

## PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority citation for part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. Section 7.96 is amended by revising paragraph (k)(2) to read as follows:

### § 7.96 National Capital Region Parks.

\* \* \* \* \*

(k) \* \* \*

(1) \* \* \*

(2) No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons and bumper stickers. A permit is required for the sale or distribution of permitted merchandise when done with the aid of a stand or structure. Such stand or structure may consist of one table per site, which may be no larger than 2½ feet by 8 feet or 4 feet by 4 feet. The dimensions of a sales site may not exceed 6 feet wide by 15 feet long by 6 feet high. With or without a permit, such sale or distribution is prohibited in the following areas:

\* \* \* \* \*

3. Section 7.96 paragraph (k)(3) is removed.

4. Section 7.96 paragraph (k)(4) is redesignated as paragraph (k)(3).

Dated: March 14, 1995.

**George T. Frampton, Jr.,**

*Assistant Secretary, Fish and Wildlife and Parks.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 258

[FRL-5186-1]

RIN 2050-AE27

### Financial Assurance Effective Date for Owners and Operators of Municipal Solid Waste Landfill Facilities

**AGENCY:** Environmental Protection Agency [EPA].

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency is amending the criteria for Municipal Solid Waste Landfills (MSWLFs) under subtitle D of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6921 *et seq.*, by delaying the effective date of the

Financial Assurance Criteria set out at 40 CFR part 258, subpart G, until April 9, 1997. The extension applies to any size MSWLF, including remote, very small landfills as defined at 40 CFR 258.1(f)(1), and delays the compliance date for MSWLFs by two years, from April 9, 1995 until April 9, 1997 (for remote, very small landfills by 18 months, from October 9, 1995 until April 9, 1997).

**EFFECTIVE DATE:** The amendments in this final rule are effective March 31, 1995. The effective date of subpart G of part 258 (§§ 258.70 through 258.74) which was added at 56 FR 51016 is delayed until April 9, 1997.

**ADDRESSES:** The docket for this rulemaking is available for public inspection at Room M-2616, U.S. EPA, 401 M Street SW., Washington, DC 20460 from 9 a.m. to 4 p.m., Monday through Friday, excluding holidays. The docket number is F-95-FADF-FFFFF. Call (202) 260-9327 to make an appointment with the docket clerk. As provided in 40 CFR Part 2, a reasonable fee may be charged for copying services.

**FOR FURTHER INFORMATION CONTACT:** The RCRA Hotline toll free at (800) 424-9346 or in Washington, D.C. at (703) 412-9810, from 8:30 a.m. to 7:30 p.m. EST, Monday through Friday, excluding holidays; or Nancy Hunt, Office of Solid Waste (5303W), U.S. Environmental Protection Agency, 401 M Street SW, Washington, DC 20460 at (703) 308-8762.

### SUPPLEMENTARY INFORMATION:

#### Preamble Outline

- I. Authority.
- II. Background.
- III. Response to Comments and Analysis of Issues.
  - A. Support for Extension.
  - B. Opposition to Extension.
  - C. Local Governments.
  - D. Remote/Very Small Landfills.
  - E. Unfunded Mandate.
- IV. Effective Date.
- V. Economic and Regulatory Impacts.
  - A. Executive Order 12866.
  - B. Regulatory Flexibility Act.
  - C. Paperwork Reduction Act.

#### I. Authority

These amendments to Title 40, part 258, of the Code of Federal Regulations are promulgated under the authority of sections 1008(a)(3), 2002(a), 4004(a), and 4010(c) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. 6907(a)(3), 6912(a), 6944(a), and 6949a(c).

#### II. Background

The Agency proposed revised criteria for municipal solid waste landfills

(MSWLFs), including financial assurance requirements, on August 30, 1988 (see 53 FR 33314). The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of closure, post-closure care, and corrective action associated with MSWLFs.

