these requirements in certain situations. For example, if an owner or operator attempted to circumvent today's requirements through the creation of a sham subsidiary or through other arrangements, the Agency could in appropriate circumstances hold a parent or affiliate responsible for compliance with these rules. Thus, a definition of owners and operators which excludes corporate parents or affiliates in all situations is not appropriate. The Agency does not expect, however, that parents or affiliates will generally be subject to these financial responsibility requirements.

2. Tanks Taken Out of Operation Before the Date for Compliance (§ 280.90(b))

The preamble to the proposed rule stated EPA's intention to make the rule applicable to tanks taken out of operation before the effective date of the rule. The language of the proposed rule, however, did not state specifically that it would apply to such tanks.

The Agency received a number of comments on this provision. One commenter questioned the Agency's authority under Subtitle I to apply financial responsibility requirements retroactively to owners of tanks taken out of operation before Subtitle I was enacted in 1984.

The statutory definition of "owner" in RCRA section 9001(3)(A) and (B) includes owners of tanks taken out of operation before enactment of HSWA, as well as owners of tanks in used on the date of enactment. RCRA section 9003(a) further authorizes EPA to promulgate regulations, including financial responsibility regulations, applicable to all owners and operators of USTs. Therefore, the Agency has authority to regulate tanks taken out of operation before the enactment of Subtitle I and to impose financial responsibility requirements on owners and operators of such tanks where necessary to protect human health or the environment:

Some commenters, while not questioning the Agency's statutory authority, urged the Agency to exempt tanks taken out of operation before the effective date of the rule or before November 8, 1985 (one year after enactment of HSWA). Commenters gave the following reasons for such an exemption:

- Providers of financial assurance are not likely to offer assurance for tanks taken out of operation unless it can be proven that there is no contamination present.
- Because so many tanks have been taken out of operation in recent years, it would be extremely difficult to identify these tanks and inform former owners and operators of their obligations.

One commenter recommended that if the requirement for such tanks is retained, owners and operators of tanks that are properly closed should not be required to maintain financial assurance if they can demonstrate that no contamination is present.

At the time the Agency proposed to require owners or operators of tanks taken out of operation before the effective date to obtain financial assurance, it also proposed in the technical rule to require these tanks to comply with closure requirements (§ 280.80). The Agency reasoned that, because non-operational tanks were subject to the closure and corrective action requirements under Subparts F and H of the technical standards, requiring financial assurance was necessary to ensure that closure was undertaken properly and quickly.

Since that time, the Agency has decided to eliminate the requirement that all USTs taken out of operation before the effective date for the technical rule undergo closure. The rule does provide, however, that implementing agencies may require owners or operators to close these tanks properly if there is a reason to believe that they may pose a threat to human health and the environment. The preamble to the technical standards rule discusses the reasons for this change.

Based on comments on the proposed financial responsibility rule and the revisions to the technical standards, the Agency has decided not to require owners or operators of USTs taken out of operation before the compliance dates in this rule to obtain financial assurance. The Agency recognizes that for many owners and operators of USTs, insurance will be the only feasible financial assurance mechanism available. The Agency agrees with commenters, among them insurance companies, that insurance providers would be extremely reluctant to assure tanks taken out of operation because of the perceived greater uncertainly associated with them.

Even if providers of assurance would assure these tanks, it is unlikely that they would cover leaks which occurred before the effective date of the policy. For example, based on standard insurance industry practice, owners and operators applying for coverage must meet certain pre-conditions which may include tank tightness testing and a determination that there are no existing releases. If releases are discovered, insurance policies probably would not cover them, because the insurance industry's practice is to exclude pre-existing releases from coverage. In addition, as a condition for coverage of a tank not in operation, an insurer might require proper closure in order to minimize the risk of a release of material which might remain in the tank. Such an insurance policy would be of little value of protecting human health and the environment since it would not cover pre-existing conditions and would only cover tanks that have been emptied of their contents. The Agency believes that the owners' and operators' resources would be better spent in closure and corrective action that in attempting to procure this type of insurance. Nevertheless, owners and operators of tanks taken out of operation before the effective date remain responsible for the costs of releases associated with them.

3. Applicability to State and Federal Government Entities (§ 280.90(c))

The final rule, like the proposed rule, is not applicable to state and federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States. Several commenters argued that state and federal government entities should not be exempt from the financial responsibility requirements. Their reasons included the following:

- Such an exemption conflicts with Congressional intent to have all tanks assured.
- The exemption will discourage sound tank management practices on the part of state and Federal governments.
- The exemption would provide state-owned transit agencies with unfair advantages over private owners.

The Agency does not interpret the Congressional intent of Subtitle I to preclude exempting any class of USTs from otherwise applicable requirements when the Agency has determined that such requirements are not necessary to protect human health or the environment. See RCRA section 9003(a). With respect to financial responsibility, such requirements need not be imposed where the owners or operators will consistently be able to cover the costs of releases in a timely fashion. The purpose of these financial responsibility requirements is to ensure that funds will be available in a timely manner to cover the costs of corrective action and compensation of third parties arising

from UST releases. While the Agency recognizes that these requirements may provide an incentive for sound tank management practices, this is not their primary purpose.

No commenters disputed the Agency's opinion that Federal and state governments have the requisite financial strength and stability to fulfill their financial assurance obligations. In addition, exemption from the requirements will not discourage sound tank management practices by state and federal government entities, because they remain responsible for the cost of corrective action associated with the releases.

The Agency concedes that not having to pay the costs of procuring a financial assurance mechanism may result in a slight competitive advantage for state-owned transit agencies. Such an advantage is not likely to be significantly greater than advantages already enjoyed by state-owned transit systems (e.g., through government subsidies). In addition, the financial advantage of the state-owned agency is comparable to the position of any firm which can rely on a guarantee provided by a parent or related firm, and merely reflects the difference between large and small businesses. If releases occur, state-owned agencies may rely on state assistance to pay the costs of damages. Privately-owned transit agencies, however, would have to rely on their own funds to pay these costs. Thus, even without today's rule, private transit agencies have a financial incentive to purchase insurance coverage not shared by the state-owned agency.

4. Applicability to Local Government Entities

While the proposed rule exempted from the requirements those government entities whose debts and liabilities are the debts and liabilities of federal or state governments, local government entities were required to provide financial assurance for USTs that they own or operate. The final rule remains applicable to local government entities. However, under the Agency's schedule for phased compliance with the rule, local government entities have 24 months from the promulgation date to comply. EPA also intends to develop a financial test in the interim that will allow local governments that can demonstrate the requisite financial strength and stability to cover the costs associated with UST releases to self-insure.

Local government entities include both general purpose local governments and special purpose local entities. General purpose local government entities include municipalities, counties, townships, towns, villages, parishes and New England towns. Special purpose local governments perform a single function or a limited range of functioins. Special purpose governments are generally designated as either public authorities or special districts such as school districts, water and sewer authorities, transit authorities or power authorities. All local governments, both general and special purpose, are subject to this rule.

One commenter supported application of the financial responsibility requirements to local government entites. However, many commenters stated that the proposed exemption for federal and state governments from demonstration of financial responsibility should be extended to local government entities. The major arguments in favor of such an exemption focused on three areas: (1) The permanence and stability of local governments; (2) the incentives for local governmens to provide funds in a timely manner; and (3) the financial strength and capability to raise funds in a timely manner.

First, several commenters maintained that the permanence and stability that the Agency attributes to Federal and state governments also apply to local governments; local governments are unalterably attached to their particular location. Moreover, commenters asserted that cities almost never go bankrupt, and when they are unable to meet their financial obligations over the short-term, their debts are not forgiven under the bankruptcy laws but are extended until they can be satisfied. Therefore, unlike private firms, local governments do not disappear even if they file bankruptcy.

Second, commenters stated that local governments have the same incentives as federal and state governments to meet their UST obligations in a timely manner. Local governments exist to safeguard public health and welfare, and local officials have voter accountability that helps assure an immediate and effective response to an UST release. One commenter, an association of city governments, stated that cities have consistently demonstrated an ability to respond to UST leaks in a timely manner and have taken prompt action to ensure that leaks do not recur in the future by either upgrading or removing failed USTs.

Third, commenters claimed that local governments have the requisite financial strength to meet potential UST obligations in a timely manner. One commenter representing city governments pointed out that cities are accustomed to addressing emergencies such as natural disasters and routinely establish contingency funds of a size that could easily cover the costs associated with most UST leaks. Another commenter noted that local appropriation procedures often are structured so that officials may take fund originally intended for one purpose and divert them to a more pressing need related to USTs.

Finally, one commenter argued that for UST releases in excess of fund reserves, many local government entities—like states—have the ability to raise funds through taxes and debt issues. The commenter stated that the delays involved with tax and bond initiatives are unlikely to affect the timeliness of an UST cleanup because cities tend to be excellent credit risks and can often have contracted work performed in an emergency without having to provide funds until after the emergency is remedied or use their own personnel to respond.

The Agency believes that there is merit in many of the points commenters raised as applied to particular municipalities. However, for several reasons, the Agency is unwilling to exempt all local government entities from these requirements. There is substantial variability in local governments in terms of size, financial capacity, and functions. A number of commenters urged that the financial test should be modified so that local government entities could use it. The corporate financial test is not applicable to most government entities because it contains a net worth indicator, a financial measure that is either unavailable to many local governments or does not measure financial strength in the same way it does for private firms. It requires reporting to the U.S. Securities and Exchange Commission (SEC) or to Dun and Bradstreet, which is also not applicable to government entities. Accordingly, the Agency is taking steps to develop a financial test that will allow local governments meeting the test criteria to self-insure like private companies that use the corporate financial test. Local governments which pass this financial test will not be required to obtain other financial assurance mechanisms to comply with the requirements of this rule. In the interim as discussed in Section III.B, under the phased schedule of compliance, the compliance date for local government entities is 24 months after promulgation. The Agency anticipates that the final financial test for local government entities will be promulgated before their scheduled compliance date.

Some commenters on the proposed rule suggested that particular special purpose local governments such as public power entities or airports should be exempt from the financial responsibility requirments. The Agency sees no reason to treat particular special purpose local government entities differently from all other local governments. All local governments remain subject to the rule and may be able to meet the local government financial test under development.

Some commenters suggested a change to the corporate financial test so that power authorities meeting the other criteria in the test could use it. Specifically, they suggested that the Agency accept reports to the Rural Electrification Administration and the Energy Information Administration, as an alternative to filing with the SEC or Dun and Bradstreet. Their comments indicated that other than filing annual statements with a different Agency, they could use the Subtitle I corporate financial test. This change has been made to the corporate financial test so that power authorities meeting the criteria in the test may use. it.

5. Applicability to Indian Tribes

The proposed rule did not address the applicability of the financial responsibility requirements to Indian tribes. Indian tribes are included in the statutory definition of municipalities in RCRA Section 1004(13). Accordingly, under the phased schedule of compliance, Indian tribes will be required to comply with financial responsibility requirements on the last compliance date, 24 months after the promulgation date of the rule, similar to municipalities. However, in the proposed financial test for local government entities, the Agency will specifically request comments on whether this test should apply to Indian tribes. The Agency intends to finalize this proposed rule before the compliance date for local government entities and Indian tribes.

6. Deferrals and Exclusions (§ 280.90(d))

Under the proposed rule, EPA would have deferred from the financial responsibility requirements certain categories of tanks that the Agency also was proposing to defer under the technical requirements. The Agency proposed to defer the regulation of these categories of USTs because it had limited information about these USTs or was otherwise uncertain about the need to regulate them. Several commenters addressed these and other categories of tanks that they believed should be deferred or exempted from the final rule.

The proposed technical requirements deferred the following categories of tanks from all of their requirements (except the requirements for corrective action and notification and the prohibition of bare steel UST installation requirements): (1) Wastewater treatment tanks, (2) sumps, (3) underground bulk storage tanks, (4) USTs containing radioactive waste and other radioactive materials, (5) UST systems containing electrical equipment, (6) hydraulic lift tanks, and (7) UST systems containing used oil.

In the final technical standards rule (53 FR 37082, September 23, 1988), the Agency has excluded some of these categories of USTs from the technical requirements. Some of the other categories of USTs that the Agency proposed to defer from regulation are now regulated. The Agency continues to defer regulating certain categories of USTs (except from corrective action requirements and prohibition of bare steel UST installation).

The financial responsibility rule tracks the final technical standards rule with respect to exclusions and deferrals from the requirements. All USTs excluded from regulation are excluded from these financial responsibility requirements. All USTs that are deferred from regulation also are not subject to these financial responsibility requirements. Because the Agency is uncertain about the need to regulate deferred categories of USTs, or has limited information about them, the application of financial responsibility requirements to the deferred categories of USTs is inappropriate at this point. The Agency's decision about the regulation of each of the categories of excluded or deferred tanks is summarized below. The preamble to the final technical standards rule contains a thorough discussion of the Agency's rationale for each decision.

• *UST Systems Containing Hazardous Waste and Regulated Substances.* The Agency has excluded these tank systems from regulation under Subtitle I.

• *UST Systems Containing Electrical Equipment and Hydraulic Lifts.* Equipment or machinery using regulated substances for operational purposes are now excluded from regulation.

• *Wastewater Treatment USTs.* Wastewater treatment tanks regulated under the Clean Water Act are excluded from regulation. Wastewater treatment USTs that are *not* regulated under the Clean Water Act are deferred from regulation.

• *Tanks Containing De Minimis Quantities of Regulated Substances.* The Agency is excluding the following categories of USTs:

—USTs with a capacity of less than 110 gallons;

—USTs holding a *de minimis* concentration of regulated substances; and

—USTs that serve as emergency backup tanks, hold regulated substances for only a short period of time, and are expeditiously emptied after use.

• *Sumps.* Sumps are not excluded or deferred as a separate category; however, many sumps may be excluded under the *de minimis* exclusions, the wastewater treatment exclusion, and the statutory exclusion for storm water and wastewater collection systems. Other sumps may be deferred under the "field-constructed tank" deferral.

• *Field-Constructed Tanks.* Field-constructed tanks, which include many tanks that were classified as underground bulk storage tanks in the proposal, are deferred from regulation.

• *UST Systems That Contain Radioactive Wastes and Other Radioactive Materials.* The Agency is deferring UST systems that contain radioactive materials from regulation.

• *Backup Diesel Tanks at Nuclear Facilities.* These USTs are deferred from regulation.

• *Airport Hydrant Fueling Systems.* These USTs are deferred from regulation.

• *Used Oil.* Tanks containing used oil, including crankcase oil, are no longer deferred. They are now subject to the final technical rule, and are also subject to the financial responsibility requirement.

For each of the following categories of tanks, the Agency received comments supporting a deferral or exemption of these requirements from the financial responsibility requirements (see also the preamble to the technical standards rule for a more thorough discussion):

• *Small Capacity Tanks.* One commenter urged "special consideration" for small capacity users. One commenter suggested that petroleum USTs containing under 5,000 gallons should be exempt. Another commenter suggested 4,000 gallons as a cutoff. As noted above, the Agency has decided on a *de minimis* exclusion for tanks with a capacity of less than 110 gallons.

• *Small Business.* One commenter requested a small business cutoff for the final rules because insurance may be offered only at unaffordable rates. Other commenters requested an exemption for small businesses not engaged in petroleum marketing. The Agency has not exempted small businesses from the final financial responsibility requirements because the costs of corrective action and third-party claims will not be different for small businesses than for other owners and operators. The specific concerns of small businesses and businesses not engaged in petroleum marketing are addressed in establishing a phased compliance schedule (Section III.B in the preamble) and a lower peroccurrence amount for certain facilities not engaged in petroleum production, refining or marketing (Section III.D.1).

• *Tanks Containing Heating Oil.* Based on experience with releases in New Jersey, one commenter urged that heating oil for on-site

consumption should not be excluded from the requirements. Because heating oil tanks are excluded from regulation by statute, EPA cannot require these USTs to obtain coverage.

• *Small Throughput Tanks.* One commenter supported exempting a system with small throughput volume. According to this commenter, this exemption is appropriate because most leaks are associated with piping. The Agency recognizes that a large number of releases are associated with piping; however, the Agency does not believe an exclusion for these tanks is appropriate. Releases may still occur from tanks with small throughput and owners or operators should obtain coverage for releases that do occur. However, the Agency has taken these concerns into account in establishing a lower pre-occurrence amount of financial assurance for tanks at certain facilities not engaged in petroleum production, refining, or marketing.

• *Tanks Owned by Small, Rural Telephone Systems.* One commenter urged EPA to consider exempting small, rural telephone systems from these requirements for the following reasons: (1) The unavailability of pollution insurance, (2) the high net worth requirement for self-insurance, and (3) the high per-occurrence and aggregate coverage levels. Although EPA recognizes owners and operators of these USTs may have difficulty obtaining financial assurances, releases from these USTs may still require corrective action and cause bodily injury and property damage to third-party claimants. For these reasons, EPA has not exempted these categories of USTs.

• *Aircraft Owners.* One commenter supported an exemption for aircraft owners, comparing these USTs to motor fuel tanks with a capacity less than 110 gallons. All tanks with a capacity of less than 110 gallons are now excluded from these requirements. Thus, many aircraft owners with USTs that contain a capacity of less than 110 gallons are excluded under the *de minimis* exclusion. In addition, EPA has deferred regulation of airport hydrant systems. The Agency is not aware of any evidence to support an additional exemption for these categories of USTs that contain more than 110 gallons.

B. Compliance Dates (§ 280.91)

Today's rule is effective on January 24, 1988. However, UST owners are required to *comply* with this regulation by the date assigned to their appropriate compliance category in the rule. The composition of the compliance categories and the compliance dates for each of these categories is summarized in Table 1. As Table 1 shows, EPA has designated UST ownership as the factor determining compliance categories. The rationale for this decision is explained below.

UST owners in Category I are required to comply on the effective date three months after the rule's promulgation. UST owners in Category I include all petroleum marketing firms that own 1,000 or more USTs and all other UST-owning entities that report a tangible net worth of $20 million or more to the SEC, Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration.

USTs owners in Category II are required to comply by 12 months after the rule's promulgation date. UST owners in Category II include all petroleum marketing firms owning 100 to 999 USTs.

USTs owners in Category III are required to comply by 18 months after the rule's promulgation date. UST owners in Category III include all petroleum marketing firms owning 13 to 99 USTs at more than one facility.

TABLE 1.—COMPLIANCE DATES FOR AND COMPOSITION OF COMPLIANCE CATEGORIES

Category and compliance date for this category	Composition of category	
	Petroleum marketing firms	Nonpetroleum marketing firms
I. 3 months after promulgation date of rule, on the effective date.	All petroleum marketing firms owning 1,000 or more USTs.	All UST-owning non-petroleum marketing firms that report a tangible net worth of $20 million or more to the SEC, Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration.
II. 12 months after promulgation date of rule	All petroleum marketing firms owning 100–999 USTs.	None.
III. 18 months after promulgation date of rule	All petroleum firms owning 13–99 USTs at more than one facility.	Do.
IV. 24 months after promulgation date of rule	All petroleum firms owning 1–12 USTs or owning only one facility with fewer than 100 USTs.	All UST-owning non-petroleum marketing firms that do not report a tangible net worth of $20 million or more to the SEC, Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration, including all local government entities.

UST owners in Category IV are required to comply by 24 months after the rule's promulgation date. UST owners in Category IV include all petroleum marketing firms owning 1–12 USTs or those owning only one facility with fewer than 100 USTs. (For example, a petroleum marketing firm owning 13 USTs at one facility would be classified by EPA in Category IV.) Category IV also include all UST-owning firms not engaged in petroleum marketing but having tangible net worth of less than $20 million and all local government entities.

In § 280.92 of the final rule, the Agency defines petroleum marketing firms as all firms owning facilities engaged in petroleum production, refining, or marketing. These includes all facilities at which petroleum is produced and all facilities at which petroleum is produced and all facilities from which petroleum is sold or transferred to other petroleum marketing or to the public. Petroleum production facilities include all refineries and all facilities engaged in producing petroleum products from purchased materials. Facilities from which petroleum is sold or transferred to other petroleum marketers or to the public include all wholesale petroleum marketers facilities, such as bulk terminals and bulk plants, and all retail petroleum marketing facilities, such as automobile service stations, marine service stations, truck stops, convenience stores selling gasoline, etc. The Agency considers all facilities selling petroleum products to the public to be retail petroleum marketing facilities, even if the amount of petroleum sold is minimal. Facilities that store petroleum products in underground storage tanks *only* to refuel their own vehicles (e.g., establishments owning fleets of vehicles) are not considered facilities that are engaged in petroleum marketing. Establishments that store fuel to refuel vehicles rented to the public (e.g., rental car facilities) are not considered facilities engaged in petroleum marketing as long as the fuel is not sold to the public at large.

The Agency considers firms owning both petroleum marketing facilities and other types of facilities that are not engaged in petroleum marketing to be petroleum marketing firms. The compliance date for such firms is based

on the total number of USTs owned at their petroleum marketing facilities and at their other facilities.

Many commenters on EPA's proposed rules suggested that the Agency delay the effective date of the rule because pollution liability insurance for USTs and other financial assurance mechanisms would not be available to a large number of UST owners and operators by the rule's effective date. Although EPA has decided not to delay the effective date of this rule, the Agency is concerned about the unavailability of financial assurance mechanisms for a large portion of the regulated community. On March 31, 1988, EPA published a supplement to the proposed rule (53 FR 10401) in which the Agency explained that it was considering a phase-in of the financial responsibility regulations to allow different categories of owners and operators to come into compliance at different times after publication of the final rules. The principal reason for the phase-in was to provide sufficient time for owners and operators to obtain financial assurance in accordance with the rules. Additional reasons for the proposed phase-in included:

- The time necessary for providers of financial assurance mechanisms to conform them to EPA's requirements;
- The time necessary to provide assistance and outreach programs for portions of the regulated community;
- The administrative difficulties of trying to implement this regulation for such a large and diverse regulated community; and
- The unavailability of mechanisms to large portions of the regulated community.

The Agency received a large number of comments in response to this notice. Although the majority of commenters generally agreed with the phase-in strategy, many suggested an across-the-board delay and still others were concerned about the possible negative consequences of any type of delay (including a phase-in) to the implementation of the financial responsibility rules. The Agency agrees with many commenters who pointed out that the relative unavailability of financial responsibility mechanisms (primarily insurance, the financial test of self-insurance, or state funds) presents a problem for some members of the regulated community and that a phase-in may help to alleviate this problem. However, the Agency recognizes that the problem of the unavailability of mechanisms for some members of the regulated community may not be resolved before the compliance date for the requirements for those owners. The Agency retains its discretion to use the suspension of enforcement authority provided in section 9003(d)(5)(D) to address the problem of unavailability in the future. EPA expects that implementation of the rule during the phase-in period will enable the Agency to develop appropriate suspension of enforcement procedures based on this experience tailored to the numbers and types of facilities for which assurance remains unavailable.

Many commenters opposed a phase-in or any type of delay in the implementation of these rules. Their arguments included:

- Delaying implementation of financial responsibility rules will not increase the availability of insurance and may even further delay any response from the insurance marketplace.
- Delaying the implementation of financial responsibility rules removes a strong incentive to replace or upgrade substandard USTs quickly.
- Delaying implementation of the financial responsibility rules may delay the establishment of state funds.
- Delaying implementation of the financial responsibility rules will not eliminate the need for regulated entities to apply for a suspension of enforcement.

In deciding that a phase-in is the best regulatory strategy, the Agency has attempted to establish compliance dates which are as early as possible considering the type of assurance different types of facilities are likely to obtain. The use of an approach involving different compliance dates for different compliance categories is designed to achieve the maximum balance between the need to ensure financial capability for UST releases and the necessary time for owners and operators to obtain assurance mechanisms. For example, EPA believes that almost all firms in Category I will be able to comply with these requirements using the financial test of self-insurance or a guarantee. Chapter 2 of an EPA-sponsored study, entitled "Financial Responsibility for Underground Storage Tank Releases: Financial Profile of Retail Motor Fuel Marketing Firms," shows that all but one of the firms for whom data were collected that own 1,000 or more USTs (assuming that there are 4.1 USTs per outlet) have over $20 million in tangible net worth. Firms in other industry sectors with at least $20 million in tangible net worth will be able to pass the financial test of self-insurance as long as they file financial statements with the SEC, the Energy Information Administration, or the Rural Electrification Administration, or they report their tangible net worth to Dun and Bradstreet and Dun and Bradstreet assigns them a financial strength rating of 4A or 5A. The Agency sees no reason why such firms should not be required to comply with this regulation by the effective date of the requirements.

Further, almost all firms in Category II either have insurance now or can buy it from providers already in the marketplace, on the condition that they upgrade their tanks to meet insurers' criteria. These firms have 12 months from the promulgation date to apply for insurance and to upgrade their tanks. This period also gives insurance providers time to conform their pollution liability or environmental impairment policies to EPA's regulatory requirements and to raise the necessary capital or reinsurance to offer the limits of liability required in today's rules.

The Agency recognizes that the smaller petroleum marketing firms in Category III are less likely than firms in Category II to have have insurance and therefore need additional time for processing of their insurance applications and upgrading their USTs to meet insurers' requirements. These firms have 18 months from the promulgation date to comply with the regulations.

The Agency expects that regulated entities in Category IV (which includes the smallest petroleum marketing firms, general industry firms with tangible net worth under $20 million, local government entities, etc.) will have the most difficulty obtaining financial assurance. Most of these entities cannot pass the financial test of self-insurance included in today's rule, and pollution liability insurance has not generally been available to them. EPA expects that the majority of these regulated entities will have to rely on state funds for assurance. Many commenters responding to the Supplemental Notice (53 FR 10401) stressed that EPA's estimate of 18 months for state funds to form was overly optimistic. Today's rule would give those entities relying on a state fund for financial assurance 24 months from the rule's promulgation date to come into compliance.

In the absence of a phase-in, the Agency does not believe that most entities in the regulated community would have adequate time to comply with the financial responsibility regulations, because only the self-insurance mechanism can be implemented immediately by those firms able to use it. Those firms able to use insurance will probably not be able to comply by the effective date of the regulations. Even those firms that already have UST pollution liability policies probably do not have policies that conform to EPA's requirements or

that have sufficient limits of liability. These policies will have to be changed or augmented to comply with today's financial responsibility regulation.

It will be even more difficult for those firms that may be able to obtain insurance but have not yet done so to comply by the effective date of the regulations. One current insurer of USTs commented that some type of phase-in is "imperative" because the administrative capacity of UST insurers is not sufficient to accommodate all tank owners and operators who want to purchase insurance. In addition, most of the pollution liability insurance currently being offered to petroleum marketers contains preconditions with respect to the age of the USTs insured and leak detection methods. Firms with older USTs or inadequate leak detection methods will need time to comply with these insurer requirements. It would be impossible for all firms not already meeting these requirements to comply with them by the effective date of the regulations. Finally, as pointed out by many commenters, the development of state funds can take a considerable amount of time. Thus, the Agency concludes that it would be impossible for most of the regulated community to comply with today's financial responsibility requirements within 90 days of the promulgation of the regulations.

At the same time, the discretionary authority to suspend enforcement of the rules is not an adequate substitute for the phase-in because suspension does not serve the same purpose as a phase-in. The Agency believes that human health and the environment will be better protected by establishing reasonable compliance dates than by requiring large portions of the regulated community to devote their immedaite compliance efforts to petitioning for a suspension of enforcement. During the phase-in period, the resources of the regulated community can be devoted tc obtaining financial assurance mechanisms, and the resources of the states, EPA, and the regulated community can be devoted to developing and encouraging the development of mechanisms such as state funds and RRGs. Inclusion of a phase-in will restrict the use of the suspension of enforcement mechanism to those situations where compliance difficulties have to do with things other than inadequate time to complete administrative activities and to meet insurers' preconditions.

The Agency also does not believe that deferral of the requirements is a useful substitute for a phase-in. A phase-in has two advantages over a deferral. First, a phase-in is more protective of human health and the environment than a deferral in that it requires those who can obtain financial responsibility mechanisms to do so. Second, when the deferral period is ended, there is likely to be a last-minute rush of activity that could overwhelm the insurance industry's administrative capacity and the capacity of those businesses providing tank replacement, upgrading, and release-detection services.

Furthermore, the Agency does not think this relatively short phase-in will delay the entry of new insurers into the marketplace. If the rule did not include a phase-in of compliance dates, any new insurer would have to (1) develop and announce a new program that would comply with EPA's requirements and (2) process and accept applications for this program within 90 days to allow the regulated community to comply by the effective date of the regulations. EPA believes it would be extremely difficult for UST owners and operators to get pollution liability insurance conforming to the requirements of this rule from new insurers within 90 days of the rule's effective date. The phase-in establishes the necessary time for new insurance programs to develop, publicize their operations, and process applications. With the phase-in, a new program would have 1 year to carry out these steps for its first customers and an additional year to process applications for other members of the regulated community. Furthermore, the regulated community still has a strong incentive to purchase insurance prior to the required compliance dates. The phase-in of compliance with the financial responsibility requirements does not relieve the regulated community of liability for corrective action and third-party liability. Thus, many in the regulated community will attempt to obtain insurance as soon as it becomes available.

Nor does the Agency believe that the phase-in will remove incentives for regulated entities to replace or upgrade substandard USTs or to initiate leak detection. If the rule had only one compliance date, it would be impossible for the existing tank replacement and leak detection industries to provide adequate professional service to the many firms that may need their services. The technical standards rule phases in leak detection and tank upgrading and replacement requirements for the same reason.

Finally, the Agency does not believe that the phase-in will delay the implementation of state funds. None of the state representatives who commented on the Supplemental Notice (53 FR 10401) were of the opinion that the phase-in would delay the implementation of state funds. They explained that states would need time to pass laws authorizing the establishment of a fund, to develop regulations specifying how the fund would be implemented, and to develop revenue sources and capitalize the fund. In fact, EPA views the phase-in as the only way to allow states adequate time to develop thoughtful, sound, and adequately-funded programs. The Agency believes it is more protective of human health and the environment to allow time for the development of well-thought-out programs than to create a situation that will result in the development of state funds that have not been properly designed.

In the example given in the Supplemental Notice (53 FR 10401), the phase-in categories were set up based on the number of tanks owned or operated as an indicator of financial strength and thus the time needed to comply with the rule. In today's rule, the phase-in categories are set up based on UST ownership for petroleum marketing firms and on net worth for non-petroleum marketing firms. One commenter requested that EPA clarify, both for the purpose of the phase-in and for the rule in general, that "individual persons controlling separately operated facilities may * * * treat themselves either as a single owner or operator or as several independent operators." Although this interpretation reflects EPA's intention with regard to most provisions of the final rule being promulgated today (see Section III.A.1. above), it is not the basis for the final rule's phase-in provision. Instead, the phase-in is based on the total number of USTs owned to make clear at what time USTs that are owned and operated by different entities are required to be in compliance with the final rule. UST ownership is a better indicator of both ability to comply with the financial test and to obtain insurance. If the Agency adopted the commenter's suggestion, many more owners or operators of USTs at more than one facility could qualify for a later compliance date. EPA has designated UST ownership, rather than UST operation, as the factor determining the compliance category so that earlier compliance dates will be required for most USTs (since UST-owning firms tend to be larger than UST-operating firms).

The majority of commenters agreed that the number of tanks is the most reasonable basis on which to predicate

a compliance date phase-in. The reasons for the choice of the number-of-tanks criterion included:

- The number of tanks reflects a firm's financial strength and its ability to get insurance (and thus to comply with the rule);
- The number of tanks is a partial measure of the risk of release; and
- The number of tanks is easy to determine for compliance purposes and easy to verify for enforcement purposes.

Other phase-in criteria suggested by commenters included measures that were more reflective of risk (e.g., age, storage capacity, or location of tanks), financial strength, and type of industry. One commenter suggested that the basis for compliance should be the ability of owners or operators to self-insure or to obtain insurance from private or public sources. In essence, this is the strategy the Agency has adopted: it involves separating the regulated community into two groups, petroleum marketing firms and other regulated entities. For petroleum marketing firms, the number of tanks owned acts as a reasonable proxy for the ability of a firm to self-insure or to obtain insurance. For other regulated entities, the $20 million in tangible net worth requirement is a good proxy for firms that will be able to use the financial test because almost all firms with $20 million in tangible net worth should be able to use the financial test, irrespective of how many tanks that they own. (Entities with less than $20 million in tangible net worth may not be able to self-insure and insurance has not been available to such firms up to now.)

The Agency rejected basing the phase-in on risk-related measures because a schedule designed to require the highest risk USTs to comply first would not further the Agency's objective in phasing in compliance with the rules. The Agency's objective for phasing in compliance is to give the regulated community the time it will need to obtain assurance. For this reason, in developing the phase-in the Agency considered only those factors (e.g., financial strength) related to the ability of various segments of the regulated community to obtain assurance.

The Agency also notes that requiring high-risk USTs to comply first could have a negative impact on the availability of financial assurance mechanisms. If high-risk USTs were required to comply first (as some commenters suggested), insurers already in the market would be reluctant to insure additional USTs and new insurers would be reluctant to enter the market. Therefore, this would act as a disincentive to a gradual increase in the availability of insurance.

In the example described in the March 1988 **Federal Register** notice, EPA set up compliance categories and compliance dates as follows:

Compliance date	Number of tanks owned or operated
Effective date of rule	1,500 or more.
6 months after effective date	50 to 1,499.
12 months after effective date	6 to 49.
18 months after effective date	1 to 5.

For reasons already discussed, EPA decided to base the phase-in on the number of USTs owned and to develop different compliance categories for petroleum marketing firms and for non-petroleum marketing firms to reflect the time necessary for regulated entities to comply with this regulation. The Agency decided to give firms in the second category more time to comply and to change the number of tanks owned (for petroleum marketing firms) in each category so that the categories would more accurately reflect this objective. In making these changes, the Agency was aided by information provided by commenters with regard to the availability of assurance to various segments of the regulated community.

Petroleum marketing firms owning 1,000 or more USTs (as opposed to 1,500 or more USTs) are in Category I because the Agency believes that such firms can almost always use the financial test of self-insurance.[5] Petroleum marketing firms owning between 100 to 999 USTs (as opposed to 50 to 1,499 USTs) are in Category II because the Agency believes this UST ownership spread more accurately represents the UST-owning firms that have insurance now or can obtain it most easily. Petroleum marketing firms owning between 13 and 99 USTs at more than one facility (as opposed to 6 to 49 USTs) are in Category III because this range more accurately represents UST-owning firms that are eligible for insurance but may need more time to obtain it than firms in Category II. In addition, because insurance has not been available to petroleum marketing firms owning only one facility in the past, such facilities have been moved to Category IV.

