

Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.

Briefing on Activities of Nuclear Waste Technical Review Board (Public Meeting)

(Contact: Seth Coplan, 301-504-1850)

3:30 p.m.

Discussion of Internal Management Issues (Closed—Ex. 2)

Thursday, March 4

2:00 p.m.

Briefing on License Renewal Issues (Public Meeting)

(Contact: William Travers, 301-504-1117)

Friday, March 5

10:00 a.m.

Briefing by Executive Branch (Closed—Ex. 1)

Week of March 8—Tentative

Monday, March 8

2:30 p.m.

Discussion of NRC Policy Options Concerning Nuclear Safety Issues in Eastern Europe and Former Soviet Union (Public Meeting)

(Contact: Michael Congdon, 301-504-2744)

Tuesday, March 9

10:00 a.m.

Briefing on Activities of the Center for Nuclear Waste Regulatory Analysis (CNWRA) (Public Meeting)

(Contact: Malcolm Knapp, 301-504-3324)

11:00 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.

Briefing on Proposed Rulemaking for Preparation and Use of Radiopharmaceuticals (Public Meeting) (Contact: Anthony Tse, 301-492-3797)

ADDITIONAL INFORMATION: Affirmation of "Final Amendments to 10 CFR Part 61, 'Licensing Requirements for Land

Disposal of Radioactive Waste'" (Public Meeting) scheduled for February 9 was postponed.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETING CALL: (Recording)—(301) 504-1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504-1661.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 93-3886 Filed 2-16-93; 10:21 am]

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Federal Register

Thursday
February 18, 1993

Part II

Environmental Protection Agency

40 CFR Part 280

Underground Storage Tanks Containing
Petroleum; Financial Responsibility
Requirements; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 280

[FRL-4128-9]

RIN 2050-AC67

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA, or the Agency) is promulgating financial responsibility requirements applicable to local governmental owners and operators of underground storage tanks containing petroleum. EPA promulgates these requirements under the authority of section 9003 (c) and (d) of the Resource Conservation and Recovery Act 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 four alternative mechanisms for use by local governments to demonstrate financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental underground storage tank releases. The Agency is adding these local governmental financial assurance mechanisms to the existing mechanisms contained in the financial responsibility rule promulgated October 26, 1988. These additional mechanisms will allow a greater number of local governmental entities to comply with the financial assurance requirements and will result in a net cost savings to local governments estimated at approximately \$32 million over a ten year period.

EFFECTIVE DATE: This rule becomes effective on March 22, 1993.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (703) 412-9810 in Virginia, or Sammy Ng in EPA's Office of Underground Storage Tanks at (703) 308-8882.

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

I. Authority

II. Background

A. Legislative and Regulatory Overview

1. RCRA Subtitle I
2. October 26, 1988 Rule
3. Discussion of the Financial

Responsibility Requirements for Governments in the October 26, 1988 Rule

- A. The Proposed Rule
- B. Key Provisions in Today's Rule
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III. Section-by-Section Analysis

- A. Applicability
- B. Definition of Terms
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IV. New Mechanisms for Demonstrating Financial Responsibility

- A. Description of Mechanisms
1. Bond Rating Test
2. Local Government Financial Test (§ 280.105)
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- B. Reporting by Owner or Operator
- C. Recordkeeping
- D. Bankruptcy or Other Incapacity of the Owner or Operator

V. Economic Impact Analysis

- A. Economic Impact Analysis
1. Compliance with Executive Order 12291
2. The Affected Community
3. Assumptions and Methodology Used in the EIA
4. Cost Impacts
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- B. Regulatory Flexibility Act
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VI. Supporting Documents

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. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, and 6991h).

II. Background

This section provides the legislative and regulatory background for this rule and summarizes today's additional mechanisms for financial responsibility for local government entities.

A. Legislative and Regulatory Overview

This section discusses the statutory authority for financial responsibility regulations for UST owners and operators, the provisions of the financial responsibility regulations promulgated on October 26, 1988 and the scope of the financial responsibility regulations being promulgated today.

1. RCRA Subtitle I

The Hazardous and Solid Waste Amendments of 1984 (HSWA) extended and strengthened the provisions of the Resource Conservation and Recovery Act (RCRA). HSWA added Subtitle I to RCRA, establishing provisions for the development and implementation of a regulatory program for underground storage tanks (USTs) containing certain substances, including petroleum and other regulated substances (such non-petroleum 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 also modified Subtitle I by specifying the minimum statutory levels of financial responsibility for petroleum marketers and the factors that EPA may consider in setting minimum levels for non-marketers. The objective of the financial responsibility requirements is to ensure that owners and operators can respond promptly to clean up releases and to compensate third parties for any injuries or damages associated with UST releases.

2. October 26, 1988 Rule

The final financial responsibility rule, promulgated on October 26, 1988 applies 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 tank systems excluded from the technical standards.

To cover the potential costs of corrective action and third-party

liability claims from sudden and nonsudden accidental releases from USTs, the rule requires the following parties to obtain financial assurance of at least \$1 million per occurrence:

(1) All owners or operators of petroleum USTs at facilities engaged in petroleum production, refining, or marketing; and

(2) Owners or operators of USTs with an average monthly throughput of more than 10,000 gallons.

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. The responsibility for cleanup and third-party compensation in the event of UST releases was established under the technical standards published in September 1988. The October 1988 financial responsibility rule made owners and operators responsible for complying with the financial responsibility requirements, but otherwise imposed no new liability; rather, the rule was intended to verify that local government owners or operators of USTs would be able to meet their liabilities in the event of an UST release. It is important to note that exemption from the financial responsibility requirements would not exempt an owner or operator from their liabilities in the event of an UST release.

UST owners or operators may use the following mechanisms to satisfy the requirements: 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. (Under the October 26, 1988 rule, only private companies reporting to credit reporting agencies, publicly-held companies reporting to the Securities and Exchange Commission, and public utilities reporting to specified agencies are eligible to use the financial test of self-insurance.) 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 a combination of mechanisms provides the full amount of required 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 October 26, 1988 final rule requires owners or operators to submit documentation of financial responsibility to the implementing agency for three occurrences: (1) After a known or suspected release occurs, (2) when a provider becomes incapable of providing assurance, and (3) 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 also maintain records of the financial assurance mechanisms used to satisfy these requirements on-site or at their place of business.

The October 26, 1988 rule also contains provisions that require third-party providers of financial assurance (i.e., sureties, insurance companies, risk retention groups, guarantors, and providers of letters of credit) to provide notice of cancellation with an adequate time period for the UST owners and operators to seek alternative coverage and to determine whether there has been a release that would trigger the third-party mechanism. On November 9, 1989, EPA published an interim final rule that modified the required language of endorsements required for insurance policies as they relate to cancellation (54 FR 47077).

The State program approval objective for financial responsibility of owners and operators of petroleum UST systems was also promulgated October 26, 1988. This objective outlines two general provisions: (1) The considerations used to determine whether States' financial responsibility requirements will be considered "no less stringent" than the corresponding Federal requirements standard, and (2) the standards that must be met to demonstrate adequate enforcement of compliance.

3. Discussion of the Financial Responsibility Requirements for Governments in the October 26, 1988 Rule

Although the final financial responsibility rule (53 FR 43322, October 26, 1988) exempts those government entities whose debts and liabilities are the debts and liabilities of Federal or State governments, local government entities are required to provide financial assurance for USTs that they own or operate. Under the Agency's schedule for phased compliance with the final rule, local

government entities have been given until February 18, 1994, one year from the promulgation of today's rule, to comply. In the October 1988 final rule, the Agency stated its intention to develop a financial test in the interim that would allow local governments to demonstrate that they have the requisite financial strength and stability to pay the costs associated with UST releases. After passing this financial self-test, local government entities will be allowed to demonstrate financial responsibility in a manner similar to private companies that meet the criteria of the corporate financial test of self-insurance.

Under the compliance schedule, Indian tribes are required to comply with financial responsibility requirements under the same schedule as local governments; that is, within one year from the promulgation of today's rule (i.e., before February 18, 1994).

4. The Proposed Rule

The proposed rule was published on June 18, 1990. The Agency received comments from 23 commenters. Most supported the development of the new financial responsibility mechanisms, stating that these additional mechanisms allow more local governments to comply with the financial assurance requirements, and that they would be able to do so at lower cost. Some commenters suggested changes or additions to the mechanisms proposed. Where appropriate, the Agency has adopted these suggestions. The specific issues raised and the Agency's responses are addressed in "Summary of Comments and Responses on Proposed Additional Financial Responsibility Mechanisms for Local Governments Subject to Subtitle I of the Resource Conservation and Recovery Act."

One commenter proposed as a new alternative mechanism that EPA issue regulations allowing implementing agencies to redirect funds from Federal- or State-funded programs to pay for the expenses associated with corrective actions. The Agency rejected this suggestion because it has no statutory authority to redirect funds from other State or Federal programs.

B. Key Provisions in Rule

In today's rule, the Agency is providing additional mechanisms that will allow local governments to comply with the financial responsibility requirements. These mechanisms do not replace the existing methods; rather, they supplement them. These mechanisms are similar in intent to the corporate guarantee and the financial

test of self-insurance now allowed as mechanisms for corporations. Local governments eligible to use the mechanisms may use them alone or in combination with other mechanisms, as described below.

One commenter questioned the language indicating that all local governments "may use" the new financial assurance mechanisms, since the criteria associated with using the mechanisms by definition restricts their use by certain entities. The Agency emphasizes that all local governments may seek to use all mechanisms, but only those that meet all qualifying criteria may use a specific mechanism to demonstrate financial responsibility.

EPA is promulgating four additional mechanisms for use by local government entities to demonstrate financial responsibility:

(1) *Bond rating test.* Local government entities with \$1 million or more of total outstanding issues of general obligation bonds (excluding refunded obligations) and having investment-grade ratings would be eligible to demonstrate financial responsibility. Non-general purpose local governments (e.g., special districts and school districts) with \$1 million or more of investment-grade revenue bonds may also use this mechanism if they do not have the authority to issue general obligation bonds. General obligation bonds that are backed by credit enhancement mechanisms other than bond insurance may not be included in the bond rating test. Revenue bonds that are backed by any type of credit enhancement mechanism may not be included in the bond rating test. Bonds with investment grade ratings are defined as those having a Moody's bond rating of Baa or higher (i.e., Aaa, Aa or A), or a Standard and Poor's bond rating of BBB or higher (i.e., AAA, AA, or A). Passing the bond rating test will be considered a sufficient demonstration of financial responsibility.

(2) *Worksheet test.* A worksheet test has been developed for use by local government entities that do not have general obligation or revenue bond ratings or that have less than \$1 million in outstanding issues of investment-grade-rated general obligation or revenue bonds. (Governments meeting the requirements of both the bond rating test and the worksheet test may use either mechanism but are assumed to use the bond rating test as a matter of administrative convenience.) Local governmental entities having outstanding issues of general obligation or revenue bonds that are rated as less than investment grade are not eligible to use the worksheet test. The worksheet

incorporates several financial criteria designed to measure a local government entity's financial stability. Passing the worksheet test will be a sufficient demonstration of financial responsibility.

(3) *Guarantee.* A local government entity can demonstrate financial responsibility by obtaining a binding guarantee from another governmental entity able to demonstrate financial responsibility assurance through the alternative mechanisms. The guarantor must have the authority to provide a guarantee to the local government entity seeking financial assurance. For example, a town may serve as the guarantor for a special district, a county may serve as the guarantor for a school district, a State may serve as the guarantor for a county, or a city may act as a guarantor to a special district (e.g., a transportation authority or a government utility). A guarantee for the entire aggregate limit for which a local government must demonstrate financial responsibility will be a sufficient demonstration of financial responsibility. A guarantee for a lesser amount may be used in combination with one or more other allowable mechanisms to demonstrate financial responsibility.

(4) *Maintenance of a funded balance.* Local government entities may satisfy the financial responsibility regulations by developing a self-administered emergency response fund to finance an UST corrective action and pay for third-party damages. A fund balance established for the entire aggregate limit for which a local government must demonstrate financial responsibility will be a sufficient demonstration of financial responsibility. A fund balance established for a lesser amount may be used in combination with one or more other allowable mechanisms to demonstrate financial responsibility.

The October 1988 rule allows the use of combinations of financial responsibility mechanisms. This feature is extended to include the financial self-test mechanisms being promulgated today. For example, a local government entity may use the guarantee or funded balance mechanisms to satisfy the deductible amounts of insurance policies. Local governmental entities may use the mechanisms being promulgated today in addition to the mechanisms allowed by the October 1988 rule: insurance, risk retention group (RRG) coverage, surety bond, letter of credit, State-required mechanisms, or a State fund or other State assumption of responsibility.

In contrast to the specifications for the corporate self-test, EPA does not believe

that local governments will use consolidated financial statements to support both the worksheet and the guarantee mechanisms. Local governments are separate legal and financial entities from States and from each other. The situation wherein a local government will consolidate its financial statements with a State, or vice versa, and use the consolidated statements to support both the worksheet and the guarantee, cannot occur. In addition, most local governments are independently chartered. By the nature of the local government charters, local government operations that are consolidated, such as utility operations accounted for as enterprise funds, never issue stand-alone financial statements, because they have no independent standing. Thus, there is no potential that the consolidated entities could first use their own financial statements for the worksheet, and then rely on the consolidated financial statements for a guarantee, because they have no independent financial statements. Independent authorities (e.g., independent school districts) are independent because they have separate charters and/or articles of incorporation; they operate independently and their financial statements are never consolidated with the statements of the nearby general purpose governments.