In the August 30, 1988 proposal, rather than proposing specific financial assurance mechanisms, the Agency proposed a financial assurance performance standard. The Agency solicited public comment on this performance standard approach and, at the same time, requested comment on whether the Agency should develop financial test mechanisms for use by local governments and corporations.

In response to comment, the Agency promulgated several specific financial mechanisms in the October 9, 1991 final rule on MSWLF criteria (56 FR 50978), in addition to the financial assurance performance standard of section 258.74, which allows approved States to use any State-approved mechanism that meets that performance standard. Commenters on the August 30, 1988 proposal also supported the development of financial tests for local governments and for corporations to demonstrate that they can satisfy the goals of financial assurance on their own, without the need to produce a third-party instrument to assure that the obligations associated with their landfill will be met. The Agency agreed with commenters and in the October 9, 1991 preamble, announced its intention to develop both a local government and corporate financial test in advance of the effective date of the financial assurance provisions.

The Agency has delayed the effective date of the financial responsibility provisions until April 9, 1995 (see 58 FR 51536) in order to provide adequate time to promulgate a financial test for local governments and another for corporations before the effective date of the financial assurance provisions. The delayed effective date also was intended to provide owners and operators sufficient time to determine whether they satisfy the applicable financial test criteria for all of the obligations associated with their facilities, and to obtain a guarantor or an alternate instrument, if necessary. The Agency also recognized that local governments, in particular, require notice of the requirements in order to plan their budgets for the upcoming year.

The Agency proposed a local government financial test and a corporate financial test on December 27, 1993 (see 58 FR 68353) and October 12,

1994 (see 59 FR 51523), respectively. The Agency expects to promulgate the local government test in the fall of 1995 and the corporate test in the spring of 1996. The Agency, therefore, proposed an additional extension on October 18, 1994 to delay the current April 9, 1995 effective date for subtitle D financial assurance requirements by one year until April 9, 1996 (see 59 FR 52498) to allow MSWLF owners and operators that qualify to demonstrate financial assurance for their closure, post-closure, and corrective action obligations through the use of a financial test. Owners and operators who meet the requirements of the financial tests will not be required to obtain a third-party financial assurance instrument<sup>1</sup> for these obligations.

### III. Response to Comments and Analysis of Issues

This section summarizes and addresses the major comments out of a total of 139 comments received on the October 18, 1994 proposal. A discussion of, and response to, all comments can be found in the docket for this rulemaking.

#### A. Support for Extension

Most commenters support the proposal to extend the effective date of the financial assurance requirements. Many commenters, however, expressed concern that the proposed one-year extension until April 9, 1996 would not be enough time for MSWLF owners and operators to meet the financial assurance requirements by using the local government and corporate financial tests. Not only have the financial tests not been promulgated yet, but States will need time to incorporate the financial tests into their regulations and MSWLF owners and operators will then need time to comply with the recordkeeping and reporting requirements of the financial test (or with the requirements of an alternate financial assurance instrument).

The Agency agrees that one year may not be enough time to take advantage of a financial test and, accordingly, has decided to extend the effective date of the financial assurance requirements for MSWLF owners and operators by two years from April 9, 1995 until April 9, 1997 (for landfill owners and operators of remote, very small landfills by 18 months, from October 9, 1995 until April 9, 1997). Although the Agency would like to implement the financial assurance requirements as soon as possible, the Agency must also balance

the goals of ensuring protection of human health and the environment and minimizing the costs of regulatory compliance to owners and operators of MSWLFs. The Agency believes that the potential cost savings to MSWLF owners and operators of complying with financial assurance requirements through the use of a financial test outweigh the risks of delaying their implementation. The Agency does not believe that delaying the effective date of the financial assurance requirements by a temporary extension will result in a significant threat to human health and the environment. The purpose of the financial assurance requirements is to ensure that funds will be available to cover the costs of closure and post-closure care if the owner or operator is unable to cover these costs when they occur. The delay in implementing the financial assurance requirements, however, does not in any way affect the owner or operator's existing obligation to conduct closure and post-closure care at the facility when required in a manner consistent with the Subtitle D criteria, and to pay the costs incurred in conducting those activities. Like other future business expenses, the Agency anticipates that most owners and operators have prepared or are currently preparing to meet these expenses. Thus, it is unlikely that a delay in implementing the financial responsibility requirements will result in significant numbers of unfunded closure and post-closure care activities.