Category IV was expanded to include firms owning 1 to 12 USTs or, as noted above, only one facility with fewer than 100 USTs (as opposed to 1 to 5 USTs). This expansion of the upper limit of the category from 5 to 12 USTs allows additional time for compliance for the smallest rural jobbers. These firms may have older USTs and greater difficulty obtaining insurance than other petroleum marketers. All non-petroleum marketing firms which cannot self-insure, including local government entities, have also been included in Category IV because pollution liability insurance has not been available to these entities in the past.

[5] Information supporting EPA's assumptions with regard to the types of financial assurance mechanisms available to petroleum marketing firms owning different numbers of USTs can be found in the Regulatory Impact Analysis for the rule that is available in the docket.

C. Definition of Terms (§ 280.92)

In the preamble to the proposed rule, the Agency discussed definitions for several terms used in the rule. With the exception of "occurrence," the Agency is adopting the definitions as proposed. This discussion addresses only those terms for which the Agency received comment.

1. Accidental Release and Occurrence

In the April 17, 1987, proposal, the Agency defined "accidental release" as

> "Any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action, bodily injury or property damage neither expected nor intended by the tank owner or operator (§ 280.91).

This definition incorporates both sudden and nonsudden releases, as required by RCRA Section 9003(c)(6). In addition, the Agency proposed to define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank."

Two commenters asserted that the proposed definitions of occurrence and accidental release do not reflect standard insurance definitions. The commenters noted that the comprehensive general liability (CGL) form issued by the Insurance Service Office (ISO) defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions." They also noted that the ISO's pollution liability coverage form does not define "occurrence" or "release." Instead, the policy uses the term "pollution incident." These commenters urged EPA to remove the definitions of "occurrence" and "accidental release" from the rule and the certificate and endorsement forms, and to replace them with the term "pollution incident." Another commenter argued that the definition of "occurrence" should be changed to reflect the ISO's newest CGI form.

Commenters warned that if the definitions in the regulation remain at variance with those in use in the ISO's

pollution liability coverage form, courts will have to review more than one definition of key policy terms during litigation. Insurers indicated that EPA's use of non-standard definitions in today's rule would reduce the range of predictability in UST coverage and expose insurers to an uncertain amount of liability. Such conditions, they argued, would seriously impair the insurance industry's willingness to provide liability insurance required by today's rule.

In specifying the language in the certificate of insurance and endorsement, the Agency does not intend to modify contractural obligations regarding the extent of coverage under insurance policies used to satisfy the liability coverage requirement. In response to the problems cited by commenters, the Agency has retained the definition of "occurrence" but added clarifying language to the rule. The rule now allows insurance policies containing alternate definitions of "occurrence" or standard terms other than "occurrence," such as "pollution incident," to be used to satisfy the UST liability coverage requirements. This definition of occurrence is included in today's rule to assist in the understanding of the financial assurance requirements, i.e., to clarify the scope of coverage required under the rule. It is not intended to limit the meaning of "occurrence" in a way that conflicts with general insurance industry usage.

The Agency prefers not to require that policies incorporate a specific definition of "occurrence" because of the wide range of definitions currently in use and because insurance practices may change over time. However, the Agency has the authority under RCRA section 9003(d)(1) to specify acceptable and unacceptable liability insurance policy terms and the Agency may need to specify such terms in the future. In addition, policies employing unsatisfactory definitions of "occurrence" or unsatisfactory terms other than "occurrence" may not provide liability protection in accordance with today's rule.

In addition, the Agency has made a minor change to the definition of "accidental release" simply to capture the meaning more precisely. The modified definition, with the modification in italics, is as follows:

"Any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action *and/or compensation for* bodily injury or property damage neither expected nor intended by the tank owner or operator.(§ 280.92(a)).

The Agency received two comments arguing that the definitions of "occurrence" and "accidental releases" should include releases that are caused intentionally (e.g., sabotage, vandalism). EPA believes that an explicit inclusion is unnecessary. Since "accidental release" is defined as a release resulting in "a need for corrective action and/or compensation for bodily injury or property damage, neither expected nor intended by the tank owner of operator," the relevant determinants of coverage are the intentions and expectations of the insured. Thus, damage resulting from sabotage or vandalism is accidental if the insured party had no intention or expectation of such damage.

Finally, a commenter also suggested that vague terms like "intended" or "expected" in the definition of accidental release be defined in the rule. However, as discussed above, EPA intends to allow insurers flexibility in writing policy language by not defining every policy term explicitly. The Agency recognizes that such terms are open to interpretation, but also realizes that because they are common in insurance industry usage, defining them in the rule is not necessary and may limit availability. Therefore, the Agency believes that it is appropriate to leave interpretation of such terms to private insurance law.

2. Bodily Injury

In the proposal and in the final rule, the Agency defines "bodily injury" as having the meaning given to it by applicable state law. In addition, the definition excludes those liabilities that, consistent with standard industry practice, are excluded from coverage in liability insurance policies for "bodily injury."

The Agency received several comments in favor of the proposed definition and some comments opposed. Commenters opposed to the definition maintained that it would create inconsistent definitions, and thus varying scopes of coverage, from state to state. One commenter proposed that EPA define "bodily injury" as "any damage to a third party which the tank owner or operator is legally liable for causing due to negligence."

The Agency is reluctant to adopt a standard definition for a number of reasons. First, the Agency fears that any attempt to redefine "bodily injury" will result in a more tightly limited insurance market. Comments received from the insurance industry strongly urged EPA to retain the approach in the proposed rule, and predicted that insurers might exit the market if the term is given a standard definition.

Second, EPA recognizes that third parties will generally bring liability claims pursuant to state law. Because the definition of "bodily injury" and the treatment of bodily injury claims differ from state to state, the Agency believes that mandating a nationwide definition would promote confusion in state courts, which would be required to review two definitions of "bodily injury" (i.e., a definition pursuant to state law and a standard definition) during litigation.

Third, the Agency prefers the definitions of terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. Since the definition of "bodily injury" often varies from state to state, mandating a standard definition would establish definitions of terms inconsistent with their common meanings.

Consequently, EPA has retained the proposed definition of "bodily injury" in today's final rule.

3. Director of the Implementing Agency

This term refers to the person responsible for implementing the UST program under Subtitle I of RCRA. For USTs in authorized states, this person is the Director of the state agency; for USTs in states without approved programs, this person is the EPA Regional Administrator.

In today's rule, this term replaces the term "Regional Administrator," a term used in the proposed rule, wherever appropriate.

4. Petroleum Marketing Facilities

This definition was not in the proposed rule. It has been added to the final rule to assist in understanding the phased schedule for compliance and to define per-occurrence levels of assurance for USTs. The definition closely follows the statutory language of RCRA section 9003(d)(5) (A) and (B). "Petroleum marketing facilities" are all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

5. Petroleum Marketing Firms

These are all firms owning petroleum marketing facilities. Firms owning other types of facilities with USTs, as well as petroleum marketing facilities, are considered to be petroleum marketing firms. This definition also was not in the proposed rule. It has been added to the final rule to assist in understanding the phased schedule for compliance.

6. Property Damage

In the proposed rule and in the final rule, the Agency defines property damage as having the meaning given it by applicable state laws. In addition, the term excludes those liabilities which, consistent with standard industry practice, are excluded from coverage in liability insurance policies.

One commenter agreed with the Agency's approach, while other commenters suggested that the definition be modified to cover an intentional act (e.g., sabotage). Including intentional acts in the definition, the commenters argued, would ensure that owners or operators will be financially responsible for all leaks and spills, not just those that are accidental or unintentional.

As noted above, the relevant intentions and expectations of damage or injury are those of the insured. Thus, damage resulting from sabotage would be considered accidental if the insured party did not intend or expect such damage.

Consequently, EPA has decided that including intentional acts in the definition of "property damage" is unnecessary.

7. Additional Definitions

One commenter suggested that EPA use the broad term "financial assurance" to designate all acceptable methods of satisfying the financial responsibility requirements, and proposed a definition of the term.

EPA uses the term "financial assurance" to designate all acceptable methods of satisfying the financial responsibility requirements, but is not defining the term in today's rule. Because the rule clearly delineates all financial assurance mechanisms by which owners or operators may satisfy these requirements, the Agency believes that defining the term is unnecessary.

D. Amount and Scope of Required Financial Responsibility (§ 280.93)

The rule promulgated today requires that owners or operators of petroleum USTs that are located at facilities engaged in petroleum production, refining, or marketing or that handle more than 10,000 gallons of petroleum per month demonstrate evidence of financial responsibility in the minimum amount of $1 million per occurrence to cover corrective action and third-party compensation costs for accidental releases from their tanks. The minimum per-occurrence amount of assurance required for owners or operators of USTs that are not located at facilities engaged in petroleum production, refining, or marketing and that handle 10,000 gallons or less of petroleum per month is $500,000. In addition, the Agency is establishing requirements for annual aggregate levels of assurance, based on the number of USTs to be assured. Today's rule also includes a paragraph (§ 280.90(e)) that explicitly states that if the owner and the operator of a tank are separate persons, only one person must demonstrate financial responsibility. The Agency's reason for adding this paragraph is discussed in Section III.A.1, Owners and Operators.

The rationale for determining the amount and scope of required assurance is discussed below, as it pertains to the following topics:

(1) Per-Occurrence Amounts.
(2) Aggregate Amounts.
(3) Apportionment of Costs and Level of Assurance under Separate Mechanisms.

1. Per-Occurrence Amount

Section 280.93(a) of today's rule establishes $1 million per occurrence as the minimum amount of required financial assurance for owners or operators of petroleum USTs located at facilities engaged in petroleum production, refining, or marketing and for owners or operators of petroleum USTs that handle more than 10,000 gallons of petroleum per month. The minimum amount of required assurance for USTs that handle 10,000 or less gallons of petroleum per month and are located at facilities that are not engaged in petroleum production, refining, or marketing is $500,000. The proposed rule required that *all* owners or operators of petroleum-containing USTs provide assurance in the minimum amount of $1 million.

EPA received numerous comments on the subject of the required per-occurrence amount of assurance. Arguments for lowering this amount of assurance included:

- The costs of almost all UST releases are far lower than $1 million;
- Small businesses cannot afford to obtain $1 million in per-occurrence coverage;
- The money required to pay insurance premiums would be better spent on upgrading tanks;
- Insurance coverage for $1 million per-occurrence is not available; and
- A lower per-occurrence limit would encourage insurers and reinsurers to offer UST pollution liability coverage.

Several commenters pointed out that EPA had required the same per-occurrence limit of $1 million for all USTs even though Subtitle I clearly allows the Agency to set limits lower than $1 million for USTs at facilities not engaged in petroleum production, refining, or marketing and that are not used to handle large amounts of petroleum. The reasons given in support of a lower per-occurrence limit for USTs at these facilities included many of the same arguments presented above and additional reasons specific to facilities not engaged in petroleum production, refining, or marketing. Some of these additional reasons included:

- Low-volume facilities are less likely to have catastrophic-failure-induced large releases;
- Low-throughput facilities will have smaller releases from their underground pipes; and
- Low-throughout facilities can be monitored more accurately.

Finally, several commenters argued that $1 million in per-occurrence coverage might be too low. They explained that past claims data underestimate future claims and that both corrective action and third-party liability awards will be more costly in the future than they have been in the past because of corrective action regulations that impose minimum cleanup standards.

As explained in the proposal, the minimum $1 million per-occurrence level required for owners or operators of USTs at facilities engaged in petroleum production, refining, or marketing was based on the provisions of section 9003(d)(5) (A) and (B) of Subtitle I of RCRA. These sections state:

(5)(A) The Administrator, in promulgating financial responsibility regulations under this section, may establish an amount of coverage for particular classes or categories of underground storage tanks containing petroleum which shall satisfy such regulations and which shall not be less than $1,000,000 for each occurrence with an appropriate aggregate requirement.

(B) The Administrator may set amounts lower than the amounts required by subparagraph (A) of this paragraph for underground storage tanks containing petroleum which are at facilities not engaged in petroleum production, refining, or marketing and which are not used to handle substantial quantities of petroleum.

The Agency's interpretation of these provisions is confirmed by the discussion of this amendment to Subtitle I, section 205 of SARA, in the Conference Report accompanying SARA. The Report states that "The Administrator cannot set a minimum financial responsibility requirement of less than $1 million for tanks which are engaged in petroleum production, refining or marketing * * *." (House Report 99–962, 99th Congress, 2nd Session, p. 264.)

Therefore, absent further instruction from Congress, EPA's per-occurrence

requirement for USTs at facilities engaged in petroleum production, refining, and marketing must be at least $1,000,000.

The Agency shares the concern expressed by commenters that releases may be more expensive in the future, and performed an analysis of this issue. The model developed to aid in this analysis estimates both the costs and frequency of UST-related corrective actions. It takes into account both the more stringent cleanup standards that will prevail under the technical standards being imposed by EPA and the fact that releases will be detected sooner, when they are smaller, once the regulations have been promulgated. This analysis showed that the average costs of UST-related corrective actions will be lower rather than higher in the future (see Appendix A of the Regulatory Impact Analysis for the Financial Responsibility Requirements for Underground Storage Tanks Containing Petroleum and Chapter 7 of the Regulatory Impact Analysis of the Technical Standards for Underground Storage Tanks). Because the number of UST-related releases and the extent of the damage associated with these releases will not increase in the future, the Agency is confident that corrective action and third-party liability costs will also not increase in the years after promulgation of these requirements.

In the final rule, EPA allows owners or operators of petroleum underground storage tanks that are not located at facilities engaged in petroleum production, refining, or marketing and that handle an average of 10,000 gallons or less of petroleum per month (based on annual throughput for the previous calendar year) to provide a minimum of $500,000 in per-occurrence assurance. As indicated above, section 9003(d)(5)(B) authorizes the Administrator of EPA to set per-occurrence amounts lower than $1 million for petroleum USTs located at facilities that are not engaged in petroleum production, refining, or marketing and that are not used to handle substantial quantities of petroleum.

Section 9003(d)(5)(C) of Subtitle I lists the factors that the Administrator may consider in setting an amount of assurance lower than $1 million for certain classes and categories of USTs:

- The size, type, location, storage, and handling capacity of underground storage tanks in the class or category and the volume of petroleum handled by such tanks;
- The likelihood of release and the potential extent of damage from any release from underground storage tanks in the class or category;
- The economic impact of the limits on the owners and operators of each such class or category, particularly relating to the small business segment of the petroleum marketing industry;
- The availability of methods of financial responsibility in amounts greater than the amount established by this paragraph; and
- Such other factors as the Administrator deems pertinent.

When the Agency considered these factors for the proposed rule, it concluded that a $1 million per-occurrence level of assurance for all USTs was appropriate and would achieve EPA's goal, which was to set a per-occurrence level high enough to cover the costs of 99 percent of UST release occurrences.

The Agency still believes that this goal is appropriate. Material submitted to the docket in response to the proposed rule has enabled the Agency to perform a more refined analysis of the frequency of per-occurrence claims at various levels. From this analysis, the Agency concludes that a $500,000 level of assurance is adequate to assure the costs of approximately 99 percent of per-occurrence claims for USTs with throughputs no greater than the throughputs characteristic of USTs at retail motor fuel marketing facilities. (This analysis is provided in Appendix B to the Regulatory Impact Analysis.) Thus, the Agency has revised the final rule to provide a lower per-occurrence level for such facilities, and has limited facilities qualifying for this lower per-occurrence amount to those with UST throughputs no greater than retail motor fuel marketing facilities (i.e., 10,000 gallons per month).

In responding to comments on the proposal and revising the rule, the Agency considered each of the criteria in section 9003(d)(5)(C), both when evaluating a per-occurrence limit of $500,000 and when identifying the class of USTs that would be allowed to use this lower per-occurrence limit. The Agency decided to use monthly throughput as the measure that best distinguishes USTs used in petroleum producing, refining, and marketing, for which Congress mandated a minimum per-occurrence limit of $1,000,000, from USTs used in other industries that might appropriately be assigned a lower per-occurrence limit. As discussed in the preamble to the proposed rule, factors such as age of tank, material of construction, and the presence of a secondary containment are not critical in determining a per-occurrence limit:

> Although such factors do affect a tank's propensity to leak, there is no evidence to suggest that any of these factors affects the costs related to a release. The setting of an appropriate per-occurrence level depends on the costs of individual releases rather than on the probability that a release will occur, and there is therefore no reason why the factors mentioned above should have a bearing on the per-occurrence level of coverage required. For example, a release from a 1-year-old tank can be just as expensive to address as a release from a 20-year-old tank.

The Agency based its decision to allow a lower per-occurrence limit for facilities that are not engaged in petroleum production, refining, or marketing and that have a monthly throughput of 10,000 gallons or less primarily on the extent of the potential damage associated with releases from these tanks. The Agency also carefully analyzed the extensive UST claims record submitted by the largest insurer of service station USTs and found that this record provided statistically significant evidence that releases costing more than $500,000 occur less than 1 percent of the time. The Agency has concluded that coverage of $500,000 will assure that the per-occurrence limit is exceeded less than 1 percent of the time. These same data show that a per-occurrence limit set below the $500,000 level would be exceeded more than 1 percent of the time.

For this reason, the final rule rejects those suggestions of commenters that low-throughput USTs be exempted or that the per-occurrence limit for such USTs be set below $500,000.

The choice of 10,000 gallons per month as the definition of "substantial quantities of petroleum" is also consistent with Congressional intent as expressed in the Conference Report accompanying SARA. It states that the Administrator cannot:

> set a minimum financial responsibility requirement of less than $1 million * * * for tanks that dispense very large volumes, for instance tanks at airports. (p. 264)

The 10,000-gallon-per-month throughput limit for USTs qualifying for the $500,000 minimum per-occurrence amount is far lower than the volume of fuel dispensed monthly at typical airports.

EPA has not considered economic impact to be a primary factor in determining the appropriate per-occurrence limits. The Agency's regulatory impact analysis found that the cost of insurance premiums would have relatively minor impacts on most smaller firms that are not engaged in retail motor fuel marketing. Further, the threat to human health and the environment posed by releases from USTs is the same, in terms of severity, whether the leaking tank is owned by a small firm or a large firm.

The Agency agrees with those commenters who suggested that facilities outside the retail motor fuel marketing industry may have difficulty obtaining financial assurance mechanisms. The Agency has found that no insurer offering policies to facilities not engaged in petroleum production, refining, or marketing meets these coverage requirements. Lowering the per-occurrence limit may serve to increase the availability of financial assurance mechanisms. A lower per-occurrence limit will make it easier for insurers with limited reserves to offer these policies, will ease the capitalization of RRGs, and will allow states to set up state funds with less commitment of funds.

2. Aggregate Amounts

Section 9003(d)(5)(A) of Subtitle I grants the Administrator discretion to set "an appropriate aggregate requirement" for financial responsibility for petroleum USTs. In § 280.92(b) of the proposed rule issued on April 17, 1987, owners or operators of petroleum USTs were required to demonstrate evidence of financial responsibility in annual aggregate amounts that varied from $1 million to $6 million, depending on the number of USTs assured (see Table 2) by the mechanism or combination of mechanisms. (For the purposes of determining required aggregate levels of coverage only, any reference to tanks means only individual containment units and does not include combinations of these units. See § 280.93(c).)

TABLE 2.—PROPOSED AGGREGATE SCHEDULE

Number of tanks	Annual aggregate amount
1-12 tanks	$1,000,000
13-60 tanks	2,000,000
61-140 tanks	3,000,000
141-250 tanks	4,000,000
251-340 tanks	5,000,000
341 or more tanks	6,000,000

The Agency considered this appropriate because the aggregates were set at a sufficiently high level that corrective action and third-party liability costs incurred in any one year from releases from petroleum USTs would not be exceeded more than one percent of the time. The aggregate amounts were derived from an analysis of the probability and magnitude of corrective action and third-party liability costs during the first five years after the technical standards were promulgated. EPA's analysis used an annual probability of 11.8 percent that a tank would experience a release during these years.

The Agency received numerous comments on the proposed aggregate schedule, many of which called for lower aggregate levels. Commenters justified their requests for lower aggregates on the grounds that insurers reported no release costs exceeding $2 million and that the Agency had based its proposed aggregate schedule on an unrealistically high (11.8 percent) release probability rate. They also pointed out that aggregate insurance coverage over $2 million was unavailable, higher aggregate levels would cause correspondingly higher insurance premium costs, and the money needed for higher premium costs would be better spent on upgrading tanks. The two largest insurers of USTs noted that an aggregate of $2,000,000 had never been exceeded on any of their policies.

The Agency continues to find that the aggregate is most appropriately set on the basis of the number of USTs covered by a financial mechanism, and that an aggregate should generally provide adequate funding 99 percent of the time. However, the Agency agrees with those commenters who argued that EPA's initial estimates, both of the costs and probabilities of releases, were too high, especially for those firms that will actually be able to obtain insurance. In addition, the Agency recognizes that both the availability of financial mechanisms and economic impacts should be considered in determining classes and categories with respect to aggregate limits, as authorized under section 9003(d)(5)(C). As a result of these considerations, the Agency has revised its aggregate schedule so that the maximum aggregate is $2,000,000 (the maximum aggregate currently available), and mechanisms covering 100 USTs or less may use an aggregate of $1,000,000. Table 3 presents the aggregate schedule included in the final rule.

TABLE 3.—Aggregate Schedule

Number of tanks	Annual aggregate amount
1-100 tanks	$1,000,000
101 or more tanks	2,000,000

This revised aggregate schedule assures that most firms will not exceed the aggregate more than 1 percent of the time, given the Agency's revised estimates of the risk of UST releases. (See Appendix B of the Regulatory Impact Analysis for the Financial Responsibility Requirements for Underground Storage Tanks Containing Petroleum.) The revised aggregate schedule also has a number of important advantages over the proposed schedule. First, insurance programs do not currently provide coverage for aggregates higher than $2 million. Thus, under the revised schedule, which caps aggregates at $2 million, firms will be able to use existing insurance programs. Also, the lowered aggregates should encourage greater availability of mechanisms other than insurance and thus enable more owners or operators to utilize alternate mechanisms. For example, by reducing the amount of capitalization required, the revised schedule will make it easier to capitalize RRGs and state funds that form to provide UST pollution liability insurance. In addition, firms that already have pollution liability insurance for their USTs at the $1 million and $2 million aggregate levels will not be required to find methods of meeting the balance of their financial responsibility obligations. Given that these aggregate levels ensure that most UST owners and operators will not exceed the aggregate more than 1 percent of the time, EPA believes that the cost of requiring such additional assurance would be unnecessary.

Under the revised aggregate schedule, there are two categories of firms that may exceed the aggregate more than 1 percent of the time. The first category includes firms with more than 500 USTs. (These firms also could have exceeded the aggregate more than 1 percent of the time under the proposed aggregate schedule.) The Agency has not extended the aggregate schedule for firms owning more than 500 USTs because these firms are large and usually have more than $1 billion in net worth. Such firms can easily meet their financial obligations for UST corrective action and third-party liability, even if these obligations exceed $2 million. Further, these firms tend to have good leak prevention programs and consequently have lower risks of UST releases than most similar firms.

The second category of firms that may have more than a 1 percent chance of exceeding the aggregate are firms with between 40 and 100 USTs that do not have sufficient leak detection programs. However, most firms with between 40 and 100 USTs are currently insured and meet insurers' leak detection requirements. Because the small number of firms with between 40 and 100 USTs that do not have sufficient leak detection programs will have to meet EPA's UST leak detection technical standards within 5 years, the Agency

has decided not to set a higher aggregate for these firms on the basis of their temporarily higher risks.

The Agency received a number of comments suggesting that a lower aggregate level for owners or operators of upgraded tanks could provide an incentive for other owners or operators to upgrade their systems—in essence a "credit system." EPA agrees with these suggestions, but because the Agency has lowered the maximum aggregate level of required assurance from $6 million to $2 million and has raised the number of tanks qualifying for the $1 million aggregate from 12 to 100, much of the incentive to upgrade tanks and qualify for a lower level of required assurance has effectively been eliminated. Given that few owners or operators would be able to upgrade tanks to a level that would qualify for a lower amount of assurance, EPA believes that the complexity of developing, implementing, and administering such a program far outweighs its potential benefits. Therefore, the Agency still believes that it is appropriate to continue to use the number of tanks owned or operated, rather than tank characteristics, as the basis for determining aggregate levels.

During the comment period, a number of questions were raised regarding the effective date for increases in an aggregate level when an owner or operator acquires or installs additional tanks. The Agency agrees that it could prove awkward to change an aggregate level in midyear and took that factor into consideration in determining when financial assurance levels should be updated. Financial assurance mechanisms such as insurance policies and letters of credit are generally written for one year, and the final rule is consistent with this practice. Thus, an owner or operator who is using a single mechanism to assure his tanks and who has increased the number of tanks for which he is providing financial assurance is required to update the level of assurance (i.e., the aggregate level) on the anniversary date of the financial assurance mechanism. If this same owner or operator is using a combination of mechanisms to provide financial assurance for his tanks, the level of assurance must be updated by the first-occurring anniversary of any of the mechanisms being used (excluding a financial test or guarantee) (see § 280.93(f)).

The question of tank numbers also arose in the context of determining the appropriate aggregate amount when a firm is acting as a self-insurer, guarantor, and/or indemnitor (however, indemnities are not an allowable mechanism under the final rule, as discussed in Section III.G of the preamble). By aggregate amount, EPA means the total of all costs potentially incurred within a given year for all releases from petroleum USTs for which evidence of financial responsibility is being demonstrated by a single mechanism or a combination of mechanisms. If an owner or operator uses different financial assurance mechanisms to cover different USTs, the appropriate aggregate amount is based on the number of tanks covered by each separate mechanism or combination of mechanisms. One commenter recommended that, for the purpose of determining whether a firm passes the financial test, the aggregate level of coverage be "based on the total number of tanks for which a firm is responsible by self-insurance, indemnity, or guaranty." Because this was EPA's intention at the time of the proposal, the Agency recognizes that the explanation in the preamble to the proposed rule confused some commenters. By stating that the aggregate amount is based on the number of tanks for which a single mechanism or combination of mechanisms is being used to demonstrate evidence of financial responsibility the Agency means:

1. If an owner or operator self-insures his own tanks and guarantees tanks belonging to a different owner or operator, the owner must pass the *financial test* based on the total number of tanks self-insured and guaranteed. Two different examples follow:

- If an owner is self-insuring 60 tanks and guaranteeing 60 tanks, the amount of annual aggregate assurance to be demonstrated to use the financial test to self-insure and guarantee these tanks is $2 million. The guarantee must be issued for an aggregate amount of $1 million.
- If a guarantor guarantees 60 tanks for each of three different owners, the amount of annual aggregate assurance to be demonstrated to use the financial test to guarantee these 180 tanks is $2 million. Each of the three guarantees, however, must be issued for an aggregate amount of $1 million.

2. If an owner or operator uses a *combination of mechanisms* (e.g., insurance and surety bond) to demonstrate evidence of financial responsibility, the aggregate amounts provided by these mechanisms added together must equal the required aggregate amount for the number of tanks for which these mechanisms are demonstrating financial responsibility. For example, if an owner with 200 tanks has insurance with a $1 million aggregate, aggregates of additional mechanisms for these tanks must equal at least $1 million, for a total of $2 million in aggregate coverage.

3. If an owner or operator uses one financial mechanism to demonstrate evidence of financial responsibility for one set of tanks and another mechanism to demonstrate evidence of financial responsibility for a different set of tanks, each mechanism must have an aggregate amount appropriate to the separate set of tanks assured. For example, an owner has a total of 300 tanks: 140 tanks in one state and 160 tanks in another state. The 140 tanks are assured at the $2 million aggregate level by a mandatory participation state fund that only assures tanks in that state. The owner must provide additional financial assurance at the $2 million aggregate level for the other 160 tanks located elsewhere.

3. Apportionment of Costs and Levels of Coverage Under Separate Mechanisms

Several commenters questioned the provision that separate mechanisms (or combinations of mechanisms) obtained for corrective action and third-party liability must each be at the full amount of required assurance. The commenters believed that this provision would be prohibitively expensive. The Agency has retained this provision in the final rule despite the added costs of providing coverage under this approach. As explained in the preamble to the proposed rule, the Agency decided not to apportion costs between third-party liability and corrective action because apportionment limits the amount of funds that are available for either type of cost. Thus, mechanisms covering these costs separately cannot be set at amounts less than the full amount of required assurance.

Owners or operators may use a combination of mechanisms to obtain a total of $1 million per occurrence and appropriate aggregates, as long as both corrective action and third-party compensation are fully covered. For example, an owner or operator may obtain insurance coverage for the first $100,000 of corrective action and third-party liability costs and use an approved state fund to cover corrective action and third-party liability costs in excess of $100,000 up to $1,000,000. In another example, an owner or operator could obtain insurance coverage for the first $100,000 of corrective action and $300,000 of liability costs and use an approved state fund to assure corrective action costs above $100,000 and third-party liability costs above $300,000, up to $1 million.

E. Allowable Mechanisms and Combinations (§ 280.94)

1. *Mechanisms Allowed.* The proposed rule allowed a variety of mechanisms to be used to demonstrate financial responsibility, including: a financial test of self-insurance, guarantee contract, indemnity contract, insurance, RRG coverage, surety bond letter of credit, state-required mechanisms, or a state fund or other

state assumption of responsibility. In general, commenters supported the range of allowable mechanisms proposed by the Agency. As discussed below, the final rule authorizes the use of each of the proposed mechanisms, with the exception of the indemnity contract, and an additional mechanism, a fully-funded trust fund.

The preamble to the proposed rule stated that three mechanisms were considered but not included in the set of allowable mechanisms: trust funds, security agreements, and lines of credit. One commenter explicitly supported the Agency's rationale for excluding trust funds and security agreements. The Agency rejected security agreements because of three concerns with respect to the adequacy of the assurance such agreements would provide: (1) The liquidity of the collateral subject to the agreement; (2) the procedural requirements to establish and maintain a security agreement; and (3) the ability of the implementing agency to seize and sell the collateral.

One commenter urged the agency to allow lines of credit, stating that lines of credit could be used for UST purposes as well as for other business purposes. The Agency believes, however, that its basis for rejecting lines of credit (i.e., that they are conditional on the current financial standing of the borrower and therefore do not represent a substitution of the issuer's credit for the borrower's) continues to be valid and, thus, that lines of credit should not be an allowable mechanism.

Another commenter advocated the inclusion of trust funds in the set of allowable mechanisms, claiming that large firms may want to use a trust fund to cover multiple tanks if other mechanisms are not available. The commenter recommended allowing either a fully funded trust fund or partial funding combined with additional coverage from another instrument.

The Agency has decided to include the trust fund as an allowable financial assurance mechanism. (See also Section III.M of this preamble.) For reasons cited in the preamble to the proposed rule, a trust fund with a build-up period does not provide adequate financial assurance for corrective action and third-party liability which could be incurred at any time in the future. However, the Agency will allow a trust fund that is immediately funded at the full amount of coverage, or partially funded and combined with another mechanism to provide full coverage. Although such a trust fund will be costly compared to other mechanisms, the Agency decided to allow it as another option to the coverage requirements.

The Agency has also removed indemnities from allowable mechanisms. In order to cover third-party liability, indemnities so closely duplicate the structure and operation of a guarantee contract that there was little to be gained by including it, and including it as a separate mechanism might create unnecessary confusion. Indemnities would generally be provided by the same firms that provide guarantees and thus their inclusion in the rule would not increase the number of potential providers of assurance.

2. *Combinations of Mechanisms.* Under the proposed rule, any combination of allowable financial assurance mechanisms could be used to demonstrate financial responsibility for corrective action and third-party compensation. Commenters in general supported this approach.

In the preamble to the proposed rule, the Agency discussed a "double-counting" problem that may arise when a financial test is combined with a guarantee provided by a corporate parent. In many cases, the reported net worth of a corporate parent includes the net worth of its subsidiaries. If a subsidiary uses the financial test (based on its own net worth) in combination with a parent guarantee (based on the parent's net worth), the subsidiary's assets available to cover UST obligations will be double counted. This double-counting will exaggerate the reserves available to the subsidiary and the parent to cover UST obligations and thus may provide inadequate financial assurance. To avoid this problem, the Agency suggested that, in cases where a financial test is combined with a guarantee, the financial information supporting the two instruments cannot be drawn from consolidated statements.

One commenter objected to the Agency proposal on two counts. First, the commenter pointed out that the Agency did not include the prohibition against consolidated financial statements in cases of a combined financial test and guarantee in the proposed rule itself, but only in the preamble. Second, the commenter stated that preparing unconsolidated financial statements would be costly for many firms and would effectively require firms to reveal generally confidential, unconsolidated data. The commenter recommended that some other means be found to address the double-counting problem of a combined financial test and guarantee.

Despite this last objection, the Agency has decided to incorporate in the final rule (§ 280.94(c)) the restriction on the use of consolidated financial statements in support of a financial test and guarantee combination. While the Agency acknowledges that this provision may impose costs on those financial test users that do not routinely prepare statements that are not consolidated with those of their guarantors, commenters have not suggested an alternative and the Agency sees no other simple way to ensure that a combined financial test and guarantee offers the full amount of net worth coverage that the Agency is requiring. If the costs of preparing unconsolidated statements and of revealing confidential business information outweigh the benefits of using a combined financial test and guarantee, then owners or operators have other financial assurance mechanisms available.

EPA does agree, however, that the restriction on the use of consolidated financial statements should be formalized in the rule itself and has accordingly added this provision at § 280.94(c).

3. *Attorney General Certification (§ 280.94(b))*—The proposed rule required that a guarantee, indemnity contract, or surety bond have a certification by the Attorney General of any state where the tanks being assured are located that the mechanism is valid and enforceable in that state. This provision was designed to ensure that the mechanisms satisfy necessary contractual formalities or requirements of a state's laws.

Several commenters objected to the requirement for an Attorney General's certification. They maintained that state Attorneys General will find the "valid and enforceable" standard unacceptable and that they do not possess the statutory authority to issue such a certification. Another commenter claimed that the certification is unnecessary because the "ultra vires" defense is essentially untenable and the right of third parties to enforce such instruments is a commonly accepted legal principle.

The Agency disagrees with the commenters' concern over the certification issue. First, state Attorneys General have indicated their willingness to provide "valid and enforceable" certifications required for the RCRA Subtitle C corporate guarantee for liability coverage (40 CFR 264.147(g) and 265.147(g)). Of a group of state Attorneys General surveyed regarding the Subtitle C corporate guarantee for liability coverage, no responding Attorney General refused to issue a certification for this corporate guarantee based on a lack of statutory authority. However, several Attorneys General indicated

that such a request could only be made through a state agency.