To support this rule, the Agency has prepared a Background Document, "Background Document in Support of Financial Self-Test for Local Governments Subject to the Financial Responsibility Requirements of Subtitle I of the Resource Conservation and Recovery Act," that describes in detail the methodology and analyses used to evaluate potential financial responsibility mechanisms.

C. Rationale for Agency's Approach

The Agency had four main goals in developing the additional alternatives being promulgated today for local governments to demonstrate financial responsibility under Subtitle I. First, the Agency wanted to recognize fundamental differences between governmental entities and private entities. Second, the Agency wanted to keep the rule as flexible as possible to allow local governments a variety of choices in demonstrating financial responsibility. Thus, the Agency is promulgating several financial assurance mechanisms for local governments. Third, the Agency wanted to keep the mechanisms as simple as possible to minimize the administrative burden on local governments as well as the implementing agency. Thus, the

Agency is promulgating options that use data believed to be readily available to local governmental entities or that are consistent with governmental practices and is maintaining the same approach to reporting requirements adopted in the regulations published in the October 1988 rule. Fourth, the Agency wanted financial responsibility mechanisms that could realistically be used by local governments.

In the October 1988 rule, the Agency provided a mechanism whereby financially secure corporations can self-insure. The rule provided two alternatives for corporations. Under Alternative I, a firm can self-insure if it meets four criteria: (1) Tangible net worth equal to 10 times the sum of its financial responsibility amounts for underground storage tanks, its closure, post-closure care, liability coverage, and/or corrective action costs for Subtitle C facilities, and its plugging and abandonment costs for Class I Hazardous Waste Injection Wells, (2) tangible net worth equal to at least \$10 million, (3) annual filing of its financial statements with the Securities and Exchange Commission (SEC), the Rural Electrification Administration (REA), the Energy Information Administration (EIA), or Dun & Bradstreet (which must have assigned a financial strength rating of 4A or 5A), and (4) annual reports which, if independently audited, did not include an adverse auditor's opinion or a disclaimer of opinion. Under Alternative II, a corporation can self-insure if it meets four criteria: (1) Tangible net worth of at least \$10 million, (2) tangible net worth at least six times its UST obligation, (3) U.S. assets equal to at least 90 percent of total assets, or at least six times its UST obligations, and (4) net working capital equal to 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 Baa. In addition, a firm using Alternative II must either report its financial information to the SEC, the EIA, or the REA or obtain a special auditor's report.

Local government entities, however, differ in several important characteristics from corporations, which makes the application of the corporate self-test mechanism in the October 1988 rule impractical for local governments. For example, "general purpose" local governments (counties, municipalities, and townships) generally use accounting systems that do not recognize assets in a manner similar to private companies. For example, municipal buildings and infrastructure

(e.g., streets and utility lines) are not generally carried as assets on the local government financial statements. Thus, a test based on "tangible net worth" is, by definition, unworkable for many local governments. (It should be noted, however, that government-owned utilities that provide financial data to the Rural Electrification Administration or the Energy Information Administration are allowed to use the corporate financial test under the October 1988 rule.) Also, the accounting standards used by most local governmental entities are not the same as the Generally Accepted Accounting Principles ("GAAP") used by private entities. Most local governments use either cash basis accounting (often mandated by State law) or "modified" accrual accounting, where the recognition of revenues may be delayed. Consequently, a test based on "net working capital" may be unworkable for most local governmental entities. In addition, local governments are not generally required to report financial information to a regulatory agency similar to the Securities and Exchange Commission. Thus, it is impossible to incorporate mandatory reporting to an independent organization into a self-test.

Nevertheless, the Agency believes that a mechanism parallel to self-insurance is particularly appropriate for local government entities. The Agency has determined that local government entities are, in general, more financially stable than private companies. Most local governments, unlike private entities, have the authority to levy taxes or to independently set rates, which provide a consistent, reliable source of income. In contrast to corporations, they are less likely to dissolve or merge with other entities which means that they are less likely to have abrupt changes in financial structure. They are, by definition, geographically fixed, eliminating potential concerns that they may move and abandon their USTs. They rarely go bankrupt, suggesting that they are, as a class, more financially stable. As discussed in the background document, the available literature suggests that even bankruptcy does not allow local government entities to void their legal obligations. Additionally, unlike some private companies, local governments are generally required to make their financial data publicly available.

These factors suggest that a self-test for municipalities does not necessarily require the same level of built-in safeguards as required of private entities. Assurance that local government owners and operators will

be financially responsible for their UST-related obligations, therefore, can be demonstrated more easily than assurance for private entities. Consequently, the primary concern of the Agency in developing this rule is that local governments show evidence of financial stability and prudent financial management.

D. Description of the Regulated Community

This section describes the nature of the local governmental entities that would be regulated under today's rule, including a description of their UST ownership characteristics, a brief description of their operation, and an overview of the considerations the Agency has used in developing today's rule.

The Agency estimates that about 62,000 petroleum USTs that are subject to Subtitle I jurisdiction are owned or operated by approximately 25,000 local government entities. Most of these USTs store petroleum products for purposes other than retail motor fuel sales. A local government entity may, for example, own USTs that store gasoline to fill police and fire vehicle tanks.

Local government entities include both general purpose local governments and special purpose local government entities. General purpose local government entities include municipalities, counties, townships, towns, villages, parishes, and New England towns. Special purpose local governments include entities that perform a single function or a limited range of functions. Special purpose local governments are generally designated as either public authorities or special districts such as school districts, water and sewer authorities, transit authorities, redevelopment authorities, irrigation districts, or power authorities. All local governments, both general and special purpose, are subject to this rule and are eligible to use the new financial assurance mechanisms described in today's rule. Several commenters requested an expansion or clarification of the definition of local government entities to include local public transit systems and redevelopment authorities. The Agency originally intended these types of local government entities to be included in the definition, and has clarified the definition as requested by the commenters.

The Agency's research has shown an extremely low rate of fiscal emergencies among governmental entities through the 1970s and 1980s. A 1983 study by the Advisory Council on Intergovernmental Relations (ACIR)

found only three incidents of bankruptcy among general purpose governments, only one of which caused a general purpose governmental body to void a legally binding agreement. In all other cases, even local government entities that entered bankruptcy were forced to make full restitution, although sometimes over a stretched-out payment term. Since 1983, only five additional general purpose governments are known to have declared bankruptcy. There has been a similarly low rate of bankruptcy among special purpose districts. Between 1972 and 1989, 29 utility special districts, two school districts, and six other special purpose districts and hospitals filed for bankruptcy (out of a total of more than 40,000 school districts and special purpose districts).

Although bankruptcy is an extreme condition, the Agency believes this very low incidence (0.003 percent per year) reflects general stability of local government entities. In contrast, 56,423 (1.3 percent) of the 4,256,243 private companies in operation filed bankruptcy petitions in 1982.¹ This number increased to 88,278 in 1987. Combined with the relatively low costs of UST financial responsibility obligations (relative to other environmental obligations and most governmental activities in general), the relative stability of local governments is interpreted by EPA to indicate a general ability to meet financial obligations under Subtitle I.

In addition, the Agency's research has shown relatively few cases where releases were known to have come from local government-owned USTs. For releases that did occur, local government entities were generally able to clean up and to pay for the costs of corrective actions associated with the releases. Because of the limited data regarding local government responses to UST releases, however, the Agency has relied primarily on data and analyses regarding the overall financial health of local governments. One commenter indicated that cleanups of UST releases at airports are generally funded from operations or funds for construction projects. The Agency interprets this statement as additional support for allowing local governments to demonstrate financial responsibility based on their internal financial condition, rather than requiring the use of third-party mechanisms.

III. Section-by-Section Analysis

A. Applicability

Today's rule would apply to all non-exempt governmental owners and operators of underground storage tanks containing petroleum. 40 CFR § 280.90(c) exempted from financial responsibility requirements State and Federal government entities whose debts and liabilities are the debts and liabilities of a State or the United States. Although the October 1988 rule excluded State and Federal governments, it required local government entities to demonstrate financial assurance for USTs that are owned or operated by the government.

Data available to the Agency in preparing the Regulatory Impact Analysis for the October 1988 rule suggest that local government entities collectively own approximately 62,000 USTs. Additional analysis of the New York State tank notification data base suggests that larger local government entities are more likely to own USTs and are more likely to own multiple USTs, but a specific breakdown of how many of each type of local government own USTs is not available from the data available to EPA. Overall, EPA estimates that about approximately 25,000 local governments own USTs.

Local government entities are created under State law, and consequently vary significantly from State to State. All local government entities recognized under State law may seek to use the financial assurance mechanisms being promulgated today. As recognized by the Bureau of the Census, local government entities generally fall into the following categories:

County Governments: Organized county governments are found throughout the nation except for Connecticut, Rhode Island, the District of Columbia, and limited portions of other States. In Louisiana, the county governments are officially designated as "parish" governments, and the "borough" governments of Alaska resemble county governments in other States. In general, county governments are defined in terms of a geographical area served, rather than a specific population.

Municipal Governments: Municipal governments include active government units officially designated as cities, boroughs (except in Alaska), towns (except in the six New England States and Minnesota, New York, and Wisconsin), and villages. This concept corresponds to the "incorporated places" that are recognized in Census Bureau reporting of population and housing statistics.

Township Governments: Township governments exist to serve inhabitants of areas without regard to population concentrations. This category includes governments officially designated as "towns" in the six New England States, New York, and Wisconsin, some "plantations" in Maine, and "locations" in New Hampshire, as well as governments called townships in other areas. In Minnesota, the terms "town" and "township" are used interchangeably.

School Districts Governments: Forty-five States have established public school systems with sufficient autonomy and fiscal authority that they can be classified as independent local government entities.

Special Purpose Districts: Special purpose districts are governmental entities created to perform a single or limited range of functions (e.g., school districts, park and recreation districts, libraries, fire protection districts, cemeteries, transit districts, redevelopment authorities, etc.). These districts may be subdivided into any of the following distinct categories: (1) Local or metropolitan districts; (2) districts dependent on or independent of a municipality for their creation or operation; and (3) districts created by State enactment or by municipal resolution. They have sufficient administrative and fiscal autonomy to qualify as separate governments.

Indian Tribes: Indian Tribes are included in the statutory definition of municipality in RCRA Section 1004(13) and are, therefore, required to comply with the financial responsibility requirements by the same compliance date as other local government entities. This rule treats Indian Lands as local government entities and allows them to use the self-test mechanisms to demonstrate financial responsibility.

Several commenters requested exemptions from the UST financial responsibility requirements for local governments. Commenters gave the following reasons for such an exemption: (1) Local governments, as a class, have sufficient financial strength and stability to pay for corrective actions without the need to demonstrate financial responsibility; and (2) the adverse effects on the ability of local governments to fund emergency services if required to divert funds to pay for assurance mechanisms. One commenter, a small rural town, indicated that it cannot qualify to self-insure and added that the financial responsibility regulations impose financial burdens with which the town, and presumably other towns, could not possibly comply.

¹ "Statistical Abstract of the United States," 109th Edition. United States Department of Commerce, Washington, D.C., 1989; and "General Report on Industrial Organization," 1982 Enterprise Statistics. Issued October 1986.

EPA believes that commenters may have failed to distinguish between: (1) The need for local governments to pay for costs associated with UST releases, as required under the technical standards; and (2) the financial responsibility regulations, which merely require that UST owners be able to demonstrate that they will be able to meet such costs if they occur. Even if EPA were to exempt local governments from the requirement to demonstrate financial responsibility, such an exemption would not, under Subtitle I, relieve them from the legal liability to pay for the costs of UST releases and to compensate third parties for damages caused by releases.

The Agency agrees that most local government entities do have the resources and the will to meet financial responsibilities. This belief underlies the effort to develop mechanisms by which local governments can demonstrate compliance with the financial responsibility requirements without the need to obtain insurance or the use of other third-party mechanisms.

The Agency also agrees with commenters who noted that some local governments may not have the resources to meet their UST-related financial obligations. Consequently, it would not be appropriate to exempt all local governments from the need to demonstrate financial responsibility. Further, EPA believes that exempting all local governments from the requirement to demonstrate financial responsibility would not be consistent with statutory intent as discussed in 9003(d)(5).

The Agency notes the concern about the potential impact on local governmental services. The Agency believes, however, that the mechanisms provided will allow any fiscally solvent local government to demonstrate financial responsibility and continue to operate its USTs, and will do so at minimum cost to the affected local governments. EPA encourages governments unable to demonstrate financial responsibility using the worksheet, bond rating, or fund balance mechanisms to seek guarantees from neighboring jurisdictions or from county governments. EPA believes that such entities are better able to determine the strengths of the government seeking the guarantee, and to measure how essential are the services offered, than the Agency would be in developing a uniform national standard.

B. Definition of Terms

1. Bond Ratings

A bond rating is an "evaluation of the credit quality of notes and bonds

usually made by independent rating services. . . . Ratings generally measure the probability of the timely repayment of principal and interest of municipal bonds."² In this rule, only ratings made by Moody's Investors Service and Standard & Poor's will be considered eligible for use in demonstrating financial responsibility.