The Agency believes that the two-year extension adopted in this rule can be fairly characterized as the logical outgrowth of the October 18, 1994 proposal. Although the proposed rule contemplated a one-year extension, the point was to provide notice of the need for additional time for MSWLF owners and operators to meet the financial assurance requirements through the use of a financial test. In light of the comments received, the Agency is now persuaded that a two-year, not a one-year, extension is necessary for MSWLF owners and operators to meet the financial assurance requirements through the use of a financial test.

#### B. Opposition to Extension

Four commenters out of a total of 139 commenters oppose extending the time for MSWLFs to comply with financial assurance requirements.

One commenter argues that MSWLF owners and operators could comply at this time using currently available financial assurance mechanisms, such as a trust fund, letter of credit or surety bond, and that an extension would only serve to delay closure of MSWLFs that

could not meet financial assurance requirements. A related comment argues that repeated delays undermine the credibility of the financial assurance program; that the use of a trust fund is preferable to a financial test; and that any additional delay in implementing the financial assurance requirements for local governments should be no more than eight months after the April 1995 effective date.

Although many MSWLF owners and operators could comply with financial assurance requirements using currently available alternatives, the Agency is committed to developing a local government and corporate financial test as an alternative to third party financial mechanisms for the reasons discussed above. The Agency, therefore, believes that MSWLF owners and operators should not have to select a financial assurance mechanism until all the financial assurance alternatives are available, including the financial tests, so that MSWLF owners and operators can assess all the alternatives to determine which one will best serve their needs.

The Agency disagrees that delaying the effective date will only serve to delay closure of facilities that cannot meet the financial assurance criteria. MSWLFs are already subject to design and operating requirements that are more extensive, and significantly more expensive, than the financial assurance criteria. MSWLFs that were unable to meet Federal minimum design and operating requirements have already closed.

The State of Missouri argues that a delay in implementing Federal financial assurance requirements would place MSWLF owners and operators in States that already require financial assurance at a competitive disadvantage with MSWLF owners and operators in States that do not currently require financial assurance, as well as place States with existing or planned financial assurance programs in the position of having to spend valuable time and effort to delay their own programs.

The Agency does not believe that an additional two years to comply with Federal financial assurance requirements would create a competitive disadvantage between MSWLF owners and operators in States with different financial assurance requirements. The available evidence suggests that the costs of transporting waste—even between adjacent States—will more than offset the additional costs of disposing of waste in a State with financial assurance requirements. Further, since waste disposal contracts are generally written to cover several

<sup>1</sup> For a description of the third-party instruments available to MSWLF owners and operators see 56 FR 50978.

years, the Agency believes it is unlikely waste generators will shift disposal to a different MSWLF during a temporary extension period.

Furthermore, in the absence of a significant competitive disadvantage among States as a result of the delay there is, arguably, no need for States with existing or planned financial assurance programs to change their own requirements. States can adopt requirements under State law that are more stringent than the Federal requirements and, therefore, do not need to delay implementing their own financial assurance requirements. Indeed, States that adopt responsible financial assurance requirements over the next two years will be better able to cover unanticipated MSWLF closure or post-closure costs. If, however, a State chose to delay its own financial assurance requirements, the commenter has not shown that it would be prohibitively expensive or difficult to implement such an extension.