Second, the surety bond and guarantee authorized in today's rule may be subject to the insurance laws and regulations of certain states. Although the "ultra vires" defense is generally no longer considered tenable, the Attorney General certification requirement ensures that any contractual formalities unique to a particular state have been addressed in the contractual agreement and that questions concerning the validity of the agreement will not delay the provision of funding for corrective action. The Agency recognizes that some states may require minor changes to the wording of the instruments to ensure that they are valid and enforceable under the laws of the state. The final rule requires submission of a letter by the Attorney General of a state verifying the validity and enforceability of the guarantee and surety bond before these mechanisms may be used to demonstrate financial responsibility.

4. *New Mechanisms.* Many commenters advocated adding a mechanism under which the Federal government provides some form of financial assurance. The suggested forms for this mechanism ranged from a Federal fund to some form of Federal insurance pool.

Several commenters advocated a Federal insurance program to offer liability insurance at a reasonable price. One commenter supported a program similar to the Federally-run Flood Insurance Program under which premiums are paid by member corporations. However, another commenter said this approach would not work, because insured parties would not want to subsidize other parties with USTs installed over vulnerable ground-water areas.

Several other commenters advocated various forms of Federal funds. One suggested approach was to establish a loan fund from which owners or operators could borrow at no interest and repay over a 25-year period. Another suggestion was to establish a fund to cover events that cost between some established amount that reflects average remedy costs and one million dollars. Under this approach, the fund would only be available to owners and operators who demonstrate responsible monitoring and leak prevention practices.

In the SARA amendments to Subtitle I, Congress has established a $500 million Leaking Underground Storage Tank (LUST) Trust Fund for addressing releases from petroleum USTs. However, after the effective date of the technical standards, use of the Trust Fund is authorized by RCRA section 9003(h) only in the following limited circumstances: (1) A responsible owner or operator capable of taking prompt and appropriate corrective action cannot be identified; (2) prompt action is required to protect human health and the environment; (3) the cost of the corrective action exceeds the financial responsibility requirements established under this rule and expenditure of additional funds is necessary; and (4) the owner or operator has failed or refused to comply with a corrective action order. (Uses of the Fund are discussed in more detail in Section IV.B.) The Fund may not be used for the purposes suggested by the commenters. Nor is EPA authorized under Subtitle I to develop another fund for any of the purposes suggested by the commenters.

In addition, one of the Agency's major goals reflected throughout the entire UST regulatory program is to encourage development of the UST program as a state-implemented program. EPA encourages states to consider developing the type of funds that commenters urged should be undertaken by the Federal government. Several different types of state funds or state-backed insurance programs can serve as assurance mechanisms to allow owners and operators to comply with the financial responsibility rule. In addition, state funds may provide valuable assistance and incentives to the regulated community to comply with the new tank performance standards.

5. *Specification of Tanks in Financial Assurance Instruments.* In the proposed rule, the Agency required that the financial assurance instruments list by identification number the specific tanks that they cover. Many commenters addressing specific mechanisms argued that this requirement is unnecessary and could in fact limit coverage or delay payment from the assurance mechanism. They felt that listing tanks individually could lead to contention as to which tanks was the source of release.

This final rule requires the listing of facilities where assured tanks are located rather than the tanks themselves. The Agency has concluded that listing of tanks at a facility where all tanks are assured under a single mechanism is unnecessary. A listing by facility should also provide greater certainty concerning which tanks at a given location are covered by the policy. Moreover, listing tanks by facility also prevents delays in payment that might arise if coverage were triggered only after identification of the particular tank that had caused the damage.

In today's rule the language of the assurance instruments is amended to strike the requirement for tank identification numbers and add a statement indicating that the required aggregate coverage levels have been purchased. Each instrument must identify each facility covered by the mechanism and the number of tanks at each facility. If separate mechanisms are used to cover different USTs at one location, the tanks covered by each mechanism must be identified in the wording of the mechanism.

F. Financial Test of Self-Insurance (§ 280.95)

1. Proposed Financial Test

As part of the underground storage tank requirements proposed on April 17, 1987, EPA included a financial test that could be used by owners and operators to self-insure. UST owners or operators able to meet the proposed financial test criteria would not be required to obtain insurance or another financial assurance mechanism to demonstrate evidence of their financial responsibility for corrective action and third-party claims arising from UST releases. The financial test of self-insurance was also proposed as a means to qualify guarantors and indemnitors of firms owning or operating USTs.

As originally proposed, the Subtitle I financial test consisted of the following criteria:

a. The firm must have a tangible net worth equal to at least 10 times the amount of aggregate assurance required for UST financial assurance. The proposed amount of required aggregate assurance ranged from $1 million to $6 million, depending on the number of tanks the owner or operator, guarantor, or indemnitor was assuring for EPA or an authorized state. If the firm was also using a financial test to meet the financial responsibility requirements for the costs of closure, post-closure care, liability coverage, and/or corrective action at a Subtitle C facility, or for the costs of plugging and abandonment at a Class I Hazardous Waste Injection Well, the firm was required to have a tangible net worth equal to at least 10 times the sum of these costs plus the required aggregated coverage for its USTs.

b. The firm must have a tangible net worth of at least $10 million.

c. The firm must either file annual financial statements with the SEC or annually report the firm's tangible net worth to Dun and Bradstreet (D&B), which must have assigned the firm a financial strength rating of 4A or 5A.

d. The firm's year-end financial statements, if independently audited, could not include an adverse auditor's opinion or a disclaimer of opinion.

In addition to these financial test criteria. the proposed requirements included procedures for financial test reporting and certification. Within 90 days after the close of each fiscal year, the chief financial officer of the firm owning, operating, guaranteeing, or indemnifying had to sign a letter reporting the year-end financial information supporting the firm's use of the financial test. If an owner or operator, guarantor, or indemnitor found at the end of the fiscal year that he was no longer eligible to use a financial test, the owner or operator was required to obtain an alternate mechanism within 120 days of the end of the fiscal year. Finally, the proposed rule authorized the Regional Administrator to disqualify a firm's use of the financial test if he found, based on reports of the firm's financial condition, that the firm no longer met the financial test requirements. The owner or operator would have 30 days after notification of such a finding to obtain another financial assurance mechanism.

The criteria for the proposed Subtitle I test reflected several key Agency objectives. First, the reliance of the test principally on a net worth measure was intended to keep the test relatively simple to administer and monitor, in view of the large number of firms to be regulated under Subtitle I requirements. At the same time, the net worth criteria were designed to ensure that virtually all firms able to pass the test would also be able to meet their UST obligations. In particular, the requirement that firms demonstrate a level of net worth 10 times the size of their potential UST obligations was based on an Agency analysis of failure rates among firms classified on the basis of their ratios of UST liabilities to net worth. The Agency found that, for those firms with UST liabilities equal to 10 percent or less of their net worth, the associated probability of bankruptcy was approximately one percent. Therefore, to achieve a level of assurance such that no more than one percent of financial test users would go bankrupt as a result of their UST obligations, the Agency decided to require that financial test users maintain their net worth at a level at least 10 times their environmental obligations.

By requiring that other environmental obligations assured by a financial test be aggregated with the required UST assurance when determining the amount of net worth to require, the Agency wished to prevent financial test users from diluting the degree of assurance provided by the test. Similarly, the requirement that there be no auditor's disclaimer of opinion or adverse opinion was also intended to increase the margin of security provided by the test. A disclaimer of opinion or an adverse opinion indicates that the auditor has found material uncertainties regarding the firm's valuation of its assets, current litigation or tax liabilities, or changes in accounting method. Therefore, because these opinions indicate that the reported net worth of a firm may be greater than its actual net worth, there is considerable doubt as to whether a firm receiving a disclaimer of opinion or an adverse opinion has sufficient resources to meet its UST obligations.

Finally, the requirement that firms either file their financial statements with the SEC or report to D&B and obtain a D&B financial strength rating of 4A or 5A was meant to ensure that the information used to support a financial test would be publicly available and therefore easily verified by EPA or state regulators. At the same time, by allowing a D&B rating as an alternative to filing with the SEC, the Agency wished to make the test available to the large number of privately-held UST owners and operators who would not otherwise be submitting their financial statements to the SEC.

2. Comments on the Proposed Financial Test

EPA received comments on its proposed Subtitle I financial test from a wide representation of firms and entities that will be affected by the UST requirements. These included both publicly- and privately-held firms, municipalities, trade associations, environmental groups, state regulatory agencies, and firms representing all aspects of UST ownership: owners of a single tank or many tanks, petroleum refiners and marketers, and firms engaged in businesses other than petroleum production, refining, or marketing. The majority of comments focused on (1) the net worth criteria of the financial test; (2) requirements for financial test certification and reporting; and (3) the ability of municipalities to use the test. Comments were also received on a number of miscellaneous issues, such as the aggregation of other environmental costs with the required level of UST coverage; the use of a binding guarantee to support the financial test; and the extension of the aggregate schedule for owners or operators using a financial test to assure a large number of USTs. The substance of the major comments received is briefly summarized below, followed by the Agency's rationale for accepting or rejecting commenters' recommendations in the final financial test requirements.

a. *Net Worth Criteria of the Financial Test.* Many commenters objected that the proposed financial test would not be available to any but the largest petroleum distributors or refiners and therefore recommended that the net worth criteria of the test be relaxed to allow smaller businesses to use the test. Other commenters argued that a lower net worth multiple was appropriate in view of the fact that the proposed per-occurrence and aggregate amounts of coverage were much higher than the average costs of UST releases. Commenters also questioned why a 10 times net worth multiple was proposed for Subtitle I, when a six times net worth multiple is required for the Subtitle C tests for closure and post-closure care and liability coverage.

The Agency agrees that the availability of the financial test will be limited to larger firms in the regulated community; nevertheless, EPA also believes that this restriction is necessary to increase the likelihood that a financial test user will be able to pay for its potential UST obligations. Because the incidence of bankruptcy among firms with less than $10 million in tangible net worth is approximately two times as great as the bankruptcy rate among firms with more than $10 million in tangible net worth, the Agency has decided to retain the minimum $10 million tangible net worth requirement in the final rule.

For similar reasons, the Agency has also decided to retain the requirement that tangible net worth be at least 10 times the required UST aggregate for any firm using the financial test. Lowering the net worth multiple would mean that more than one percent of financial test users would be predicted to fail without funding their UST obligations—a risk that the Agency does not believe should be accepted among financial test users, particularly since owners or operators who use any of the other financial assurance mechanisms allowable under Subtitle I (insurance, surety bond, etc.) pose little risk of incurring unfunded UST obligations.

Other changes are, however, being made in the final UST rule that should make the 10 times level of net worth somewhat less restrictive to potential financial test users. First, the schedule of required annual aggregates has been modified (see Section III.D), so that the maximum annual aggregate to be assured is $2 million rather than $6 million as originally proposed. Thus,

without changing the net worth requirement, the corresponding level of required net worth will nevertheless be lower for many firms owning and operating large numbers of USTs.

Second, the Agency has incorporated into the final rule (§ 280.95(c)) a second set of financial test criteria that may be used instead of the originally proposed "net worth" test. Owners or operators may now choose to use the financial test criteria of the Subtitle C test for liability coverage, as specified in § 264.147(f)(1) or § 265.147(f)(1), to demonstrate their ability to pay for their UST obligations. These criteria are included in the final rule as Alternative II, while the originally proposed financial test is retained as Alternative I. As a result of this addition, firms with a tangible net worth of $10 million and *six* times their UST obligations will be able to use a financial test under Alternative II, as long as they also have:

- At least 90 percent of their assets in the United States, or U.S. assets at least six times their UST obligations; and
- Net working capital at least six times the required amount of UST aggregate coverage; or
- A current Standard and Poor's bond rating of AAA, AA, A, or BBB, or a current Moody's bond rating of Aaa, Aa, A, or Ba.

As with Alternative I of the Subtitle I financial test, if the firm is using a financial test to assure the costs of closure, post-closure care, corrective action, liability coverage, and/or plugging and abandonment costs at a Class I Hazardous Waste Injection Well, then the multiple requirements of Alternative II must be applied to the sum of these costs plus the UST-required annual aggregate. EPA believes the two tests provide equivalent assurances of financial strength.

EPA has decided to adopt this Alternative II financial test in addition to Alternative I as a way of increasing the availability of the financial test without jeopardizing the level of assurance provided by the test. As designed for the Subtitle C liability test, and now for the UST Alternative II test, the requirement that either 90 percent of a firm's assets be in the United States or that U.S. assets be at least six times its UST obligation is intended to ensure the accessibility of these assets, should the firm require them to meet its UST costs. The net working capital requirement is designed to measure the adequacy of a firm's liquid resources, given the potential level of its environmental obligations. Because, however, the level of net working capital can vary significantly by industry, the Agency allows firms to meet the bond rating requirement as an alternative to the net working capital requirement. Thus, financially healthy firms that typically maintain relatively low levels of working capital due to the nature of their business can nevertheless use the bond rating alternative to demonstrate that they have adequate liquid resources to meet their obligations.

The Agency decided to use the financial test criteria of the Subtitle C test for liability coverage for the UST financial test because they were specifically designed for assurance of possible, rather than certain, costs. For this reason, these criteria are somewhat less stringent than the standards of the Subtitle C closure and post-closure test where future costs that are certain to be incurred are being assured. Furthermore, the criteria selected for the Alternative II test have the advantage of being easily obtained from public sources even for those firms that do not have audited financial statements or do not report to the SEC.

b. *Requirements for Certification and Reporting.* EPA received two comments endorsing the Agency's proposal not to require firms using the financial test to obtain a special auditor's report verifying the financial test information contained in the chief financial officer's report. Other commenters, however, objected to the proposed requirements for financial test certification and reporting on the grounds that such requirements were unnecessarily burdensome and restrictive. Specific objections to the reporting and certification requirements are summarized below, followed by the Agency's response to each of these objections.

- The requirement that the chief financial officer list in his annual letter every tank being assured by the financial test would be especially time-consuming for owners and operators of a large number of tanks.

EPA agrees that the requirement for individual tank listing in the chief financial officer's letter may impose an unnecessary recordkeeping burden on firms with many USTs or on firms that frequently change their inventory of USTs. The Agency has therefore adopted in the final rule the suggestion that financial test users list the sites or facilities where their tanks are located, rather than each tank. (This same suggestion has been adopted for all the financial assurance mechanisms in the final rule; see Section III.E.5.) If, however, separate mechanisms or combinations of mechanisms are used to assure different sets of USTs at a location, individual tanks must still be identified.

- Other ratings, such as a Moody's or a Standard and Poor's rating, should be allowed as a substitute for a D&B rating as part of the financial test criteria.

EPA has decided not to allow a bond rating from Moody's or Standard and Poor (S&P) as part of the Alternative I test, because these ratings cannot be used in the same way as D&B ratings or SEC reports—namely, to verify that a firm has at least $10 million in net worth. The Agency has, nevertheless, incorporated requirements for a Moody's or S&P bond rating in the Alternative II test: Under § 280.95(c)(1), a financial test user may either demonstrate that it has net working capital at least six times the required amount of UST aggregate coverage or that its most recent bond issue has received an investment grade bond rating from Moody's or S&P. As such, the bond ratings are intended to increase the availability of the test to those firms that are financially strong, but because of the nature of their business, do not routinely maintain high levels of working capital. The bond ratings are *not*, however, intended to provide evidence of the level of a firm's net worth. In the Alternative II test, this purpose is instead accomplished by the requirement that a firm either report to the SEC, the Energy Information Administration, or the Rural Electrification Administration, in which case its net worth can be easily verified in the reports publicly available from these agencies, or submit a special auditor's report, corroborating the firm's declaration that it has at least $10 million in tangible net worth.

- The annual reports filed by utilities with the Energy Information Administration and by rural electric cooperatives with the Rural Electrification Administration are publicly available. The Agency should allow reporting to one of these agencies as a substitute for reporting to the SEC.

The Agency agrees with these commenters. Because the annual reports filed by utilities with the Energy Information Administration and by rural electric cooperatives with the Rural Electrification Administration are publicly available and equivalent to annual reports filed with the SEC, the Agency will allow an annual report to one of these two agencies to substitute for reporting to the SEC.

- The 90-day deadline for filing financial test information after the firm's fiscal year end is inconvenient in view of other deadlines for filing with public agencies.

EPA recognizes that filing with the SEC is a time-consuming process, involving the compilation and

verification of large amounts of financial data. Because the UST financial test relies on the same information that is reported to the SEC, many firms will not be able to prepare their financial test submission until they have first completed the SEC filing. Furthermore, the deadline for the annual reports filed by utilities with the Energy Information Administration is April 30 (i.e., 119 days after the end of the calendar year), whereas there is no strict deadline for filing with the Rural Electrification Administration. In view of these considerations, the Agency has decided to extend the deadline for completing the UST financial test by an additional 30 days. This means that the financial test information is now required to be completed 120 days after the end of the firm's reporting year, rather than 90 days, as originally proposed. With this change, the preparation of the UST financial test information should not add significantly to the reporting burden of firms.

Given this extension of the reporting deadline, the Agency has also decided to extend the deadline for obtaining a new financial assurance mechanism for those firms that find that they can no longer use a financial test. The final rule now requires that firms must obtain alternative coverage within 150 days of the end of the year reported in their annual financial statements if these statements indicate that they no longer meet the financial test criteria (§ 280.95(e)). This 150-day period is based on the expectation that firms will need up to 120 days after the close of their reporting year to compile their financial information and an additional 30 days to find an alternate mechanism if this information does not support renewing their financial test.

• The proposed rule did not clearly define the authority given to the Regional Administrator to request further information from financial test users.

EPA has retained in the final rule the proposed provision authorizing the Director of the implementing agency to require reports of financial condition at any time from a financial test user and to disallow use of the financial test if these reports demonstrate that the financial test criteria are no longer being met (§ 280.95(f)). In response to commenters' concern that such authority could be used arbitrarily to disqualify the use of the test by some firms, the Agency emphasizes that the information requested by the Director of the Implementing Agency could be used only to verify compliance with the financial test requirements as they are promulgated under § 280.95 (b) or (c) and (d). Generally, such information would include unaudited interim financial statements (such as 10–Qs submitted to the SEC) or mid-year restatements of financial information (such as 8–Ks submitted to the SEC). Any information not bearing on the requirements specified in the financial test would not be used to disqualify an owner or operator. The Agency has modified the wording of this provision to make its intention clearer in this respect.

• Reporting of financial information to EPA could result in anti-competitive activity because EPA is under no obligation to keep such information confidential.

EPA does not believe that the financial test reporting requirements will in any way violate a financial test user's interest in keeping information confidential, because the test relies only on information that is already reported to other organizations that make this information publicly available. Furthermore, the financial assurance rules do not require regular reporting of information to EPA, but instead require that owners or operators maintain a record of this information at their place of business.

In summary, the Agency emphasizes that the reporting and certification requirements for the Alternative I financial test are designed to be minimally burdensome to firms, while still ensuring that financial test information can be verified through sources other than the owner or operator. Because firms will be allowed to meet the test requirements by reporting their net worth to Dun & Bradstreet as an alternative to reporting to the SEC, the Energy Information Administration, or the Rural Electrification Administration, financial test users will not necessarily be required to have audited financial statements. For owners and operators who opt for the Alternative II financial test, however, the reporting and certification requirements are stricter. Specifically, Alternative II requires that the financial statements of an owner or operator using the financial test be independently audited. EPA considers this requirement to be necessary in the case of Alternative II because of the type of information called for by the test—namely, the level of net working capital and the level of U.S. assets. The measurement of these variables can differ substantially according to the accounting method used to prepare financial statements. By requiring that the financial statements of Alternative II test users be independently audited, EPA has, at a minimum, the assurance that these variables will be measured in a relatively consistent and conservative fashion and in accordance with generally accepted accounting principles.

Furthermore, in the final rule, Alternative II requires a special auditor's report from those firms that do not file their statements with the SEC, the Energy Information Administration, or the Rural Electrification Administration. The reason for this requirement is to provide the Agency with some objective measure of the validity of the information reported by those firms whose financial information may not otherwise be publicly available. Thus, this requirement serves the same basic purposes as the D&B rating that is included as part of the Alternative I financial test.

c. *Availability of the Financial Test to Municipalities.* Many commenters on EPA's proposed financial test requirements pointed out that the test was designed for use by private corporations and not by municipalities or other governmental entities. In particular, the reliance of the test on measures of net worth makes it inappropriate for use by most municipalities since net worth is generally not a meaningful or readily measurable indicator of a government entity's ability to meet its obligations. Only for those special purpose municipalities, whose operations and accounting procedures are similar to those of a privately owned firm, is "net worth" a meaningful indicator of financial condition. Commenters also noted that the proposed financial test reporting requirements were inapplicable to those municipalities that do not file financial statements with the SEC or report their net worth to D&B.

As discussed in Section III.A.4., the Agency intends to propose a financial test for local government entities. Under this test, qualifying local government entities would be able to demonstrate that they are capable of self-insuring the costs of cleanup and third-party liability associated with UST releases, and thus do not need to obtain a separate financial assurance mechanism.

d. *Miscellaneous Issues Concerning the Proposed Financial Test.* In the preamble to the April 17, 1987, proposed Subtitle I financial test, EPA requested comments on two requirements under consideration for inclusion in the final rule: (1) A requirement that firms issue a binding written guarantee that they will pay for the corrective action and third-party obligations that they were assuring with a financial test or through provision of a guarantee or indemnity contract; and (2) a requirement

extending the aggregate schedule beyond the required maximum for financial test users.

One commenter objected to the proposal to incorporate a binding written guarantee into the financial test criteria on the grounds that it could result in lower bond ratings for firms and increased interest costs on their debt, which in turn would impair firms' abilities to demonstrate financial assurance. Commenters also questioned whether such a guarantee would materially improve EPA's ability to obtain the required funding for UST obligations in the event of a firm's bankruptcy. In view of these comments, EPA has decided not to incorporate a requirement for a binding guarantee in the financial test provisions of the final rule.

With respect to extending the aggregate schedule for financial test users, some commenters considered that this provision would be unfair to large, financially viable firms who seek to assure their obligations with a financial test. The Agency's original intention in making such a suggestion was to limit the ability of financial test users to assure thousands of tanks on the strength of a limited net worth. Because the required aggregate is capped, it would be possible for a firm to add to the number of tanks it was assuring by means of the financial test without having to increase its required level of net worth. The Agency, however, has decided that extending the aggregate schedule is not necessary for financial test users assuring large numbers of USTs. As indicated above in discussing the aggregate schedule, those few firms that assure hundreds or thousands of USTs are also firms with resources that are substantial and more than sufficient to cover their obligations. Moreover, these same firms are likely to have good loss prevention programs to limit their potentially large liability.

Other comments received on the proposed financial test criteria included objections to the Agency's proposal to require, for purposes of the Subtitle I financial test, that an owner or operator add to the required UST aggregate any other environmental costs for which a financial test is used to demonstrate financial assurance. Commenters questioned why a ten times net worth multiple would be applied to the sum of these costs under Subtitle I, while under the provisions of the Subtitle C test, a six times net worth multiple is required for coverage of all costs being assured by a financial test.

The Agency believes that this addition of costs is necessary to ensure that an UST owner or operator can meet all of its environmental obligations without jeopardizing the financial health of the firm. The financial tests used for closure and post-closure care, liability coverage, and corrective action all rely on a measure of a firm's net worth relative to the costs being assured. If, therefore, these costs were not added together in the UST financial test for purposes of determining the required amount of net worth, UST owners or operators would, in effect, be "double pledging" their financial resources, thereby reducing the likelihood that UST obligations could be met if they were also faced with other environmental costs.

One commenter recommended that a firm owning or operating USTs and using a financial test to assure Subtitle C obligations should be required to have a tangible net worth equal to the sum of *10* times the applicable UST aggregate plus *six* times the applicable Subtitle C costs, rather than a tangible net worth equal to 10 times the sum of all costs assured by a financial test, as the Agency proposed. It was argued that this procedure for determining the magnitude of net worth coverage for multiple environmental obligations was more consistent with the Subtitle C financial test requirements, which use a six times net worth multiple. However, for reasons discussed in Section III.F.2.a. above, the Agency continues to believe that, for the purposes of the Alternative I financial test, a requirement that net worth coverage be fully 10 times *all* costs being assured by a financial test is necessary to maintain the level of protection that the Agency has set as the standard for the Subtitle I test. The Alternative II financial test, by contract, requires that net worth coverage be at least six times all environmental costs being assured by a financial test. This lower net worth coverage is acceptable in the context of the Alternative II test because the test requires firms to meet other criteria indicative of financial strength that are not included in the Alternative I test.

Another set of recommendations received by EPA urged the Agency to make the Subtitle I test more consistent with the Subtitle C financial test. In one case, a commenter recommended that the Subtitle I test adopt the same procedure for calculating tangible net worth as is currently used for the Subtitle C test for closure and post-closure care (§ 264.151(f) and (g)). Under this procedure, any of the costs being assured by the test that have been incorporated in the measure of a firm's liabilities can be subtracted from the liability total and added to net worth. Because generally accepted accounting principles require that firms accrue as liabilities those future costs that are reasonably certain and measurable, those firms with known future environmental obligations are required to count these obligations as part of their liabilities. The net worth (or difference between total assets and total liabilities) of such firms will be decreased correspondingly by the amount of the accrued liability. Thus, generally accepted accounting procedures measure net worth as if known future obligations had already been paid for or discharged. However, the purpose of the net worth criteria in a financial test is to measure the net worth resources available to a firm *before* it incurs an environmental cost, and thereby to determine whether the firm can meet this cost without jeopardizing its ability to meet other unanticipated obligations. For the Subtitle C test, EPA therefore believed that the appropriate procedure for measuring a firm's available resources was to compute net worth before adjusting for those liabilities that the test is being used to assure. EPA believes that the same reasoning is applicable to the Subtitle I test and, therefore, allows in the final rule any UST costs that have been accrued as part of total liabilities to be subtracted from the sum of total liabilities and added back to net worth. The Agency has adopted this procedure for purposes of both the Alternative I and the Alternative II UST financial tests.

3. Summary of Changes in the Financial Test

As discussed in Section 2 above, the Agency has made a number of changes to the Subtitle I financial test, proposed on April 17, 1987, largely in response to the comments received on the proposal. These changes are briefly summarized below.

a. *Alternative Financial Test Option.* In addition to the originally proposed Subtitle I test, the Agency is allowing UST owners and operators who wish to use a financial test to meet the criteria of the Subtitle C test for liability coverage. Under this option, owners or operators, and/or guarantors, would be required to demonstrate the following:

- A tangible net worth of at least $10 million;
- A tangible net worth of at least six times the amount of the applicable UST aggregate;
- U.S. assets at least 90 percent of total assets, or U.S. assets at least six times the amount of the applicable UST aggregate; and either:
- Net working capital at least six times the applicable UST aggregate, or
- A current bond rating for the most recent bond issue of AAA, AA, A, or BBB as issued

by Standard and Poor's, or Aaa, Aa, A, or Baa as issued by Moody's.

In addition, firms using this alternative must have independently audited financial statements and cannot have an auditor's adverse opinion, disclaimer of opinion, or going concern qualification. For those firms that do not file their financial statements with the SEC, the Energy Information Administration or the Rural Electrification Administration, a special auditor's report, which compares the financial information reported in the test submission to the firm's financial statements and certifies that there are no material differences between the two, is also required.

b. *Disallowance of a Financial Test if a "Going Concern" Qualification Is Received on a Firm's Financial Statements.* In the proposal, the Agency stipulated that, if the financial statements of a financial test user had been independently audited, they could not carry an adverse opinion by an independent certified public accountant or a disclaimer of opinion. In the final rule, the Agency has decided to add a "going concern" qualification to the types of auditor's opinions that will disqualify a firm from using a financial test. Because a "going concern" qualification indicates that there is a question about the ability of a firm to stay in business, the Agency does not believe such firms should be allowed to rely on their own resources to cover their UST obligations.

c. *Reporting to the Energy Information Administration or the Rural Electrification Administration.* The final rule allows utilities filing annual reports with the Energy Information Administration and rural electric cooperatives filing annual reports with the Rural Electrification Administration to use the financial test.

d. *Listing of Locations of Covered USTs.* The financial test, like all of the financial assurance mechanisms in the final rule, does not require identification of individual tanks at the locations assured by the financial test unless the financial test is only being used to cover some of the USTs at one location.

e. *Extending the Deadline for Preparing the Financial Test.* The final rule allows firms using a financial test 120 days from the end of their reporting year to prepare their UST financial test. In EPA's original proposal, the chief financial officer of the firm had to sign the financial test documentation within 90 days of the close of the fiscal year. The final rule also allows owners or operators who can no longer use a financial test 150 days from the end of the reporting year to obtain alternative means of financial assurance. In the event that an owner or operator fails to obtain alternative assurance, he must notify the Director of the implementing agency within 10 days. In the proposed rule, only 120 days were allowed to obtain an alternative mechanism.

f. *Procedures for Determining Tangible Net Worth.* In the final rule, the Agency has adopted the procedure for calculating a firm's tangible net worth from the Subtitle C financial test for closure and post-closure care. With this procedure, firms are allowed to deduct from their total liabilities any accruals for costs that are being assured by the financial test. This deduction can then be added to the measure of tangible net worth.

G. Guarantee (§ 280.96) and Indemnity Contract

The final rule, unlike the proposed rule, allows only one form of financial assurance by which a firm promises to pay the specified amounts for corrective action or third-party liability for another firm: a guarantee (§ 280.96). Indemnities, which were included in the proposed rule, are not authorized in the final rule. EPA based its decision not to authorize the indemnity on the following rationale.

Many commenters on the proposed rule noted that authorization of an indemnity as an allowable mechanism to provide financial assurance in this regulatory context would seem to endorse practices which, in the past, required some petroleum product marketers to indemnify their suppliers. Although the Agency's proposed authorization was not intended to endorse any other use of indemnities, the Agency believes that dropping the indemnity will prevent any possible misunderstanding.

Moreover, in order to cover third-party liability, indemnities duplicate so closely the structure and operation of a guarantee contract that, in effect, no additional financial assurance option is added by including indemnities. In fact, their inclusion may create unnecessary confusion because, in the petroleum marketing industry, indemnities have been used in a very different context. Commenters on the proposal indicated that, in the past, petroleum product marketers have often been required by their contracts to indemnify their suppliers, rather than looking to them for indemnities and guarantees. Finally, because the same kinds of firms are likely to be guarantors and indemnitors, indemnities do not provide the regulated community with an additional group of potential financial assurance providers. For these reasons, the Agency authorizes guarantees in today's rule but not indemnities.

A guarantee is a promise by one party (the guarantor) to pay specified debts or satisfy the specified obligations of another party (the principal) in the event the principal fails to satisfy the debts or obligations. Under the final rule, a guarantee may be provided by related firms or by unrelated firms that have a substantial business relationship with the owner or operator. The obligation between the owner or operator (the principal), the implementing agency, or third parties rests on regulatory requirements and potential tort liability. If the owner or operator fails to perform corrective action or satisfy certified third-party claims, the guarantor agrees to fund a standby trust from which the implementing agency will direct the payment of corrective action costs or third-party claims.

Guarantors must demonstrate that they are qualified to provide financial assurance by satisfying the Alternative I or Alternative II financial test under § 280.95, described in Section III.F. Also, to ensure that state insurance laws do not call into question the enforceability or validity of the mechanism, the guarantee can be used only if it is certified as valid and enforceable by the Attorney General of the state where the USTs covered by the mechanism are located.

Many commenters questioned the availability of the guarantee, particularly to small- and medium-size firms. These commenters were concerned that such firms would not have the required relationship with a potential guarantor or that a potential provider would be unable to satisfy the financial test requirements. EPA's proposed rule included guarantees among a variety of alternative mechanisms to provide owners and operators a number of compliance options. Although some segments of the regulated community will be unable to use the guarantee because of the rule's business relationship and financial test requirements, the Agency continues to believe these requirements are necessary to ensure that the guarantee provides adequate financial assurance. These provisions, therefore, remain unchanged in today's rule.

The proposed rule allowed firms to provide a guarantee if they were related firms that own a controlling interest in the owner or operator (parent firms), firms that own a controlling interest in a parent firm of the owner of operator (grandparent firms), or affiliated firms that are controlled by a parent that also owns a controlling interest in the owner

or operator. As defined in § 280.92(c), "controlling interest" means direct ownership of at least 50 percent of the voting stock. The proposal also allowed a firm engaged in a "substantial business relationship" with the owner or operator to provide a guarantee as an act incidental to that business relationship. These firms were included to increase the number of potential financial assurance providers without sacrificing the validity or enforceability of the instrument. Section 280.91(j) of the proposed rule defined a "substantial business relationship" to mean the business relationship necessary under applicable state law to make a guarantee issued incident to the relationship valid and enforceable. A guarantee is considered incident to such a relationship if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

These required relationships between owners or operators and providers of guarantees were the subject of many comments. Several commenters praised the Agency for expanding the number and kinds of corporate affiliates that are authorized to provide guarantees of financial assurance and urged even further-broadening in recognition of the variety of corporate structures that exist within some sectors of the regulated community such as electric utilities. One commenter suggested the broader definition of corporate affiliates used in Federal securities law, which would include any firm that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the owner or operator.

EPA's concern is to ensure that guarantees from corporate affiliates are valid under appropriate state law and that sufficient unity of interest exists between the guarantor and the owner or operator to provide adequate assurance of financial responsibility. The proposed relationship requirements are those that seem most likely to result in adequate assurance. A firm engaged in a substantial business relationship with the owner or operator can, however, provide a guarantee regardless of its position within the corporate structure. Thus, the Agency will allow affiliates, such as those enumerated in the securities definition, that satisfy this criterion to provide financial assurance as guarantors.

The proposed rule required providers to use the contractual language specified in the rule for the guarantee. Some commenters expressed concern that the proposed wording of the guarantee instrument did not sufficiently limit the providers' liability, particularly in the event of the bankruptcy of the owner or operator. The Agency believes that the required language explicitly limits the obligation of the provider to the per-occurrence and aggregate amounts for corrective action and third-party liability as stated on the face of the instrument and that the wording, therefore, need not be modified. In addition, as discussed in Section III.V.2 of this preamble, the Agency is incorporating certain exclusionary language into the terms of the guarantee to more clearly limit the type and circumstances of third-party liability for which this mechanism can be used. A provider may, however, have incurred obligations outside those of the guarantee contract, under state law or other contractual agreements with the owner or operator. Such legal obligations will not be changed by the limitations in the guarantee.

H. Insurance and Risk Retention Group Coverage (§ 280.97)

1. Availability

Today's rule allows UST owners and operators to demonstrate financial responsibility through the purchase of insurance. The Agency believes that for many owners and operators, insurance will be the private mechanism of choice because it will be less costly and more available to most owners and operators than the other commercial mechanisms. Many commenters expressed concern, however, that insurance would not be readily available, and many felt that coverage, if available, would not be offered at the levels required by EPA and that it would not be available to particular groups of owners and operators.