2. Investment Grade Bonds

As defined by the Comptroller of the Currency, investment grade bonds are generally regarded as eligible for bank investment. In addition, the legal investment laws of various States may impose certain ratings or other standards for obligations eligible for investment by savings banks, trust companies, and fiduciaries generally. For purposes of this rule, investment grade bonds are considered to include bonds rated Aaa, Aa, A, and Baa by Moody's, or AAA, AA, A, and BBB by Standard and Poor's.³

3. General Obligation Bonds

General obligation (G.O.) bonds, also known as "full faith and credit" bonds, are secured by their issuers' ability to levy ad valorem taxes or to draw from other unrestricted revenue sources, such as sales or income taxes. These bonds are important mechanisms for financing municipal capital improvements such as schools, streets, and municipal buildings. The bond issuer's ability to generate revenues is evaluated by analyzing factors in four categories: socioeconomic, finance, debt, and administration.⁴

4. Revenue Bonds

A revenue bond is a long-term debt instrument that is issued to finance a specific public enterprise and that is payable solely from enterprise earnings or from a dedicated tax.⁵ The Agency has determined that most revenue bonds issued by general purpose governments (i.e., counties, municipalities, and townships) are issued to fund specific projects with dedicated revenue streams

not necessarily central to the operations of that government, and that the evaluation criteria associated with these revenue bonds may not fully reflect the socioeconomic, financial, and administrative condition of a general purpose government. Instead, the ratings reflect a more limited set of criteria pertaining to the specific project financed. In contrast, the Agency has determined that revenue bonds issued by special districts are generally used to finance projects central to the operations of the special districts, so that the ratings encompass a broader view of the overall financial condition of the issuing entities. In this rule, the Agency allows only special districts and school districts that do not have the authority to issue general obligation debt to use investment-grade ratings on revenue bonds to demonstrate financial responsibility.

5. Substantial Governmental Relationship

The October 26, 1988 rule authorized owners and operators to obtain a corporate guarantee to meet their financial responsibility requirements. The corporate guarantor must: (a) Have a controlling interest in the owner or operator or in a specified related firm; or (b) issue the guarantee as an act incident to a "substantial business relationship" with the owner or operator (§ 280.96). The object of the corporate guarantee is a valid and enforceable contract. Additionally, to insure that State insurance laws will not impair the enforceability or validity of the mechanism, a corporate guarantee may be used only if it is certified for use by the Attorney General of the State in which the USTs are located.

Local governments, however, do not have "controlling interests" in one another, and their interactions may not be of an economic nature constituting a "substantial business relationship." As with the corporate guarantee, the Agency is concerned that local governmental guarantees be valid and enforceable, and that they do not conflict with State insurance laws. Thus, a municipality using a local governmental guarantee must certify that there is a "substantial governmental relationship" underlying the guarantee. Such a relationship must include a clear commonality of interests, such as common constituencies served, overlapping geographical jurisdiction, or mutual impact in the event of an UST release. In addition, a local government acting as a guarantor must have the authority to enter into such agreements.

Examples of governmental guarantees could include: (1) A guarantee offered

² Moody's Investors Service, Inc., "Moody's on Municipals: An Introduction to Issuing Debt," 1989, p. 75.

³ Both Standard and Poor's and Moody's recognize groupings within the major bond rating classes. Moody's signifies higher ranking bonds within a class with a "1" (e.g., Baa1), while Standard and Poor's uses a +/- system to designate higher and lower ranking bonds. This proposed rule does not consider these groupings. Thus, a Baa1 rating is classified as a Baa rating for the purposes of the test, while an AA+ or AA- rating is classified as an AA rating.

⁴ Standard & Poor's Corporation, "Standard & Poor's Debt Ratings Criteria: Municipal Overview," 1986.

⁵ Standard & Poor's Corporation, "Standard & Poor's Municipal Finance Criteria," 1989.

by a county to an incorporated city located partially or entirely within the limits of the county; (2) a guarantee offered by one county to another if both counties cover a common aquifer subject to contamination by UST releases; (3) a guarantee offered by the State to a local government within the State; or (4) a guarantee offered by a general purpose local government to an independent school district, water district, utility district, or other special district serving the guarantor in whole or in part. One commenter questioned what types of publicly owned utilities would be eligible to receive a guarantee. Any special district is eligible to receive a guarantee if it has its own governing body and an independent accounting system.

Additional examples of appropriate intergovernmental relationships for a governmental guarantee would be joint operating agreements for emergency responses across jurisdictional boundaries, or purchase of non-UST-related services such as water or education.

One commenter asked three questions pertaining to activities that constitute a "substantial governmental relationship": (1) Whether a governmental entity may act as a guarantor for more than one entity; (2) whether a contractual relationship (under an intergovernmental pooling arrangement) of a pool to provide safety and risk management services in addition to risk pooling will be recognized as a "substantial governmental relationship"; and (3) what criteria determine that a relationship is "sufficiently non-monetary."

The Agency concludes that a local government may act as guarantor for multiple entities. A guarantee from a risk pool, however, is not considered a governmental guarantee for the purposes of establishing financial responsibility. The role of a risk pool is almost exclusively monetary, similar to that of insurance. Issuance of a guarantee would not change the nature of that relationship. The Agency recognizes that participation in a risk pool provides a means for local governments to reduce their liability for large unforeseen events. However, risk pools have not been approved as a Federal financial responsibility mechanism because no comprehensive yet manageable set of Federal guidelines could be developed to ensure that all risk pools would have adequate oversight to make them comparable to the other financial responsibility mechanisms allowed.

The Agency notes that, under § 280.100, risk pools can be adopted as Federal financial responsibility mechanisms by individual States as State-required mechanisms. That is, a State may allow or require local governments to demonstrate financial responsibility through participation in a risk pool if the State can demonstrate to the Agency that the risk pool would be at least equivalent to the other financial responsibility mechanisms allowed.

C. Amount and Scope

The amount and scope of financial responsibility is not being changed from the requirements established in the October 1988 rule. Governmental entities owning or operating USTs at facilities with a monthly throughput of less than 10,000 gallons must demonstrate financial responsibility in the amount of \$500,000 per occurrence. Governmental owners and operators owning or operating one or more USTs at facilities with a monthly throughput of 10,000 gallons or more must demonstrate financial responsibility in the amount of \$1 million. In addition, owners and operators of USTs must demonstrate financial responsibility in the amount of an appropriate annual aggregate. Owners and operators of 100 or fewer USTs must demonstrate financial responsibility in the annual aggregate amount of \$1 million, and owners and operators of more than 100 USTs must demonstrate financial responsibility in the annual aggregate amount of \$2 million.

One commenter suggested incorporating a mechanism in the rule that would allow for reductions in the required level of assurance when tanks are replaced with intrinsically safe tanks or upgraded to be intrinsically safe. The commenter believed that this proposal would result in more equitable and less burdensome requirements for assurance. The Agency disagrees with the commenter's suggestion for the reasons cited in the October 1988 final rule and the June 1990 proposed rule.

Another commenter indicated that disclosing the amount of money that will be paid per release by an assurance mechanism may adversely affect a local government's position in litigation or settlement negotiations. The commenter recommended deleting this provision from the financial officer's letter. EPA believes that the commenter may have misinterpreted the intent of the financial officer's letter. The amount assured, as cited in the financial officer's letter, is not meant to be a minimum amount that must be paid in the event of a release, but rather the minimum amount that a local

government must be able to pay if required to meet corrective action costs and third-party liabilities. EPA assumes that governments will use all defenses and mechanisms to ensure that payments for third-party liabilities are fair and equitable. Conversely, the amount of financial assurance demonstrated does not limit a local government's potential liability in the event of a release. Local governments are liable for all costs resulting from a release, regardless of the amount for which they demonstrate financial responsibility. EPA requires that an amount be specified in the financial officer's letter to ensure that senior officials of the government are aware of their potential obligations as UST owners.

IV. New Mechanisms for Demonstrating Financial Responsibility

A. Description of New Mechanisms

Today's rule promulgates four additional financial assurance mechanisms for use by local government entities that own or operate USTs containing petroleum: A bond rating test, a worksheet test, a governmental guarantee, and maintenance of a funded balance. These additional mechanisms are described below. In addition to these mechanisms, local governments that are owners and operators of USTs may use any of the financial responsibility mechanisms authorized under 40 CFR § 280.94 (i.e., insurance, Risk Retention Group (RRG) coverage, surety bonds, letters of credit, fully-funded trust funds, State-required mechanisms, a State fund, or other State assumption of responsibility). The Background Document prepared in conjunction with this rule explains in more detail the data and methodology used to develop the new mechanisms now being finalized.

1. Bond Rating Test (§ 280.104)

In order to pass the bond rating test, local government entities must have outstanding issues of general obligation bonds that are currently rated at least "investment grade" by Moody's or Standard & Poor's. Special districts, such as school districts or airport authorities, that do not have the authority to issue general obligation bonds may substitute investment grade revenue bonds for general obligation debt to satisfy the bond rating test. In both cases, the municipality's total outstanding obligation must be \$1 million or more, excluding refunded obligations. Investment grade bonds are those with 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 Baa. If a local government has multiple outstanding issues of general obligation or revenue bonds with different ratings, or if the ratings assigned to a single class or issue of bonds by different ratings agencies differ, the lowest rating must satisfy the criterion of the test.

If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain alternative coverage within 150 days of the change in status.

The Agency is aware that municipal bonds are often insured by third-party insurance companies, and that the rating assigned to such insured bonds is established primarily by the creditworthiness of the insurer. After examining the criteria used by the rating companies to evaluate bond insurance companies, however, the Agency has concluded that the provisions for ongoing review and intervention granted to the bond insurance companies under the insurance agreements provides a level of third-party oversight comparable to that provided directly by the bond rating companies. For purposes of this rule, therefore, the Agency is not distinguishing between general obligation bonds that are uninsured or insured by a bond insurance company.

EPA has not found evidence that other providers of other methods of credit enhancement, such as letters of credit, provide a degree of oversight equivalent to that provided by bond insurers. Consequently, ratings that are supported by means of credit enhancement other than bond insurance may not be used to demonstrate financial responsibility.

The Agency has selected the existence of investment-grade bond ratings on general obligation debt as an option for demonstrating financial responsibility for several reasons. First, EPA took into consideration the use of bond ratings as a standard measure of risk by banks and other fiduciary entities. As a result of a 1938 agreement issued jointly by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System and the Executive Committee of the National Association of Supervisors of State Banks, these agencies have given municipal bonds in the first four rating categories (Aaa through Baa or AAA through BBB) privileged status as investment securities. Banks are permitted to hold only a certain number of low or unrated

bonds, and they must balance such holdings with higher rated or more credit-worthy securities. Second, bond ratings serve as one of the only independent evaluations of local government entities' financial health. To perform their evaluations, the bond rating companies must consider a variety of factors that affect both local government entities' current ability to pay and the likelihood of continued ability to pay in the future. In particular, the costs of environmental obligations are included in the evaluations. Thus, the costs of underground storage tanks, solid waste landfills, hazardous waste landfills, sewage treatment plants, and associated environmental liabilities are factored into the rating analysis.⁶ Third, general obligation bonds are secured by the full faith and credit of the borrower, and backed by the issuers' ability to levy taxes or make legislative appropriations. The Agency considers this underlying security equivalent to the requisite level of financial responsibility intended under Subtitle I. Fourth, bonds are re-rated on a periodic basis. Local governments are required to provide current financial data annually; failure to do so can result in removal of the bond rating. Also, the rating agencies receive local newspapers from around the country to monitor local conditions.⁷

Today's rule allows the use of insured issues of general obligation bonds. Information from bond rating companies indicates that local governments do not purchase insurance as a means of earning an investment grade rating, but rather to increase the rating from a lower investment grade (e.g., Baa, Baa1, or A) to the very highest (Aaa). In exchange for the cost of the insurance, the local governments obtain a lower interest rate for the life of the bond. Analysis undertaken by Moody's of four major bond insurers shows that virtually all of the insured debt would have earned an investment grade rating without the insurance, and so would qualify under the bond rating test.⁸ In addition, bond insurers, unlike bond rating agencies, have a strong financial

interest in the soundness of the local governments. If a local government defaults on a payment, the bond insurers must meet the payment. Consequently, bond insurers track the financial obligations of insured local governments closely and often have covenants that allow them to intervene in local government operations. Insurers, for example, may insist on more conservative fiscal policies to preserve the financial strength of a community, which in turn, lowers the risk and cost associated with the bond insurance. Although the bond rating of insured bonds does not directly indicate a local government's financial condition, it does demonstrate both that the government has assured the insurance company of its ability to meet its debts, and that a third party has a strong confidence in the financial health of the local government.

Two commenters agreed with and endorsed the methodology of the bond rating test, stating that the test will serve as a simple method for demonstrating financial responsibility and will provide the Agency with the assurance it seeks without imposing too great a burden on the regulated community.

Several commenters suggested that the Agency expand the bond rating test to include revenue bonds and other sorts of debt instruments as well as general obligation bonds. The Agency has researched the criteria used to assign credit ratings on short-term notes, certificates of participation, lease rental debt, and revenue bonds, and examined how well the credit rating addresses the financial health and fiscal management practices of local governments. The Agency also reviewed the default rates of these types of securities.

EPA is expanding the bond rating mechanism to allow non-general purpose governments (i.e., special districts and school districts) that do not have the authority to issue general obligation bonds to demonstrate financial responsibility if they have earned an investment-grade rating on at least \$1 million in outstanding revenue bond issues not backed by any form of credit enhancement.

EPA has determined that revenue bond financing is central to the operation of most special districts and that the ratings on revenue bonds issued by special districts therefore provide an adequate representation of their financial strength. Special districts are created for a specific purpose, such as to provide airport services to a community. The revenue stream underlying the strength of a special district is the same as the base underlying its associated revenue

⁶ Linda Reidt Critchfield, EPA Office of Underground Storage Tanks, memorandum to the record, "Conversation with Al Medioli, Moody's Investor Services on August 29, 1989," September 15, 1989.

⁷ Ibid.