A commenter from the insurance and surety industry argues that delaying the effective date of the financial assurance requirements to allow the use of a financial test would ultimately undermine the purpose of the financial assurance requirements and force States to incur the costs of closing, and remediating releases from, MSWLFs that cannot meet financial assurance requirements. The argument is that the use of a financial test would mean that only the least financially able MSWLF owners and operators would purchase third-party financial assurance instruments, which would discourage the continued development of alternate financial assurance instruments in the insurance and surety industry, thereby, making it more expensive and more difficult to obtain third-party financial assurance instruments. Financially weaker MSWLF owners and operators would, therefore, be unable to meet financial assurance requirements and would seek to further reduce the requirements necessary to meet a financial test. Inevitably, States would be burdened with the closure and response costs of financially weak MSWLF owners and operators that are either unable to obtain third-party financial assurance instruments or that are allowed to continue to operate as a result of a devalued financial test.

This comment is more appropriately addressed to the proposed financial tests themselves, rather than to a delay in implementing the financial assurance requirements. At this time it is difficult, if not impossible, to predict how many MSWLFs will or will not be able to meet a financial test, because the local

government and corporate financial tests have not yet been promulgated or otherwise finalized. Accordingly, the Agency will address this issue more fully in the financial test rulemakings. Even if, however, insurance and surety mechanisms become expensive and difficult to obtain due to underwriting considerations, owners and operators still have the option of obtaining a guarantee, a letter of credit, or of establishing a trust fund to comply with financial assurance obligations. Trust funds, in particular, are available to all owners and operators regardless of corporate affiliation or prevailing market conditions, because creating a trust fund does not present a financial risk.

In any event, the Agency does not believe that a temporary delay in implementing the Subtitle D financial assurance requirements in anticipation of the development of a financial test will cause financial services firms to abandon the market for, or otherwise limit their development of, third-party financial assurance instruments. First, it is the Agency's understanding that providers of financial assurance mechanisms make decisions regarding potential markets and the desirability of entering those markets based on evaluations of long-term market demand; arguably, a two-year delay should not have a significant effect on this long term decision-making. Second, an extensive market for financial assurance mechanisms, which is sufficient to maintain the infrastructure of the market for such mechanisms, already exists independent of the RCRA Subtitle D financial assurance requirements. For example, owners and operators of hazardous waste treatment, storage and disposal facilities (TSDFs), underground storage tanks, and PCB commercial storage facilities must meet financial assurance requirements, which include third-party mechanisms that are essentially the same as those provided for in the Subtitle D criteria.

#### *C. Local Governments*

Some commenters argue that local governments as a class should be exempt from meeting financial assurance requirements for MSWLFs, because unlike private MSWLFs owners and operators, local governments do not go out of business or otherwise disappear. Today's rule and the October 18, 1994 proposal, however, only address the issue of extending the effective date for meeting the financial assurance requirements for MSWLFs; they do not raise the issue of whether certain classes of MSWLF owners and operators, such as local governments,

should be exempt from the financial assurance requirements. The Agency previously addressed this issue in the October 9, 1991 rule that revised the minimum Federal standards, including financial assurance criteria, for MSWLFs (see 56 FR 50978). At that time, the Agency determined that local governments should not be exempt from financial assurance requirements because local governments may be unable to obtain the immediate funds necessary to meet closure and/or corrective action obligations at MSWLFs so as to ensure protection of human health and the environment. Local governments, for example, often have relatively limited resources, limited flexibility in their annual budgets and a limited ability to quickly obtain traditional sources of financing or revenues, such as bond issues, taxes and intergovernmental transfers.

#### *D. Remote/Very Small Landfills*

Today's rule extends the effective date of the financial assurance requirements for all MSWLF owners and operators, including remote, very small (less than 20 tons per day) landfills as defined at 40 CFR § 258.1(f)(1), until April 9, 1997. Although the proposed rule contemplated extending the effective date of the financial assurance requirements for all MSWLFs, this was apparently unclear to several commenters who suggested that the Agency extend the deadline for the remote, very small landfills as well as for the general class of MSWLFs. Remote/very-small landfills had been subject to different deadlines for meeting the MSWLF criteria than the general class of MSWLFs; until today's rule the effective date of the financial assurance requirements for owners and operators of remote, very small landfills was October 9, 1995 (see 58 FR 51536).