The Agency recognizes that the liability insurance market, particularly the market for pollution liability coverage, has become restricted in recent years. As many commenters pointed out, a number of factors have contributed to the current limited availability of liability insurance.

The Agency also believes that despite the tight market, some insurance is available for USTs and more may become available in the near future. Evidence from the commenters suggests that UST coverage is currently available from a small number of specialty insurers, although some policies do not provide the level and scope of coverage required in the rule. One major provider of UST coverage insures over 80,000 tanks at 25,000 locations. A major insurance broker has obtained coverage for over 1,500 petroleum marketers with more than 90,000 tanks at over 26,000 locations. Effective July 1, 1987, the company that wrote policies for this broker stopped writing new policies or renewing existing policies. However, the broker is continuing to offer coverage through a RRG which has recently become licensed and which is currently offering policies. In addition to the petroleum marketers currently covered through existing policies, the RRG intends to extend coverage eventually to many of the 78,000 open dealers who currently find it difficult to obtain insurance.

Although UST insurance is most readily available to petroleum wholesalers and distributors, some non-marketers (e.g., auto dealers) have also been able to purchase coverage. Many insurance companies that do not specialize in pollution insurance nevertheless offer UST coverage to their policyholders who purchase other lines of commercial liability coverage. A major supplier of insurance to petroleum marketers also issues policies to non-marketers purchasing other liability lines. Three other major insurers also reported that they provide UST coverage to some non-marketers.

The market for UST coverage has improved somewhat since the financial responsibility regulations were proposed on April 17, 1987. Two new UST insurers have entered the market (one of whom offers coverage to non-marketers) and an existing insurer, who had provided coverage in only a few states, has expanded to offer coverage in all fifty states. This insurer also offers coverage to single station owners. Two insurers already offering other pollution liability lines have indicated that they are considering offering UST coverage as well.

The Agency is aware that the availability of coverage at the per-occurrence limits required in the statute and today's rule is limited. Recently, one major insurer lowered its per-occurrence limits from $1 million to $500,000. Its aggregate coverage levels remain at $2 million, enough aggregate coverage for owners and operators with any number of tanks to meet the aggregate requirement in the rule. The RRG discussed above has begun offering policies with $750,000 per-occurrence limits and plans to offer $1 million limits when it becomes sufficiently capitalized. In addition, a number of insurers not specializing in pollution liability coverage continue to offer coverage with $1 million per-occurrence limits. While some of these insurers offer aggregate limits of only $1 million, in most cases these insurers provide coverage to

owners or operators with fewer tanks for whom $1 million would be adequate to meet the Agency's requirement. In some cases, owners and operators may have to combine policies and other mechanisms to obtain the required coverage.

While the current insurance supply is inadequate to cover all members of the regulated community, the Agency hopes that the supply will expand in the months between the promulgation of the regulations and the compliance dates for the majority of unassured USTs. As noted above, a slight expansion has already occurred. The requirement to demonstrate financial responsibility should significantly increase the demand by owners and operators for UST insurance. At the same time, promulgation of UST technical standards should increase the ability of the insurance industry to predict its risk in offering UST coverage. These two factors may increase the certainty of the profitability of insuring USTs and should encourage new entrants into the marketplace.

The Agency further believes that 12 to 18 months is a reasonable time in which to expect the insurance industry to respond to the increased demand for coverage and for alternatives to conventional insurance, like RRGs or state funds, to develop. Estimates of the time frames for establishing new insurance programs and RRGs range from 12 to 36 months. Commenters on the Supplemental Notice generally agreed with the estimates, with only one commenter suggesting that it might take as long as 5 years for a RRG to form.

Nevertheless, the Agency recognizes that some owners and operators may have difficulty obtaining insurance after the date set for compliance with the rule. In particular, individual service station dealers who are not part of an industry association may face such difficulties because UST policies are often sold through such associations, making it difficult for unaffiliated owners or operators to obtain insurance on their own. Individual service station dealers and other UST owners and operators not currently members of larger groups or trade associations may have to form or join a group to facilitate purchase of UST coverage or the formation of a RRG. Alternatively they may be able to rely on a state fund.

2. Insurance Cost and Its Impact

Many commenters felt that the cost of insurance for USTs would be prohibitively high and suggested that in considering the impact of the rule, the Agency had underestimated the cost of UST pollution liability policy premiums. Other commenters addressed issues concerning the high cost of insurance in general and felt that particular groups of owners and operators, especially small businesses and local governments, would be adversely affected by the regulations.

The Agency believes that its projection of average premium costs of $2,000 to $4,000 per facility is accurate. The estimate was developed based on current and projected premiums using data supplied by insurers. The information received in the comments supports this estimate. The proposed RRG noted above reported that its average premium for $1 million peroccurrence coverage is expected to be $2,000 per site. Other current providers reported premiums of $500 to $2,000 for coverage of one to twelve tanks. The largest average premiums were reported by the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA). These trade associations reported average premiums of $13,600 and $32,000 per member respectively. NACS and SIGMA members tend to own several locations, however, and there is likely to be more than one tank at each location. Forty percent of NACS members own more than 10 stores, while 47 percent of SIGMA members own 11 to 50 outlets and 39 percent own 51 or more. Given the large numbers of sites covered, the high NACS and SIGMA average premiums are also in line with the Agency's original estimate.

Reported claims data suggest that UST claims have been predictable and not extremely costly. Most claims have been under $100,000. In addition, insurers can expect the risks of UST coverage to become more predictable in the future. While the cost of insurance for USTs could be relatively high initially, particularly when the regulations first go into effect, the increased predictability and decreased risk that the technical regulations are likely to promote should help to limit costs.

The Agency recognizes that the cost of liability insurance in general may pose a hardship upon some members of the regulated community. However, average premiums of about $2,000 are small compared to the costs of corrective action which, if incurred, would certainly pose a much greater economic hardship.

The Agency received several comments with specific suggestions for alternative requirements that might reduce the cost of obtaining insurance coverage for USTs. One commenter suggested that a tank manufacturer's product liability policy might be extended to provide indemnification for tank owners or operators. However, such a mechanism would present a number of difficulties in meeting the financial responsibility requirements. Among the difficulties would be setting a level of product liability insurance that would ensure indemnification of each tank purchaser at a level of $1 million. In addition, it is likely that the scope of product liability insurance coverage would be unacceptably low (e.g., it would only cover releases caused by tank defects). Also, administrative difficulties connected with securing payment through a manufacturer's policy might delay cleanup. For example, a claim might have to be made by first contacting the manufacturer who would then contact the insurer. Therefore, the Agency declines to authorize such a mechanism as a means of compliance with the regulations. The Agency recognizes, however, that tank manufacturers may act as guarantors for tank owners or operators provided that they comply with the applicable requirements of § 280.96.

3. Viability of Risk Retention Groups

Commenters raised a number of issues concerning the viability of risk retention groups (RRGs) as an alternative to traditional insurance coverage. Among the issues were: Difficulty of organization, cost of capitalization, instability of RRGs, and conflicts between current state laws and regulations and the Liability Risk Retention Act of 1986 (RRA), 15 U.S.C. 3901 *et seq.*

The Agency recognizes that forming an RRG requires considerable effort. Evidence from the comments suggests that it would take at least one year to establish a group. However, such groups are currently being organized to offer environmental impairment liability insurance. One of these RRGs is now offering coverage to a number of UST owners and operators, including owners of single outlets for retail motor fuel marketing.

A number of commenters were concerned that costs of capitalization could be high for RRGs. The Agency recognizes that capitalization costs could be a significant barrier to RRG development. At present, however, there is little evidence available to indicate what typical capitalization costs per owner or operator are likely to be. The recently formed RRG mentioned above requires a capital contribution of $2,000 or an amount equivalent to the annual premium, whichever is less. Premiums

are currently around $1,600 per site and are expected to increase to about $2,000.

Broader questions of general RRG stability and solvency, along with issues concerning the regulation of RRGs by states, are questions connected with the RRA and go beyond issues directly related to financial responsibility for underground storage tanks. Therefore, it is not within the scope of this rulemaking to address these broader RRG issues. Such issues, however, are being addressed by other agencies of the federal government. The Commerce Department has recently issued a report evaluating the effectiveness of the RRA.[6] The report found no major problems with RRGs themselves (in terms of solvency and potential risk to the public), but noted conflicts between state insurance laws and regulations and the provisions of the RRA. Such conflicts are matters for the states to address.

RRGs may be unavailable to some owners or operators due to an inability to organize into a group or raise the necessary capital. Regulation may also limit the formation of such groups in some states. While some UST owners and operators may be unable to form RRGs, however, the Agency believes the groups may provide an alternative to insurance for a number of owners and operators of USTs.

4. Specific Requirements for Insurance and Risk Retention Group Coverage

A number of commenters questioned specific policy conditions that insurance mechanisms must include under this rule. In general, commenters questioned the effect of these requirements on the availability of insurance. The Agency recognizes that the limited availability of insurance, in part, reflects the significant uncertainties regarding the risk that insurance providers may be undertaking and that various policy language has been developed to minimize uncertainty. Therefore, in specifying certain policy conditions the Agency attempted to meet two objectives: (1) The need to ensure that insurance coverage will provide the same level of protection as other mechanisms; and (2) the need to preserve flexibility in policy specifications to allow insurers to develop acceptable policies and to avoid unnecessarily constructing the availability of insurance.

a. *On-Site Cleanup.* Several commenters questioned the availability of insurance for on-site cleanup and suggested that financial responsibility for these costs not be required. The statute clearly requires financial assurance for corrective action. Corrective action involves cleanup of contamination caused by a release. While a release may, for an initial period of time, be confined to the property of an owner or operator of an UST, there is no way to ensure, without corrective action, that the release will not eventually affect the health or property of others. Financial responsibility for corrective action will ensure that cleanup may be undertaken promptly, thus minimizing third-party and environmental damage.

The Agency recognizes that some insurers are reluctant to provide on-site coverage because of the "moral hazard" involved. In other words, insurers fear that coverage of on-site corrective action could provide a disincentive to the owner or operator of an UST to maintain his site properly or may encourage negligence and thus may result in more releases and more claims to the insurance provider. Insurers also fear that coverage for on-site cleanup might make them responsible for the costs of routine maintenance or site restoration. First party coverage (i.e., coverage of damages to the insured) has traditionally been offered as a separate type of coverage.

Some insurers, however, provide on-site coverage in order to limit their exposure to more expensive third-party claims. Currently, the two primary sources of insurance for petroleum USTs cover on-site cleanup of UST releases. A recent entrant into the market also provides on-site cleanup coverage. In addition, some other insurance providers will cover on-site cleanup if it will prevent more costly third-party damages. The comments suggesting that on-site coverage is not generally available referred to policies covering environmental impairment liability in general and do not reflect the standard practice of the specialized market for UST coverage. The Agency received only one comment regarding the recent entry into the UST market of an insurer who will not cover on-site cleanup.

One commenter suggested that coverage for cleanup be mandated whether or not the corrective action is ordered by the government. Such a requirement could be interpreted to mean that policies must cover response actions that the owner or operator might perform as a general operating practice. Although the Agency is requiring that on-site corrective action be covered by all financial responsibility mechanisms, it does not intend to require policies that make insurers responsible for activities that are clearly the day-to-day responsibility of the owner or operator. Therefore, the Agency wishes to clarify that EPA is not mandating that acceptable insurance policies cover response actions that are part of routine maintenance of the tank site, site restoration and enhancement. Corrective action coverage will be required only for cleanup of releases required by §§ 280.60 to 280.66 and 280.72 of the technical standards or ordered by the implementing agency. The Agency believes that this requirement will ensure that adequate financial resources are available to perform necessary corrective action.

b. *Non-Sudden Accidental Occurrences.* Several commenters also suggested that insurance companies would not be willing to provide coverage for non-sudden occurrences as required by today's proposal. The statute requires, however, that all releases, whether sudden or non-sudden, be covered. This is particularly necessary to ensure adequate coverage for USTs, because it is often difficult to determine whether an UST release is sudden or gradual. Therefore, to ensure adequate protection of human health and the environment, both types of coverage are necessary. Comments indicate that coverage for non-sudden releases is currently offered by the major providers. In the event that an owner or operator could not obtain insurance for non-sudden releases, a separate mechanism could be used. Both mechanisms, however, must provide $1 million worth of coverage (see Section III.D.3).

c. *Agency Specification of Various Policy Terms.* A number of commenters from the insurance industry felt that EPA-proposed coverage terms did not precisely follow insurance industry standards and would limit availability of insurance coverage for USTs. However, it was also clear from industry comments that adoption of the recommended language would not, by itself, increase the availability of pollution insurance. The objections of the commenters centered on the definitions of the terms occurrence, accidental release, and bodily injury; on the prohibition of certain exclusions (those for non-sudden releases and on-site coverage); and the requirement that 120-day notice be given to an insured in the event of a cancellation. The commenters recommended that the Agency defer to standard industry practice in establishing policy language. One commenter suggested specific terms

[6] U.S. Department of Commerce, *Liability Risk Retention Act of 1986 Implementation Report*, September 1987

that he felt would more strictly define appropriate insurance coverage.

The Agency has two reasons for clearly delineating the terms of insurance policies that are acceptable to meet financial responsibility requirements. The first is that, given an insurance market with widely varying types and scopes of coverage, the Agency is concerned that the insurance provided to an UST owner or operator in fact provides a sufficient level of financial assurance. Second, because the Agency has mandated that proof of financial responsibility be demonstrated only in the event of a release or if specifically requested by the implementing agency, the Agency wants to define very clearly the terms of acceptable coverage so that both the insurer and the owner or operator can determine whether the policy is adequate to comply with the regulations.

Several commenters took issue with the Agency's use of the terms "occurrence" and "accidental release," preferring instead the combined term "pollution incident," a term widely used in the insurance industry. Commenters also suggested that the term "bodily injury" be defined in a manner consistent with the standard established in ISO's new CGL policy. These issues apply to all the instruments and have been addressed in Section III.C above.

Commenters also requested that the 120-day notification period for cancellation of insurance be shortened. The Agency agrees that a shorter time period will still give owners and operators adequate time to locate another mechanism for financial responsibility, and that the 120-day requirement may put too severe a burden on insurers by exposing them to the risk that the insured will fail to pay the premium in those 120 days. Thus, the 120-day notification period may limit the availability of UST insurance. The Agency is therefore shortening the notification period to 60 days (see also Section III.P below regarding cancellation of mechanisms). The notification period for other terminations of insurance policies has also been shortened to 60 days.

Commenters made a number of very specific recommendations regarding the terms of insurance policies. Several commenters suggested that acceptable policies be required to include a provision specifying that the insurer pay on behalf of the insured, rather than reimburse the owner or operator for cleanup costs or third-party damage payments. The Agency has considered these comments and has determined that specification that insurance policies pay on behalf of rather than indemnify the insured is not necessary to ensure that insurance will provide adequate assurance for corrective action and third-party liability costs. Many policies currently in use already specify that the insurer will pay on behalf of the insured, especially in cases of third-party liability. In some cases of corrective action, the implementing agency may undertake response activities to clean up a release in a timely manner. In such cases the implementing agency would receive reimbursement by the insurer.

One commenter recommended that lower premiums be mandated for tanks brought into compliance with tank performance standards in advance of their compliance dates. The Agency does not need to mandate particular premium levels because the market itself should respond to tank improvements by offering lower premiums for safer tanks.

d. First Dollar Coverage. Many commenters felt that the provision requiring policies that make insurers liable for amounts within the deductible applicable to the insurance policy would be unfair to insurers, and ultimately force them to bear the cost of the deductible. The Agency disagrees with these comments. The Agency developed this requirement to ensure that disputes (between the insurer and the insured) over who is responsible for paying amounts within deductible limits will not interfere with prompt performance of corrective action measures or with payment of third-party claims. The Agency does not intend to require policies that limit the right of insurers to specify deductibles applicable to particular policies and to receive these costs from insureds. Therefore, the first dollar coverage requirement should not hinder development of a pollution liability insurance market. If an owner or operator is in bankruptcy at the time of a release and therefore cannot pay the deductible, the insurer, as a creditor, could seek payment through the bankruptcy proceeding, just as any other creditor would.

Commenters suggested that the LUST Trust Fund might be used to guarantee payment of deductibles to the insurer. However, the statute establishing the LUST Trust Fund specifically defines those cases in which the Fund will pay corrective action costs and does not include payment of deductible amounts. In addition, the Trust Fund cannot be used to pay third-party damages.

Pollution liability policies frequently have high deductibles in order to keep premium costs down, and commenters suggested that paying amounts within these deductibles may not be affordable by the insured. The first dollar coverage requirement will prevent delay of cleanup or payment for third-party damages in such cases and will meet the Agency's goals of protecting human health and the environment. The insurer will still be entitled to recover costs within deductible limits from policyholders, although in such cases payment arrangements would have to be made.

e. Policy Retroactive Dates and Exclusions for Pre-Existing Conditions. Several commenters expressed concern that the Agency's acceptance of claims-made policies would limit protection of the insured and, consequently, the degree of financial assurance. Claims-made policies typically provide coverage only for releases reported during the policy period and that begin subsequent to the policy's retroactive date. The retroactive date is generally the same as the effective date of the policy.

One commenter suggested requiring the retroactive date to be 18 months prior to the effective date of the policy. The Agency understands the concern of the commenters and realizes that use of claims-made policies could result in occasional gaps in coverage, particularly with respect to releases occurring prior to the retroactive date. The Agency considered a requirement that claims-made policies have retroactive dates 6 months prior to the issue date of the policy but decided against such a requirement because few, if any, insurers are willing to offer such a policy. Given that insurance is likely to be the "mechanism of choice" of most UST owners and operators (especially smaller businesses), the Agency feels that its goals of protecting human health and the environment will not be served by specifying policy provisions which will prevent most otherwise qualified UST owners and operators from being able to obtain insurance. Prohibiting the use of claims-made policies or requiring a retroactive date prior to the policy effective date is likely to severely limit insurance availability.

In addition, the problem of gaps occurring in coverage prior to the retroactive date is likely to be a significant problem primarily at the outset of the UST financial responsibility requirements, when large numbers of previously uninsured owners and operators purchase insurance for the first time. After that initial time period, most owners or operators should be able to maintain continuous coverage, given the advance notice of cancellation that the Agency is requiring as well as the use of extended reporting periods for claims-made contracts.

Extended reporting periods allow the insured to report a release occurring during the policy period after the termination date of the new policy. This "tail" coverage helps prevent gaps in coverage that could arise because the replacement policy will not cover releases that occur prior to the retroactive date of the policy. In the case of policy renewal as opposed to policy replacement, most policies should provide continuous coverage over time because the retroactive date of the policy is generally the original issue date and not subsequent renewal dates.

As the technical requirements for leak detection are phased in, owners and operators are likely to identify a number of USTs that are leaking and are not covered by a financial assurance mechanism. When the owners or operators of these tanks obtain insurance, these identified leaks are likely to be excluded from coverage as "pre-existing conditions." The Agency realizes that insurance is not appropriate to meet the cost of known releases and is not requiring that insurance policies purchased to comply with today's rule cover known pre-existing conditions. Any requirement for coverage of known conditions would be likely to severely limit UST insurance availability because insurers will not be willing to issue policies obligating payment for damages that have already occurred. UST owners and operators are responsible for cleanup and third-party liability costs that are not covered by financial assurance mechanisms. In some instances the LUST Trust Fund or state funding programs may be appropriate means to fund cleanup of those pre-existing conditions. (Under the LUST Trust Fund, however, owners and operators are liable for any funds expended to clean up pre-existing conditions.)

An insurance representative expressed concern that implementation of the technical regulations would result in discovery of more releases in the early years of the regulation and lead insurers to avoid the UST market until compliance with the technical regulations is complete. While it is likely that more releases will be discovered in the early years of regulation, this fact alone should not reduce insurance availability. Insurers will establish their own pre-conditions for tank coverage. Such pre-conditions may include inspections, audits or other measures to identify existing leaks. Tanks that are insurable are likely to remain so. Tanks that are discovered to be leaking are likely to need corrective action and appropriate repair, upgrading, or replacement before an insurer will accept them for coverage. These measures will also be required by the technical standards. Phased implementation of the technical requirements should not adversely affect insurance availability, because insurers will be able to require correction of existing releases as a condition for coverage.

f. *Endorsement and Certificate of Insurance.* The Agency received a number of comments regarding the specific wording of the Endorsement and Certificate of Insurance required for users of insurance and RRG coverage. All commenters on this issue agreed that the requirement that tanks be listed by identification numbers on the certificate of insurance or endorsement would result in more limited insurance coverage than the standard industry practice of listing covered tanks by site. As described in Section III.E.5, the Agency agrees with these comments. For the purpose of determining the appropriate aggregate coverage, however, a statement indicating that the mechanism assures 100 or fewer or more than 100 USTs is necessary. In today's rule, the endorsement and certificate language (§§ 280.97(b)(1) and 280.97(b)(2)) has been amended to strike the requirement for tank serial numbers and instead requires a listing of the number of tanks at each facility insured and the name and address of each facility.

Commenters also suggested that the issue date of the policy is unnecessary for the endorsement and certificate of insurance, given that the policy effective date, which defines the date on which coverage begins, is also required. The Agency again agrees with the commenters that inclusion of the issue date is unnecessary and that the scope of coverage provided is clearer when the endorsement and certificate of insurance contain only the effective date of the policy. In policies without an effective date, the issue date is considered to be the same as the effective date. However, in cases in which policies include effective dates, coverage is generally considered to begin on the effective date. In most cases, the issue date and the effective date of the policy will be the same, but in those cases in which they are not, the difference could be a source of dispute concerning whether a particular release is covered. Listing only the effective date on the endorsement and certificate will eliminate such a dispute. Today's rule does not include the issue date of the policy in the endorsement or certificate (§§ 280.97 (b)(1) and (b)(2)), but does continue to require listing of the policy effective date.

g. *Six Months Extended Reporting Period.* As indicated in the April 1987, proposal, the Agency is concerned that a claims-made contract may leave gaps in coverage if, for example, a claim is reported after the expiration of a policy for a release that began prior to the expiration date. Such claims may not be covered by a replacement financial assurance mechanism (see retroactive date discussion, Section III.G.4.e above). Originally, the Agency proposed a one year "extended discovery" period to address this concern. Under this provision, claims made during the extended discovery period for losses that occurred during the policy period would be covered. In today's rule, the Agency has changed the term to "extended reporting period" and reduced the time frame to six months. These changes were made for several reasons.

Commenters suggested replacing the term "extended discovery period" with the term "extended reporting period" to clarify that the period only covers incidents which took place during the actual policy period and were reported during the extended reporting period. The Agency agrees with commenters that the insurance industry suggestion more accurately describes the coverage that the Agency intends. The Agency intends to require that only releases beginning during the policy period itself be covered during the extension and agrees with commenters that the term "extended discovery period" could cause confusion over whether a policy would cover occurrences beginning during the extended discovery period or only those beginning under the actual policy period and reported during the discovery period. Therefore, the Agency has changed the term to "extended reporting period." The Agency also agrees with the comment that it would be unnecessary to include an extended reporting period clause in an occurrence-based contract because by definition, such policies cover losses occurring during the policy period regardless of when they are reported. Therefore paragraph 2(e) of the endorsement and certificate of insurance (§§ 280.97(b)(1) and 280.97(b)(2)) are required only in the case of a claims-made contract.

The Agency also reconsidered the proposed one-year time frame for extended reporting. Several commenters addressed this issue. One suggested a reporting period of three years. Others urged that EPA should not establish a mandatory time frame. While the

Agency recognizes that a three-year reporting period may afford even greater assurance by allowing an owner or operator more time in which to report damages caused by a release, the Agency has declined to mandate such a lengthy reporting period. Insurers are unlikely to be willing to offer "tail" coverage as long as three years due to the continuing risk to which such coverage would expose them. Also, even if insurers were willing to offer long reporting periods, the cost of the coverage could be prohibitively expensive. Because the Agency believes that an extended reporting period is essential to ensure adequate coverage by claims-made policies, the Agency has decided not to mandate a reporting period of such length that the insurance would be unavailable or unaffordable to otherwise qualified UST owners and operators. The significant reduction in insurance coverage created by such a provision would result in lesser protection of human health and the environment.

At the same time, the Agency does not believe that the length of the reporting period should be entirely discretionary. Therefore, the Agency has decided to set a shorter minimum length of six months for the extended reporting period.

The Agency has decided that six months is a reasonable time frame in which to identify and report a release following termination of a policy for the following reasons. First, implementation of leak detection requirements should result in prompt detection of releases. Six months should be sufficient time to report releases occurring during the policy period. The Agency is making such a reporting period mandatory for all claims-made contracts used to demonstrate compliance with today's rule, regardless of the reason for termination. Although the extended reporting period differs from the industry standard, it is important to bridge the potential gap between the end of a claims-made insurance policy and the initiation of another assurance mechanism.

Second, commenters estimated that the cost of the extended reporting period could range from half the premium cost to more than the cost of a yearly premium. This reflects the difficulty in establishing proof of when releases reported during this extension actually occurred. The Agency feels that the cost of a six-month period would be affordable for more owners or operators than the cost of a one-year period, thus increasing total insurance coverage. This is especially true because the owner or operator must also pay the cost of a new financial assurance mechanism to remain in compliance with the rule.

The change of the reporting period requirement from one year to six months may help to address two other issues raised by commenters. The first issue raised by commenters concerned potential conflicts over responsibility for coverage during the reporting period. A release discovered during the reporting period could either be covered by the old insurance policy if it began prior to policy termination or by the new replacement mechanism if it began later. There could be a delay in payment for corrective action and third-party damages while the date of the release was determined. As the reporting period was extended the potential for conflict would increase. By reducing the reporting period to six months, the Agency intends to minimize the potential for conflict between mechanisms and thus the potential for delay in meeting the costs of a release.

Second, members of the insurance industry noted that the extended reporting period required by the Agency differed from the reporting period in common use in the industry in that it was an "upfront" requirement, not an option to be purchased only in the event that a policy was cancelled for reasons other than non-payment of premium. Insurers feared that mandatory reporting periods would expose them to the possibility of supplying coverage for one year to an insured who had not paid his premium, or who voluntarily cancelled, thus essentially receiving "free" coverage for one year. The Agency wishes to stress that it is only requiring an extended *reporting* period during which insureds may report releases that occurred while their policy was in effect, not an extended *coverage* period during which insurers would be liable for releases occurring after the policy's termination. Insureds who voluntarily cancel their policies, therefore, would not receive "free" coverage for any period of time. Futhermore, by establishing an appropriate schedule of premium payment, insurers can best protect themselves against providing "free" coverage to insureds whose policies they ultimately would cancel due to nonpayment of premium.

One commenter recommended that forfeiture of insurance coverage due to delayed notice of a claim be prohibited. The Agency believes, however, that the extended reporting provisions of the rule adequately ensure that claims will be covered even if not reported immediately to the insurer. The reporting period would allow an insured covered by a claims-made policy extra time to report any releases which may have occurred during the policy period, but which were not immediately discovered.

h. *Legal Defense Costs.* The Agency's proposal to exclude legal defense costs from the coverage limits of insurance policies used to comply with financial responsibility requirements was opposed by many commenters. The commenters argued that insurers will not provide coverage exclusive of legal defense costs. The Agency has reviewed these comments and decided to continue to require exclusion of coverage for legal defense costs from insurance policy indemnity limits.

The exclusion was originally proposed for several reasons: (1) To ensure that legal defense costs would not absorb too great a portion of coverage limits and thus leave little coverage available for corrective action and third-party liability; (2) to conform to the general insurance industry standard practice for comprehensive general liability of paying all legal defense costs outside policy limits until the indemnity limits have been exhausted; and (3) to provide the same level of financial assurance to cover both third-party claims and corrective action as the other mechanisms (none of the other mechanisms for demonstrating financial responsibility under the rule covers legal defense costs).

In general, the above reasons for the exclusion are still valid. Legal defense costs could amount to a significant portion of policy limits now and in the future. A study by the ISO indicates that legal defense costs have increased three times faster than indemnity losses since 1960.[7] Defense costs per one dollar of loss tripled between 1956 and 1984. This trend is not limited to any one particular area, but rather is common throughout the general liability field. There are few actual data on defense costs for liability suits brought in cases of pollution releases, but an Agency analysis of general liability, Superfund, and asbestos claims suggests that legal defense costs in cases involving pollution liability could constitute as much as 36 to 42 percent of policy liability limits.

The insurance industry standard for commercial general liability coverage continues to be payment for all legal defense costs outside general liability policy limits until the limits have been

[7] *The Rising Costs of General Liability Legal Defense*, Insurance Services Office, 1986.

exhausted by indemnity payments. Only about 25 percent of commercial general liability policies include payment of legal defense costs within policy limits and ISO's standard CGL policy includes a clause obligating the insurer to provide payment for legal defense until coverage is exhausted by indemnity payments. EIL policies are more likely than CGL policies to include legal defense costs within policy limits; however, industry practice even within the smaller universe of EIL policies is not uniform. EIL policies are available that provide indemnity limits exclusive of legal defense costs.

The Agency recognizes that the insurance industry attitude toward legal defense costs may be changing. Some members of the industry, in response to the spiralling costs of legal defense, have begun examining ways to contain defense costs, feeling that the insurer's traditionally unlimited "duty to defend" may be a disincentive to policyholders to keep legal defense costs down. At the same time, it does not appear that the industry is moving toward inclusion of legal defense costs within policy limits as a solution to the problem. While ISO proposed at one time that some portion of legal defense costs be included within policy limits, it withdrew that proposal and has more recently put forward a plan to limit legal defense costs outside of policy limits.

Although the Agency's reasoning on costs of legal defense and standard insurance practice continue in general to hold true, EPA recognizes that legal defense costs are sometimes handled differently in the specialized market of insurance USTs. The consensus of commenters is that insurance policies for USTs generally include legal defense costs within the policy limits. All policies issued through one major broker were written inclusive of legal defense costs. A number of other insurance providers similarly indicated that UST coverage would only be available if legal defense costs were included. One major insurer, however, has excluded, and will continue to exclude, legal defense costs for policy limits. Thus, while many current UST policies include legal defense in policy limits, the Agency does not feel that the exclusion or inclusion of legal defense costs will affect the availability of insurance coverage over the long term.

The Agency considered two other approaches to dealing with legal defense costs. The first would be to allow insurers to include legal defense costs within the limits. Because few UST insurers currently offer coverage exclusive of defense costs, this option would at least reinforce currently available insurance policies as a means of compliance with financial responsibility regulations. In addition, while it is clear that RRGs may cover legal defense costs (section 3901(a)(2)(A) of the RRA explicitly legal defense costs within the definition of allowable liability coverage), it is not clear that RRGs will generate enough capital to cover legal defense costs above and beyond policy limits. Inclusion of defense costs in the limits could facilitate RRG formation. The second approach would be to allow insurers to include legal defense costs within policy limits higher than the $1 million requirement. This approach would address insurer concerns regarding defense cost limitation, but probably would not address issues of RRG capitalization.

The Agency believes, however, that arguments for continued exclusion are compelling and that development of higher insurance policy limits allowing defense costs to be included would not guarantee that insurance would provide adequate financial assurance. The final rule continues to require that policy limits be exclusive of legal defense costs. The statutory requirement is $1 million of per-occurrence coverage for the costs of corrective action and third-party liability for USTs at facilities engaged in petroleum production, refining, or marketing. If insurance policy limits included defense costs, in effect, insurance policies would be providing financial assurance at a level lower than that required by the statute. Exclusion of legal defense costs from policy limits is also consistent with RCRA Subtitle C liability coverage regulations.

The Agency recognizes that in many cases legal defense costs may not be high enough to significantly affect the adequacy of insurance policies to provide the coverage required, particularly that for corrective action. However, if defense costs for petroleum USTs are low, then the insurance industry will not be excessively burdened if it must cover these costs outside of policy limits. Alternatively, if defense costs for petroleum USTs are high, then coverage for these costs outside policy limits is necessary to ensure adequate financial assurance for corrective action and third-party liability costs. While this may place a greater burden on the insurer, the insurer is free, as many insurers are currently doing, to limit defense costs in some way outside of policy limits.

i. *Insurer Qualifications.* The April 1987, proposal required that insurers eligible to provide policies in compliance with UST financial responsibility requirements be licensed to transact the business of insurance or as an excess or surplus lines insurer in each State where a covered UST is located. Commenters suggested that the proposed qualifications were too limiting and one commenter suggested substituting Department of Transportation regulations that allow insurers licensed or approved by a foreign government to provide coverage in addition to those licensed in any state or eligible to provide coverage as an excess or surplus lines insurer.

The Agency does not, however, feel that its qualifications for insurers are overly stringent. Foreign insurers offering coverage in the United States are generally licensed to provide coverage in at least one state which would, in most cases, qualify them to provide coverage as an excess lines insurer. Therefore, the EPA qualifications requirements should not necessarily prevent UST owners or operators from purchasing insurance from a foreign insurer. The Agency does not, however, wish to allow UST owners and operators to purchase insurance to meet financial responsibility requirements from an insurer who may not be a stable source of coverage. An insurer who is licensed only by a foreign government may not be subject to the same reserve requirements that help to ensure that an insurer can meet his obligations.

The Agency has, however, decided to make other changes to the qualifications for RRGs and insurers. Today's rule does not include separate qualification for RRGs and insurers as originally proposed, but instead imposes the same qualifications for both. Because a RRG is a type of insurer, it is simpler and more appropriate to delete the separate requirements for RRGs. The Agency has also decided to delete from the insurer qualifications the requirement that insurers be licensed or eligible in "each state where a covered underground storage tank is located." The final rule requires instead that insurers and RRGs be licensed to transact the business of insurance or eligible as an excess or surplus lines insurer in "one or more states." This change was made because the Agency decided that the proposed requirements might too severely limit insurance coverage available to owners and operators with USTs in more than one state. While the Agency continues to believe that it is essential that insurers and RRGs supplying financial assurance under today's rule be subject to adequate regulatory oversight, it

believes that a requirement that insurers be licensed or eligible in one or more states will ensure that insurers and RRGs are sufficiently qualified to provide UST coverage. This ensures that the insurance provider meets the qualifications of the state in which it is writing policies. If a provider writes a policy for a large firm with USTs in more than one state, the provider must meet the eligibility requirements in the state where the firm buys the policy, but does not need to meet licensing requirements in every state where an UST may be located.

j. *Other Comments.* Commenters suggested specific changes regarding the manner in which insurance policies are interpreted by the courts, specifically, questions of joint and several liability and use of retroactive damages. These comments go beyond the scope of this rulemaking and are appropriately left to private insurance law. Note, however, that under RCRA section 9003(h)(6), liability is strict, joint and several for government costs incurred in responding to a release of petroleum from an UST under section 9003(h).