⁸ Memorandum from Kate Donaldson, James Dickson, and Tony Bansal, ICF Incorporated, to Stephanie Bergman, EPA Office of Underground Storage Tanks, "Municipal Bond Insurance," May 31, 1989; memorandum from Kate Donaldson, James Dickson, and Tony Bansal, ICF Incorporated, to Stephanie Bergman, EPA Office of Underground Storage Tanks, "Municipal Bond Insurance Companies," June 22, 1989.

bonds. Ratings on revenue bonds are, therefore, appropriate measures of special districts' financial capabilities. (This is not the case for a general purpose government that issues revenue bonds, such as a city, because the revenue stream supporting a specific revenue bond is not equivalent to the overall tax base supporting the local government.) In addition, EPA determined that there has been a low incidence of default of investment-rated revenue bonds not enhanced by third-party support—e.g., bond insurance or a letter of credit. EPA examined information on revenue bond defaults between January 1989 and May 1991. Over that time period, approximately 150 issues defaulted. EPA estimates that no more than five of these issues had unenhanced investment-grade bond ratings from Moody's at the time of default, representing a default rate of less than 0.1 percent per year of rated bonds. Eight of the defaulted issues were backed by letters of credit, and two were insured by bond insurance companies.

Because the credit rating for revenue bonds issued by general purpose governments (e.g., townships, cities, and counties) would not measure the financial health and fiscal management practices of that type of government as a whole, and because revenue bonds are not usually used to finance projects central to the operation of a general purpose government, the Agency has determined that general purpose governments with the authority to issue general obligation debt may not use revenue bonds to demonstrate financial responsibility.

Similarly, because the credit rating for short-term notes, lease rental debt, and certificates of participation does not provide sufficient information on the financial strength of local governments, local governments may not use these instruments to demonstrate financial responsibility.

Two commenters asserted that the bond rating test is unavailable to many local governments simply because the amount of outstanding debt is less than one million dollars and suggested that the required amount of outstanding debt should be decreased. EPA intends the bond rating mechanism to be used by local governments that have shown their capability to sustain debts comparable in size to the minimum level of financial assurance as determined by statute. Governments that are not able to demonstrate such capability may use another mechanism to demonstrate financial responsibility. Based on the analysis conducted for the proposed rule, the Agency estimates that

approximately 87 percent of general obligation bonds are issued for aggregate amounts greater than \$1 million.

One commenter endorsed the bond rating test, but noted that a governmental entity will no longer qualify for the bond rating test if it reduces its total debt below \$1 million. The commenter suggested that the amount of unused debt capacity may be more important than the amount of debt. Another commenter stated that the essential factor in the test should not be the dollar limit outstanding, but rather the statutory right of the authority to issue bonds and the credit ratings which have been established for that particular government entity on debt which has or could be issued. Because a local government entity does not have a credit rating from Standard and Poor's or Moody's unless it has outstanding debt, the commenter urged the Agency to devise some test, presumably a worksheet test, to measure credit worthiness if bond ratings have not been issued.

The Agency has determined that it is appropriate to require \$1 million in outstanding debt as part of the bond rating mechanism. The requirement ensures that the bond rating used to demonstrate financial responsibility is based on a level of outstanding debt consistent with the amount of financial responsibility being demonstrated. Although there may be merit in the argument that the level of debt capacity is an indicator of potential financial abilities, EPA does not believe that incorporating available debt capacity would be feasible. First, calculating levels of available capacity is more difficult than applying the bond rating test as written, and is subject to greater uncertainties. Second, the fact that the local government has available debt capacity does not ensure that it will be able to issue the debt and maintain its bond rating, particularly if the amount of outstanding debt is substantially less than the amount of required financial assurance. The Agency notes that excess bond authority may be used as one part of one alternative of the fund balance mechanism.

Because bond rating information is easily obtainable, the use of bond ratings as a self-test mechanism will impose minimal administrative burden in determining a local government entity's eligibility. Many local government entities, however, do not currently have general obligation bond ratings. As of July, 1991 Moody's had ratings for a total of 7,653 investment-rated general obligation bonds issued by local government entities that were "investment grade" and were not

insured.⁹ (Because some local government entities may have multiple issues of general obligation bonds, the number of local governments with rated bonds may be lower.) Although Standard & Poor's rates additional entities, there is a substantial overlap—one study found that 94 percent of cities of 2,500 or more residents with a rating from Standard & Poor's also had a rating from Moody's.¹⁰ In contrast, there are more than 80,000 local government entities in the United States, of which an estimated 25,000 own USTs. To provide local governments with as many compliance choices as possible to meet the requirement, the Agency has also developed additional self-test mechanisms to demonstrate financial responsibility.

2. Local Government Financial Test (\$ 280.105)

As part of the underground storage tank requirements proposed on June 18, 1990, EPA included a local government financial test that could be used by local government owners and operators of USTs to satisfy the financial responsibility requirements of § 280.93. The local government financial test, or "worksheet test", was designed for local governments that cannot use the bond rating test (§ 280.104) because they have less than \$1 million in outstanding investment grade bonds. As described in the preamble to the proposed rule, however, local government entities that have applicable outstanding debt rated lower than investment grade, even if this amount is less than \$1 million, cannot use the worksheet test. This limitation on the use of the worksheet test applies, therefore, to the general obligation debt of general purpose local governments and to outstanding revenue bonds of those local government entities that are legally restricted from issuing general obligation bonds.

As described in the preamble to the proposed rule, the Agency designed and developed the worksheet test to capture local government variation using an index of financial strength. The index assigns a rank to each of the general purpose governments in the Census of Governments. After arraying the governments according to their rank on the index, the test establishes a cut-off

⁹ Brenda Ramos, Moody's Investors Service, Public Finance Department, letter to Linda Critchfield, EPA, July, 1991.

¹⁰ Cluff, George S., and Farnham, Paul G., "Standard & Poor's vs. Moody's: Which City Characteristics Influence Bond Ratings?", *Quarterly Review of Economics and Business*, Board of Trustees of the University of Illinois, Volume 24, No. 3, 1984.

point that, in the Agency's opinion, excludes that bottom fraction of local governmental entities that might not be able to meet their financial obligations in the event of an UST release. The procedures used to develop the index and establish the threshold cut-off are discussed in the preamble to the proposed rule, the background documents to this rulemaking, and in subsequent sections.

The test was designed to isolate the fraction of governmental entities that are in poor financial condition from those other governments that, in general, have sufficient resources and flexibility to respond to an UST release. Consequently, the Agency is not establishing the worksheet test as a precedent for other Agency regulations affecting local governments, because other regulations may require either larger required levels of funds or more certain cash flows.

Features of the Proposed Local Government Financial Test

The proposed worksheet test had the following features:

- Using a worksheet, an eligible local governmental entity would calculate nine financial ratios using easily available financial data. The nine ratios were:

- Debt service to total revenues,
- Total funds to total expenses,
- Total revenues to total expenses,
- Debt service to population,
- Total revenues to population,
- Total expenses to population,
- Total funds to total revenues,
- Total funds to population, and
- Local revenues to current expenditures.

- Each of the nine ratios was compared to the national distribution of that ratio to calculate a z-score, which is a measure of how far above or below the national average the municipality's ratio lies.

- The individual z-scores for the nine ratios were then weighted and added to calculate a total score, or index.

- Governments with a total score that passed the specified threshold could use the test as a mechanism for demonstrating financial responsibility for UST corrective action and third-party liability claims. To simplify the use of the worksheet test, the threshold value was incorporated into the calculation of the final score, so that governments achieving a final score greater than zero passed the worksheet test.

Comments on the Proposed Local Government Financial Test

EPA received several comments on its proposed financial test for local governments. The comments focused on (1) the exclusion of local governments with less than investment grade debt; (2) use of the term "self-insurance"; (3) updating the worksheet test using 1987 Census of Governments data; (4) deleting specific ratios from the test; (5) lowering the threshold level; and (6) the appropriateness of the worksheet test for non-general purpose local governments. The substance of the major comments received is briefly summarized below, followed by the Agency's rationale for accepting or rejecting the commenters' recommendations in the final worksheet test requirements.

(1) *Exclusion of Local Governments with Less than Investment Grade Debt.* One commenter believed the worksheet test should be available to all local governments, even those with outstanding debt rated below investment grade. The commenter reasoned that bond rating entities are not always accurate and, moreover, provide ratings that allow investors to assess a potential investment, a different purpose than assessing financial responsibility to respond to an UST release. The commenter stated that allowing use of the worksheet test would recognize these realities without undercutting the purpose of the test.

For reasons cited in the preamble to the proposed rule, however, EPA does not agree that local governments with bond ratings of less than investment grade should be eligible to use the worksheet test. The Agency notes that (1) failure to earn an investment rating is costly to local governments, (2) local governments have the incentive and ability to work with bond rating agencies to establish policies and procedures that would raise the bond ratings, and (3) the bond rating process involves a more detailed examination of local government financial condition than can be accomplished through a simple worksheet test.

(2) *Use of the Term "Self-insurance."* One commenter stated that State law might prohibit certain otherwise eligible government entities from using the worksheet test. The commenter noted that New York State law authorizes specific programs for self-insurance and that, because they have not been specially authorized for this purpose, component school districts cannot use the worksheet test (or, indeed, the bond rating test) to demonstrate the ability to self-insure.

EPA understands that the term "self-insurance" has specific legal meanings that may be limiting and has, therefore, modified the rule to delete references to "self-insurance." The modifications clarify that the use of the worksheet test mechanism is to demonstrate compliance with the financial responsibility regulations, and not to "self-insure."

(3) *Updating the Worksheet Test Using 1987 Census of Governments.* Although not proposing specific amendments to the worksheet, two commenters criticized the use of data from the 1982 Census of Governments in developing the worksheet test. One commenter believed that use of decade-old data could introduce inaccuracies in the results of the worksheet test. As an example, the commenter pointed out that changes in the financial practices of local governments, such as an increase in the size of new debt issues, could mean that the reality of what makes a local government financially strong is different now than it was in 1982.

EPA agrees with the commenter and, in response, has updated the analyses used to develop the worksheet test using data from the 1987 Census of Governments, which was not available when this rule was proposed. As further described below and in the Background Document, the new analyses show that the ratios included in the proposed worksheet test were highly correlated with similar factors in the analyses of both the 1982 and 1987 Census of Governments data, and that incorporation of the 1987 data did not significantly alter the structure of the worksheet test. In particular, EPA confirmed that ratios incorporating population (for example, total revenues per capita) and fiscal autonomy (e.g., local revenues to current expenditures) are important indicators of the relative financial strengths of governments. In addition, EPA has updated the worksheet to reflect changes in the means, standard deviations, and weights associated with each of the ratios.

(4) *Deleting Specific Ratios from the Worksheet Test.* One commenter urged the Agency to delete Factor 5, "local coverage" (local revenue to current expenses), from the worksheet test as inappropriate for use in assessing a local government's level of financial responsibility. The commenter argued that Factor 5 disadvantages those local governments that rely more heavily on State funding than others. While this factor is designed to measure local autonomy and the ability of local governments to redirect funds to meet the cost of UST releases, the commenter argued that a significant proportion of

the funds that local governments receive from States is not tied to specific purposes and may be used as the local government deems appropriate.

EPA believes that, because local governments do not control and cannot assure the continuance of State or Federal aid, local governments with a high dependence on non-local sources are less assured of the ability to respond to UST releases, whether the funds are dedicated to specific programs or not. The Agency notes that a local government may be weak in a particular variable but still pass the worksheet test. For example, a government with a high reliance on intergovernmental aid may still pass the worksheet test if its overall financial situation is predominantly sound as measured by the remaining variables. The selection of factors was developed through extensive statistical analysis of local government financial conditions. For reasons described below, however, the Agency has modified the proposed worksheet test to replace the ratio of local revenues to current expenditures with the ratio of local revenues to total revenues, an alternate ratio representative of "local coverage".

(5) *Lowering the Threshold Level.* One commenter recommended that the threshold value should be reduced from 15 to a maximum of 10 percent. The commenter argued that EPA's own statements in the preamble that local governments rarely go bankrupt, are not permitted to void obligations through bankruptcy, and generally possess the ability to meet financial obligations through taxation were inconsistent with the finding that 15 percent of local governments should be disqualified from using the worksheet test to demonstrate financial responsibility. In addition, the commenter believed that the worksheet analysis exaggerated the actual impacts likely to occur by not including consideration of incidence of UST ownership. The commenter reasoned that small local governments, the ones that are most likely to rely on a worksheet test, are much less likely to own USTs than larger local governments. Thus, the average impacts assumed exaggerate actual impacts likely to occur. The commenter concluded that these factors suggested that a 15 percent failure rate was too stringent, but that a maximum cutoff of 10 percent would recognize the reality of the financial strength of local governments.

The Agency notes that costs associated with clean-ups can range widely and that different standards cannot be applied to different owners. In fact, if standards were based on size

of the local government, proportionately fewer smaller governments would be able to demonstrate financial responsibility because of the more limited total resources of small local governments. As shown in the background document, however, EPA believes that smaller governments are more likely to pass the worksheet test than are their larger counterparts. Consequently, the Agency believes its overall approach used to set the threshold is appropriate.

Two commenters pointed out that the difference between the 10 and 15 percent cutoffs in the Agency's analysis was not great. Another commenter stated that the threshold should be reconsidered or justified because the commenter did not believe the preamble or supporting documents contained evidence that 15 percent of local government entities are, in fact, financially unstable and, even if they are generally unstable, that they will be incapable of meeting their UST obligations.

As described below, the Agency has updated the worksheet test using the 1987 Census of Governments, including updated means, standard deviations, and weights for each ratio, as well as a reevaluation of the threshold level. Based on its review of the updated information, the Agency has determined that a threshold level that allows 90 percent of local governments to demonstrate financial responsibility based on the worksheet test represents a reasonable balance between the statutory requirement that UST owners demonstrate financial responsibility and the demonstrated stability of most local governments. Consequently, the Agency agrees with the commenters that a 10 percent threshold offers adequate safeguards.