#### *E. Unfunded Mandate*

A few commenters assert that the financial assurance requirements contained in the October 9, 1991 final rule on MSWLF Criteria (56 FR 50978) constitute a Federal unfunded mandate on local governments. Today's rule, however, provides regulatory relief by extending for two years the effective date by which MSWLF owners and operators (including local government owners and operators) must meet those financial assurance requirements. Moreover, the purpose of the extension provided by this rule is to allow the Agency sufficient time to promulgate a rule to give MSWLF owners and operators additional flexibility to meet the financial assurance requirements. That rule will allow owners and

operators to use a financial test instead of a more expensive third-party instrument to assure that adequate funds will be readily available to cover the costs of closure, post-closure care, and corrective action associated with MSWLFs.

IV. Effective Date

Today's rule is effective immediately. Section 3010(b) of RCRA provides that regulations respecting requirements applicable to the treatment, storage, or disposal of hazardous waste shall take effect six months after the date of promulgation. However, section 3010(b)(1) of RCRA allows the Agency to set a shorter effective date if the Agency finds that the regulated community does not need six months to come into compliance with the new regulation.

The regulated community does not need six months to come into compliance with today's rule, because the provisions of this rule delays the regulatory requirements of financial responsibility and allows the Agency time to develop additional, more flexible, methods for MSWLF owners and operators to comply with the regulations. Today's rule, therefore, is immediately effective under section 553(d) of the Administrative Procedure Act.

V. Economic and Regulatory Impacts

A. Executive Order 12866

Under Executive Order 12866, which was published in the Federal Register on October 4, 1993 (see 58 FR 51735), the Agency must determine whether a regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Agency believes that this final rule does not meet the definition of a

major regulation. Thus, the Agency is not conducting a Regulatory Impact Analysis, and today's final rule is not subject to review by the Office of Management and Budget (OMB) based upon Executive Order 12886.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act [5 U.S.C. 601 et seq.] at the time an Agency publishes a proposed or final rule, it generally must prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions), unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. The effect of this final rule is to provide small entities with additional time to meet the financial assurance requirements of subtitle D regarding closure and post-closure costs. Therefore, pursuant to 5 U.S.C. 605b, the Agency believes that this final rule will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Agency has determined that there are no new reporting, notification, or recordkeeping provisions associated with today's final rule.

List of Subjects in 40 CFR Part 258

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: March 31, 1995.

Carol M. Browner, Administrator.

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

PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS

1. The authority citation for part 258 continues to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6912(a), 6944(a), and 6949a(c); 33 U.S.C. 1345(d) and 1345(e).

2. § 258.70 is amended by revising paragraph (b) to read as follows:

§ 258.70 Applicability and effective date.

\* \* \* \* \*

(b) The requirements of this section are effective April 9, 1997.

3. § 258.74 is amended by revising paragraph (a)(5) to read as follows:

§ 258.74 Allowable mechanisms.

\* \* \* \* \*

(a) \* \* \*

(5) The initial payment into the trust fund must be made before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.

\* \* \* \* \*

4. § 258.74 is amended by revising the third sentence of paragraph (b)(1); by revising the second sentence of paragraph (c)(1); and by revising the second sentence of paragraph (d)(1) to read as follows:

§ 258.74 Allowable mechanisms.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \* The bond must be effective before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58. \* \* \*

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* The letter of credit must be effective before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58.

\* \* \*

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \* The insurance must be effective before the initial receipt of waste or before the effective date of the requirements of this section (April 9, 1997), whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of § 258.58. \* \* \*

\* \* \* \* \*