Commenters also suggested that the potential for direct action against a provider of financial assurance would deter insurers from entering the market. The statutory provisions of RCRA section 9003(d)(2), however, specifically allow direct action against any provider of financial assurance. It is, therefore, beyond the authority of the Agency to prevent such direct action.

Other commenters suggested that private insurers provide guidance to states on the structure of state programs, that insurance be used to fill gaps in state fund coverage for third-party liability, and that EPA develop outreach programs and programs to encourage entry of private insurers into the market. The Agency agrees that private insurers can provide guidance on the structure of state funds and states may choose to consult with private insurers in the development of state funds. This rule allows several mechanisms and combinations of those mechanisms to achieve compliance. For example, traditional insurance may be used in combination with some other mechanism (like a state fund) to demonstrate financial responsibility.

To encourage the entry of private insurance carriers, the Agency is currently working with the insurance industry to develop a better understanding of the UST population and how UST insurance works. Several insurance companies currently provide UST coverage and there are indications that other insurers are planning to enter the market. In addition, the Agency believes that the implementation of the technical regulations will make UST risks more predictable and thus make the market more attractive to insurers.

I. Surety Bond (§ 280.98)

The final rule, like the proposed rule, allows owners or operators to use surety bonds to satisfy their financial responsibility obligations. Section 9003(d)(1) specifically lists surety bonds as mechanisms to be considered in establishing financial responsibility requirements. Several commenters expressed concern about the availability, terms, and costs of surety bonds. These commenters did not object to the use of surety bonds as a financial mechanism, but questioned whether owners or operators would be able to obtain surety bonds at a reasonable cost. They cited several factors affecting availability. Some commenters felt that surety companies would be reluctant to provide coverage because they believe the implementing agency would have absolute discretion over the control of the funds. For this reason, one commenter objected to the cancellation provision, which requires the surety to fund a standby trust in the event the principal fails to obtain an alternative mechanism and the Director of the implementing agency knows or suspects that a release has occurred. A large number of commenters stated generally that surety bonds will be unavailable for third-party liability and corrective action. Finally, some commenters stated that if surety bonds are available, only those companies able to meet the financial test could afford the bond. Along these lines, one commenter explained that, in attempting to meet the collateral requirements of a surety bond, petroleum marketers would reduce or eliminate their financial ability to puchase their products and equipment or to upgrade or monitor their equipment.

The agency recognizes that certain terms of the proposed performance bond (e.g., the cancellation provision) may limit the availability of the bond. The Agency believes, however, that the terms of the surety bond as proposed are necessary to ensure that coverage is available when needed to take corrective action and compensate third parties. For example, without the cancellation provision, sureties could cancel coverage when a release is suspected and the costs would be unfunded.

The commenters who objected to the discretionary authority of the Director of the implementing agency to control the funds appear to misunderstand the proposed regulations. The performance bond clearly describes the situations in which funds may be drawn; the Director does not have unlimited discretion to draw on the funds. (See also Section III.N of the preamble for discussion of the standby trust.)

The Agency acknowledges that many companies will be unable to afford surety bonds, or meet collateral requirements. EPA has authorized the use of those bonds in order to allow those persons who can secure surety bonds the option of using them to comply with these requirements. The rule continues to allow use of a surety bond.

In addition, as discussed in Section III.V.2. the Agency is incorporating certain exclusionary language into the terms of the instrument to more clearly limit the type and circumstances of third-party liability for which this mechanism can be used.

J. Letter of Credit (§ 280.99)

The final rule, like the proposed rule, allows owners or operators to use letters of credit to satisfy their financial responsibility obligations. Section 9003(d)(1) specifically lists letters of credit as a mechanism to be considered in establishing financial responsibility requirements. Many commenters on this mechanism did not object to the use of letters of credit, but were concerned about whether this mechanism would be available. For example, many commenters believed that letters of credit are not viable options for smaller entities. Commenters pointed out that smaller companies cannot meet collateral or liquidity requirements necessary to obtain letters of credit.

Other commenters pointed out that the costs of letters of credit are much higher than the costs of insurance, and that tying up capital or collateral to purchase letters of credit would prevent owners or operators from using letters of credit to purchase equipment for their businesses, including monitoring equipment and equipment for upgrading or replacing tanks. One commenter noted that the letter of credit would be unavailable to many governmental bodies because some lending institutions refuse to issue them to governmental bodies, and some city codes prevent governmental entities from securing letters of credit.

The Agency acknowledges that the collateral requirements for letters of credit may approach or exceed the face value of the letter of credit, and will be prohibitively expensive for many owners and operators. The Agency is allowing the use of letters of credit.

however, as an option for those owners and operators who can afford them.

One commenter objected to the language in the letter of credit because he believed that it requires the issuer to examine the legitimacy of the conditions precedent to presentation of the sight draft. This commenter suggested that the sight draft and the statement that the Director of the implementing agency must provide to the bank should identify the purpose for which the letter is being issued (corrective action and/or third-party liability for sudden and/or non-sudden releases). This commenter also suggested that these documents should specify the tank identification number and name and address of each facility location.

The letter of credit does not require the issuer to examine the legitimacy of the conditions precedent to presentation of the sight draft. The letter of credit is payable upon presentation of a sight draft and a signed statement certifying that the letter is payable pursuant to these regulations.

A number of commenters, in addressing specific mechanisms, disagreed with the proposed requirement to identify individual tanks that are assured by the mechanisms. They all felt that identification of the facilities covered by the mechanism would ensure that releases from the facilities are covered, without delays and needless paperwork to determine which tank was the source of the release. The Agency agrees, and has revised the language of the mechanisms to specify coverage by facility, rather than by individual tank. Individual tanks must be identified if separate mechanisms are being used to cover different USTs. The letter of credit does allow the parties to specify the purpose for which the letter is being issued ("corrective action" and/or "compensating third-parties for bodily injury and property damage").

In addition, as discussed in Section III.V.2., the Agency is incorporating certain exclusionary language into the terms of the instrument to more clearly limit the type and circumstances of third-party liability for which this mechanism can be used.

K. Use of State-Required Mechanisms (§ 280.100)

EPA proposed that, in those states that have not obtained UST regulatory program approval, UST owners and operators may use state-required financial assurance mechanisms to meet the federal financial responsibility requirements. However, the proposed rule required the EPA Regional Administrator to determine that such mechanisms provide assurances that are at least equivalent to those of mechanisms specified in the Federal requirements.

Several commenters noted that allowing use of state-required mechanisms will do little to help UST owners or operators because not all states have established or will establish their own financial responsibility requirements. Another commenter supported EPA's proposal that state-required mechanisms used to determine financial responsibility while EPA reviews the state program will be considered to be at least equivalent to other required mechanisms and thus in compliance with Subpart I for the amount and types of costs covered by the mechanisms.

In response, the Agency agrees that some states without authorized UST programs may not have state-implemented financial responsibility requirements for USTs. However, owners or operators in states that do not have authorized programs, but which do have financial responsibility requirements, will be able to use equivalent state-required mechanisms. These owner or operators will not have to procure additional mechanisms to satisfy the Federal requirements. The final rule regarding the use of state-required mechanisms retains the language in the proposed rule.

L. State Fund or Other State Assurance (§ 280.101)

EPA proposed that UST owners or operators may use state funds or other state assurance programs to meet the financial responsibility requirements. RCRA section 9004(c)(1) authorizes the use of "corrective action and compensation programs administered by state or local agencies" as mechanisms to provide evidence of financial responsibility for state program approval.

Although several commenters supported the use of state assurance programs as an acceptable financial assurance mechanism, commenters remarked that state assurance programs are generally not available and, even where available, often do not provide sufficient coverage. Several states remarked that they did not plan to establish funds or that the Federal government should not rely on states to demonstrate financial responsibility for UST owners and operators.

The Agency recognizes that state assurance programs are not widely available to date. However, funds have been established in several states, including Virginia, Delaware, and Minnesota. Other states are also in the process of attempting to establish funds. The Agency does not require any state to establish an assurance program.

In addition, EPA is aware state assurance programs may not provide complete financial responsibility for UST owners or operators. For example, funds may not cover third-party compensation or all corrective action costs. Therefore, UST owners and operators using these types of programs must use other financial assurance mechanisms in combination with a state fund to demonstrate compliance with the financial assurance requirements.

Several commenters suggested that states use particular program structures or particular financing mechanisms. For example, several commenters suggested that state funds cover corrective action costs above $100,000 and third-party compensation costs above $300,000, up $1 million per occurrence. Other commenters suggested that state funds be structured to encourage entry of private insurers into the UST insurance market.

The Agency believes that the structure and means of financing programs is at the discretion of each state. EPA will not dictate the approach states should take in establishing assurance programs. However, for those states interested in establishing assurance programs, EPA will provide assistance in designing and evaluating such programs. In addition, EPA has developed a handbook providing guidance on establishing state assurance programs.

The Agency also does not intend to mandate a particular program structure in states that currently use funds to cover UST release costs. For example, the Agency would not require a state with a fund that only covered corrective action costs to alter its fund structure (e.g., to add coverage for third-party compensation) in order to qualify under this section. The owner or operator would have to obtain additional assurance to cover third-party liability requirements.

M. Trust Fund (§ 280.102)

A trust fund was not included in the proposed rule as an allowable financial assurance mechanism. As stated in the preamble to the proposed rule, the Agency believed that a trust fund with a pay-in period would provide inadequate financial assurance early in the period, and a fully-funded trust fund would be unaffordable to the owners or operators most likely to need to use the trust fund. Moreover, the Agency felt that a trust fund used in combination with an insurance policy would problably be more costly than paying the additional

premium for first-dollar insurance coverage because: (1) Unlike the costs of other mechanisms, trust fund deposits are not business expenses for federal tax purposes; and (2) insurance policies for USTs may be written to include coverage of a deductible that is later recovered from the insured.

The Agency received a comment requesting that a trust fund be allowed as a financial assurance mechanism. This commenter maintained that some firms may wish to use a trust fund to cover multiple tanks if other mechanisms are not available, and advocated allowing either a fully-funded trust fund or a partially-funded trust fund if combined with another mechanism that provides the remaining amount of required coverage.

In light of this comment, the Agency decided to allow trust funds in the final rule. Although the Agency believes that trust funds will in general cost more than other mechanisms and in many cases will be unaffordable, trust funds are allowed to provide more flexibility to owners or operators in providing financial assurance. To ensure that the trust fund will provide adequate financial assurance, the Agency requires the trust fund to be fully-funded for the amount of required coverage, or partially-funded and used in combination with another allowable mechanism that provides the remaining amount of required coverage.

The language of the trust fund instrument is identical to the language of the standby trust fund used to manage funds paid from other mechanisms (e.g., letter of credit). The amount of the trust fund is determined by the owner or operator, as long as the remaining amount of required coverage is provided by another mechanism.

In addition, as discussed in Section III.V.2. of the preamble, the Agency is incorporating certain exclusionary language, into the terms of the instrument to more clearly limit the type and circumstances of third-party liability for which this mechanism can be used.

N. Standby Trust Fund (§ 280.103)

Under the proposed and final rule, EPA establishes the standby trust fund as the depository mechanism that an owner or operator must put in place upon acquiring one of the following financial assurance instruments: Guarantee (§ 280.96), surety bond (§ 280.98), or letter of credit (§ 280.99). Funds drawn under any of these instruments, pursuant to the instruction of the Director of the implementing agency, must be deposited directly into the standby trust fund by the institution making the payment. The use of a standby trust is necessary because without such a depository mechanism, any funds drawn under those instruments that are payable to the Regional Administrator would have to be paid into the U.S. Treasury and could not be used specifically to pay for the UST corrective action or third-party liability claims for which the funds were intended without Congressional action (see 31 U.S.C. 3302). Similarly, funds payable to the state Director may have to be paid into the state treasury.

The rule requires that the trustee must have the authority to act as a trustee and its trust operations must be regulated and examined by a federal or state agency. This trustee qualification requirement is the same as the trustee qualification requirement under the Subtitle C regulations. If the trust operations are not regulated and examined by a federal agency, the trust operations must be regulated and examined by a state agency in each state in which a standby trust fund is established.

All commenters on the proposed standby trust requirement argued that the provision is unnecessary. In the case where a guarantee is used to provide financial assurance, several commenters asserted that the use of the guarantee is comparable to self-insurance, which does not require a standby trust because, in each instance, funds are assured from existing corporate assets. The Agency recognizes that corporate assets are the source of the funds for both self-insurance and guarantees, but does not believe that the similarity obviates the need to establish the standby trust when a guarantee is used to provide financial assurance.

The standby trust fund is necessary to ensure access to funds when they are required and to ensure that the implementing agency can address corrective action requirements promptly and preclude further damage to health or the environment.

The financial test of self-insurance is a direct mechanism for providing finanical assurance. When it is used, the owner or operator ensures that he will take prompt, corrective action and pay valid third-party claims from existing corporate assets—evidenced by satisfaction of the financial test.

A payment guarantee, such as the guarantee in the proposed rule and today's rule, is an indirect mechanism. When it is used, the guarantor does not ensure that it will take prompt corrective action or pay third-party claims if the owner or operator does not. Rather, the guarantor contracts with the implementing agency that, if the owner or operator fails to undertake required activities, the guarantor will provide the necessary funds to undertake the activities from its corporate assets. EPA cannot hold the funds directly because of the prohibitions of 31 U.S.C. 3302, as discussed above. It is necessary, because of the prohibition, that the funds be placed in an existing depository mechanism, the standby trust, from which the implementing agency can direct funding of required actions as promptly as possible. Therefore the standby trust requirement for a guarantee remains a provision of today's rule.

Other commenters disagreed with the provision that the standby trust must be established at the same time as the financial assurance mechanism, noting that, under RCRA Subtitle C, the trust is established only when assured funds are required. The commenters misstate the requirements of Subtitle C. The standby trust requirement in today's rule differs from the Subtitle C model because its purpose is different. In the Subtitle C rule, guarantees are recognized to assure funds for closure and post-closure and third-party liability. No standby trust is required for the guarantee for liability because valid third-party claims, if not paid by the owner or operator, are paid by the guarantor directly to the claimants. If an owner or operator fails to perform closure or post-closure care whenever required to do so, the guarantor can perform the required activities itself or establish a trust from which EPA can fund the activities. Today's rule provides financial assurance for both corrective action and third-party liability. A release from an UST may or may not occur. If a release does occur and corrective action is necessary, it should not be delayed while a standby trust is put in place. Prompt action will prevent further damage to human health and the environment. In addition, because under Subtitle I one assurance mechanism covers both corrective action and third-party liability, the standby trust provides a mechanism for the Director of the implementing agency to ensure that funds are available first to pay for corrective action (see Section III.S). The Agency, therefore, has not changed the requirement that a standby trust be established when a guarantee, letter of credit, or surety bond is acquired to provide financial assurance in compliance with this rule.

The wording of the standby trust agreement must be identical to the wording provided by § 280.103(b). Uniform wording of the agreement minimizes the administrative burden on

the implementing agency by eliminating case-by-case review of standby trust agreements and provides owners and operators with the assurance that the agreements will satisfy the regulatory requirements. In addition, as discussed in Section III.V.2. of the preamble, the Agency is incorporating certain exclusionary language into the terms of the instrument to more clearly limit the use of the mechanism only to costs associated with releases from USTs.

Commenters on the standby trust were also concerned about the costs of trusts, particularly if the owner or operator has several facilities in several states for which standby trusts must be established and maintained. The Agency evaluated the costs related to establishing and maintaining a standby trust fund when today's rule was proposed. The primary costs are the costs of managing the funds; other relatively minor costs include the administrative fee charged to establish the trust fund and fixed fees for simply maintaining the account. The incremental costs of establishing a standby trust at the time the instrument is established will be minimal, since there will be no funds in the trust. The Agency believes, therefore, that the requirement to establish the standby trust fund at the time a financial assurance instrument is acquired will not be particularly burdensome to UST owners or operators.

In addition, the final rule allows the owner or operator to establish one trust as the depository mechanism for all funds assured in compliance with this rule. Owners and operators with a number of facilities in various states may, therefore, establish one standby trust into which funds can be deposited if and when required. States authorized to implement this program may adopt this policy or may require the owner or operator to establish a standby trust in their own jurisdictions.

O. Substitution of Financial Assurance Mechanisms by an Owner or Operator (§ 280.104)

Under § 280.104 of the proposed and final rule, the Agency allowed an owner or operator to substitute alternate financial assurance, provided that an effective financial assurance mechanism or combination of mechanisms that satisfy the financial responsibility requirements existed at all times. After obtaining alternate financial assurance, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance. The owner or operator must maintain continuous coverage with a financial assurance mechanism to ensure the availability of funds at all times for corrective action and third-party liability claims, should a release occur from an UST containing petroleum.

The Agency received no comments on provisions regarding the substitution of financial assurance mechanisms by an owner or operator, and thus promulgates these provisions as proposed.

P. Cancellation or Nonrenewal by a Provider of Financial Assurance (§ 280.105)

1. Length of Notice Period

In the April 17, 1987, proposal, the Agency required insurers to provide owners or operators 120 days notice before cancelling (i.e., failing to renew) insurance coverage and 90 days before terminating a policy under other circumstances (e.g., non-payment of premium by an insured). Other providers of financial assurance were permitted to cancel, refuse to renew, or otherwise terminate an instrument only if the provider first notified the owner or operator at least 120 days in advance. Further, EPA required any owner or operator failing to obtain an alternate mechanism within 60 days after receiving a notice of cancellation or termination to notify the implementing agency of such failure and submit evidence of the existing financial assurance mechanism, the name and address of the provider of financial assurance, and the date of cancellation. In the sixty days remaining until termination of coverage, the implementing agency would then have the opportunity to inspect the affected tanks to determine if any releases had occurred, thus assuring that the still viable mechanism could be drawn upon to provide any necessary funds. Moreover, the 120-day requirement reflected the Agency's concern that providers of financial assurance might want to cancel their mechanisms upon the discovery of an UST release, leaving the owner or operator without assurance when it is most needed.

Several commenters, primarily from the insurance industry, urged EPA to reduce the number of days' notice required for cancellation to 60 days. The commenters presented several arguments supporting their request. First, they argued that 60 days is an adequate amount of time for owners or operators to search for and obtain any other type of available assurance, or to determine that none is available and report this to the implementing agency. Second, commenters noted that a 60-day notice period is becoming a standard insurance practice in many states. Third, commenters viewed the 120-day provision as punitive to insurers, and predicted that reducing the notice period to 60 days would result in the greater availability of affordable coverage. Finally, two commenters warned that if 90 days or more notice were required, insurers would automatically send out cancellation notices on an annual basis to every insured party, thereby giving them the time to review accounts at a point closer to the beginning of a new policy year.

Based on these comments, the Agency has concluded that the 120-day notice period is unnecessary for insurance, RRG coverage, and state fund coverage. In the 60 days following an owner's or operator's determination that no other financial assurance is available, the Director of the implementing agency has the authority to require a guarantor, surety, or issuer of a letter of credit to fund a standby trust. However, the Director of the implementing agency does not have the authority to require insurers, RRGs, and state funds to fund a standby trust should a leak be suspected or confirmed. Consequently, an additional 60-day period following the determination by an owner or operator that no alternate financial assurance is available would not benefit an owner or operator using insurance, RRG coverage, or state fund coverage in the manner intended by the Agency.

Other circumstances unique to insurance, RRG coverage, and state funds also support the conclusion that a 120-day notice period for cancellation is inappropriate for these mechanisms. In cases where insurance or RRG coverage is cancelled, for example, an owner or operator has an incentive to submit any claims if there is a release. In addition, the extended reporting period for claims-made policies allows an owner or operator to file a claim six months after the policy has been cancelled. Finally, states are not likely to abruptly withdraw financial assurance in case of an UST leak.

Consequently, EPA has decided that providers of insurance, RRG coverage, and state-backed coverage need only provide a 60-day notice period for cancellation or termination of coverage. Owners or operators who fail to obtain alternate coverage after these mechanisms are cancelled are still required to notify the implementing agency 60 days after being notified of cancellation or termination of financial assurance (i.e., when coverage expires). Reporting at this time can trigger an evaluation of the USTs for releases which should be reported during the extended reporting period.

Nevertheless, the Agency, for the reasons noted above, believes that the proposed 120-day period is essential in cases where an owner or operator has obtained a guarantee, letter of credit, or surety bond. Therefore, providers of these financial assurance mechanisms must still provide a 120-day advance notice of cancellation or termination of coverage.

2. Termination for Non-Payment of Premium

A number of commenters, primarily from the insurance industry, argued that the provisions should allow for a quick termination of coverage in the event of non-payment of premium by an insured. Most suggested that this period be 10 days. Under the proposed provisions, commenters noted that the insurance agent or insurer would have to provide 90 days worth of coverage on behalf of an insured who fails to pay his premium. Some commenters warned that should the 90-day period be maintained in all cases, they might protect themselves from this contingency by requiring full payment of premium prior to the issuance of coverage. Moreover, commenters asserted that termination with 10 days notice for non-payment of premium conforms with standard industry practice on other types of insurance.

While sympathetic to industry concerns, EPA is unwilling to accept a 10-day notice period in these cases. First, the Agency calculates that such a brief notice period will not allow UST owners or operators sufficient time to obtain alternate assurance mechanisms, and hence will result in unacceptable gaps in coverage.

Second, the Agency remains convinced that the shortened 60-day notice period will fulfill the needs of providers. As noted earlier, a 60-day notice period is standard in many states. In addition, insurers, for example, could protect themselves by establishing an appropriate schedule of premium payment. Insurers could require payment 90 days before the expiration date of coverage for the maintenance or renewal of the policy. An insurer could then terminate the policy with 60 days notice if an insured does not meet the schedule of payment within 30 days of the premium due date.

The Agency therefore is requiring a 60-day notice period for termination of coverage even in the event of non-payment of premium by an insured.

Q. Reporting by Owner or Operator (§ 280.106)

The April 17, 1987, proposal required each UST owner or operator to keep evidence of financial responsibility at his UST site or at his place of business. (Section III.R of this preamble describes the nature of the records that the owner or operator must maintain.) In addition, the proposed rule required an owner or operator to submit the appropriate documentation of financial responsibility to the implementing agency in the following circumstances:

(1) When the owner or operator notifies the Regional Administrator of the existence of a new petroleum underground storage tank under § 280.22;

(2) Within 30 days after the owner or operator has a known or suspected release from a petroleum underground storage tank required to be reported under § 280.74;

(3) If the owner or operator fails to obtain alternate coverage as required by this subpart within 30 days after the owner or operator receives notice of:

- Commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a provider of financial assurance as a debtor,
- Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism,
- Failure of a guarantor to meet the requirements of the financial test, or
- Other incapacity of a provider of financial assurance;

(4) If an owner or operator is unable to obtain alternate assurance within 60 days after receiving a notice of termination of a mechanism, as required by § 280.105(b); or

(5) If the owner or operator using the financial test fails to meet the requirements of the test, as required by § 280.94.

The Agency received several comments supporting the proposed reporting requirements. Two commenters, both representative of large segments of the regulated community, noted that an annual reporting requirement would impose excessive administrative burdens on small businesses. Moreover, a number of state government commenters expressed concern that they might be unable to administer a mandatory reporting requirement. The commenters supported their position by citing the large size of the regulated community, the lack of state financial and personnel resources, and the excessive paperwork burdens that would accompany such an effort.

Other commenters, however, urged EPA to mandate more extensive reporting requirements. Two commenters suggested an annual demonstration of financial responsibility. The commenters cited several benefits of enhanced requirements, including: (1) Greater incentives for proper tank management and rapid release detection and response; (2) the Agency's ability to target enforcement efforts towards owners or operators who fail to submit evidence; and (3) greater assurance that funds will be available to pay the costs of UST releases.

There are other potential advantages of more stringent reporting requirements. Stringent reporting could increase the level of compliance with the regulations, since owners or operators would be required to demonstrate on an annual basis that they have obtained financial assurance required under this subpart.

Despite these considerations, the Agency has decided that the advantages of more frequent reporting are outweighed by several factors unique to the UST financial responsibility program. First, the regulated UST community, consisting of an estimated 1.7 million USTs located at 500,000 facilities, is extremely large. Receiving and processing financial assurance certifications from all these UST owners or operators on an annual basis could place substantial administrative burdens on implementing agencies. In fact, the sheer volume of reports could overwhelm implementing agencies and mask the more critical information, i.e., cancellation or release notices. However, the Agency intends to develop non-traditional approaches to compliance monitoring and enforcement and will initiate pilot projects in states to test these approaches.

In addition, provisions in SARA for the LUST Trust Fund create incentives for owners and operators to comply with the regulations, since the fund may be used to pay for costs in excess of the required amount of financial responsibility if the owner or operator has maintained evidence of financial responsibility. To increase awareness of and compliance with UST rules, EPA is preparing a public outreach program aimed at providing UST owners and operators with information on all UST requirements. Moreover, many UST owners and operators are already obtaining insurance to limit their exposure to future liability due to UST costs.

Finally, the alternative of reporting by postcard, while minimizing costs for owners and operators, would still inundate implementing agencies with the same number of reports, and thus would not alleviate the critical problem created by annual reporting.

The Agency has thus decided not to impose more stringent reporting requirements on the regulated community.

The Agency also received comments opposing certain provisions of the proposed reporting requirements. Several commenters disagreed with the

requirement to submit financial responsibility documentation for new, and not old, tanks, arguing that new tanks are less likely to leak than older tanks.

The Agency has retained this provision in the final rule. As noted above, the proposed requirement builds upon existing notification requirements mandated under section 9002(a) of Subtititle I and codified in the UST technical standards (53 FR 37082, September 23, 1988). Specifically, § 280.22 requires owners or operators who bring a new tank into use to notify the appropriate state or local agency or department of the existence, age, size, type, location, and uses of the new tanks as well as to obtain an installation certification. Including financial assurance information in these reports involves a minimal increase in the cost of these reports for the regulated community and provides valuable compliance monitoring information to the implementing agency.

Another commenter argued that owners or operators should not be required to submit financial assurance documentation for new tanks to both the EPA Regions and the states. The Agency agrees with the commenter. While the proposed rule required owners or operators to submit this documentation to the Regional Administrator, today's rule relies on submittal of the new tank notification to the appropriate state or local agency or department, as required in § 280.22 and RCRA section 9002(a).

Another commenter found the wording of § 280.106(a)(2) unclear, and inquired whether financial responsibility documentation should be submitted for a suspected release or only in the event of a confirmed release. The financial assurance reporting requirements, which have been revised to reflect provisions for reporting releases for corrective action in §§ 280.53 and 280.61 of the UST technical standards, now require submittals in the event of the confirmed releases. (These provisions are discussed in further detail in Section IV.F of the UST technical standards preamble.)

The same commenter urged EPA to allow entities installing large numbers of tanks the option of submitting financial responsibility documentation annually to the Regional Administrator rather than submitting multiple documentation for each new tank. The Agency sees no reason to adopt this approach. Section 280.22 requires that owners or operators certify in the new tank notification form that they are in compliance with the financial responsibility provisions as well as provide information on compliance with other technical requirements.

R. Recordkeeping (§ 280.107)

Under the proposed rule, owners or operators were required to maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subpart until one year after closure or one year after the completion of closure and corrective action. An owner or operator was required to maintain at his UST site or place of business the following types of evidence for mechanisms used to demonstrate financial responsibility:

(1) Copies of assurance mechanisms specified in §§ 280.94 through 280.100, worded as specified.

(2) Letters of certification from the chief financial officer of firms using the financial test of self-insurance or providing guarantees, based on year-end financial statements for the last completed fiscal year. Such evidence must be on file no later than 120 days after the close of each fiscal year.

(3) Originally-signed duplicates of the standby trust funds worded as specified in § 280.103(b) for guarantees, surety bonds, or letters of credit.

(4) Originally-signed duplicates of the insurance policies or RRG coverage policies with the endorsements or certificates of insurance and any amendments.

(5) Copies of letters or certificates from states regarding coverage by state funds or other state assurances.

The proposed rule also required the owner or operator to maintain a certification that the financial assurance mechanism used to demonstrate financial responsibility is in compliance with the requirements of the rule.

The Agency received a number of comments concerning the recordkeeping requirements of owners or operators of petroleum USTs. Some commenters expressed unconditional support for the provisions.

Several commenters, however, were dissatisfied with the requirements. One commenter urged EPA to delete the recordkeeping requirements and instead require owners or operators to submit evidence of financial responsibility directly to the Agency. Since the Agency, as noted in Section III.Q, does not require the automatic submission of financial responsibility documentation, it has decided to retain the recordkeeping requirements under § 280.107.

Another commenter suggested that the certification of compliance be kept at the UST site, rather than at the place of business, and that it include the address of the corporate office where details would be maintained. The provisions of this section allow UST owners or operators to choose this recordkeeping option. However, as with the technical standard rule, off-site records must be made available on request of the implementing agency.

One commenter noted that compiling the annual letter from the chief financial officer supporting the use of financial tests or guarantees is unnecessary. The commenter suggested that this annual letter should not be required, especially since the certification of financial responsibility presents essentially the same information. Another commenter asserted that the certification of financial responsibility is unnecessary.

The Agency has decided to retain both requirements. Because EPA is not receiving financial responsibility reports on a regular basis, the Agency believes that requiring an annual letter from the chief financial officer may be necessary to further ensure the validity of various financial responsibility mechanisms. Moreover, the Agency notes that large firms, as a matter of standard business practice, routinely maintain the information required in the annual letter. Similarly, requiring the certification of financial responsibility will provide additional incentives for owners or operators to comply with the regulations at all times, and will not entail a substantial administrative burden.

One commenter argued that sending the chief financial officer's annual letter to all UST sites will present significant administrative burdens on some firms. The Agency agrees, and notes that the commenter might have misread the proposed rule, which allows owners or operators to maintain all documentation at either the UST site or the owner's or operator's place of business. However, off-site records must be made available upon request of the implementing agency.

One commenter questioned the need to maintain an originally-signed duplicate of the standby trust agreement at each UST location or place of business when it is adequate to maintain only a copy of the guarantee, surety bond, or letter of credit. Similarly, the commenter questioned the need to maintain an originally-signed duplicate of the insurance policy when it is adequate to maintain a copy of the certificate of insurance, especially since the commenter's policy contains confidential information not intended for widespread distribution. Requiring originals, the commenter asserted, would increase the paperwork burden exponentially for firms with large numbers of facilities. As an alternative, the commenter recommended that the Agency allow owners or operators to

keep copies at each location and be required to submit originals only in accordance with proposed (§ 280.106 or within 15 days of a written request by the Agency.

The Agency agrees with the commenter that requiring an originally-signed duplicate of the standby trust agreement and the insurance policy to be maintained at each facility is unnecessary. An owner or operator need not maintain an originally-signed duplicate of an insurance policy in order to draw on the policy; similarly, an owner or operator need not present an originally-signed copy of a standby trust in order to exercise the trust.

Consequently, the Agency has revised the final rule to require an owner or operator using a guarantee, surety bond, or letter of credit to maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement. In addition, an owner or operator using an insurance policy or RRG coverage is now required to maintain a copy of the signed insurance policy or RRG coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements.

The Agency also received two comments suggesting that including a list of specific tanks and tank numbers in the financial assurance mechanism is unnecessary. The Agency agrees with these comments and has revised the required wording of all mechanisms to reference each facility where covered USTs are located rather than a tank-specific list of USTs at each facility (see discussion under Section III.E of this preamble).

Pursuant to the changes outlined in Section III.T, owners or operators will not be required to maintain evidence of financial responsibility for one year after closure. Rather, owners or operators need only maintain such evidence until the date of closure or until corrective action is completed if a release is found at the time of closure.

S. Drawing on Financial Assurance Mechanisms (§ 280.108)

The proposed rule provided special procedures for funding and drawing on the trust fund and on the standby trust fund for those financial assurance mechanisms (guarantees, indemnity contracts, surety bonds, and letters of credit) that require action by EPA to initiate payment. The rule proposed procedures for EPA to follow in funding corrective action and paying valid third-party claims, while minimizing the administrative burdens on the Agency and owners, operators, and claimants.

For corrective action claims, the proposed rule required that an owner or operator who notifies the Regional Administrator of a release in accordance with proposed notification requirements (Subpart F of 40 CFR Part 280) must provide evidence of financial assurance within 30 days. Once EPA possessed the evidence of the assurance mechanism, the Regional Administrator would be able to prepare and submit the appropriate instructions to the provider of financial assurance to fund the standby trust, if necessary. If the owner or operator fails to conduct any necessary corrective action, the Regional Administrator can direct the provider to fund the standby trust and can direct payments from the fund.

The proposal provided different procedures for third-party compensation claims in § 280.108(b)(2) than were established for corrective action claims, because the UST owner or operator may contest a third-party compensation claim as invalid or inaccurate. In order to avoid EPA being placed in the role of a claims adjuster, the proposal required the owner or operator and the third-party claimant to submit a document signed by each party and by attorneys representing each party certifying the validity and amount of the claims. If the parties cannot agree on the claims or amount underlying the signed certificate, a lawsuit may be required to adjudicate the validity of the claim and any amount due.

In addition, § 280.108(c) of the proposed rule established procedures for the Regional Administrator to draw on the financial assurance mechanisms once estimates or known costs of corrective action and third-party claims are available. The rule required the Regional Administrator to instruct the trustee to pay corrective action costs before paying third-party claims in order to minimize further threats to human health and the environment and additional third-party claims caused by the release.

A number of commenters criticized the Regional Administrator's discretionary authority to fund the standby trust fund as too vague, especially in light of the Regional Administrator's apparent lack of training in technical and financial issues, his vulnerability as a political appointee to political pressures, and the lack of a mechanism by which a guarantor or indemnitor can appeal the Administrator's decision to fund the amount awarded. Some commenters thought that this loss of control over funds by financial institutions or other entities will discourage participation by such entities in providing financial assurance.

One commenter argued that providers of financial assurance will be reluctant to issue instruments if they believe they will have to process paperwork and follow the funding protocol even when their customers are financially capable of performing corrective action or paying third-party claims, or are able to obtain a substitute instrument. Apparently, providers of surety bonds and letters of credit carefully screen customers in order to minimize the likelihood that the instrument will ever be drawn upon; that is, these are truly intended to be "standby" instruments. As a solution, the commenter recommended that the 120-day cancellation provision be shortened, and that the instrument be drawn on only if substitute coverage has not been provided five working days before the instrument expires. This timeframe would lessen the probability that unnecessary paperwork and processing would commence and that cash would sit needlessly in trust funds requiring management by the trustee.

The essence of these comments is that the mechanism for funding the standby trust will diminish the availability of the financial assurance vehicles requiring establishment of a standby trust. In responding to these comments, as well as those discussed below, it should be noted that the Agency's desire to encourage the availability of a wide array of financial assurance vehicles under this rule is secondary to the Agency's mandate to assure that all financial vehicles will be readily available when a leaking UST is discovered. Thus, assuring the availability of funds for corrective actions must take precedence over marginally enhancing the availability of any one mechanism.