(6) *Appropriateness of the Worksheet Test for Non-general Purpose Local Governments.* Two commenters stated that a financial test, such as the worksheet, designed to measure the financial strength of general purpose governments, is unsuitable for special purpose organizations such as airports, bridge and toll road authorities, and publicly-owned utilities. Unlike general purpose governments, one commenter argued, these so-called "proprietary" government entities conform to generally accepted accounting procedures similar to accounting systems employed in the private sector, rather than the modified accrual accounting terms and criteria appropriate to measure the success of a traditional government. Because the corporate test is similarly inappropriate for these special-purpose entities, the

commenter requested that the Agency develop an alternative financial test for government entities required to use accrual accounting. The commenter suggested that the corporate test in 40 CFR 280.95, based on the accrual method, might be modified to take into account the substantially greater financial stability of publicly-owned utilities.

The Agency recognizes that specific data requirements preclude most special districts from using the worksheet test. In limited cases, however, some special districts (e.g., school districts that serve a specific population) may have the information necessary to complete the worksheet test (e.g., they can measure population). EPA believes that the new mechanisms, particularly with the inclusion of revenue bonds issued by special districts using the bond rating test, will allow most UST-owning governments to demonstrate financial responsibility without the need for an additional financial test targeted specifically at special districts.

Update of Worksheet Test Using 1987 Census of Governments

Although its basic features have not been modified, the Agency has updated the worksheet test using the 1987 Census of Governments. The procedures used to conduct the new analyses were the same as for the proposed rule, as documented in the preamble to the proposed rule and the background documents to this rulemaking, and as summarized below.

Starting with 78 different financial ratios and variables commonly used in financial analysis, the Agency used a statistical technique called "factor analysis" to group the variables. Factor analysis serves two purposes. First, it identifies underlying characteristics, or factors, that differentiate between the members of a population (in this case, between different counties, municipalities, and townships). Second, it tells how much of the difference (the "percent of variance explained") between the members of the population is accounted for by each factor. The Background Document contains a more detailed explanation of the statistical analyses performed, including the factor analysis.

The factor analysis identified a total of 15 factors that distinguish between local government entities. Based on its review of the results of the factor analysis, the Agency identified six factors that (1) captured the variation in financial performance of local governments and (2) appeared appropriate for the UST financial test. As with the proposed worksheet test,

the final worksheet test includes the following six factors: (1) Debt burden, (2) funds coverage, (3) outlays per capita, (4) funds per capita, (5) local coverage, and (6) revenues to expenses. In selecting the factors and variables to be included in the worksheet test, however, the Agency rejected size, because the Agency did not wish to exclude financially strong smaller local government entities simply because of size.

After selecting the factors to be represented in the worksheet, it was necessary to select the specific ratios to represent the factors. In choosing ratios, the Agency wished to (1) keep the total number of ratios to a manageable level, while (2) retaining as large a number of specific indicators as feasible. The final worksheet uses nine ratios, which include the variables (1) debt service, (2) total revenues, (3) total expenditures, (4) population, (5) total funds, and (6) local revenues. The ratios selected and the factors that they represent are presented below.

Factor 1—debt burden: debt service to total revenues.

Factor 2—funds coverage: total funds to total revenues; total funds to total expenses.

Factor 3—outlays per capita: total revenues per capita; total expenses per capita.

Factor 4—funds per capita: total funds per capita; debt service per capita.

Factor 5—local coverage: local revenues to total revenues.

Factor 6—revenues to expenses: total revenues to total expenses.

EPA found that, in general, the same ratios included in the proposed worksheet test were important in the factor analyses of both the 1982 and 1987 Census of Governments data. There is, however, one change to the worksheet test ratios as a result of the updated factor analysis. Factor 5, "local coverage", is now represented by the ratio of local revenues to total revenues rather than the ratio of local revenues to current expenses. The factor analysis of 1987 Census of Governments data found that the ratio of local revenues to total revenues was very highly correlated with Factor 5, while the ratio of local revenues to current expenses was correlated less highly and was also correlated with several different factors. The preamble to the proposed rule provides a detailed description of the importance of each of these factors. One other minor addition to the final test is inclusion of payments for retirement of debt principal (not just interest payments) in the calculation of total expenses. This was inadvertently

omitted from the proposed rule. (EPA has modified the parameters of the test to reflect the revised definition of total expenses.)

Together, these factors provide a balanced view of the stability and financial strength of a local government entity. The Agency does not believe that any single factor or variable can provide a sufficient indication of overall financial stability. Specifically, EPA does not believe a focus on funds alone, without adequate safeguards, would provide as good an indication of the ability of local government entities to provide financial assurance for an UST release.

These factors serve to achieve the Agency's goal of identifying and eliminating those local government entities that have overall financial characteristics that are in the bottom fraction of all local government entities, and that may, therefore, be at sufficient risk of experiencing financial distress that would prevent them from meeting their UST obligations.

As described at proposal, in developing the worksheet the Agency determined that performance on the specific ratios selected to represent the six factors should be standardized so that all ratios are placed on an equal basis. This is done by calculating the "z-score" for each of the ratios in the test. The z-score of an individual ratio is calculated by first subtracting the mean, and then dividing by the standard deviation:

$$z = \frac{(\text{ratio} - \text{mean})}{\text{standard deviation}}$$

The distribution of the z-scores will always have a mean of 0 and a standard deviation of 1, thereby placing each variable in the index on a common level. To calculate a single index value, the z-scores are then weighted and added together; the weights are based on the percentage of variance explained by the underlying factors.

Selection of the Final Threshold Value

Having updated the financial index, the Agency then examined different threshold levels to determine a cut-off for selecting those local governments that have fiscal characteristics adequate to demonstrate financial responsibility to meet UST obligations. As described in the preamble to the proposed rule, EPA evaluated the impacts of a \$1 million release to determine an appropriate threshold for allowing local governments to demonstrate financial responsibility through the worksheet test. In selecting a threshold, the Agency

was guided by two important considerations: (1) most local governmental entities are expected to be able to meet their financial obligations under Subtitle I, so a cut-off threshold in the lower range (i.e., 1 to 30 percent) is appropriate, and (2) local governmental entities on the margin of the selected threshold should clearly be able to pay the emergency response and corrective action costs of an average UST release.

For purposes of the evaluation, EPA assumed that the release costs would be financed by a mortgage-type loan over a 20 year period at an interest rate of 10 percent. This interest rate is meant to be illustrative; local governments may be able to borrow at rates lower than 10 percent. Under a mortgage-type loan, repayment is made in equal annual installments consisting of both interest payments and principal repayment. The annual payment of a \$1 million loan over 20 years at an interest rate of 10 percent is \$117,459; the first year's payment consists of \$100,000 interest and \$17,459 principal repayment.

To evaluate whether a debt of \$1 million would be too burdensome, the Agency considered the post-release performance on the nine ratios used to develop the index. The Agency paid specific attention to two financial parameters that financial institutions regularly use to evaluate prospective debtors: Debt service capability and accumulated funds. The Agency felt that it is important to consider the potential debtor's debt servicing capability because excessive debt would require excessive funds for debt servicing, which could result in a negative cash flow (expenditures greater than revenues) for weak debtors. Continuous negative cash flows increase the risk of financial instability in the short run and financial insolvency in the long run. It is important to consider the amount of accumulated funds available to a prospective debtor because a reserve of accumulated funds provides an extra "cushion" for those emergencies when routine cash flows are disrupted as a result of unforeseen circumstances. As long as a local government that is on the margin of the cut-off threshold being evaluated can demonstrate that it can service its debts and has a "cushion" of accumulated funds for emergencies, the Agency feels comfortable that it will be able to perform its routine business when faced with an UST release.

In its evaluation, however, the Agency did not use a precise yardstick for evaluating the impacts of a \$1 million release. It is the Agency's belief that proposing a cut-off threshold that is applicable to the majority of local

governments with diverse size, demographic, and financial characteristics is more a matter of informed judgment than one of precise measurement.

Impacts were evaluated on the bottom 30 percent of all general purpose local governments in the 1987 Census of Governments with data sufficient to calculate the index score (11,487 governments). For each government, the following adjustments were made to 1987 financial performance in accordance with the definitions of terms used in calculating the index:

- Total expenses were increased by \$117,459 (total incremental debt service);
- Current expenses were increased by \$117,459 (total incremental debt service);
- Total debt was increased by \$982,451 (loan amount of \$1 million minus first-year principal repayment);
- Total funds were reduced by \$117,459 (total incremental debt service); and
- Debt service was increased by \$117,459 (total incremental debt service).

In essence, the evaluation was made as if the release had been incurred in 1987 and reflected in end-of-year financial data, with no adjustments made by the local government to redirect funds or to increase revenues.

After adjusting the financial values, each of the nine ratios in the index test was recalculated. Impacts were examined by looking at the "marginal" local governments at each threshold in one percent increments. That is, to evaluate the effects of selecting a threshold of -6.425 (the index value exceeded by 95 percent of all general purpose local governments), EPA examined the 383 local governments scoring between -6.425 and -6.043 (the index value exceeded by 94 percent of all local governments). The remainder of this discussion presents results of the "post-release" ratios for each of five different threshold levels: -6.425, -4.937, -3.990, -3.242, and -2.586. Details of the results are provided in the Background Document supporting this rule.

It should be noted that no attempt was made to weight the potential impacts in terms of the likelihood of UST ownership. That is, although only about 2,764 of the 26,189 general purpose local governments serving fewer than 2,500 residents are believed to own USTs, the release costs were imposed on all local governments.¹¹ Consequently,

the average impacts shown exaggerate the actual impacts likely to occur. (Nevertheless, an individual government experiencing an UST release may experience the full effects assumed in estimating the average impacts.) Also, the results assume that the local governments make no efforts to mitigate the financial impacts, either through increasing taxes and fees or reducing other expenditures.

Because the index ranks local governments in terms of a smooth array, there is unlikely to be a single value at which clear differences in performance appear. Instead, an evaluation of impacts is likely to show increasing performance and ability to accommodate the costs of an UST release with increasing threshold value.

Evaluation of Threshold of -6.425. The marginal local governments meeting a threshold of -6.425 (those between the fifth and sixth percentiles on the index test) have an average post-release fund balance of about \$3,052,000 and a median post-release fund balance of about -\$49,000.^{12,13} About 62 percent of the marginal local governments have a negative fund balance, with the median of total funds per capita equal to -\$46. The median debt service per capita is \$167. The median ratio of local revenues to total revenues equals 32 percent. For the median local government, total revenues are about 47 percent of total expenditures.

Evaluation of Threshold of -4.937. With an increase in threshold to -4.937 (corresponding to the 10 percentile value), the average post-release fund balance of the marginal local governments is \$1,673,000 and the median post-release fund balance increases to -\$34,400. The percentage of local governments with negative cash balances improves to about 56 percent. The median ratio of total funds per capita improves marginally to -\$25. The median annual debt service per capita decreases to \$131. The median ratio of locally derived revenues to total revenues increases to 40 percent, whereas the median ratio of total

revenues to total expenses increases slightly to about 49 percent.

Evaluation of Threshold of -3.990. When the minimum score is changed to -3.990 (corresponding to the 15 percentile value), the average post-release fund balance is \$4,180,000 and the median fund balance decreases slightly to about -\$35,000. The percentage of local governments with negative fund balances increases slightly, to about 58 percent, while the median ratio of funds per capita improves slightly to -\$24. The median ratio of debt service per capita decreases to \$127. The median ratio of local revenues to revenues increases to 47 percent, whereas the median of total revenues to total expenses decreases slightly to 48 percent.

Evaluation of Threshold of -3.242. At a threshold of -3.242 (corresponding to the 20 percentile value), the average post-release fund balance is \$5,693,000 and the median post-release fund balance increases to about -\$20,000. The percentage of local governments with negative fund balances decreases to 55 percent, while the median fund balance per capita increases to -\$14. The median ratio of debt service per capita decreases to \$119. The median ratio of local revenues to total revenues increases to 52 percent, whereas the ratio of total revenues to total expenses remains steady at 48 percent.

Evaluation of Threshold at -2.586. At a threshold of -2.586 (corresponding to the 25 percentile value), the average post-release fund balance is \$6,651,000 and the median post-release fund balance improves to about -\$15,000. The percentage of local governments with negative fund balances decreases to 52 percent. The median ratio of fund balance to population improves to \$10. The median value of debt service per capita increases slightly to \$123. Local governments show increasing coverage of their expenses, including an increase in the median ratio of local revenues to total revenues to 57 percent and in the median ratio of total revenues to total expenses to about 54 percent.

Analysis of Impacts on Households. EPA has considered the impacts of tank closures that may be caused by the inability of local governments to demonstrate financial responsibility. EPA estimated the impacts on households of compliance with the financial responsibility requirements for the median size, marginal government at each threshold examined. EPA estimates that the median "marginal" general purpose government (by population) at the 5 percentile threshold serves

Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks, November 1992.

¹² A threshold value set at the 5 percentile would exclude the local governments with index values in the lowest five percent and would include the remaining 95 percent. A threshold value set at the 10 percentile would be more stringent—it would exclude the local governments with index values in the lowest 10 percent, and allow only those local governments with index values in the upper 90 percent to pass the worksheet test.

¹³ The median value is the value for which half of the local governments have a higher value, and half have a lower value.

¹¹ EPA, "Economic Impact Analysis of Additional Mechanisms for Local Government Entities to

approximately 1,011 residents, or 389 households. EPA's analysis of UST ownership patterns suggests that governments of this size own an average of 1.1 USTs. Based on an average present value cost per UST closure of \$7,000, the residents would incur an estimated present value cost of \$19.80 per household.¹⁴ The present value of closure costs are estimated to range from \$18.00 to \$54.00 per household for residents served by median governments owning one to three USTs, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 10 percentile, the costs to governments required to close their USTs are estimated to be \$15.81 per household. Costs may range from \$14.37 to \$43.11 per household for residents served by median governments owning one to three USTs, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 15 percentile, the costs to governments required to close their USTs are estimated to be \$16.81 per household. Costs may range from \$15.28 to \$45.86 per household for residents served by median governments owning one to three USTs, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 20 percentile, the costs to governments required to close their USTs are estimated to be \$14.95 per household. Cost may range from \$13.59 to \$40.78 per household for residents served by median governments owning one to three USTs, respectively.

Based on the average number of USTs owned by the median "marginal" general purpose local government at the 25 percentile, the costs to governments required to close their USTs are estimated to be \$13.90 per household. Costs may range from \$12.64 to \$37.91 per household for residents served by median governments owning one to three USTs, respectively.

These estimates tend to exaggerate the costs per household, because they use the total estimated aggregate cost over a ten-year period. Consequently, they represent the cost to households if the entire cost associated with closing USTs

were incurred and levied in a single year, rather than paid out over time.

Summary. Based on its review, the Agency has concluded that there are significant improvements in the "post-release" financial conditions of governments as the threshold is increased to about the 10 percentile, modest improvements as the threshold is increased from about the 10 percentile to the 20 percentile, and further increases beyond the 20 percentile. Because the extent of the increases from the 10 to the 15 percentile is minor, the Agency has determined that a threshold level of 10 percent provides adequate safeguards, and is consistent with statutory intent.

3. Governmental Guarantee (\$ 280.106)

In today's rule, EPA is providing for the use of a guarantee mechanism for governmental entities. This mechanism, although not strictly a "self-test" mechanism, provides local government entities with a financial assurance mechanism comparable to the corporate guarantee allowed for private owners and operators of USTs. To be eligible to act as a guarantor, a local government entity must pass the bond rating or worksheet test.

The governmental guarantee differs in several respects from the current corporate guarantee. Under the governmental guarantee, local governments would be allowed to choose between a guarantee with or without a standby trust requirement. Under the corporate guarantee, firms are required to use a standby trust. If a local government chooses the governmental guarantee without the standby trust option, it is required to pay for corrective actions as needed and as directed by the implementing agency. Under the standby trust option, local governments will be required to fund a separate trust fund to the full amount of coverage upon discovery of a release. Again, the Agency's decision to allow local governments the option of a guarantee without the standby trust fund is based on local governments' history of meeting obligations and on their ability to consistently raise revenue through taxation. In addition, the governmental guarantee requires that the local governments entering into the agreement demonstrate a "substantial governmental relationship." This parallels the requirement in the corporate guarantee for a "substantial business relationship," while recognizing that the types of relationships between governments is fundamentally different than business relationships and that

they are primarily based on common or overlapping constituencies.

The requirement of a "substantial governmental relationship" reflects two concerns of the Agency. First, EPA wishes to ensure that the guarantee contract is founded on a sufficient basis to be held valid and enforceable. Second, EPA seeks to avoid conflict with State insurance laws and regulations. The existence of a "substantial governmental relationship" should provide sufficient nonmonetary consideration to address these concerns.

One commenter supported the requirement for a substantial governmental relationship, stating that the governmental guarantee mechanism needs to be based on a substantial governmental relationship, and that the relationship should incorporate the full faith and credit of the guaranteeing agency.

One commenter asked whether, in States that allow intergovernmental risk pooling, the contractual relationship of a pool to provide safety and risk management services in addition to risk pooling would be recognized as a "substantial governmental relationship," thereby allowing existing pools to act as guarantors to their members. EPA does not believe that a risk pool should be allowed to operate as a guarantor, because the nature of the relationship is strictly monetary and does not necessarily involve a substantial governmental relationship. It should also be noted that risk pools can be included as compliance mechanisms on a state-by-state basis as state-required mechanisms.

Another commenter claimed that EPA should explicitly recognize the relationship between a "joint action agency" and its member publicly-owned utilities as a "substantial governmental relationship," thus allowing these entities to qualify for use of the governmental guarantee mechanism. The commenter reasoned that these agencies, not-for-profit entities created by State law to allow publicly-owned utilities to combine resources for various purposes, could include the provision of a guarantee of UST financial responsibility within their operation. EPA has concluded that because joint action agencies are non-profit organizations and not governmental entities, they are not eligible to act as guarantors.

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 that the principal fails to satisfy its debts or obligations. In the corporate guarantee, if the owner or operator fails

¹⁴ As discussed in the EIA, the present value cost of closure includes the costs of closure associated with the technical standards (e.g., tank excavation and removal, product removal, and site assessment), plus the present value of the incremental cost of fuel purchased at retail service stations, minus the present value of the expected cost of corrective action for UST releases if the USTs were not closed.

to perform corrective action or satisfy 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.

EPA believes that the guarantee mechanism would work well for governments, and is establishing two possible constructions for such a mechanism (discussed below). Using this mechanism, a municipality, for example, might obtain a guarantee from the State, a town might obtain a guarantee from the surrounding county or parish, or a special district might obtain the guarantee of the sponsoring local government entity. Guarantors must demonstrate that they are qualified to provide financial assurance by satisfying the bond rating test under 40 CFR 280.104, the worksheet test under 40 CFR 280.105, or the fully-funded fund balance test under 40 CFR 280.107.

Several commenters supported the inclusion of the governmental guarantee mechanism, although some also noted specific cases where the mechanism might not be applicable. Two commenters did not believe that the mechanism would be used by certain classes of government entities, arguing that special districts would be unable to obtain guarantees from local governments and that local governments would be unable to obtain guarantees from their State governments.

EPA believes that the guarantee is likely to be used primarily by governments with close and long-standing ties. The Agency emphasizes that the guarantee mechanism was developed to allow governments with common interests to cooperate to keep necessary USTs in operation. The mechanism is not intended to require any government to act as a guarantor. Nevertheless, if even a small number of governments are able to qualify using this mechanism, it will serve the purpose intended.

Commenters agreed that the guarantor should not be required to fund a standby trust, arguing that (1) a standby trust is not appropriate for local governments, given their strong history of meeting their financial obligations and their ability to raise revenue consistently, (2) a standby trust was unnecessary for guarantees among governmental entities, and would add unnecessary paperwork and administrative costs that were contrary to the Agency's goal of reducing the burden on local government, and (3) the governmental guarantee would not necessarily be similar to a corporate guarantee because of State-by-State differences in statutory restrictions. EPA

agrees with the commenters and has allowed for use of a governmental guarantee with or without a stand-by trust fund.

One commenter stated that certification by a State Attorney General was necessary because some States could presumably prohibit or restrict the ability of a municipal government to make such a guarantee. Another commenter supported the Agency's decision not to require a State Attorney General's certificate attesting to the legality of the governmental guarantee. The commenter agreed with the Agency that the added degree of certainty provided by this requirement was appropriate in the case of a corporate guarantee, but was unnecessary for guarantees among governmental entities, and would burden local governments with unnecessary paperwork and costs.

The Agency is not requiring certification by the State Attorney General prior to offering the guarantee. Local governments have strictly defined and enforced limitations on their abilities to enter into contracts. These limitations are codified in State law and constitution and vary by State. The Agency believes that these restrictions imposed on local government entities should, in general, act as a sufficient check to prevent local governments from entering into invalid guarantees, and that the nature and purpose of local governments will prevent the issuance of guarantees unless there is a clear governmental interest.

Because the Agency wants to avoid unnecessary paperwork and burden on the part of local governments, EPA intends to keep the rule as proposed. EPA encourages governments wishing to use the guarantee to seek clarification of their authority if they are unsure of whether they may issue guarantees.

EPA solicited comments on whether passing the fund balance test should qualify governmental entities to act as guarantors. The sole commenter on this issue stated that a government passing the fund balance test should qualify to act as a guarantor, assuming that State statute permitted a governmental entity to be a guarantor. After further review, EPA has decided that allowing governments using the fund balance mechanism to act as guarantors would be consistent with the overall approach taken in the development of the new mechanisms. The Agency has, therefore, modified the proposed rule to allow the fully-funded fund balance mechanism to serve as the basis for a governmental guarantee.

Government Guarantee With Standby Trust

The first alternative governmental guarantee parallels the corporate guarantee, in that it must include a pledge to fund a standby trust in the event of failure by the UST owner or operator to pay corrective action or third-party liability claims. In today's rule, the guarantor must have legal authority to issue the guarantee. The Agency anticipates that most guarantees will be based on a clear and significant governmental relationship such as overlapping geographical boundaries, taxing or service constituencies, or shared impact from an UST release.

Government Guarantee Without Standby Trust Requirements

In a governmental guarantee without a standby trust requirement, the guarantor agrees to provide funds for corrective action and third-party compensation as directed by the implementing agency on an on-going basis, up to the limits of the guarantee. Rather than fully funding a standby trust, the guarantor would make the payments directly as funds are required.

The current corporate guarantee requires the establishment of a standby trust, and requires a guarantor to fund the trust (1) after notification that a guarantee will be cancelled if a release has been detected and no alternate coverage has been obtained, or (2) when a release has occurred and the owner or operator has failed to perform corrective action or payment of a settlement or judgment for third-party liability. The corporate guarantee requires funding of a standby trust for several reasons. First, the issuance of a guarantee is founded on the existence of a substantial business relationship; such relationships are subject to change over time. Second, the underlying mechanism used by the guarantor depends primarily on the existence of readily liquidated assets, rather than on-going financial strength. Consequently, the Agency wishes to insure that the funds are made available before adverse events can occur. Third, the Agency wishes to reduce the potential delay involved in enforcing first against the UST owner or operator, and then against the guarantor for payment.

These concerns are mitigated under the governmental guarantee. First, the Agency believes that the governmental relationships that are likely to lead to the issuance of guarantees will be founded on geographical proximity and service to a common constituency. These relationships are not subject to rapid change. Second, the Agency

recognizes in this rule that local government entities, as a class, have greater financial stability than private corporations. It is, therefore, less critical to obtain funds immediately to pay for contingent liabilities (such as payment of third-party claims) that may not occur. Third, the Agency recognizes the difference in purpose between governmental and private organizations, specifically the role of local governments to serve the public. This service orientation may make local governments more likely to fulfill their financial obligations. Consequently, the Agency has less concern that the absence of a standby trust will result in a delay in securing cleanup actions by local government owners or operators. With its modified structure, the mechanism permits a "pay-as-you-go" approach. These provisions allow a guarantor to fund corrective action costs as they are incurred, instead of requiring the guarantor to fund the standby trust fully in advance of anticipated expenditures.

Commenters on this issue agree that the governmental guarantee provides adequate safeguards without the need for creation of a standby trust fund.

4. Maintenance of a Fund Balance (§ 280.107)

Under this option, the UST owner or operator would create a dedicated fund specifically for UST releases or general catastrophic events. The dedicated fund must meet the local government's aggregate financial responsibility requirements (or such amount needed to fulfill gaps in financial responsibility from other mechanisms used in combination with the funded balance). Use of the fund balance mechanism requires local governmental entities to establish irrevocable trusts pledged to use for UST response or use in responding to catastrophic events, including UST releases.

Control of the fund would continue to rest with the local government entity. Control and accounting for these funds would be administered following the standards appropriate for other insurance trusts already maintained by local government entities, including pension trusts and worker's compensation funds.

The fund balances must be held as cash or investment securities that will be available in the event of an UST release and must be irrevocably dedicated to use for UST response or for responding to catastrophic events, including UST releases. As discussed below, the Agency is providing three alternatives that may be used in establishing the fund.

Based on an analysis of Census data and data on Minnesota cities, the Agency believes that the fund balance mechanism is unlikely to be used widely by general purpose governments, because few who require an alternative mechanism to the bond rating and worksheet tests have adequate funds.¹⁵ The fund balance mechanism may prove more useful for special districts and school districts that may not be able to use the worksheet test. The inclusion of a fund balance mechanism as a financial assurance option should increase the flexibility provided owners and operators in demonstrating financial assurance. Today EPA is providing the following three sub-options, any one of which may be used to demonstrate financial responsibility.

Fully-Funded Dedicated Fund

Under this alternative, the local government would establish a separate fund, dedicated to payment of UST corrective actions and third-party liability claims, in the amount of its aggregate financial responsibility requirements. The fund balance must be established as an irrevocable fiduciary or trust account, with proceeds invested in cash or readily marketable securities. This mechanism would be the most similar to the corporate trust fund option (§ 280.102 of subpart H) and is intended to be similar to "trust accounts" and "insurance accounts" held by local governments for pensions and insurance. Although there are currently no restrictions to local governments using the trust fund option under § 280.102, the fully-funded dedicated fund option would not require the local government to establish a third-party trustee for the fund. Instead, the fund would be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

Catastrophic Events Contingency Fund

Under this option, a municipality would be able to use a dedicated fund used for general emergency response and third-party liability (e.g., flood relief, hurricane relief, or other environmental cleanups) as evidence of UST financial responsibility. In the proposed rule, EPA required that a fund used to cover both UST costs and other emergency costs incurred by local governments be funded in the amount of \$10 million to qualify as a mechanism for demonstrating financial

responsibility. Numerous commenters requested that EPA reduce the required size of a combined emergency response fund. EPA conducted a limited survey of nine governments to determine the prevalence and typical size of emergency response funds.¹⁶ The Agency found that most funds are relatively small (less than \$5 million). Based on those findings, EPA has reduced the required size of a combined emergency response fund to \$5 million. In making this determination, the Agency considered that, when a local government draws upon its emergency response fund, it must replenish the fund in order to be prepared to meet the costs of the next emergency that may arise. It should be noted that local governments may establish a dedicated fund equal to their aggregate annual UST liability if doing so requires sequestering less money.