With respect to the commenters who thought that the Regional Administrator's role in ordering the funding of the standby trust or the disbursement of funds would impair availability or, worse, compromise the integrity of the financial assurance program, these comments greatly overstate the discretion accorded to the Director of the implementing agency (either the Regional Administrator or the state Agency director) under these regulations. The Director of the implementing agency is required to act only under clearly defined circumstances, and, other than for cancellations, only when the owner or operator does not cover the costs of corrective action and third-party liabilities. For example, the Director will require funding of and draw on the standby trust in three situations: (1) If

the owner or operator fails to establish alternative financial assurance within 60 days of notice of cancellation, and the Director of the implementing agency determines or suspects that a release has occurred and so notifies the owner or operator (evidence of a suspected release under § 280.50 includes positive monitoring results from testing, monitoring and sampling, unusual operating conditions, or the discovery of regulated substances in the environment); (2) if the Director determines that there is a release and the owner or operator fails to undertake necessary corrective action; or (3) if the Director receives proper certification of a third-party liability claim or a valid final court order for a third-party liability claim that the owner or operator fails to pay (§ 280.108(a)(2) in the final rule). Thus, while the Director is a critical participant, the provider of financial assurance and the owner or operator are intimately involved in the actions triggering funding of the trust, and ample notification accompanies each step.

One commenter seemed to argue that availability does not hinge on the Director's role so much as it is a function of the provider of assurance's aversion to risk and paperwork. According to this arugment, these mechanisms will be available only to owners and operators who have the ability to undertake corrective action and meet demands for third-party damages, but be jeopardized if it is likely that the standby trust might be funded, necessitating cost and paperwork.

In response, EPA notes that payment into the standby trust fund is not easily triggered, but occurs when cancellation of the financial assurance vehicle coincides with the likelihood of certainty of a release from an UST or when the owner or operator fails to carry out or pay for the actual costs of corrective action or fails to pay valid third-party claims. When an instrument is cancelled and there is a known or suspected release, questions of aversion to handling costs or red tape are clearly secondary to securing the availability of funds for corrective action. The only other circumstances under which the standby trust would be drawn upon are consistent with the commenter's concern; that is when the owner or operator truly fails to cover the assured costs. Further discussion of cancellation and notice is provided in Section III.P, above.

One commenter objected to the specific langauge in the proposed § 280.108(a)(1)(ii) that empowers the Regional Administrator to require funding of the standby trust if the financial assurance mechanism is cancelled and not replaced and if the Regional Administrator "determine or suspects that a release . . . has occurred," arguing that mere "suspicion" on the part of the Regional Administrator was not adequate ground for funding the trust. The commenter would amend this language to prevent the Regional Administrator from acting unless a determination has been made that a release has actually occurred.

The Agency cannot accept this restriction on the Director's authority to act on the suspicion that a release has occurred. EPA intends that this suspicion be based on objective evidence, such as failure of a tank tightness test, discovery of free product in adjacent sewer and utility lines, notice by the owner or operator, or other clear but unverified evidence. Further, the suspicion must be coupled with the cancellation and nonreplacement of the financial assurance mechanism as described above. In this case, there would be no new assurance mechanism to take over when the cancellation becomes effective, leaving the owner or operator potentially unable to fund corrective action and third-party liabilities arising from release that occurred before the cancellation.

Finally, a number of commenters misunderstood the workings of the provision. One commenter thought that EPA should not propose procedures to evaluate third-party claims, but, rather, should allow the parties themselves or the courts to settle claims. An insurance company association commented that the language suggested that the owner or operator may settle a claim with a potential claimant without consultation with the insurer, thus placing the insurer in the position of indemnifying any claim, no matter how frivolous, if the owner or operator chooses to settle. An insurance company commenter requested that the standby trust provision be clarified to prevent its application to insurance entirely.

In response, the Agency notes that the claims for third-party damages are settled by the parties themselves, with full access to the courts if unresolved issues remain. The regulations simply provide a mechanism that expedites settlement of claims made against the funds held in trust if the parties agree on the details of the settlement. It is unlikely that insurance companies will be providing surety bonds, guarantees, or letters of credit, but if they do, issues concerning any alleged breach of duty by parties to the agreement are the province of the legal system, not the Director. Finally, the regulations state clearly that the provisions of the standby trust do not apply to insurance policies.

After reviewing all of the comments on drawing on the financial assurance mechanisms, EPA has concluded that only two changes should be made to § 280.108 as proposed. All references to the Regional Administrator have been changed to the Director to clarify that these responsibilities are delegated to the Director of the state implementing agency in authorized states. In addition, the standby trust is only required for guarantees, letters of credit, and surety bonds because indemnity contracts are not included as an allowable mechanism in the final rule.

T. Release From the Requirements (§ 280.109)

Under the proposed rule, owners and operators were released from the requirements after completion of closure or, if corrective action was required, after the tank was properly closed and after completion of corrective action. The preamble to the rule, however, discussed the Agency's intention to require owners and operators to comply with the requirements for one year after closure. Many commenters objected to the possibility that owners or operators who properly close their tanks would be subject to the requirements for one year after closure. These commenters pointed out that there is no need to require coverage after closure because corrective action, when required, must be taken before closure, and because they believe that insurers are unlikely to insure owners and operators after tanks are closed.

Commenters indicated that it is unlikely that financial assurance providers will provide coverage after tank closure. The Agency recognizes that this is the case. The closure requirements in Subpart G of the technical standards specify a closure process that requires owners and operators to notify the Director of the implementing agency before closure, and conduct a site assessment. If releases are identified, the owner or operator must conduct corrective action and the tanks cannot be closed until corrective action is completed. This process will ensure that closure is not completed until any releases from the petroleum UST system have been cleaned up.

Therefore, the Agency has determined that the need for financial assurance will be greatly diminished after corrective action and closure are

completed and will not require owners and operators to maintain financial assurance after proper closure of their tanks. Under the final rule, owners and operators are released from the requirements after completion of closure or of corrective action and closure, when required.

U. Bankruptcy or Other Incapacity of Owner or Operator or Provider of Financial Assurance (§ 280.110)

The proposed rule required that any owner or operator named as a debtor in voluntary or involuntary bankruptcy proceedings (under Title 11 of the U.S. Code) notify the Regional Administrator within 10 days after commencement of such proceeding. In addition, the proposed rule required a guarantor or indemnitor to notify the owner or operator by certified mail within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) of the U.S. Code that names such guarantor or indemnitor as debtor. The proposed rule stipulated, furthermore, that any owner who demonstrated financial responsibility using a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of a provider to issue a guarantee, indemnity contract, surety bond, insurance policy, risk retention group coverage policy, letter of credit, or state-required mechanism. Finally, proposed § 280.110 required states to notify the Regional Administrator and owners and operators covered by a state fund or other state assurance within 30 days after the assurance mechanism becomes incapable of covering assured costs. The proposed rule adopted the provision in Subtitle C rules for the incapacity of owners or operators, guarantors, or financial institutions (see §§ 264.148 and 265.148), but amended the language to make it more applicable to the requirements for Subtitle I financial responsibility.

One commenter doubted whether an owner or operator would be informed within 10 days after the commencement of bankruptcy of a provider of assurance to notify EPA of the bankruptcy. The commenter suggested that this requirement be eliminated.

The commenter appears to have misread the rule. Proposed § 280.110 required a guarantor or indemnitor to notify the owner or operator by certified mail within 10 days after commencement of a voluntary or involuntary bankruptcy proceeding naming the guarantor or indemnitor as a debtor. (As noted in Section III. G of today's preamble, indemnity contracts cannot be used to satisfy the financial responsibility requirements.) An owner or operator, in accordance with § 280.106, must notify the Director of the implementing agency of the incapacity (e.g., bankruptcy) of a provider of financial assurance only if the owner or operator fails to obtain alternate assurance within 30 days of receiving notice of such incapacity.

The Agency, therefore, has decided to promulgate these provisions as proposed.

V. Provisions Pertaining to Other Instruments (§ 280.111)

1. Maintaining Other Instruments at Required Levels of Coverage

If the Director of the implementing agency requires funding of the standby trust where financial assurance is provided by a guarantee, letter of credit, or a surety bond, and draws on the standby trust or on a trust fund to pay the cost of corrective action or third-party damages, the full amount of assurance required by § 280.93 will no longer be available. The proposed regulations did not specify the steps the owner or operator had to take to assure that his financial responsibility obligations were being met after one of these mechanisms had been used. While the need to take these steps was implicit in the proposed rule, the Agency is making a technical addition to the rule to clarify precisely how the mechanisms would be implemented. Accordingly, a new section has been added to the final financial responsibility regulation (§ 280.111) establishing requirements for replenishing a guarantee, letter of credit, surety bond, or trust fund if the assurance these mechanisms provide falls below the required amount.

These new provisions provide that, if the amount in the standby trust is reduced below the full amount of assurance required, the owner or operator shall:

(1) By the anniversary date of the financial mechanism from which the funds were drawn,

(2) Replenish the value of financial assurance to equal the full amount of assurance required, *or*

(3) Acquire another financial assurance mechaism for the amount by which funds in the standby trust have been reduced.

If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms. This new section provides needed instruction for the Director of the implementing agency and the owner or operator, and, more importantly, ensures that an adequate level of funding will be available for corrective action and payment of third-party damage claims.

2. Exclusionary Language for Other Instruments

The language of the instruments for guarantees, letters of credit, surety bonds and trust funds in today's rule contains a provision that they do not apply to certain categories of damages or obligations. These exclusions are patterned on existing standard exclusions found in insurance coverage, and are intended to ensure that the coverage is not exhausted by the payment of claims that are covered by other compensation systems or that are otherwise not intended to be included within the scope of coverage. The five exclusions do not represent all common insurance policy exclusions, but were selected because they were considered most relevant to the financial assurance mechanisms for liability required under Subtitle I. In commenting on specific mechanisms, some commenters were concerned about the possible uses for the mechanisms or the Director's perceived discretion in ordering payments from the standby trust. Incorporating this exclusionary language will ensure more certainty for the owner or operator and for the provider that these mechanisms will be used only for costs associated with UST releases, as the rule requires.

The exclusions, with one exception, parallel exclusions that are being proposed for instruments under Subtitle C. The purpose of adding these exclusions to Subtitle C instruments is similar to the purpose under Subtitle I, to ensure that coverage provided by the instruments will be available only to respond to corrective action and third-party claims related to releases from underground storage tanks and will not be available to cover routine accidents not related to USt releases or claims for damage to the owner or operator, or to meet other liabilities assumed by the owner or operator which are unrelated to UST releases. The Subtitle C exclusion, however, excludes damage to the property of the owner or operator. While permissible for Subtitle C liability requirements because only third-party damages must be covered, such an exclusion would be inappropriate for Subtitle I because coverage for corrective action is explicitly required. Accordingly, EPA is providing a limited form of on-site exclusion which prevents use of funds to cover non-required

corrective action (e.g., cleanup which would be part of routine maintenance and not subject to Subpart F of the technical standards).

Exclusion (a), for obligations under workers' compensation, disability benefits, or unemployment compensation law or similar law, is intended to prevent the use of Subtitle I financial assurance mechanisms to cover such claims.

Exclusion (b), for bodily injury to the employees of the owner or operator, is also intended to ensure that such claims are not covered by assurance mechanisms obtained to comply with this rule.

Exclusion (c), for bodily injury or property damage arising out of the ownership or use of any aircraft, motor vehicle, or watercraft, is to prevent use of an authorized financial assurance mechanism for routine accidents that are not directly related to management of underground storage tanks.

Exclusion (d), for property damage other than that related to cleanup as required by under Subpart F of the technical standards, is intended to prevent use of the instruments' funds to meet other on-site cleanup costs such as those for routine maintenance.

Exclusion (e), for bodily injury or property damage for which the owner or operator is obligated to pay damages by reason of the assumption of liability in a contract or agreement, is intended to exclude liabilities assumed by contract that do not involve the ownership or operation of the underground storage tank. It does not exclude settlements or other agreements to pay damages in connection with accidental occurrences resulting in bodily injury or property damage caused by releases from underground storage tanks.

W. Suspension of Enforcement (§ 280.112)

1. Statutory Authority

RCRA section 9003(d)(5)(D) authorizes the Administrator to suspend enforcement of the financial responsibility requirements for particular classes or categories of USTs. Suspensions of enforcement may allow time for owners and operators of USTs in particular classes or categories or located in particular states to obtain assurance for corrective action and third-party compensation costs. Because some owners or operators of certain classes or categories of USTs may find that financial assurance mechanisms are not generally available on the date set for compliance in the rule, suspensions would allow these owners and operators time to comply with the requirements through the formation of RRGs or the establishment of state funds.

The statute requires that, to suspend enforcement, the Administrator must determine that (1) methods of financial responsibility are not generally available for USTs in the class or category; and (2) either steps are being taken to establish a RRG for that class of tanks or a state is taking steps to establish a corrective action and compensation fund under RCRA section 9004(c)(1). A suspension of enforcement may not exceed 180 days. The Administrator has the discretion to suspend enforcement for a period of less than 180 days.

After an initial suspension expires, the Administrator may again suspend enforcement of financial responsibility requirements, but only if (1) methods of financial responsibility are still not generally available, and (2) either (a) "substantial progress" has been made in establishing a RRG; or (b) the owners or operators of USTs belonging to the class or category demonstrate, and the Administrator finds, that the state is unable or unwilling to establish a fund *and* formation of a RRG is not possible.

EPS proposed relatively detailed procedures and criteria for its consideration of suspension applications. EPA requested comment on all aspects of the proposed suspension of enforcement procedures and on any alternative procedures.

2. Suspension of Enforcement Process

A number of commenters stated that the proposed requirements were unnecessarily complex and burdensome. They urged the Agency to simplify the procedural requirements associated with suspension of enforcement. (A detailed summary of these comments is contained in the Response to Comments document, Section II.T., in the docket.) Based on these comments and the enormous uncertainty over the number of suspension applications the Agency will receive on the dates set for compliance, the Agency has decided to defer promulgation of the final procedures for suspension of enforcement. Therefore, this section is not included in today's final rule; EPA intends to promulgate final suspension procedures as necessary in the future.

As noted earlier, the regulated community subject to these rules is extremely large. Due to current constraints in the insurance industry and the assurance risks associated with the existing tank universe, there is also a correspondingly large universe of USTs for which financial assurance is currently available. However, EPA is today phasing in these requirements over two years and recognizes that the availability of certain financial assuance mechanisms (particularly state funds) may change dramatically during that time. Moreover, some states may receive approval to operate their programs in lieu of the Federal UST program as the compliance dates arrive. As a result of these factors, there is significant uncertainty over whether, and to what extent, suspension of enforcement will be necessary in the future. Thus, it is impossible for the Agency to craft appropriate procedures for implementing the provision in a manner that is at the same time consistent with statutory requirements, responsive to the regulated community, and not an overwhelming burden on the Agency.

During the phase-in period, the Agency will gain experience with implementation of the UST financial responsibility program and gather additional information on the form that suspension of enforcement petitions should take. This will serve as the basis for adopting procedures, if necessary, before the scheduled compliance dates for the largest group of UST owners and operators. Until such procedures are promulgated, however, the Agency does not intend to exercise its discretionary suspension authority.

IV. Integration with Other EPA Programs

In promulgating the Subtitle I financial responsibility requirements, the Agency received a number of comments concerning integration of these requirements with other EPA program, including other Subtitle I rulemakings and the LUST Trust Fund programs.

A. Other Subtitle I Rulemakings

The proposal noted that certain requirements in other Subtitle I rulemakings were relevant to UST financial responsibility requirements. One set of relationships raised in the preamble was the influence of UST technical standards on the cost of corrective action and third third-party liability, and on the amounts of aggregate coverage needed. Early detection or reduction in the probability of release will reduce the occurrence and extent of harm, thus influencing coverage. These relationships were the subject of numerous comments addressed in Section III.D of this preamble concerning aggregate levels of coverage.

Numerous comments raised other significant concerns about the relationship between the technical and financial responsibility requirements. Commenters were concerned about the

impact providers of financial assurance would have on tank upgrading and replacement vis-a-vis the proposed phasing of requirements in the technical standards rule. For example, several state and local governments addressed the relationship between the content and timing of the proposed technical UST requirements and the financial requirements, primarily the securing of insurance. They thought that insurance would become more readily available and less expensive if tank inspection and certification were required first since insurance companies generally attached these conditions to coverage. However, they were surprised that the Agency's timeframe for bringing tanks into compliance with new tank standards was so long in view of the relationship between tank upgrading and inspection and availability of insurance.

Some went further, stating that the insurance industry via the financial responsibility requirements would be determining the technical tank standards, and that this incongruity was a major philosophical and logical flaw in the regulations. Rather, technical considerations should drive the construction and monitoring standards; then, with tougher tank standards, the financial responsibility requirements cna be significantly curtailed. Furthermore, they argued that the heavy reliance placed by Congress and EPA on financial responsibility was not consistent with the goal of Subtitle I to prevent contamination of ground water. Instead, consideration should be given to expanding efforts in preventing contamination, which should be the objective of regulation, rather than environmental reclamation after the fact.

Commenters from the regulated community made approximately the same comment as the above, noting that meeting conditions imposed by insurers for tank tightness and leak detection will force tank owners and operators to meet technical standards when the financial responsibility requirements become effective, despite the later compliance schedules under the technical standards.

Drawing a blunter economic relationship between the financial responsibility and the technical requirements, these commenters stated that the money spent on insurance would be unavailable for tank upgrading where, they reasoned, it would be better spent. One commenter concluded that a conservative UST technical program and the state-of-the-art UST manufacturing and installation techniques currently available will substantially reduce, if not eliminate, the need for excessive financial responsibility in most cases.

Commenters from states and the regulated community argued that the timing and content of the technical and financial responsibility regulations will result in remediation, rather than prevention, being the dominant consideration behind UST control, and in the providers of financial assurance specifying the technical requirements for tank owners and operators as a condition for coverage. The states and owners and operators apparently differ on how each would correct this situation. The states would strengthen the technical requirements and reduce the financial responsibility requirements, whereas commenters from the regulated community would substitute state-of-the-art technical requirements for all financial assurance requirements.

EPA does not believe either correction is necessary. EPA does not agree with the assumption that the technical and financial responsibility rules are necessarily competing alternatives, and in its final rules has attempted to interrelate the two more clearly.

Congress specified that financial responsibility under section 9003 (c) and (d) of RCRA could be required at the discretion of the Administrator. SARA amended these provisions to mandate financial responsibility coverage and to provide a response program for petroleum UST releases. Congress did not present these amendments as alternatives to technical specifications for USTs. The sections of this comprehensive legislation cannot be viewed in isolation, but must be viewed as a whole; the overall goal of the legislation is to reduce the unacceptable risk to human health and the environment posed by thousands of UST leaks through prevention and assuring quick response when leaks occur.

Both the technical and financial responsibility requirements are preventive in nature. Neither would be totally preventive of harm to the public health and environment in itself, but in conjunction they will assure a high degree of protection. The direct control of leakage from USTs is obviously a preventive strategy, but is not foolproof. The funds assured through the various mechanisms permitted in this rulemaking establish a safety net that finances immediate and thorough corrective action when a release does occur and before the spread of contamination. If the provider of assurance also places demands on the owner or operator for technical controls, this strengthens protection of public health and the environment by increasing the incentive for tank upgrading and replacement as well as assuring funds for corrective action and third-party liability.

Phasing in compliance for the financial responsibility requirements brings this compliance schedule more into balance with the compliance schedule for the technical requirements. The Agency projects that many owners and operators will begin to comply with the technical standards early in the phased-in schedule for tank testing and upgrading or replacement. These tanks will represent low-risk USTs and thus financial assurance, particularly insurance, should be available for them at a lower cost than for pre-regulation tanks.

The Agency recognizes that there might be continuing concern because the timeframes for the two regulations are not the same; however, EPA cannot wait until all technical requirements are in place before imposing the financial responsibility rules. The result of further delay would be an unduly long period of time during which many members of the regulated community would have no financial assurance and could be unable to afford the cost of cleanup or liability. Moreover, longer delay would provide little incentive to states and insurance providers to develop mechanisms that will be needed to comply with the rule.

Several commenters claimed that the burden of complying with financial responsibility requirements would force owners and operators to move tanks aboveground and, thus, that the final rules should contain criteria that help the changeover to aboveground systems. For example, commenters suggested that an owner or operator's commitment to move tanks aboveground over a specified period of time should trigger an exemption from interim requirements for leak detection. Small businesses would be especially likely to install aboveground petroleum tanks in place of USTs. Because these tanks would pose significant hazards to facility personnel, local communities, and the environment, the commenters went on to urge the Agency to assess the consequences of this scenario before promulgating a final rule, and, meanwhile, to exempt small businesses not involved in petroleum marketing from financial responsibility requirements.

The Agency feels that moving tanks aboveground is not necessarily a problem if done in compliance with applicable state and local requirements.

Any tank removed from underground to aboveground must meet the same closure requirements under Subpart G as any other tank that is taken out of service or permanently closed. No reasons have been put forth by commenters for why financial assurance requirements should be waived for owners and operators who intend to withdraw tanks from coverage under these regulations in the future. In addition, because numerous jurisdictions already stringently regulate or prohibit aboveground tanks, the Agency suspects that moving tanks will not present as appealing an alternative to leaving the tanks underground and providing mandated protection. Therefore, EPA has not provided an exemption from these requirements for tanks that may be moved aboveground.

Finally, two suggestions were submitted that would relate technical and financial requirements. One commenter suggested that a financial credit should be available to owners and operators who installed secondary containment with continuous interstitial monitoring, thereby minimizing the potential for leak occurrence and attendant cleanup costs and third-party damages. However, EPA has rejected the use of such credits, as discussed in Section III.D, above.

The second mechanism consists of a new federal fund, financed by a sales tax on petroleum products, to be collected and used by states as a state cleanup fund. One condition on the fund is that owners and operators would have to register tanks with the state environmental department within 90 days, with failure to comply triggering the need to supply proof of insurance and/or net worth as prescribed in the proposed financial responsibility regulations. However, the only available federal fund, the LUST Trust Fund under section 9003(h), was created to provide cleanup of UST releases in particular circumstances. Congress did not authorize its use as a financial assurance mechanism. Rather the fund is intended to "stand behind" the owner or operator who has obtained financial responsibility in the required amounts. SARA Conference Report H. Rep. 99-962, 99th Cong., 2nd Sess. at 271.

B. Leaking Underground Storage Tank (LUST) Trust Fund and Response Program

Because the LUST Trust Fund and the financial responsibility program are closely related, the comments proposed a wide range of uses for the Fund. Several commenters stated that the final regulation should require states to use the Trust Fund to cover costs in excess of financial responsibility limits where the owner or operator has complied with all regulatory and financial responsibility requirements. In support, the commenters cited the Agency's discretion to forego full cost-recovery in section 9003(h)(6)(B) and the potential incentive this provision might give owners and operators to secure financial responsibility and report leaks promptly, as reasons why the final rules should specify such a condition on use of the Trust Fund.

Several additional uses of the Trust Fund were suggested. One commenter encouraged EPA to allow use of Trust Fund monies in cases where a leak occurs at the site of an owner or operator who belongs to a class against which enforcement has been suspended. Another commenter suggested that the Trust Fund could be used to repay RRGs for payments for deductibles. To offset these costs to the Fund, the RRG would require protection beyond that required by the final regulations (e.g., secondary containment). Another commenter objected to the requirement that an insurance company must pay the deductible for a company in bankruptcy, because if the Trust Fund were used for such purposes, the U.S. Government would be a preferred creditor in bankruptcy, whereas an insurance company making the payment would be non-preferred.

A state commenter argued that Trust Fund money should not be given only to states with approved UST regulatory programs. The commenter stated that the Trust Fund and the regulatory program were created separately and should remain so; that the loss of Fund monies would place a major financial burden on states with marginal capability to fund the base program; and, furthermore, that the environment and public health would be jeopardized by not using the Trust Fund separately from the regulatory program, as designed by Congress. Mayors could tap into the Fund if EPA would require, as part of state program approval, that the state program provide direct municipal access to the Trust Fund for cleanup and oblige the state to address other local concerns. In addition, the commenter urged EPA to seek authority to use the Fund as a source of grants to develop local programs.

With respect to the numerous and varied uses of the LUST Trust Fund offered in the comments, as noted earlier, Congress has authorized use of the Fund to pay corrective action costs only under limited and specifically defined circumstances. After final regulations on the technical standards and financial responsibility go into effect, Fund monies can be used to pay for corrective action only in the following situations:

(1) An owner or operator who is required to undertake the corrective action and who is capable of carrying out corrective action properly does not exist or cannot be identified;

(2) Prompt action by the Administrator (or state) is necessary to protect human health and the environment;

(3) The financial resources of the owner or operator, including any UST financial assurance, are inadequate to pay the entire cost of the corrective action, and expenditures from the Fund are necessary to assure effective corrective action; or

(4) An owner or operator has failed or refused to comply with an order to perform corrective action.

Section 9003(h)(11) explicitly prohibits the expenditure of Fund monies for corrective action at any facility where the owner or operator has failed to maintain evidence of financial responsibility in the required amounts, except (1) in cases where there is no solvent owner or operator, or (2) in cases where immediate action is necessary to respond to an imminent and substantial endangerment of human health or the environment, or (3) to undertake an "allowable corrective action" to protect human health. (Section 9003(h)(5) defines these allowable corrective actions to include "temporary or permanent relocation of residents and alternative water supplies" and exposure assessments undertaken to protect human health.)

One result of these requirements is the preclusion of many of the alternative uses for the Fund suggested by commenters. Specifically, EPA does not agree that the state should be required to use the Trust Fund to cover costs in excess of the financial responsibility requirement. While the statute clearly allows the state to use the Trust Fund in such a situation, the decision should be made on a case-by-case basis at the discretion of the state. EPA also does not agree with commenters who suggested that the Trust Fund be used to (1) repay RRGs for payments for deductibles, and (2) to pay deductibles for companies in bankruptcy. Owners and operators are expected to maintain evidence of financial responsibility and pay the costs of their releases. Congress intended the Trust Fund to stand behind an owner or operator who obtained assurance to meet the financial responsibility requirement and, as indicated above, is to be used in instances where the cost of corrective action exceeds the level of financial responsibility required to be maintained.

In response to the comment that Trust Fund money should not be given to states that do not have approved UST regulatory programs, the Agency wants to emphasize that the negotiation of state cooperative agreements for use of the LUST Trust Fund is proceeding on a path separate from the approval of state programs. However, EPA has decided to make a link between the LUST Trust Fund and UST regulatory program to ensure that future contamination is minimized. After the effective date of today's final rule, a state's success in making reasonable progress toward submitting a completed application for state program approval may be grounds for increasing state access to the Trust Fund in fiscal year 1990 and thereafter.

In response to the commenters urging that the Trust Fund be made directly available to local governments, EPA's cooperative agreement process involves states negotiating arrangements for proper use, recovery, and accounting of Trust Fund money with EPA. The municipalities are not parties to these negotiations and will need to rely on the state to implement a sound and effective program for the use of the Trust Fund for corrective action. The statute does not provide for any direct EPA/municipality arrangement.

Finally, as discussed in Section III.W of this preamble, the Agency has decided to defer promulgation of final procedures for suspension of enforcement. Until such procedures are promulgated, the Agency does not intend to exercise its discretionary suspension of enforcement authority. At that time, the Agency will address the use of LUST Trust Fund monies to respond to releases from tanks whose owner or operator is a member of a class which has been granted a suspension of enforcement.

V. State Program Approval

A. Background

Section 9004 of RCRA allows any state to submit an underground storage tank regulatory program for review and approval by EPA. An EPA-approved state UST regulatory program will operate "in lieu of" the Federal program. The Agency may approve the state program if the state demonstrates that its program (1) imposes requirements that are "no less stringent" than the Federal release detection, prevention, correction, and financial responsibility requirements; and (2) provides for adequate enforcement of compliance with such requirements.

B. Financial Responsibility Objective (§ 281.37)

In its final State Program Approval rule (53 FR 37212, September 23, 1988), EPA promulgated criteria for state program approval in the form of objectives for seven of the technical program elements in the final technical standards rule (53 FR 37082, September 23, 1988): New UST system design, construction, installation and notification; upgrading existing UST systems; general operating requirements; release detection; release reporting and investigation; corrective action; and out-of-service and closed UST systems. The eighth objective for financial responsibility of owners and operators of petroleum UST systems is promulgated in today's rule.

These objectives represent the Agency's expectations of what constitutes a no-less-stringent state program. By requiring the state to achieve the objectives underlying the detailed Federal requirements in each element rather than match each regulatory detail of the Federal requirements, EPA provides a performance-based measure for evaluating programs and recognizes that the precise details in the Federal program are not the only feasible approach to UST regulation. By establishing these objectives, EPA also provides a framework for approval that guarantees that each state UST program provides a minimum level of protection.

An important objective of the Federal program is that owners and operators of UST systems containing petroleum have adequate financial responsibility to undertake corrective action and meet third-party liability claims. The Federal law mandates $1 million per occurrence with appropriate aggregate amounts as the minimum level of assurance needed by most owners and operators of petroleum UST systems to meet cleanup and liability costs. Today's Federal financial responsibility rule allows an exception for certain classes of owners and operators who store small quantities of petroleum for purposes other than selling it as a product. More specifically, owners and operators not engaged in petroleum production, refining, or marketing and who have a throughput of 10,000 gallons or less per month are required to have only $500,000 per occurrence for corrective action and third-party liability claims. In addition, the financial responsibility rule sets the aggregate amounts at $2 million for owners and operators with more than 100 UST systems, and $1 million for those who have 100 or fewer UST systems. Finally, the financial responsibility requirements will be phased-in over a 24-month period from the date of promulgation for different groups of owners and operators. In order to be no less stringent than the Federal requirements for financial responsibility for USTs containing petroleum, the state must have requirements for owners and operators to have financial assurance and for the types of mechanisms used to provide that financial assurance.

The Agency received comments in support of the holistic approach to determining no less stringent state programs, particularly because such an approach would enable a state to trade-off more stringent technical requirements with less stringent financial requirements, for example, lower amounts of financial responsibility. While the Agency understands that states may experience difficulty in obtaining statutory or regulatory authority to require $1 million in coverage, that amount was established by Congress in Subtitle I and EPA believes it does not have the flexibility to lower that level of coverage as part of the Federal program or as part of state program approval.

The first aspect of this objective (§ 281.37(a)) concerns the amount of financial assurance, both per occurrence and in aggregate, that an owner or operator must have. First, the state must have a statute or regulations that require an owner or operator to have at least $1 million or $500,000 per occurrence and $1 million or $2 million in aggregate, depending on the size and type of the operation. This requirement follows directly from the Federal financial responsibility regulations for petroleum-containing UST systems.

The Supplemental Notice published on December 23, 1987 (52 FR 48644) included an objective for financial responsibility; however, aggregate levels were not included in the proposed objective. To remain consistent with the Federal requirements for financial responsibility, the Agency today is promulgating the final objective with a requirement that the owner or operator have financial assurance in appropriate aggregate levels. Addition of the aggregate is necessary to ensure that approved states require an adequate level of coverage. The aggregate level varies depending on the number of tanks owned or operated. Owners and operators with 1 to 100 tanks must have an aggregate level of coverage of $1 million and those with more than 100 tanks must have an aggregate level of coverage of $2 million. The final objective establishes the same levels of coverage. Further discussion on pre-

occurrence and aggregate levels of coverage can be found in today's preamble at Section III.D.

The second aspect of this objective (§ 281.37(b)) concerns the phase-in compliance schedule for owners and operators. The objective proposed on December 23, 1987 (52 FR 48644) did not include a provision for a phase-in schedule. This provision is being added to be consistent with decisions made following the Supplemental Notice to the proposed rule for financial responsibility for petroleum USTs that was published in the Federal Register on March 31, 1988 (53 FR 10401). In today's final financial responsibility rule, EPA has decided to phase-in compliance over 24 months from the date of promulgation at all UST systems following a schedule based on net worth and the number of tanks owned. Although EPA recommends that a similar approach be used by state programs, the Agency has decided to allow flexibility in the objective for states to use other phase-in approaches provided that the schedule is completed in 24 months. Approaches that allow all of the regulated community to wait until the end of the 24-month period would not be accepted as an orderly schedule.

The third aspect of this objective (§ 281.37(c)) concerns the variety of financial mechanisms that may be used by owners and operators to demonstrate adequate financial responsibility. The Federal financial responsibility rule allows a wide variety of mechanisms and combinations of mechanisms to be used. The state may also allow a variety of financial mechanisms to be used. To determine whether state-allowed or required mechanisms are no less stringent than the Federal requirement, general criteria have been established that are applicable to all financial mechanisms. By establishing these criteria in the Federal objective, the Agency believes that it is unnecessary for the state to have detailed requirements for each mechanism affected by these criteria for purposes of state program approval. However, EPA encourages states to adopt the financial responsibility regulation, especially the language of each mechanism, since they have been developed and tested to ensure that adequate financial responsibility will be available when necessary. For example, the state will not be expected to demonstrate that its regulations require a surety company to state in a bond that the bond cannot be cancelled during a 120-day period following notice of cancellation of the bond to the owner or operator. The state must, however, be able to draw on the funds assured by the bond before cancellation occurs. The state regulations must ensure that the time period before the effective cancellation of the bond provides ample opportunity for the state to assess the facility, determine if a release has occurred, and, if needed, draw funds from the instrument. In this way, the Federal objectives for financial responsibility for UST systems containing petroleum are met.

Section 9004(c)(1) of Subtitle I allows states to set up a fund that may be used to meet the no less stringent requirement for financial responsibility. The state may choose to establish a state fund to provide financial assurance for certain classes of owners and operators or for all owners and operators. The general criteria for state funds are represented in the objective (§ 281.37(a) and (c)); these criteria are essentially the same as the requirements for state funds set out in the Federal financial responsibility rule in § 280.100. Further discussion on state funds and their use in providing financial assurance will be available in guidance due to be issued this fall by EPA. A briefer discussion can also be found in EPA's *State Program Approval Handbook.*

Some commenters expressed concern that the requirement that states have a financial responsibility program that is no less stringent than the Federal program in order to receive state program approval will delay approval of state programs. The commenters stated that complex financial responsibility requirements could discourage states from submitting UST programs for approval. They urged that EPA promulgate a simple financial responsibility framework and provide guidance to the states.

As explained above, the requirement that an approved state program contain financial responsibility requirements that are no less stringent than those under the Federal program is required by RCRA Section 9004. However, EPA has developed an approach to state program approval that provides states as much latitude as possible consistent with the statute in adopting approaches to fulfill the requirement. The Agency recognizes the difficulties for states in developing financial responsibility programs and is preparing detailed guidance and outreach assistance to states to help them develop their programs.

A more complete analysis of issues regarding state program approval is presented in the preamble to that rule (53 FR 37212, September 23, 1988).

VI. Compliance Monitoring and Enforcement

Although not raised as an issue in the proposal, implications of the proposed rules for compliance monitoring and enforcement activities received considerable comment. Many of the comments were submitted by states.

In general, the comments note that performing compliance monitoring and enforcement for financial responsibility rules will place a heavy resource burden on the states. Moreover, some states are currently understaffed while others apparently have little experience with the options for demonstrating financial responsibility and would have difficulty evaluating them. Also, the proposed requirement for maintaining financial responsibility for one year after tank closure would be difficult to enforce, especially if the business is sold, closes, or goes bankrupt.

Some states noted that, if the states will be responsible for implementation of the financial responsibility program and will not be provided funding, then EPA should not have a strong oversight role or stringent requirements for state program approval. Another state commenter reads the proposed section on reporting, which requires owners or operators to send evidence of financial responsibility to the Regional Administrator, to mean that EPA will administer the entire financial responsibility program.

A number of non-governmental commenters also noted the enormous burden that ensuring compliance for such a large universe would entail, with some offering approaches to enhance compliance and enforcement. One approach suggested by several commenters is that EPA collect evidence of financial responsibility from all owners or operators through periodic reporting; for example, using the Tank Notification Program to provide the basis for annual notification of compliance with financial responsibility requirements. Other commenters suggested that proof of financial responsibility be made a condition to obtain an annual operating permit. Another suggested that enforcement would be enhanced if the scope of these complicated rules could be clarified using the following techniques: (1) Workshops, (2) fact sheets, (3) more detailed summaries, and (4) condensed versions of the regulations.

Virtually all of the comments evidence both justifiable concern that performing compliance monitoring and enforcement for such an enormous regulated community presents a formidable

challenge and considerable confusion about EPA's program for dealing with this challenge. The Agency believes that UST requirements can best be implemented if the program is delegated to the states and localities. In a companion rule to the financial responsibility rules, EPA has set forth the requirements and approval procedures for state UST programs (53 FR 37212, September 23, 1988). States with approved programs will have primary enforcement responsibility for their own UST programs. Under this rule, EPA has provided states as much flexibility as possible to develop their own approach to UST regulation and implementation consistent with statutory requirements.

Thus, in response to state concerns, the Agency will be allowing each state seeking program approval considerable latitude in establishing the details of an enforcement program. Although Federal law mandates certain elements of the financial responsibility requirements (e.g., the one million dollar minimum level of assurance), the Federal program not only allows a wide variety of mechanisms, but allows the states to develop their own financial mechanisms (e.g., state funds) to meet these requirements. In short, contrary to the concerns expressed in the comments, EPA intends that, over time, states will assume primary responsibility for the UST program and will also have considerable ability to tailor their programs to each state's experiences and resources.

States could adopt more stringent provisions, such as reporting requirements, than are established in the Federal requirements, or they could adopt any of the mechanisms for assuring compliance that have been submitted in comments. Although EPA believes that the event-based reporting requirements finalized today are sufficient to ensure compliance by the regulated community and to provide timely information to the implementing agency for compliance monitoring, states can and, in many instances, have imposed annual notification requirements on owners or operators.

In addition to assisting the states seeking approval with the development of their programs, EPA will be providing the regulated community with extensive compliance outreach materials, which should include materials targeted to the needs of the large and diverse UST population. A secondary benefit of compliance outreach should be a higher degree of awareness of these regulations and a greater level of voluntary compliance, thus easing the enforcement burden on the states.

VII. Economic and Regulatory Impacts

A. Regulatory Impact Analysis

1. Compliance with Executive Order 12291

Sections 2 and 3 of Executive Order 12291 (46 FR 131393, February 19, 1981) require that a regulatory agency determine whether a new regulation will be "major" and, if so, that a regulatory impact analysis (RIA) be conducted. A major rule is defined as one that is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has conducted an RIA of the Subtitle I financial responsibility requirements for petroleum-containing underground storage tanks. Based on this analysis, the Agency has concluded that this regulation may have annual costs of greater than $100 million. Therefore, the regulation promulgated today is a major rule, as defined by E.O. 12291. The following six sections summarize the results of the RIA: Section 2 describes the integration of the technical standards and financial responsibility RIAs; section 3 describes the regulated community affected by this regulation; section 4 presents some of the methods and assumptions used to produce the financial responsibility RIA; section 5 presents EPA's estimates of the present value of real resource costs; section 6 discusses the regulation's economic impacts; and section 7 describes its potential benefits.

2. Integration of the Financial Responsibility and Technical Standards Regulatory Impact Analyses

Under section 9003 of Subtitle I of RCRA, the Administrator of EPA is required to promulgate both technical and financial responsibility requirements for USTs. The RIA described here presents the costs, economic impacts, and benefits associated with the UST financial responsibility requirements. A separate RIA assesses the costs, economic impacts, and benefits of the technical standards (53 FR 37212, September 23, 1988).

The results of the RIA for the financial responsibility regulation are presented both in terms of the incremental costs and economic impacts of the financial responsibility requirements (the additional costs and impacts that owners or operators complying with the technical standards will absorb to comply with the financial responsibility requirements) and in terms of the total costs and economic impacts associated with the imposition of the technical standards and the financial responsibility requirements. (The benefits of the technical standards and the financial responsibility requirements were not integrated because these two regulations have different types of benefits that are not additive.)

Methodology—There are two important differences between the regulated community for the technical standards rules and that for the financial responsibility requirements. First, the technical standards apply to petroleum-containing and hazardous-substance-containing USTs. The financial responsibility requirements only apply to petroleum-containing USTs. Owners or operators of hazardous-substance-containing USTs are not yet required to demonstrate evidence of financial responsibility. Second, all owners or operators of USTs falling within the scope of the technical standards rule will incur costs to comply with the technical standards. States and the Federal government, however, will not incur costs to comply with the financial responsibility requirements, because they are not required to *demonstrate* evidence of financial responsibility for their USTs. Therefore, the regulatory impact analysis for the financial responsibility requirements applies to a smaller universe of USTs (approximately 1.5 million) than does the regulatory impact analysis for the technical standards (approximately 1.7 million). The combined costs and economic impacts of both rules apply to the entire universe of 1.7 million USTs.

The technical standards will require firms to improve their methods of leak detection within 2 to 5 years after these rules are promulgated; in addition, firms are allowed up to 10 years to replace or upgrade their UST systems to meet UST system performance requirements. To comply with the financial responsibility requirements, many firms will similarly have to improve their methods of leak detection and replace or upgrade UST system components, although within a faster timeframe. This is because, to demonstrate evidence of financial responsibility, many firms that cannot self-insure and that do not currently have insurance will have to attempt to get insurance within two years of the

financial responsibility rule's effective date. Insurers will generally require upgrading of UST systems as a prerequisite to coverage.

For the financial responsibility RIA, EPA assumed that insurers would require that:

- Tanks be less than 15 years old or retrofitted to meet new tank performance standards; and
- Leak detection measures taken by tank owners or operators be at least as stringent as those required by the technical standards.

To avoid double-counting leak detection and tank upgrading costs, the combined costs of the technical standards and the financial responsibility requirements are estimated by attributing to the financial responsibility requirements the *difference* between the present value of the costs of meeting insurers' criteria and the present value of the costs of meeting the technical standards. The only other cost elements added by the financial responsibility requirements to the total costs of both rules are the costs of procuring and maintaining financial assurance mechanisms.

The financial responsibility RIA compares the economic impacts of the technical standards alone to the combined economic impacts of the technical standards and the financial responsibility requirements. While the combined impacts of both requirements are, in all cases, more severe than the impacts of the technical standards alone, in individual cases, the financial responsibility requirements actually help to mitigate the economic impacts of the technical standards. Quicker detection of UST releases and the availability of insurance to pay UST corrective action costs will lessen, for some firms, the economic impacts of having to comply with corrective action requirements.

3. The Regulated Community

This regulation is estimated to apply to 1.5 million underground storage tanks (USTs) containing petroleum located at 468,000 separate facilities. For the purpose of this analysis, the regulated community was divided into four major sectors: Retail motor fuel marketing, agriculture, local government entities, and general industry. Retail motor fuel marketing is the largest single affected sector and includes 193,000 retail motor fuel outlets owned by approximately 90,000 firms. This sector has been further subdivided into three segments: Refiners, multi-outlet retail chains, and open dealers (defined as firms owning and operating a single retail motor fuel outlet). The agricultural sector includes all farms owning USTs with capacities of more than 1,100 gallons; approximately 46,000 USTs located at 30,500 farms meet this definition. Local government entities own approximately 62,000 USTs at 29,000 facilities. For the purposes of this analysis, the general industry sector includes all other sectors (i.e., sectors other than retail motor fuel marketing, government, and agriculture) where USTs are located. Firms in the general industry sector range from large manufacturing concerns to small retail operations. USTs in this sector usually are used to provide motor fuel for fleets of vehicles (e.g., at trucking firms and automobile rental agencies) or to provide convenient access to motor fuel for off-the-road vehicles (e.g., construction equipment). The general industry sector is estimated to contain 642,000 USTs at 192,000 facilities owned by approximately 137,000 firms.

4. Assumptions and Methodology Used in the RIA

Following are the key assumptions used to estimate the costs and other impacts of this regulations:

- The costs and economic impacts of the technical standards are the baseline from which the costs and economic impacts of the financial responsibility requirements will be measured.
- Owners, rather than operators, satisfy and pay the costs of financial responsibility requirements, except when the owner is a private individual and the operator is a business corporation.
- All owners who qualify for self-insurance use this mechanism to satisfy their financial responsibility requirements and incur real resource costs for developing and maintaining the required records and reports.
- All firms or local governments currently insured for corrective action and compensation of third-parties will maintain their insurance to comply with this regulation.
- Firms or local governments that are not currently insured and that cannot use the financial test of self-insurance will attempt to obtain insurance (rather than other financial assurance mechanisms) to comply with this regulation.
- Insurance will only be available to firms or local governments meeting insurers' criteria for insurability. The RIA presents regulatory costs assuming that all firms and local governments that do not currently have insurance or pass the financial test are able to get insurance by meeting insurers' criteria for insurability (i.e., upgrading or replacing tanks greater than 15 years old and instituting suitable leak detection measures). Using this assumption results in higher costs than assuming that firms and local governments that do not currently have insurance or meet the financial test cannot get insurance. Obtaining a suspension of enforcement should be less expensive than meeting insurers' eligibility requirements within 2 years and paying insurance premiums thereafter.
- Insurance premium costs are estimated by assuming that premiums will be double the expected value of corrective action and third-party liability costs for the USTs covered. The expected value of costs of corrective action and third-party liability are based on the UST model developed for the technical standards RIA.

5. Annual Real Resource Costs

There are three main cost elements in the combined total costs of the financial responsibility and technical standards requirements: Costs related to the tank replacement and upgrading and to leak detection; costs related to performing corrective action; and the costs of procuring financial assurance mechanisms. The costs of procuring financial assurance mechanisms do not include the costs related to performing corrective action because these costs are accounted for separately. They also do not include the costs of satisfying third-party liability awards because such costs would be incurred even if the technical standards and the financial responsibility requirements were not promulgated. The cost of insurance, for example, does not include that portion of insurance premiums used to pay the costs of corrective action and third-party liability awards. It does include the cost of insurers' profits, administraive costs, and sales costs.

These costs (the *real resource costs* of insurance) are equal to approximately 40 percent of the total insurance premium cost.

The present value of the combined real resource costs of the technical standards and the financial responsibility requirements over 30 years is $70.28 billion. $38.83 billion of these costs represent the costs of tank replacement, tank upgrading, and leak detection. $29.49 billion of these costs represent the costs of performing corrective action. $1.96 billion of these costs represent the real resource costs of financial assurance mechanisms. A portion of these costs (e.g., the costs of tank upgrading and replacement, and the costs of procuring insurance) would be incurred even if the technical standards and financial responsibility requirements were not promulgated. The present value of the total incremental costs of both rules (the costs of the technical standards and the financial responsibility requirements attributable to the promulgation of these rules) is $49.63 billion. $18.50 billion of these costs are attributable to tank replacement, tank upgrading, and leak detection; $29.49 billion are attributable

to corrective action; and $1.64 billion are attributable to procuring financial assurance mechanisms.

The incremental costs of complying with the financial responsibility requirements represent a minor portion of the combined incremental costs of the technical standards and financial responsibility rules. The incremental costs of the financial responsibility requirements alone are $701 million. These incremental costs include $1.55 billion for accelerated tank replacement, tank upgrading, and leak detection (to meet insurers' criteria for insurance); $1.64 billion for financial assurance mechanisms (for firms that do not currently have them); and a $2.49 billion *cost savings* in the cost of corrective action. This savings results from the earlier application of improved leak detection, and earlier tank upgrading than would be required if only the technical standards were promulgated.

6. Economic Impacts

The economic impacts of the regulations are assessed for all firms in the retail motor fuel marketing sector, except refiners, and for firms in the general industry sector for which the expected annual insurance premium costs are more than 10 percent of the before-tax-profits.

In the retail motor fuel marketing sector, economic impacts are measured in terms of the percentage of existing outlets surviving 5, 10, and 15 years after the imposition of regulations. Through year 5, 57 percent of existing small-firm-owned outlets would survive if only the technical requirements were imposed. (Small firms are defined as firms with less than $4.6 million in annual sales. This corresponds to the Small Business Administration's definition of small firms in this sector.) Assuming the imposition of technical and financial responsibility requirements, 55 percent of existing outlets survive, if all small firms obtain insurance. By year 15, 34 percent of outlets would survive the imposition of technical requirements and 47 percent would survive the imposition of both technical and financial responsibility requirements, if all small firms obtain insurance. Thus, by year 15, the imposition of the financial responsibility requirements has a beneficial impact on the survival of small-firm-owners and operators.

Small-firm-owned outlets that do not have existing releases and that can afford improved leak detection and tank upgrading or replacement costs are better able to survive with insurance than without it. Those small-firm-owned outlets with existing releases and outlets owned by financially-marginal small firms will exit the industy more quickly with the imposition of the financial responsibility requirements than with the imposition of the technical standards alone.

The technical standards RIA does not account for the fact that many large firms in the retail motor fuel marketing sector have insurance which can mitigate the economic impacts of having to perform corrective action. It thus presents a worst case economic impact scenario. The technical standards RIA estimates that 73 percent of existing retail motor fuel marketing outlets owned by large firms (other than refiners) would survive through year 5. The financial responsibility RIA, which accounts for the fact that many of these firms have insurance, estimates that 83 percent of large-firm-owned outlets survive through year 5. By year 15, only 50 percent of large-firm-owned outlets would survive the imposition of the technical standards if they did not have insurance. When insurance is considered, 78 percent of large-firm-owned outlets survive through year 15.

In the general industry sector, EPA examined financial data for firms in 65 four-digit SIC code categories that contain firms that own USTs. In only 4 of these SIC code categories would the value of premiums exceed 10 percent of the before-tax profits of average firms in those categories having less than $1 million in assets, and the impact of these premium costs on the pre-tax returns on assets for these firms ranged between 0.1 and 0.9 percent. Most firms in these SIC code categories do not use USTs, and it is impossible that, if the costs of today's regulation imposed severe impacts on those firms in those sectors that do use them, they could avoid these costs by closing their UST facilities.

7. Benefits

Today's rule is associated with a variety of potential economic benefits that are discussed in qualitative terms in the RIA. Potential economic benefits from the financial responsibility requirements can be placed in three categories:

- Resource allocation;
- Willingness to pay for distributional goals; and
- Reductions in cleanup costs, environmental and health damage, UST releases, and business disruptions.

If the financial responsibility requirements induce firms to consider the full costs of UST releases as part of their real production costs (i.e., cost internalization), the result may be an improvement in the allocative efficiency of UST users. Since allocative efficiency improvements result in improvements for the population in the aggregate, the population can be expected to be willing to pay for this improvement. Similarly, the population also could be willing to pay for progress toward distributional goals (i.e., be willing to incur some cost to ensure that the UST owners and operators and the consumers of goods whose production involves the use of USTs and who benefit from the use of the USTs also bear the costs of that activity).

Small firms that use insurance to meet their financial responsibility requirements may be more inclined to report releases from their USTs promptly, whereas firms without insurance may be reluctant to report releases out of a fear that the costs associated with the release could force the firms out of business. In addition, firms having to obtain insurance will have to meet insurers' eligibility requirements (e.g., improved leak detection and tank upgrading), thus reducing the likelihood of releases.

As reported above, meeting insurers' eligibility criteria is estimated to save $2.49 billion in corrective action costs over 30 years. Over the long term, the imposition of the financial responsibility requirements also reduces the economic disruptions caused by the bankruptcy of firms unable to meet the costs of performing corrective action or satisfying third-party liability awards. After 15 years, the number of surviving outlets is 14 percentage points higher if financial responsibility requirements are imposed.

The RIA also estimates the quantitative benefits of the financial responsibility rule. It provides a comparison of the value of unfunded financial responsibility obligations that would occur if the technical standards alone were implemented, to the value of unfunded financial responsibility obligations if all businesses in the retail motor fuel marketing sector meet financial responsibility requirements using insurance or the financial test. In making this comparison, the RIA finds that the promulgation of the financial responsibility, in addition to the technical, standards saves $391 million, or $494 per UST, over a 30-year period.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the impact of the rule on small

entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

EPA has conducted an analysis of the impacts of this regulation on small businesses as part of its regulatory impact analysis (RIA) and has concluded that this regulation may have a significant economic impact on some small businesses. EPA examined the economic impacts of financial responsibility requirements on the small business segments of the retail motor fuel marketing industry and on the general industry sectors for which expected annual insurance premium costs are more than 10 percent of before-tax profits.

In the retail motor fuel marketing sector, economic impacts are measured in terms of the percentage of existing outlets surviving 5, 10, and 15 years after the imposition of regulations. Through year 5, 57 percent of existing small-firm-owned outlets would survive if only the technical requirements were imposed. Assuming the imposition of technical and financial responsibility requirements, 55 percent of existing outlets survive, if all small firms can obtain insurance. By year 15, 34 percent of outlets would survive the imposition of technical requirements and 47 percent would survive the imposition of both technical and financial responsibility requirements, if all small firms can obtain insurance. Thus, by year 15, the imposition of the financial responsibility requirements has a beneficial impact on the survival of small-firm-owned outlets.

In the general industry sector, EPA found that the costs of insurance premiums represent 10 percent or more of the before-tax profits of firms that have less than $1 million in assets in 4 of the 65 four-digit SIC codes examined. The impact of these premium costs on the pre-tax returns on assets for these firms ranged between 0.1 and 0.9 percent.

The RIA does not examine the possibility that all corrective action costs and third-party liability awards might be paid by state funds financed by taxes on gasoline. Such funds would minimize economic impacts on small businesses and transfer the costs of these financial responsibility requirements to the consumers of motor fuel.

C. Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2050-0066. The reporting and recordkeeping burden on the public for this collection is estimated at 65,707 hours for the 265,534 respondents, with an average of 0.1 hours per response. These burden estimates include all aspects of the collection effort and may include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information, etc.

If you wish to submit comments regarding any aspect of this collection of information, including suggestions for reducing the burden, or if you would like a copy of the information collection request (please reference ICR #1359), contact Rick Westland, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460 (202-382-2745); and Marcus Peacock, Office of Management and Budget, Washington, DC 20503.

List of Subjects in 40 CFR Parts 280 and 281

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

Lee M. Thomas,

Administrator.

Dated: October 14, 1988.

For the reasons set out in the preamble, Parts 280 and 281 of Title 40 of the Code of Federal Regulations are amended as follows:

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

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

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

2. Appendices I through III following Subpart G are designated as Appendices I through III to Part 280.

3. 40 CFR Part 280 is amended to add a new Subpart H as follows:

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Subpart H—Financial Responsibility

Sec.
280.90 Applicability.
280.91 Compliance dates.
280.92 Definition of terms.
280.93 Amount and scope of required financial responsibility.
280.94 Allowable mechanisms and combinations of mechanisms.
280.95 Financial test of self-insurance.
280.96 Guarantee.
280.97 Insurance and risk retention group coverage.
280.98 Surety bond.
280.99 Letter of credit.
280.100 Use of state-required mechanism.
280.101 State fund or other state assurance.
280.102 Trust fund.
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280.104 Substitution of financial assurance mechanisms by owner or operator.
280.105 Cancellation or nonrenewal by a provider of financial assurance.
280.106 Reporting by owner or operator.
280.107 Recordkeeping.
280.108 Drawing on financial assurance mechanisms.
280.109 Release from the requirements.
280.110 Bankruptcy or other incapacity of owner or operator or provider of financial assurance.
280.111 Replenishment of guarantees, letters of credit, or surety bonds.
280.112 Suspension of enforcement. [Reserved]

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Subpart H—Financial Responsibility

§ 280.90 Applicability.

(a) This subpart applies to owners and operators of all petroleum underground storage tank (UST) systems except as otherwise provided in this section.

(b) Owners and operators of petroleum UST systems are subject to these requirements if they are in operation on or after the date for compliance established in § 280.91.

(c) State and Federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States are exempt from the requirements of this subpart.

(d) The requirements of this subpart do not apply to owners and operators of any UST system described in § 280.10 (b) or (c).

(e) If the owner and operator of a petroleum underground storage tank are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in event of noncompliance. Regardless of which party complies, the date set for compliance at a particular facility is determined by the characteristics of the owner as set forth in § 280.91.

§ 280.91 Compliance dates.

Owners of petroleum underground storage tanks are required to comply with the requirements of this subpart by the following dates:

(a) All petroleum marketing firms owning 1,000 or more USTs and all other UST owners that report a tangible net worth of $20 million or more to the U.S. Securities and Exchange Commission (SEC), Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration; January 24, 1989.

(b) All petroleum marketing firms owning 100–999 USTs; October 26, 1989.

(c) All petroleum marketing firms owning 13–99 USTs at more than one facility; April 26, 1990.

(d) All petroleum UST owners not described in paragraphs (a), (b), or (c) of this section, including all local government entities; October 26, 1990.

§ 280.92 Definition of terms.

When used in this subpart, the following terms shall have the meanings given below:

(a) "Accidental release" means any sudden or nonsudden release of petroleum from an underground storage tank that results in a need for corrective action and/or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

(b) "Bodily injury" shall have the meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

(c) "Controlling interest" means direct ownership of at least 50 percent of the voting stock of another entity.

(d) "Director of the Implementing Agency" means the EPA Regional Administrator, or, in the case of a state with a program approved under section 9004, the Director of the designated state or local agency responsible for carrying out an approved UST program.

(e) "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

(1) a 10-K report submitted to the SEC;

(2) an annual report of tangible net worth submitted to Dun and Bradstreet; or

(3) annual reports submitted to the Energy Information Administration or the Rural Electrification Administration. "Financial reporting year" may thus comprise a fiscal or a calendar year period.

(f) "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought,

(1) By EPA or a state to require corrective action or to recover the costs of corrective action;

(2) By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

(3) By any person to enforce the terms of a financial assurance mechanism.

(g) "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank.

Note: This definition is intended to assist in the understanding of these regulations and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

(h) "Owner or operator," when the owner or operator are separate parties, refers to the party that is obtaining or has obtained financial assurances.

(i) "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

(j) "Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with USTs as well as petroleum marketing facilities are considered to be petroleum marketing firms.

(k) "Property damage" shall have the meaning given this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

(l) "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in §§ 280.95–280.103, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

(m) "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

(n) "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

§ 280.93 Amount and scope of required financial responsibility.

(a) Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts:

(1) For owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year; $1 million.

(2) For all other owners or operators of petroleum underground storage tanks; $500,000.

(b) Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following annual aggregate amounts:

(1) For owners or operators of 1 to 100 petroleum underground storage tanks, $1 million; and

(2) For owners or operators of 101 or more petroleum underground storage tanks, $2 million.

(c) For the purposes of paragraphs (b) and (f) of this section, only, "a petroleum underground storage tank" means a single containment unit and does not mean combinations of single containment units.

(d) Except as provided in paragraph (e) of this section, if the owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for:

(1) Taking corrective action;

(2) Compensating third parties for bodily injury and property damage caused by sudden accidental releases; or

(3) Compensating third parties for bodily injury and property damage caused by nonsudden accidental releases, the amount of assurance provided by each mechanism or combination of mechanisms must be in the full amount specified in paragraphs (a) and (b) of this section.

(e) If an owner or operator uses separate mechanisms or separate combinations of mechanisms to demonstrate financial responsibility for different petroleum underground storage tanks, the annual aggregate required shall be based on the number of tanks covered by each such separate mechanism or combination of mechanisms.

(f) Owners or operators shall review the amount of aggregate assurance provided whenever additional petroleum underground storage tanks are acquired or installed. If the number of petroleum underground storage tanks for which assurance must be provided exceeds 100, the owner or operator shall demonstrate financial responsibility in the amount of at least $2 million of annual aggregate assurance by the anniversary of the date on which the mechanism demonstrating financial responsibility became effective. If assurance is being demonstrated by a combination of mechanisms, the owner or operator shall demonstrate financial responsibility in the amount of at least $2 million of annual aggregate assurance by the first-occurring effective date anniversary of any one of the mechanisms combined (other than a financial test or guarantee) to provide assurance.

(g) The amounts of assurance required under this section exclude legal defense costs.

(h) The required per-occurrence and annual aggregate coverage amounts do not in any way limit the liability of the owner or operator.

§ 280.94 Allowable mechanisms and combinations of mechanisms.

(a) Subject to the limitations of paragraphs (b) and (c) of this section, an owner or operator may use any one or combination of the mechanisms listed in §§ 280.95 through 280.103 to demonstrate financial responsibility under this subpart for one or more underground storage tanks.

(b) An owner or operator may use a guarantee or surety bond to establish financial responsibility only if the Attorney(s) General of the state(s) in which the underground storage tanks are located has (have) submitted a written statement to the implementing agency that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in that state.

(c) An owner or operator may use self-insurance in combination with a guarantee only if, for the purpose of meeting the requirements of the financial test under this rule, the financial statements of the owner or operator are not consolidated with the financial statements of the guarantor.

§ 280.95 Financial test of self-insurance.

(a) An owner or operator, and/or guarantor, may satisfy the requirements of § 280.93 by passing a financial test as specified in this section. To pass the financial test of self-insurance, the owner or operator, and/or guarantor must meet the criteria of paragraph (b) or (c) of this section based on year-end financial statements for the latest completed fiscal year.

(b)(1) The owner or operator, and/or guarantor, must have a tangible net worth of at least ten times:

(i) The total of the applicable aggregate amount required by § 280.93, based on the number of underground storage tanks for which a financial test is used to demonstrate financial responsibility to EPA under this section or to a state implementing agency under a state program approved by EPA under 40 CFR Part 281;

(ii) The sum of the corrective action cost estimates, the current closure and post-closure care cost estimates, and amount of liability coverage for which a financial test is used to demonstrate financial responsibility to EPA under 40 CFR 264.101, 264.143, 264.145, 265.143, 165.145, 264.147, and 265.147 or to a state implementing agency under a state program authorized by EPA under 40 CFR Part 271; and

(iii) The sum of current plugging and abandonment cost estimates for which a financial test is used to demonstrate financial responsibility to EPA under 40 CFR 144.63 or to a state implementing agency under a state program authorized by EPA under 40 CFR Part 145.

(2) The owner or operator, and/or guarantor, must have a tangible net worth of at least $10 million.

(3) The owner or operator, and/or guarantor, must have a letter signed by the chief financial officer worded as specified in paragraph (d) of this section.

(4) The owner or operator, and/or guarantor, must either:

(i) File financial statements annually with the U.S. Securities and Exchange Commission, the Energy Information Administration, or the Rural Electrification Administration; or

(ii) Report annually the firm's tangible net worth to Dun and Bradstreet, and Dun and Bradstreet must have assigned the firm a financial strength rating of 4A or 5A.

(5) The firm's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(c)(1) The owner or operator, and/or guarantor must meet the financial test requirements of 40 CFR 264.147(f)(1), substituting the appropriate amounts specified in § 280.93 (b)(1) and (b)(2) for the "amount of liability coverage" each time specified in that section.

(2) The fiscal year-end financial statements of the owner or operator, and/or guarantor, must be examined by an independent certified public accountant and be accompanied by the accountant's report of the examination.

(3) The firm's year-end financial statements cannot include an adverse auditor's opinion, a disclaimer of opinion, or a "going concern" qualification.

(4) The owner or operator, and/or guarantor, must have a letter signed by the chief financial officer, worded as specified in paragraph (d) of this section.

(5) If the financial statements of the owner or operator, and/or guarantor, are not submitted annually to the U.S. Securities and Exchange Commission, the Energy Information Administration or the Rural Electrification Administration, the owner or operator, and/or guarantor, must obtain a special report by an independent certified public accountant stating that:

(i) He has compared the data that the letter form the chief financial officer specifies as having been derived from the latest year-end financial statements of the owner or operator, and/or guarantor, with the amounts in such financial statements; and

(ii) In connection with that comparison, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(d) To demonstrate that it meets the financial test under paragraph (b) or (c) of this section, the chief financial officer of the owner or operator, or guarantor, must sign, within 120 days of the close of each financial reporting year, as defined by the twelve-month period for which financial statements used to

support the financial test are prepared, a letter worded exactly as follows, except that the instructions in brackets are to be replaced by the relevant information and the brackets deleted:

Letter from Chief Financial Officer

I am the chief financial officer of [insert: name and address of the owner or operator, or guarantor]. This letter is in support of the use of [insert: "the financial test of self-insurance," and/or "guarantee"] to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "suddent accidential releases" and/or "nonsudden accidential releases"] in the amount of at least [insert: dollar amount] per occurrence and [insert: dollar amount] annual aggregate arising from operating (an) underground storage tank(s).

Underground storage tanks at the following facilities are assured by this financial test or a financial test under an authorized State program by this [insert: "owner or operator," and/or "guarantor"]: [List for each facility: the name and address of the facility where tanks assured by this financial test are located, and whether tanks are assured by this financial test or a financial test under a State program approved under 40 CFR Part 281. If separate mechanisms or combinations of mechanisms are being used to assure any of the tanks at this facility, list each tank assured by this financial test or a financial test under a State program authorized under 40 CFR Part 281 by the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22 or the corresponding State requirements.]

A [insert: "financial test," and/or "guarantee"] is also used by this [insert: "owner or operator," or "guarantor"] to demonstrate evidence of financial responsibility in the following amounts under other EPA regulations or state programs authorized by EPA under 40 CFR Parts 271 and 145:

EPA Regulations	*Amount*
Closure (§§ 264.143 and 265.143)	$____
Post-Closure Care (§§ 264.145 and 265.145)	$____
Liability Coverage (§§ 264.147 and 265.147)	$____
Corrective Action (§§ 264.101(b))	$____
Plugging and Abandonment (§ 144.63)	$____
Closure	$____
Post-Closure Care	$____
Liabilitly Coverage	$____
Corrective Action	$____
Plugging and Abandonment	$____
Total	$____

This [insert: "owner or operator," or "guarantor"] has not received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on his financial statements for the latest completed fiscal year.

[Fill in the information for Alternative I if the criteria of paragraph (b) of § 280.95 are being used to demonstrate compliance with the financial test requirements. Fill in the information for Alternative II if the criteria of paragraph (c) of § 280.95 are being used to demonstrate compliance with the financial test requirements.]

Alternative I

1. Amount of annual UST aggregate coverage being assured by a financial test, and/or guarantee ..... $____
2. Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee ..... $____
3. Sum of lines 1 and 2 ..... $____
4. Total tangible assets ..... $____
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] ..... $____
6. Tangible net worth [subtract line 5 from line 4] ..... $____

	Yes	No
7. Is line 6 at least $10 million?	____	____
8. Is line 6 at least 10 times line 3?	____	____
9. Have financial statements for the latest fiscal year been filed with the Securities and Exchange Commission?	____	____
10. Have financial statements for the latest fiscal year been filed with the Energy Information Administration?	____	____
11. Have financial statements for the lastest fiscal year been filed with the Rural Electrification Administration?	____	____
12. Has financial information been provided to Dun and Bradstreet, and has Dun and Bradstreet provided a financial strength rating of 4A or 5A? [Answer "Yes" only if both criteria have been met.]	____	____

Alternative II

1. Amount of annual UST aggregate coverage being assured by a test, and/or guarantee ..... $____
2. Amount of corrective action, closure and post-closure care costs, liability coverage, and plugging and abandonment costs covered by a financial test, and/or guarantee ..... $____
3. Sum of lines 1 and 2 ..... $____
4. Total tangible assets ..... $____
5. Total liabilities [if any of the amount reported on line 3 is included in total liabilities, you may deduct that amount from this line and add that amount to line 6] ..... $____
6. Tangible net worth [subtract line 5 from line 4] ..... $____

Alternative I—Continued

7. Total assets in the U.S. [required only if less than 90 percent of assets are located in the U.S.] ..... $____

	Yes	No
8. Is line 6 at least $10 million? ..... $____	____	____
9. Is line 6 at least 6 times line 3?	____	____
10. Are at least 90 percent of assets located in the U.S.? [If "No," complete line 11.]	____	____
11. Is line 7 at least 6 times line 3?	____	____

[Fill in either lines 12–15 or lines 16–18:]

12. Current assets ..... $____
13. Current liabilities .....
14. Net working capital [subtract line 13 from line 12] .....

	Yes	No
15. Is line 14 at least 6 times line 3?	____	____
16. Current bond rating of most recent bond issue	____	____
17. Name of rating service	____	____
18. Date of maturity of bond	____	____
19. Have financial statements for the latest fiscal year been filed with the SEC, the Energy Information Administration, or the Rural Electrification Administration?	____	____

[If "No," please attach a report from an independent certified public accountant certifying that there are no material differences between the data as reported in lines 4–18 above and the financial statements for the latest fiscal year.]

[For both Alternative I and Alternative II complete the certification with this statement.]

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR Part 280.95(d) as such regulations were constituted on the date shown immediately below.

[Signature]
[Name]
[Title]
[Date]

(e) If an owner or operator using the test to provide financial assurance finds that he or she no longer meets the requirements of the financial test based on the year-end financial statements, the owner or operator must obtain alternative coverage within 150 days of the end of the year for which financial statements have been prepared.

(f) The Director of the implementing agency may require reports of financial condition at any time from the owner or operator, and/or guarantor. If the Director finds, on the basis of such reports or other information, that the owner or operator, and/or guarantor, no longer meets the financial test requirements of § 280.95(b) or (c) and (d), the owner or operator must obtain

alternate coverage within 30 days after notification of such a finding.