A combined fund balance of \$5 million will equal or exceed five times the aggregate financial assurance level for most local government entities, based on the number of USTs owned and operated. This requirement is analogous to the requirement in the corporate self-test that firms must have tangible net worth equal to at least ten times their aggregate financial assurance level. The fund balance must be established as an irrevocable fiduciary or trust account, with proceeds invested in cash or readily marketable securities. The fund may be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

In establishing this option, the Agency recognizes that States often permit local governments to administer fiduciary and trust accounts, such as pension funds and workers' compensation funds, while requiring private companies to establish third-party trustees or to subscribe to State-maintained funds. EPA believes the distinction between local government entities and private companies reflects differences in State oversight (e.g., State requirements that local government entities submit budgets or financial statements), differences in purpose (i.e., companies exist to make profits, whereas local government entities are created to provide a public service), and differences in financial stability.

The Agency is including this option to allow municipalities flexibility in establishing emergency response funds while ensuring that adequate funds are

¹⁵ State Auditor of Minnesota, "Report of the State Auditor of Minnesota on the Revenues, Expenditures, and Debt of the Cities in Minnesota for the Fiscal Year Ended December 1987," November 1988.

¹⁶ Memorandum from James Dickson, Rebecca Holmes, and William Driscoll, ICF Incorporated, to Andrea Osborne, EPA Office of Underground Storage Tanks, "Local Government Emergency Response Funds," October 13, 1992.

available to respond to an UST release. Although the Agency lacks data on municipal expenditures for general emergency response and third-party liability, it believes the \$5 million requirement will assure the availability of funds for any number of UST releases should other catastrophic events occur in the same year. Thus, although the fund would not be solely dedicated to responding to UST releases, the required fund balance of five times the requirement for a dedicated UST fund will assure adequate resources to respond to an UST emergency. (UST clean-up costs currently average between \$100,000–\$150,000.)

Three commenters criticized the \$10 million fund balance that would have been required in the proposed rule, arguing that (1) the funding level required by the catastrophic events contingency fund was too inflexible for local governments to use the option, (2) only a handful of existing utility funds that are or can be used to respond to releases currently meet the \$10 million requirement, and (3) a fund balance level of \$10 million would be infeasible for most transit systems. Some commenters argued that a lesser amount (e.g., three times the requirement for a dedicated UST fund) would be adequate for a general catastrophic events contingency fund.

The Agency emphasizes that the combined fund balance alternative was developed as an administrative convenience for those governments that already maintain large contingency funds. The Agency's primary concern is to ensure that funds will be available to meet the costs associated with UST releases. The Agency notes that a government able to reserve only three times the required amount (i.e., \$3 million), as suggested by one commenter, could establish a \$1 million UST emergency response fund and a separate \$2 million catastrophic events fund. If commenters are correct that a combined \$3 million fund would be adequate to meet all requirements of the catastrophic events fund while reserving the \$1 million necessary to demonstrate financial responsibility, then a \$2 million fund reserved for catastrophic events other than UST releases would be adequate to meet those costs. As discussed below, the Agency has determined that local governments have minimal financial incentives to commingle funds designated for UST-related costs with other funds.

Incrementally Funded Trust Fund Combined With Unused Bonding Authority

Under this option, a municipality would be required to fund a dedicated fund for UST releases incrementally, making payments equal to at least one-seventh of the aggregate liability each year. A municipality using this alternative must fully fund the trust fund by the beginning of the seventh year. The fund balance must be established as an irrevocable fiduciary or trust account, with proceeds invested in cash or readily marketable securities. The fund may be administered by the treasurer or chief financial officer of the local government entity as a separate trust account.

In addition, until the dedicated fund is fully funded, the municipality is required to demonstrate the authority to issue a specified amount of general obligation bonds to respond to an UST release. The authority may consist of either a voter-approved bond referendum specifically targeted for payment of the costs associated with an UST release, or certification from the State Attorney General that the government has the authority to issue the bonds without voter approval and that the proceeds of these bonds can be used to respond to an UST release. The Agency is requiring the unused bonding authority to ensure that municipalities have resources to respond to UST releases while allowing them to develop a dedicated fund over time.

The Agency believes this mechanism is appropriate for local government entities, but not private companies, for several reasons. First, local governments operate under statutory and constitutional limitations on debt issuance. By requiring prior voter approval or certification that such approval is not necessary, the Agency is relying on safeguards that do not exist for private companies. Second, local government entities exist to provide public services, whereas private companies do not. Third, local government entities have historically been much more stable than private companies. Fourth, local government entities have an ability to levy taxes or raise fees and charges that is not available to private companies.

In developing this option, the Agency learned that local government entities will frequently obtain a bond referendum before incurring costs related to specific projects, such as construction projects, and will delay the issuance of the bonds until the funds are needed. The Agency was also informed that New York law allows local

governments to issue debt to pay certain obligations without passing a bond referendum. The Agency is also considering that the Tax Reform Act of 1986 penalizes local government entities for investing the proceeds of tax exempt bond issues. Thus, the Agency recognizes that there is both a precedent for having unused bonding authority and an incentive not to issue bonds unless necessary for actual payment of debts.

Commenters support the option of allowing use of a funded balance. One commenter noted that the availability of this option would give public entities greater flexibility in meeting their responsibilities under the financial responsibility requirements. Another commenter favored an incrementally funded trust fund as a possible financial assurance mechanism for local governments.

Two commenters identified particular situations in which local governments could be prohibited by State law from using a funded balance as a financial assurance mechanism. The Agency reiterates that it has provided multiple financial responsibility mechanisms to increase the options available to local governments so that each governmental entity can choose the mechanism most appropriate to its needs. EPA believes that State laws prohibiting the use of any of the mechanisms is consistent with the State Program Approval process, which allows States to set more stringent standards. EPA recognizes that limitations imposed by some States may act to disallow some or all of the mechanisms provided in the rule.

One commenter requested the Agency to clarify that an order or resolution of the governing body of a publicly-owned electric utility satisfies the requirement for an "order dedicating the fund." The commenter noted that this governing body would be the same entity which, for the vast majority of publicly-owned utilities, sets customer rates (e.g., a board of directors, commissioners or supervisors, or a city council).

EPA has determined that the legal authority of a municipal utility or other municipal corporation is specified in the State charter establishing the municipal corporation. Therefore, a dedicated fund for UST corrective actions may be established through a local government order by any municipal utility, or other municipal corporation, or special district whose State charter grants the authority to issue an order establishing such a fund. In their State charters, municipal corporations are granted express powers to conduct their primary business, and implied powers to carry out those

actions that are incidental and essential to the conduct of their business. Because meeting statutory and regulatory requirements are both incidental and essential to the operation of a municipal utility, it would appear that, in general, the board of directors of a municipal utility would have the legal authority to establish an UST trust fund. Because the specific authorities of municipal utilities may vary from State to State, however, and because within a State, each charter may be unique, it may be appropriate for the board of a municipal utility to obtain the advice of legal counsel before voting to establish a dedicated fund for UST corrective actions. The Agency notes, for example, that public comments on the proposed rule claim that a New York statute expressly prohibits the creation of emergency response funds by school districts and Boards of Cooperative Education.

One commenter requested clarification of the requirement that dedicated funds cannot be commingled or otherwise used in normal operations, presumably because the term "normal operations" is not defined or described in the rule or preamble. The commenter also points out that, while the commingling requirement appeared in the preamble, it was not written into the rule itself.

EPA's intent in allowing local governments to establish a dedicated fund for UST corrective actions was to reduce the burden on and cost to local governments by not requiring a third-party trust fund. Whereas a third-party trust fund was authorized for use by non-governmental owners and operators, a third-party requirement for local governments was not considered necessary because of the experience of local governments in establishing and administering such funds. Nevertheless, EPA is concerned that funds reserved for meeting the costs of corrective actions and third-party liabilities associated with UST releases be easily identifiable and readily available.

On the issue of commingling funds, EPA has found that the investment options typically available to local governments offer minimally higher returns with larger deposits. Moreover, deposits larger than \$100,000 would not be insured by the Federal Deposit Insurance Corporation, exposing a commingled fund to the risk of bank failure unless alternative insurance were obtained (e.g., from an agency or State government). Commingling funds may not be practical for local governments that seek to obtain higher returns on deposits by having a bank's trust department actively manage their assets,

because the timing of cash needs from an operational fund and from a trust fund are so widely divergent that a prudent manager would select a different mix of investment instruments for the two funds, and consequently would establish separate funds.

Because of the minimum income gains potentially available through commingling funds, as well as insurance and asset management considerations, EPA has concluded that the potential gains from commingling accounts do not outweigh the associated costs. EPA has modified the language in the rule to reflect this concern: money held for the purposes of demonstrating financial responsibility must be held in a separate account dedicated either to UST responses in particular or to emergency and catastrophic events in general.

5. Combinations of Mechanisms

The mechanisms being provided today may be used by themselves or in combination with other mechanisms. Local governments qualifying for use of the bond rating or worksheet test mechanisms are not required to obtain additional evidence of financial responsibility, but may do so if they so choose. A guarantee or dedicated fund balance may be used to demonstrate financial responsibility for amounts not assured by other mechanisms.

B. Reporting by Owner or Operator

Each government demonstrating financial assurance using the mechanisms promulgated today must notify the implementing agency at the times specified in § 280.110.

C. Recordkeeping

Owners and operators are required to maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this subpart until the tank has been properly closed or, if corrective action is required, until corrective action has been completed and the tank has been properly closed as required by 40 CFR Part 280, Subpart G. In general, the recordkeeping requirements for the mechanisms being promulgated today are equivalent to those required for the mechanisms promulgated in the October 1988 rule. Because local governments are not uniformly required to submit data to third-party agencies, however, local governments using the worksheet test must maintain a copy of the underlying financial statements or other data used to support the use of the worksheet test. Also, local government owners and operators must maintain evidence of the authority that is used to

establish dedicated funds for use in responding to UST releases. An owner or operator using the mechanisms promulgated today is required to maintain at his UST site or his office the following types of evidence for mechanisms used to demonstrate financial responsibility:

Bond Rating Test. Each local government using the bond rating test must maintain

- (1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the eligibility to use the bond rating test, and
- (2) Originally signed and dated transmission from Moody's or Standard & Poor's, showing the amount, the type of bond and the bond rating assigned.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Worksheet Test. Each local government using the worksheet test must maintain

- (1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the accuracy of the calculations and the underlying data,
- (2) A copy of the completed worksheet, and
- (3) A copy of the underlying financial data (e.g., year-end financial statements) used to compute the worksheet.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Guarantee. Each local government using the guarantee must maintain

- (1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the use of the guarantee,
- (2) An originally signed and dated guarantee contract, showing the addresses of all tanks for which financial assurance is guaranteed, the nature of the guarantee (third-party liability, corrective action, or both), and the limits of the guarantee,
- (3) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) of the guarantor certifying (1) the eligibility to use the bond rating test (unless the guarantor is a State), (2) the eligibility to use the worksheet test (unless the guarantor is a State), or (3) the existence of a dedicated UST or emergency response trust fund meeting the requirements of § 280.107,
- (4) For guarantors other than States, a copy of the documentation supporting

the bond rating or worksheet test, including (a) a copy of the originally signed and dated transmission from Moody's or Standard & Poor's to the guarantor, showing the issue size, the type of bond and the bond rating assigned, or (b) a copy of the completed worksheet and underlying financial data, and

- (5) Originally signed duplicates of the standby trust funds worded as specified in this rule for guarantees, surety bonds, or letters of credit (as necessary).

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

Fund Balance. Each local government using the fund balance mechanism must maintain

- (1) A letter signed by the chief financial officer (e.g., comptroller, controller, or treasurer) certifying the use of the fund balance mechanism,
- (2) Originally-signed letter certification from the comptroller or treasurer worded as specified in the rule and letters or certificates from municipalities regarding coverage by municipal funds or other municipal assurances,
- (3) A copy of the authorizing statute or resolution that clearly restricts use of the funds to the designated purposes,
- (4) A financial statement showing the balance of cash or liquid investments in the fund, and
- (5) A copy of either (a) the authorized bond resolution in an amount equalling or exceeding the unfunded portion of the fund or (b) State Attorney General's opinion showing that such authorization is unnecessary.

Such evidence must be on file on site or at the place of business no later than 120 days after the close of each fiscal year.

One commenter asserted that the proposed recordkeeping provisions were generally reasonable and did not represent an undue hardship to local government entities. Another commenter stated that the recordkeeping requirements of the proposed rule would be burdensome. The commenter indicated that requiring local government entities to be able to present evidence of financial capability upon request would be a suitable substitute for the proposed recordkeeping and reporting requirements.

The Agency emphasizes that there is no routine reporting requirement, but that the need to determine compliance with the requirements on an annual

basis is considered to be a fundamental part of the rule. Records are to be retained by local governments and must be provided only when (1) a release occurs, (2) the local government becomes ineligible for a financial responsibility mechanism that it is using, (3) the local government installs a new tank, or (4) records are requested by the implementing agency.

D. Bankruptcy or Other Incapacity of the Owner or Operator

Any owner or operator named as a debtor in voluntary or involuntary bankruptcy proceedings (under Title 9 of the U.S. Code) is required to notify the Regional Administrator or the implementing agency within 10 days after commencement of such proceeding. In addition, any guarantor or indemnitor is required to notify the owner or operator by certified mail within 10 days after commencement of a voluntary or involuntary proceeding under Title 9 (Bankruptcy) of the U.S. Code that names such guarantor or indemnitor as debtor. Any owner who demonstrates financial responsibility using a third-party mechanism 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 the mechanism relied upon (e.g., guarantee, indemnity contract, surety bond, insurance policy, risk retention group coverage policy, letter of credit, or State-required mechanism). Finally, municipalities are required to notify the Director of the implementing agency within 30 days of being notified that a provider of financial assurance (e.g., a guarantor) has declared bankruptcy or is otherwise incapable to cover assured costs, unless they are able to obtain alternative coverage.