(g) If the owner or operator fails to obtain alternate assurance within 150 days of finding that he or she no longer meets the requirements of the financial test based on the year-end financial statements, or within 30 days of notification by the Director of the implementing agency that he or she no longer meets the requirements of the financial test, the owner or operator must notify the Director of such failure within 10 days.

§ 280.96 Guarantee.

(a) An owner or operator may satisfy the requirements of § 280.93 by obtaining a guarantee that conforms to the requirements of this section. The guarantor must be:

(1) A firm that (i) possesses a controlling interest in the owner or operator; (ii) possesses a controlling interest in a firm described under paragraph (a)(1)(i) of this section; or, (iii) is controlled through stock ownership by a common parent firm that possesses a controlling interest in the owner or operator; or,

(2) A firm engaged in a substantial business relationship with the owner or operator and issuing the guarantee as an act incident to that business relationship.

(b) Within 120 days of the close of each financial reporting year the guarantor must demonstrate that it meets the financial test criteria of § 280.95 based on year-end financial statements for the latest completed financial reporting year by completing the letter from the chief financial officer described in § 280.95(d) and must deliver the letter to the owner or operator. If the guarantor fails to meet the requirements of the financial test at the end of any financial reporting year, within 120 days of the end of that financial reporting year the guarantor shall send by certified mail, before cancellation or nonrenewal of the guarantee, notice to the owner or operator. If the Director of the implementing agency notifies the guarantor that he no longer meets the requirements of the financial test of § 280.95 (b) or (c) and (d), the guarantor must notify the owner or operator within 10 days of receiving such notification from the Director. In both cases, the guarantee will terminate no less than 120 days after the date the owner or operator receives the notification, as evidenced by the return receipt. The owner or operator must obtain alternative coverage as specified in § 280.110(c).

(c) The guarantee must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Guarantee

Guarantee made this [date] by [name of guaranteeing entity], a business entity organized under the laws of the state of [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obligees, on behalf of [owner or operator] of [business address].

Recitals.

(1) Guarantor meets or exceeds the financial test criteria of 40 CFR 280.95 (b) or (c) and (d) and agrees to comply with the requirements for guarantors as specified in 40 CFR 280.96(b).

(2) [Owner or operator] owns or operates the following underground storage tank(s) covered by this guarantee: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22 or the corresponding state requirement, and the name and address of the facility.] This guarantee satisfies 40 CFR Part 280, Subpart H requirements for assuring funding for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the above-identified underground storage tank(s) in the amount of [insert dollar amount] per occurrence and [insert dollar amount] annual aggregate.

(3) [Insert appropriate phrase: "On behalf of our subsidiary" (if guarantor is corporate parent of the owner or operator); "On behalf of our affiliate" (if guarantor is a related firm of the owner or operator); or "Incident to our business relationship with" (if guarantor is providing the guarantee as an incident to a substantial business relationship with owner or operator)] [owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [owner or operator] fails to provide alternative coverage within 60 days after receipt of a notice of cancellation of this guarantee and the [Director of the implementing agency] has determined or suspects that a release has occurred at an underground storage tank covered by this guarantee, the guarantor, upon instructions from the [Director], shall fund a standby trust fund in accordance with the provisions of 40 CFR 280.108, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [owner or operator] has failed to perform corrective action for releases arising out of the operation of the above-identified tank(s) in accordance with 40 CFR Part 280, Subpart F, the guarantor upon written instructions from the [Director] shall fund a standby trust in accordance with the provisions of 40 CFR 280.108, in an amount not to exceed the coverage limits specified above.

If [owner or operator] fails to satisfy a judgment or award based on a determination of liability for bodily injury or property damage to third parties caused by ["sudden" and/or "nonsudden"] accidential releases arising from the operation of the above-identified tank(s), or fails to pay an amount agreed to in settlement of a claim arising from or alleged to arise from such injury or damage, the guarantor, upon written instructions from the [Director], shall fund a standby trust in accordance with the provisions of 40 CFR 280.108 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) Guarantor agrees that if, at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet the financial test criteria of 40 CFR 280.95 (b) or (c) and (d), guarantor shall send within 120 days of such failure, by certified mail, notice to [owner or operator]. The guarantee will terminate 120 days from the date of receipt of the notice by [owner or operator], as evidenced by the return receipt.

(5) Guarantor agrees to notify [owner or operator] by certified mail of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code naming guarantor as debtor, within 10 days after commencement of the proceeding.

(6) Guarantor agrees to remain bound under this guarantee notwithstanding any modification or alteration of any obligation of [owner or operator] pursuant to 40 CFR Part 280.

(7) Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial responsibility requirements of 40 CFR Part 280, Subpart H for the above-identified tank(s), except that guarantor may cancel this guarantee by sending notice by certified mail to [owner or operator], such cancellation to become effective no earlier than 120 days after receipt of such notice by [owner or operator], as evidenced by the return receipt.

(8) The guarantor's obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaded to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily damage or property damage for which [insert owner or operator] is obligated

to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

(9) Guarantor expressly waives notice of acceptance of this guarantee by [the implementing agency], by any or all third parties, or by [owner or operator].

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR 280.96(c) as such regulations were constituted on the effective date shown immediately below.

Effective date: _____

[Name of guarantor]

[Authorized signature for guarantor]

[Name of person signing]

[Title of person signing]

Signature of witness or notary:

_____

(d) An owner or operator who uses a guarantee to satisfy the requirements of § 280.93 must establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust fund in accordance with instructions from the Director of the implementing agency under § 280.108. This standby trust fund must meet the requirements specified in § 280.103.

§ 280.97 Insurance and risk retention group coverage.

(a) An owner or operator may satisfy the requirements of § 290.93 by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may be in the form of a separate insurance policy or an endorsement to an existing insurance policy.

(b) Each insurance policy must be amended by an endorsement worded as specified in paragraph (b)(1) of this section, or evidenced by a certificate of insurance worded as specified in paragraph (b)(2) of this section, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

(1) Endorsement

Name: [name of each covered location]

_____

Address: [address of each covered location]

_____

Policy Number: _____

Period of Coverage: [current policy period]

_____

Name of [Insurer or Risk Retention Group]:

_____

Address of [Insurer or Risk Retention Group]:

_____

Name of Insured: _____

Address of Insured: _____

_____

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides liability insurance covering the following underground storage tanks:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations, indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections (a) through (e) of this Paragraph 2 are hereby amended to conform with subsections (a) through (e);

a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this endorsement is attached.

b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 40 CFR 280.95–280.102.

c. Whenever requested by [a Director of an implementing agency], the ["Insurer" or "Group"] agrees to furnish to [the Director] a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"] will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

e. The insurance covers claims for any occurrence that commenced during the term of the policy that is discovered and reported to the ["Insurer" or "Group"] within six months of the effective date of the cancellation or termination of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in 40 CFR 280.97(b)(1) and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states"].

[Signature of authorized representative of Insurer or Risk Retention Group]

[Name of person signing]

[Title of person signing], Authorized Representative of [name of Insurer or Risk Retention Group]

[Address of Representative]

(2) Certificate of Insurance

Name: [name of each covered location]

_____

Address: [address of each covered location]

_____

Policy Number: _____

Endorsement (if applicable): _____

Period of Coverage: [current policy period]

_____

Name of [Insurer or Risk Retention Group]:

_____

Address of [Insurer or Risk Retention Group]:

_____

Name of Insured: _____

Address of Insured:

_____

Certification:

1. [Name of Insurer or Risk Retention Group], [the "Insurer" or "Group"], as identified above, hereby certifies that it has issued liability insurance covering the following underground storage tank(s):

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility.]

for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tank(s) identified above.

The limits of liability are [insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's or Group's liability; if the amount of coverage is different for different types of coverage or for different underground storage tanks or locations,

indicate the amount of coverage for each type of coverage and/or for each underground storage tank or location], exclusive of legal defense costs. This coverage is provided under [policy number]. The effective date of said policy is [date].

2. The ["Insurer" or "Group"] further certifies the following with respect to the insurance described in Paragraph 1:

a. Bankruptcy or insolvency of the insured shall not relieve the ["Insurer" or "Group"] of its obligations under the policy to which this certificate applies.

b. The ["Insurer" or "Group"] is liable for the payment of amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the ["Insurer" or "Group"]. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 40 CFR 280.95–280.102.

c. Whenever requested by [a Director of an implementing agency], the ["Insurer" or "Group"] agrees to furnish to [the Director] a signed duplicate original of the policy and all endorsements.

d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"] will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.

[Insert for claims-made policies:

e. The insurance covers claims for any occurrence that commenced during the term of the policy that is discovered and reported to the ["Insurer" or "Group"] within six months of the effective date of the cancellation or other termination of the policy.]

I hereby certify that the wording of this instrument is identical to the wording in 40 CFR 280.97(b)(2) and that the ["Insurer" or "Group"] is ["licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states"].

[Signature of authorized representative of Insurer]
[Type name]
[Title], Authorized Representative of [name of Insurer or Risk Retention Group]
[Address of Representative]

(c) Each insurance policy must be issued by an insurer or a risk retention group that, at a minimum, is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states.

§ 280.98 Surety bond.

(a) An owner or operator may satisfy the requirements of § 280.93 by obtaining a surety bond that conforms to the requirements of this section. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.

(b) The surety bond must be worded as follows, except that instructions in brackets must be replaced with the relevant information and the brackets deleted:

Performance Bond

Date bond executed: _____
Period of coverage: _____
Principal: [legal name and business address of owner or operator]

_____

Type of organization: [insert "individual," "joint venture," "partnership," or "corporation"]

_____

State of incorporation (if applicable):

_____

Surety(ies): [name(s) and business address(es)]

_____

Scope of Coverage: [List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility. List the coverage guaranteed by the bond: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases" "arising from operating the underground storage tank"].

Penal sums of bond:
Per occurrence $ _____
Annual aggregate $ _____
Surety's bond number: _____

Know All Persons by These Presents, that we, the Principal and Surety(ies), hereto are firmly bound to [the implementing agency], in the above penal sums for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sums jointly and severally only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sums only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sums.

Whereas said Principal is required under Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, to provide financial assurance for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"; if coverage is different for different tanks or locations, indicate the type of coverage applicable to each tank or location] arising from operating the underground storage tanks identified above, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully ["take corrective action, in accordance with 40 CFR Part 280, Subpart F and the Director of the state implementing agency's instructions for," and/or "compensate injured third parties for bodily injury and property damage caused by" either "sudden" or "nonsudden" or "sudden and nonsudden"] accidental releases arising from operating the tank(s) indentified above, or if the Principal shall provide alternate financial assurance, as specified in 40 CFR Part 280, Subpart H, within 120 days after the date the notice of cancellation is received by the Principal from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

Such obligation does not apply to any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above.

Upon notification by [the Director of the implementing agency] that the Principal has failed to ["take corrective action, in accordance with 40 CFR Part 280, Subpart F and the Director's instructions," and/or "compensate injured third parties"] as guaranteed by this bond, the Surety(ies) shall either perform ["corrective action in accordance with 40 CFR Part 280 and the Director's instructions," and/or "third-party liability compensation"] or place funds in an amount up to the annual aggregate penal sum into the standby trust fund as directed by [the Regional Administrator or the Director] under 40 CFR 280.108.

Upon notification by [the Director] that the Principal has failed to provide alternate financial assurance within 60 days after the date the notice of cancellation is received by the Principal from the Surety(ies) and that [the Director] has determined or suspects that

a release has occurred, the Surety(ies) shall place funds in an amount not exceeding the annual aggregate penal sum into the standby trust fund as directed by [the Director] under 40 CFR 280.108.

The Surety(ies) hereby waive(s) notification of amendments to applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the annual aggregate to the penal sum shown on the face of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said annual aggregate penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by the Principal, as evidenced by the return receipt.

The Principal may terminate this bond by sending written notice to the Surety(ies).

In Witness Thereof, the Principal and Surety(ies) have executed this Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 40 CFR 280.98(b) as such regulations were constituted on the date this bond was executed.

Principal

[Signature(s)]
[Names(s)]
[Title(s)]
[Corporate seal]

Corporate Surety(ies)

[Name and address]
[State of Incorporation: _____
[Liability limit: $_____
[Signature(s)]
[Names(s) and title(s)]
[Corporate seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: $_____

(c) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. In all cases, the surety's liability is limited to the per-occurrence and annual aggregate penal sums.

(d) The owner or operator who uses a surety bond to satisfy the requirements of § 280.93 must establish a standby trust fund when the surety bond is acquired. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the Director under § 280.108. This standby trust fund must meet the requirements specified in § 280.103.

§ 280.99 Letter of credit.

(a) An owner or operator may satisfy the requirements of § 280.93 by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section. The issuing institution must be an entity that has the authority to issue letters of credit in each state where used and whose letter-of-credit operations are regulated and examined by a federal or state agency.

(b) The letter of credit must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Irrevocable Standby Letter of Credit

[Name and address of issuing institution]
[Name and address of Director(s) of state implementing agency(ies)]

Dear Sir or Madam: We hereby establish our Irrevocable Standby Letter of Credit No. —— in your favor, at the request and for the account of [owner or operator name] of [address] up to the aggregate amount of [in words] U.S. dollars ($[insert dollar amount]), available upon presentation [insert, if more than one Director of a state implementing agency is a beneficiary, "by any one of you"] of

(1) your sight draft, bearing reference to this letter of credit, No. ——, and

(2) your signed statement reading as follows: "I certify that the amount of the draft is payable persuant to regulations issued under authority of Subtitle I of the Resource Conservation and Recovery Act of 1976, as amended."

This letter of credit may be drawn on to cover [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the underground storage tank(s) identified below in the amount of [in words] $[insert dollar amount] per occurrence and [in words] $[insert dollar amount] annual aggregate:

[List the number of tanks at each facility and the name(s) and address(es) of the facility(ies) where the tanks are located. If more than one instrument is used to assure different tanks at any one facility, for each tank covered by this instrument, list the tank identification number provided in the notification submitted pursuant to 40 CFR 280.22, or the corresponding state requirement, and the name and address of the facility.]

The letter of credit may not be drawn on to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of, employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

This letter of credit is effective as of [date] and shall expire on [date], but such expiration date shall be automatically extended for a period of [at least the length of the original term] on [expiration date] and on each successive expiration date, unless, at least 120 days before the curent expiration date, we notify [owner or operator] by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event that [owner or operator] is so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by [owner or operator], as shown on the signed return receipt.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner or operator] in accordance with your instructions.

We certify that the wording of this letter of credit is identical to the wording specified in 40 CFR 280.99(b) as such regulations were constituted on the date shown immediately below.

[Signature(s) and title(s) of official(s) of issuing institution]

[Date]

This credit is subject to [insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code"].

(c) An owner or operator who uses a letter of credit to satisfy the requirements of § 280.93 must also establish a standby trust fund when the letter of credit is acquired. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Director of the implementing agency will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Director under § 280.108. This standby trust fund must meet the requirements specified in § 280.103.

(d) The letter of credit must be irrevocable with a term specified by the issuing institution. The letter of credit

must provide that credit be automatically renewed for the same term as the original term, unless, at least 120 days before the current expiration date, the issuing institution notifies the owner or operator by certified mail of its decision not to renew the letter of credit. Under the terms of the letter of credit, the 120 days will begin on the date when the owner or operator receives the notice, as evidenced by the return receipt.

§ 280.100 Use of state-required mechanism.

(a) For underground storage tanks located in a state that does not have an approved program, and where the state requires owners or operators of underground storage tanks to demonstrate financial responsibility for taking corrective action and/or for compensating third parties for bodily injury and property damage, an owner or operator may use a state-required financial mechanism to meet the requirements of § 280.93 if the Regional Administrator determines that the state mechanism is at least equivalent to the financial mechanisms specified in this subpart.

(b) The Regional Administrator will evaluate the equivalency of a state-required mechanism principally in terms of: certainty of the availability of funds for taking corrective action and/or for compensating third parties; the amount of funds that will be made available; and the types of costs covered. The Regional Administrator may also consider other factors as is necessary.

(c) The state, an owner or operator, or any other interested party may submit to the Regional Administrator a written petition requesting that one or more of the state-required mechanisms be considered acceptable for meeting the requirements of § 280.93. The submission must include copies of the appropriate state statutory and regulatory requirements and must show the amount of funds for corrective action and/or for compensating third parties assured by the mechanism(s). The Regional Administrator may require the petition to submit additional information as is deemed necessary to make this determination.

(d) Any petition under this section may be submitted on behalf of all of the state's underground storage tank owners and operators.

(e) The Regional Administrator will notify the petitioner of his determination regarding the mechanism's acceptability in lieu of financial mechanisms specified in this subpart. Pending this determination, the owners and operators using such mechanisms will be deemed to be in compliance with the requirements of § 280.93 for underground storage tanks located in the state for the amounts and types of costs covered by such mechanisms.

§ 280.101 State fund or other state assurance.

(a) An owner or operator may satisfy the requirements of § 280.93 for underground storage tanks located in a state, where EPA is administering the requirements of this subpart, which assures that monies will be available from a state fund or state assurance program to cover costs up to the limits specified in § 280.93 or otherwise assures that such costs will be paid if the Regional Administrator determines that the state's assurance is at least equivalent to the financial mechanisms specified in this subpart.

(b) The Regional Administrator will evaluate the equivalency of a state fund or other state assurance principally in terms of: Certainty of the availability of funds for taking corrective action and/or for compensating third parties; the amount of funds that will be made available; and the types of costs covered. The Regional Administrator may also consider other factors as is necessary.

(c) The state must submit to the Regional Administrator a description of the state fund or other state assurance to be supplied as financial assurance, along with a list of the classes of underground storage tanks to which the funds may be applied. The Regional Administrator may require the state to submit additional information as is deemed necessary to make a determination regarding the acceptability of the state fund or other state assurance. Pending the determination by the Regional Administrator, the owner or operator of a covered class of USTs will be deemed to be in compliance with the requirements of § 280.93 for the amounts and types of costs covered by the state fund or other state assurance.

(d) The Regional Administrator will notify the state of his determination regarding the acceptability of the state's fund or other assurance in lieu of financial mechanisms specified in this subpart. Within 60 days after the Regional Administrator notifies a state that a state fund or other state assurance is acceptable, the state must provide to each owner or operator for which it is assuming financial responsibility a letter or certificate describing the nature of the state's assumption of responsibility. The letter or certificate from the state must include, or have attached to it, the following information: the facility's name and address and the amount of funds for corrective action and/or for compensating third parties that is assured by the state. The owner or operator must maintain this letter or certificate on file as proof of financial responsibility in accordance with § 280.107(b)(5).

§ 280.102 Trust fund.

(a) An owner or operator may satisfy the requirements of § 280.93 by establishing a trust fund that conforms to the requirements of this section. The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal agency or an agency of the state in which the fund is established.

(b) The wording of the trust agreement must be identical to the wording specified in § 280.103(b)(1), and must be accompanied by a formal certification of acknowledgement as specified in § 280.103(b)(2).

(c) The trust fund, when established, must be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining required coverage.

(d) If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the Director of the implementing agency for release of the excess.

(e) If other financial assurance as specified in this subpart is substituted for all or part of the trust fund, the owner or operator may submit a written request to the Director of the implementing agency for release of the excess.

(f) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (d) or (e) of this section, the Director of the implementing agency will instruct the trustee to release to the owner or operator such funds as the Director specifies in writing.

§ 280.103 Standby trust fund.

(a) An owner or operator using any one of the mechanisms authorized by §§ 280.96, 280.98, or 280.99 must establish a standby trust fund when the mechanism is acquired. The trustee of the standby trust fund must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal agency or an agency of the state in which the fund is established.

(b)(1) The standby trust agreement must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Trust Agreement

Trust agreement, the "Agreement," entered into as of [date] by and between [name of the owner or operator], a [name of state] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert "Incorporated in the state of _____" or "a national bank"], the "Trustee."

[Whereas, the United States Environmental Protection Agency, "EPA," an agency of the United States Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of an underground storage tank shall provide assurance that funds will be available when needed for corrective action and third-party compensation for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from the operation of the underground storage tank (This paragraph is only applicable to the standby trust agreement.)];

[Whereas, the Grantor has elected to establish [insert either "a guarantee," "surety bond," or "letter of credit"] to provide all or part of such financial assurance for the underground storage tanks identified herein and is required to establish a standby trust fund able to accept payments from the instrument (This paragraph is only applicable to the standby trust agreement.)];

[Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee;

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions

As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of the Financial Assurance Mechanism.

This Agreement pertains to the [identify the financial assurance mechanism, either a guarantee, surety bond, or letter of credit, from which the standby trust fund is established to receive payments (This paragraph is only applicable to the standby trust agreement.)].

Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of [implementing agency]. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. [The Fund is established initially as a standby to receive payments and shall not consist of any property.] Payments made by the provider of financial assurance pursuant to [the Director of the implementing agency's] instruction are transferred to the Trustee and are referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor as provider of financial assurance, any payments necessary to discharge any liability of the Grantor established by [the state implementing agency].

Section 4. Payment for ["Corrective Action" and/or Third-Party Liability Claims"].

The Trustee shall make payments from the Fund as [the Director of the implementing agency] shall direct, in writing, to provide for the payment of the costs of [insert: "taking corrective action" and/or compensating third parties for bodily injury and property damage caused by" either "sudden accidental releases" or "nonsudden accidental releases" or "accidental releases"] arising from operating the tanks covered by the financial assurance mechanism identified in this Agreement.

The Fund may not be drawn upon to cover any of the following:

(a) Any obligation of [insert owner or operator] under a workers' compensation, disability benefits, or unemployment compensation law or other similar law;

(b) Bodily injury to an employee of [insert owner or operator] arising from, and in the course of employment by [insert owner or operator];

(c) Bodily injury or property damage arising from the ownership, maintenance, use, or entrustment to others of any aircraft, motor vehicle, or watercraft;

(d) Property damage to any property owned, rented, loaned to, in the care, custody, or control of, or occupied by [insert owner or operator] that is not the direct result of a release from a petroleum underground storage tank;

(e) Bodily injury or property damage for which [insert owner or operator] is obligated to pay damages by reason of the assumption of liability in a contract or agreement other than a contract or agreement entered into to meet the requirements of 40 CFR 280.93.

The Trustee shall reimburse the Grantor, or other persons as specified by [the Director], from the Fund for corrective action expenditures and/or third-party liability claims in such amounts as [the Director] shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as [the Director] specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund

Payments made to the Trustee for the Fund shall consist of cash and securities acceptable to the Trustee.

Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the tanks, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a–2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment

The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with

certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Advice of Counsel

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 11. Trustee Compensation

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 12. Successor Trustee

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to the Grantor and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 13. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B or such other designees as the Grantor may designate by amendment to Schedule B. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by [the Director of the implementing agency] to the Trustee shall be in writing, signed by [the Director], and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or [the director] hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or [the Director], except as provided for herein.

Section 14. Amendment of Agreement

This Agreement may be amended by an instrument in writing executed by the Grantor and the Trustee, or by the Trustee and [the Director of the implementing agency] if the Grantor ceases to exist.

Section 15. Irrevocability and Termination

Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated at the written direction of the Grantor and the Trustee, or by the Trustee and [the Director of the implementing agency], if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 16. Immunity and Indemnification

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or [the Director of the implementing agency] issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 17. Choice of Law

This Agreement shall be administered, construed, and enforced according to the laws of the state of [insert name of state], or the Comptroller of the Currency in the case of National Association banks.

Section 18. Interpretation

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals (if applicable) to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 280.103(b)(1) as such regulations were constituted on the date written above.

[Signature of Grantor]
[Name of the Grantor]
[Title]
Attest:
[Signature of Trustee]
[Name of the Trustee]
[Title]
[Seal]
[Signature of Witness]
[Name of the Witness]
[Title]
[Seal]

(2) The standby trust agreement must be accompanied by a formal certification of acknowledgment similar to the following. State requirements may differ on the proper content of this acknowledgment.

State of _____
County of _____

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]
[Name of Notary Public]

(c) The Director of the implementing agency will instruct the trustee to refund the balance of the standby trust fund to the provider of financial assurance if the Director determines that no additional corrective action costs or third-party liability claims will occur as a result of a release covered by the financial assurance mechanism for which the standby trust fund was established.

(d) An owner or operator may establish one trust fund as the depository mechanism for all funds assured in compliance with this rule.

§ 280.104 Substitution of financial assurance mechanisms by owner or operator.

(a) An owner or operator may substitute any alternate financial assurance mechanisms as specified in this subpart, provided that at all times he maintains an effective financial assurance mechanism or combination of

mechanisms that satisfies the requirements of § 280.93.

(b) After obtaining alternate financial assurance as specified in this subpart, an owner or operator may cancel a financial assurance mechanism by providing notice to the provider of financial assurance.

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

(a) Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.

(1) Termination of a guarantee, a surety bond, or a letter of credit may not occur until 120 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(2) Termination of insurance, risk retention group coverage, or state-funded assurance may not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.

(b) If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in §280.106, the owner or operator must obtain alternate coverage as specified in this section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator must notify the Director of the implementing agency of such failure and submit:

(1) The name and address of the provider of financial assurance;

(2) The effective date of termination; and

(3) The evidence of the financial assistance mechanism subject to the termination maintained in accordance with § 280.107(b).

§ 280.106 Reporting by owner or operator.

(a) An owner or operator must submit the appropriate forms listed in § 280.107(b) documenting current evidence of financial responsibility to the Director of the implementing agency:

(1) Within 30 days after the owner or operator identifies a release from an underground storage tank required to be reported under § 280.53 or § 280.61;

(2) If the owner or operator fails to obtain alternate coverage as required by this subpart, within 30 days after the owner or operator receives notice of:

(i) Commencement of a voluntary or involuntary proceeding under Title 11 (Bakruptcy), U.S. Code, naming a provider of financial assurance as a debtor,

(ii) Suspension or revocation of the authority of a provider of financial assurance to issue a financial assurance mechanism,

(iii) Failure of a guarantor to meet the requirements of the financial test,

(iv) Other incapacity of a provider of financial assurance; or

(3) As required by § 280.95(g) and § 280.105(b).

(b) An owner or operator must certify compliance with the financial responsibility requirements of this part as specified in the new tank notification form when notifying the appropriate state or local agency of the installation of a new underground storage tank under § 280.22.

(c) The Director of the Implementing Agency may require an owner or operator to submit evidence of financial assurance as described in § 280.107(b) or other information relevant to compliance with this subpart at any time.

(The information requirements in this section have been approved by the Office of Management and Budget and assigned OMB control number 2050–0066.)

§ 280.107 Recordkeeping.

(a) Owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subpart for an underground storage tank until released from the requirements of this subpart under § 208.109. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of business. Records maintained off-site must be made available upon request of the implementing agency.

(b) An owner or operator must maintain the following types of evidence of financial responsibility:

(1) An owner or operator using an assurance mechanism specified in §§ 280.95 through 280.100 or § 280.102 must maintain a copy of the instrument worded as specified.

(2) An owner or operator using a financial test or guarantee must maintain a copy of the chief financial officer's letter based on year-end financial statements for the most recent completed financial reporting year. Such evidence must be on file no later than 120 days after the close of the financial reporting year.

(3) An owner or operator using a guarantee, surety bond, or letter of credit must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(4) An owner or operator using an insurance policy or risk retention group coverage must maintain a copy of the signed insurance policy or risk retention group coverage policy, with the endorsement or certificate of insurance and any amendments to the agreements.

(5) An owner or operator covered by a state fund or other state assurance must maintain on file a copy of any evidence of coverage supplied by or required by the State under § 280.101(d).

(6) An owner or operator using an assurance mechanism specified in §§ 280.95 through 280.102 must maintain an updated copy of a certification of financial responsibility worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Financial Responsibility

[Owner or operator] hereby certifies that it is in compliance with the rquirements of Subpart H of 40 CFR Part 280.

The financial assurance mechanism[s] used to demonstrate financial responsiblity under Subpart H of 40 CFR Part 280 is [are] as follows:

[For each mechanism, list the type of mechanism, name of issuer, mechanism number (if applicable), amount of coverage, effective period of coverage and whether the mechanism covers "taking corrective action" and/or "compensating third parties for bodily injury and property damage caused by" either "sudden accidential releases" or "nonsudden accidential releases" or "accidental releases."]

[Signature of owner or operator]
[Name of owner or operator]
[Title]
[Date]

[Signature of witness or notary]
[Name of witness or notary]
[Date]

The owner or operator must update this certification whenever the financial assurance mechanism(s) used to demonstrate financial responsibility change(s).

(The information requirements in this section have been approved by the Office of Management and Budget and assigned OMB control number 2050–0066.)

§ 280.108 Drawing on financial assurance mechanisms.

(a) The Director of the implementing agency shall require the guarantor, surety, or institution issuing a letter of credit to place the amount of funds stipulated by the Director, up to the limit of funds provided by the financial assurance mechanism, into the standby trust if:

(1)(i) The owner or operator fails to establish alternate financial assurance within 60 days after receiving notice of cancellation of the guarantee, surety bond, letter of credit, or, as applicable, other financial assurance mechanism; and

(ii) The Director determines or suspects that a release from an underground storage tank covered by the mechanism has occurred and so notifies the owner or operator or the owner or operator has notified the Director pursuant to Subparts E or F of a release from an underground storage tank covered by the mechanism; or

(2) The conditions of paragraph (b)(1) or (b)(2)(i) or (ii) of this section are satisfied.

(b) The Director of the implementing agency may draw on a standby trust fund when:

(1) The Director makes a final determination that a release has occurred and immediate or long-term corrective action for the release is needed, and the owner or operator, after appropriate notice and opportunity to comply, has not conducted corrrective action as required under 40 CFR Part 280, Subpart F; or

(2) The Director has received either:

(i) Certification from the owner or operator and the third-party liability claimant(s) and from attorneys representing the owner or operator and the third-party liability claimant(s) that a third-party liability claim should be paid. The certification must be worded as follows, except that instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Certification of Valid Claim

The undersigned, as principals and as legal representatives of [insert owner or operator] and [insert name and address of third-party claimant], hereby certify that the claim of bodily injury [and/or] property damage caused by an accidental release arising from operating [owner's or operator's] underground storage tank should be paid in the amount of $[_____].

[Signatures]
Owner or Operator
Attorney for Owner or Operator
(Notary) Date
[Signature(s)]
Claimant(s)
Attorney(s) for Claimant(s)
(Notary) Date

or (ii) A valid final court order establishing a judgment against the owner or operator for bodily injury or property damage caused by an accidental release from an underground storage tank covered by financial assurance under this subpart and the Director determines that the owner or operator has not satisfied the judgment.

(c) If the Director of the implementing agency determines that the amount of corrective action costs and third-party liability claims eligible for payment under paragraph (b) of this section may exceed the balance of the standby trust fund and the obligation of the provider of financial assurance, the first priority for payment shall be corrective action costs necessary to protect human health and the environment. The Director shall pay third-party liability claims in the order in which the Director receives certifications under paragraph (b)(2)(i) of this section, and valid court orders under paragraph (b)(2)(ii) of this section.

§ 280.109 Release from the requirements.

An owner or operator is no longer required to maintain financial responsibility under this subpart for an underground storage tank after the tank has been properly closed or, if corrective action is required, after corrective action has been completed and the tank has been properly closed as required by 40 CFR Part 280, Subpart G.

§ 280.110 Bankruptcy or other incapacity of owner or operator or provider of financial assurance.

(a) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming an owner or operator as debtor, the owner or operator must notify the Director of the implementing agency by certified mail of such commencement and submit the appropriate forms listed in § 280.107(b) documenting current financial responsibility.

(b) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing financial assurance as debtor, such guarantor must notify the owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in § 280.96.

(c) An owner or operator who obtains financial assurance by a mechanism other than the financial test of self-insurance will be deemed to be without the required financial assurance in the event of a bankruptcy or incapacity of its provider of financial assurance, or a suspension or revocation of the authority of the provider of financial assurance to issue a guarantee, insurance policy, risk retention group coverage policy, surety bond, letter of credit, or state-required mechanism. The owner or operator must obtain alternate financial assurance as specified in this subpart within 30 days after receiving notice of such an event. If the owner or operator does not obtain alternate coverage within 30 days after such notification, he must notify the Director of the implementing agency.

(d) Within 30 days after receipt of notification that a state fund or other state assurance has become incapable of paying for assured corrective action or third-party compensation costs, the owner or operator must obtain alternate financial assurance.

§ 280.111 Replenishment of guarantees, letters of credit, or surety bonds.

(a) If at any time after a standby trust is funded upon the instruction of the Director of the implementing agency with funds drawn from a guarantee, letter of credit, or surety bond, and the amount in the standby trust is reduced below the full amount of coverage required, the owner or operator shall by the anniversary date of the financial mechanism from which the funds were drawn:

(1) Replenish the value of financial assurance to equal the full amount of coverage required, *or*

(2) Acquire another financial assurance mechanism for the amount by which funds in the standby trust have been reduced.

(b) For purposes of this section, the full amount of coverage required is the amount of coverage to be provided by § 280.93 of this subpart. If a combination of mechanisms was used to provide the assurance funds which were drawn upon, replenishment shall occur by the earliest anniversary date among the mechanisms.

§ 280.112 Suspension of enforcement. [Reserved]

PART 281—APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

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

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

5. 40 CFR Part 281 is amended to add § 281.37 as follows:

§ 281.37 Financial responsibility for UST systems containing petroleum.

(a) In order to be considered no less stringent than the federal requirements for financial responsibility for UST systems containing petroleum, the state requirements for financial responsibility

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for petroleum UST systems must ensure that:

(1) Owners and operators have $1 million per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;

(2) Owners and operators not engaged in petroleum production, refining, and marketing and who handle a throughput of 10,000 gallons of petroleum per month or less have $500,000 per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;

(3) Owners and operators of 1 to 100 petroleum USTs must have an annual aggregate of $1 million; and

(4) Owners and operators of 101 or more petroleum USTs must have an annual aggregate of $2 million.

(b) Phase-in of requirements. Financial responsibility requirements for petroleum UST systems must, at a minimum, be scheduled to be applied at all UST systems on an orderly schedule that completes a phase-in of the financial responsibility requirements within 18 months after the effective date of the federal regulations.

(c) States may allow the use of a wide variety of financial assurance mechanisms to meet this requirement. Each financial mechanism must meet the following criteria in order to be no less stringent than the federal requirements. The mechanism must: Be valid and enforceable; be issued by a provider that is qualified or licensed in the state; not permit cancellation without allowing the state to draw funds; ensure that funds will only and directly be used for corrective action and third party liability costs; and require that the provider notify the owner or operator of any circumstances that would impair or suspend coverage.

(d) States must require owners and operators to maintain records that demonstrate compliance with the state financial responsibility requirements, and these records must be made readily available when requested by the implementing agency.

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