V. Economic Impact Analysis

In conjunction with this rule, the Agency has performed three impact analyses: an Economic Impact Analysis, a Federalism Assessment, and a Paperwork Reduction Act estimate. Summaries of these analyses are presented below:

A. Economic Impact Analysis

This section describes the methodology and results of an Economic Impact Analysis of the rule. EPA estimates that about 2,300 local governmental entities will be able to demonstrate financial responsibility using the mechanisms promulgated today that would not be able to demonstrate financial responsibility

using only the mechanisms allowed by the October 1988 rule. The Agency estimates that the use of these mechanisms will result in approximately 5,700 fewer USTs being closed because of a lack of financial assurance. The Agency estimates the total annualized cost savings to be about \$4.5 million, with a present value of about \$32 million over ten years, in constant 1987 dollars.

1. Compliance With Executive Order 12291

Executive Order 12291 (46 FR 13193, February 19, 1981) requires that a regulatory agency examine the potential impact of regulations. The regulatory agency must determine whether a new regulation will be "major." If it is, the regulatory agency must conduct a regulatory impact analysis (RIA). 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 the 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 analyzed the local government financial responsibility rule. Based on this analysis, the Agency has concluded that this regulation will have an annual effect of less than \$100 million. The rule is expected to reduce costs to the regulated community; these reductions are estimated to be less than \$100 million on an annual basis. Accordingly, the regulation being promulgated today is not a major rule, as defined by Executive Order 12291. Nonetheless, the Agency is interested in the potential economic effects of the regulation and has developed an Economic Impact Analysis (EIA) to examine them. The following four sections summarize the results of the EIA: Section 2 describes the regulated community affected by this regulation; Section 3 presents some of the methods and assumptions used to produce the EIA; Section 4 discusses the regulation's cost impacts; and Section 5 describes its environmental impacts.

2. The Affected Community

EPA estimates that approximately 25,000 local government entities own more than 62,000 petroleum-containing USTs. For the purpose of this analysis, the regulated community is divided into eight categories: very large, large,

medium, and small general purpose governments (i.e., cities, counties, and townships); and very large, large, medium, and small special purpose districts (including, for example, independent school districts and water districts). General purpose governments were grouped according to population: very large governments serve more than 50,000 persons; large governments serve more than 10,000 and fewer than 50,000 persons; medium governments serve more than 2,500 and fewer than 10,000 persons; and small governments serve fewer than 2,500 persons. These population categories are the same categories used in other EPA economic impact analyses, and have been used here at the suggestion of one commenter.

For this analysis, school districts were categorized by estimated population, assuming that the enrollment of a school district is one-sixth of the total population. Other special districts, which do not always have well-defined populations, were grouped according to annual revenues: very large districts have annual revenues of more than \$100 million; large districts have annual revenues of more than \$5 million and less than \$100 million; medium districts have revenues of more than \$200,000 and less than \$5 million; and small districts have revenues of less than \$200,000.

Table 1 shows the estimated total number of governments in each category, the number of UST-owning governments in each category, and the number of USTs owned. (A summary of the method used to develop these estimates is provided below.)

TABLE 1.—PROFILE OF LOCAL GOVERNMENTS

Category	Number of entities	Number of entities owning USTs	Total USTs owned
Very large governments	1,360	1,360	13,813
Large governments	4,351	3,870	9,580
Medium governments	7,054	3,643	5,126
Small governments	26,189	2,764	2,921
Very large special districts	862	840	3,148
Large special districts	4,930	4,785	17,359
Medium special districts	12,558	6,617	9,399
Small special districts	26,480	646	654
Total	83,784	24,525	62,000

Source: EPA Analysis.

EPA estimates that 1,360 very large general purpose local governments own approximately 13,800 USTs, 4,350 large

general purpose governments own approximately 9,580 USTs, approximately 7,000 medium general purpose governments own approximately 5,100 USTs, and more than 26,000 small governments collectively own fewer than 3,000 USTs. That is, most small governments are not estimated to own any USTs. EPA estimates that about 860 very large districts (including school districts) own about 3,100 USTs, approximately 4,900 large districts own about 17,000 USTs, about 12,500 medium districts own roughly 9,400 USTs, and more than 26,000 small districts own about 650 USTs. All very large local government entities are assumed to own at least one UST. The Agency used probability theory and an estimate of the total number of USTs owned by all UST-owning entities to calculate the percentage of large, medium, and small government entities that own USTs.

3. Assumptions and Methodology Used in the EIA

The analysis uses several key assumptions to estimate the costs and other impacts of this regulation:

- The baseline used to estimate incremental costs and economic impacts of the self-test rule is the cost of complying with the financial responsibility rule published on October 26, 1988. EPA assumes that local government entities will comply using the options available under the October 1988 rule in the absence of the alternative mechanisms. Local governments unable to use the financial mechanisms available under the October 1988 rule are assumed to close their USTs, in compliance with the regulations.

- Cost impacts were evaluated on an annualized basis. To develop annual costs for insurance and UST closure, EPA calculated the equivalent annual payment having the same "present value" as the cost estimates developed for the UST technical standards regulations, using a ten-year period and a real discount rate of 7 percent.

- The estimated number of USTs owned by local governments is based on a derived relationship between the annual revenues of local governments and the number of USTs owned.

- The 1985 "Summary of State Reports on Releases From Underground Storage Tanks" provides data on the percentage of releases occurring in places of different populations.

- EPA assumes that release incidents are not biased towards places of different size and that the distribution of release incidents is the same as the

distribution of USTs among local government entities.

- The analysis assumes that there are about 62,000 local government USTs, as estimated in the financial responsibility rule published in October 1988.

- The analysis uses budget data obtained from the 1982 Census of Governments to develop a relationship between budget and population and then between budget and number of USTs. (EPA used population statistics and budgets from 1982 to develop relationships between UST ownership, population, and budget, because these data provided information consistent with the UST ownership data used in this report. Estimated ownership patterns were not updated to reflect 1987 data. First, the relationship between population and UST ownership was assumed to remain stable from 1982 to 1987. Second, the relationship between constant-dollar budgets and UST-ownership was also assumed to remain stable. Third, the estimates of total UST ownership are based on 1987 data.)

- All local governments using insurance or mandatory State assurance funds to meet financial responsibility requirements for corrective action and compensation of third parties in the baseline are assumed to continue to use those mechanisms to comply with the financial responsibility requirements, rather than using the mechanisms promulgated today.

- All other local government entities that qualify for financial responsibility using the new mechanisms are assumed to incur costs ranging from \$75 (for the bond rating test) to \$253 (for the guarantee) per government per year to develop and maintain the required records and reports.

- Because local governments that do not qualify for financial responsibility under the worksheet test are assumed to be unable to obtain insurance or otherwise demonstrate financial responsibility, the analysis assumes that they close their UST systems and purchase fuel from retail petroleum dealers.

EPA estimated the fraction of local government entities that will be able to demonstrate financial assurance under the promulgated rules by assuming that governments not able to obtain insurance and not required to use State mechanisms will use the least onerous method for which they qualify:

- Local governments able to obtain insurance under the baseline are assumed to do so, rather than use the mechanisms being promulgated today,

in order to minimize their exposure to potentially large UST-related costs.

- Local governments in States with mandatory assurance programs are assumed to use them rather than the mechanisms being promulgated today.

- Local governments with outstanding issues of investment grade bonds in amounts greater than \$1 million (about 87 percent of all governments with investment grade ratings) are assumed to use the bond rating test. Analysis of data on Minnesota cities suggest that virtually all cities with populations of more than 10,000 have investment-rated general obligation bonds, and that virtually no cities with populations less than 2,000 have such bonds.

- Local governments not eligible to use the bond rating test are assumed to use the worksheet test, if they qualify. The Agency used the 1987 Census of Governments to estimate the fraction of governments with populations less than 200,000 or annual revenues less than \$100 million (i.e., those that may not qualify to use the bond rating test) that qualify at the 10 percentile threshold.

- The Agency assumes that local governments with total fund balances

greater than \$4 million that do not qualify to use the worksheet test will establish a dedicated fund meeting the requirements. Data from the 1987 Census of Governments were used to estimate the percentage of governments having more than \$4 million in funds that would not qualify under the worksheet test.

- The Agency assumes that 90 percent of school districts unable to demonstrate financial responsibility will obtain guarantees from surrounding general purpose governments. This assumption is based on the assumption that education will be deemed to be of sufficient importance that the general purpose governments served by school districts will act to insure that the USTs remain in operation.

- The Agency also assumes that half of all other special districts unable to otherwise demonstrate financial responsibility will be able to obtain guarantees from the general purpose governments served by the districts.

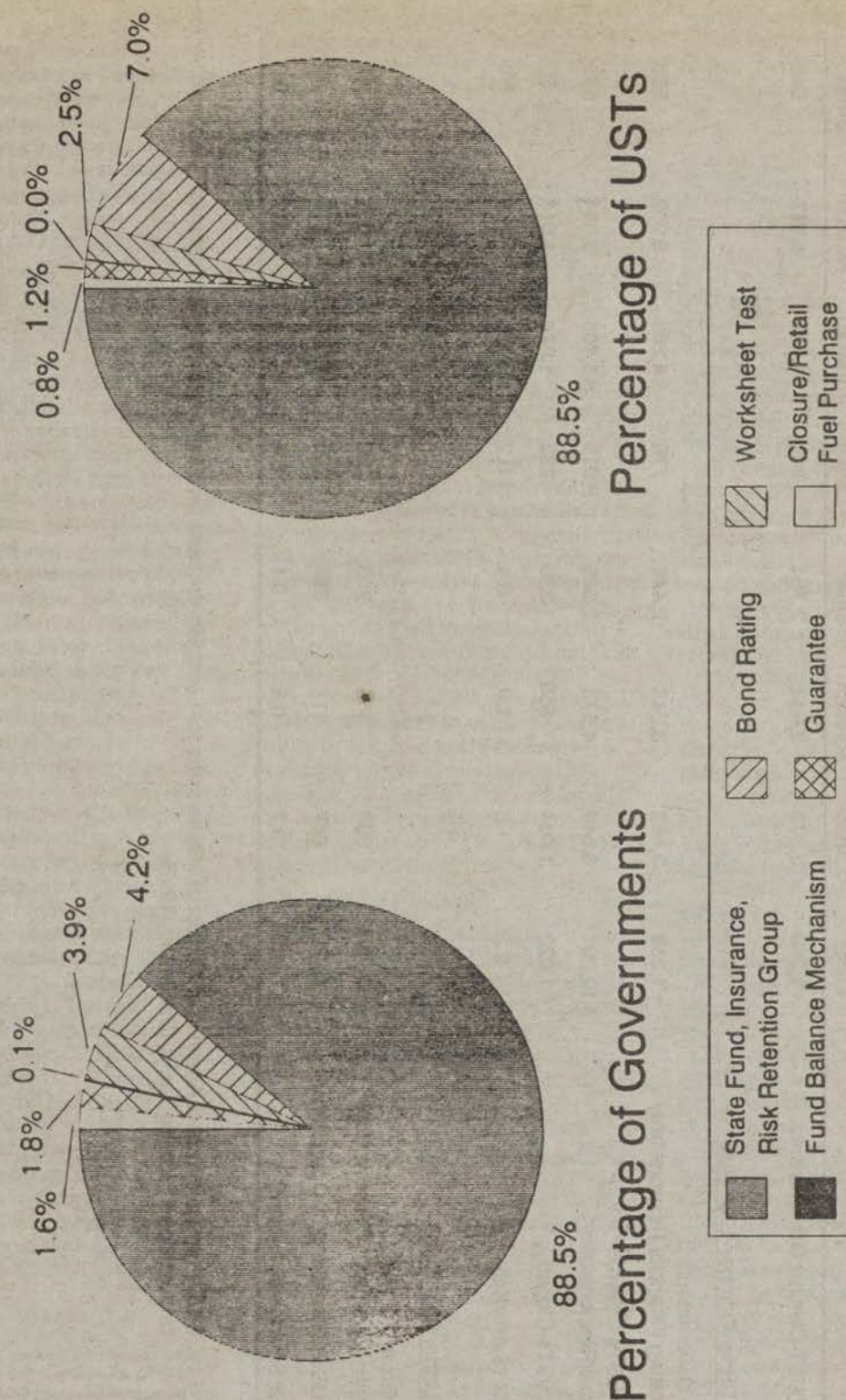
- All other general purpose governments and districts not able to demonstrate financial responsibility are assumed to close their USTs and

purchase fuel from retail petroleum stations.

Figure 1 shows the estimated fraction of local governments using each financial assurance mechanism under today's rule. It should be noted that the assumed availability of guarantees represents just one of many plausible outcomes. Other possible outcomes range from (1) all governments failing to obtain insurance or qualify using one of the self-test mechanisms will be able to continue to operate their USTs, either by obtaining guarantees or by transferring ownership of their USTs to the State or to local governments able to demonstrate financial responsibility, (2) some other fraction of all governments, without regard to purpose, will be able to obtain guarantees, or (3) no governments will be able to obtain guarantees. The EIA discusses the sensitivity of the results to alternative assumptions about the availability of guarantees.

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Figure 1
Estimated Use of Financial Assurance Mechanisms
 (Counties, Municipalities, Townships, School Districts, and Special Districts)^a



^a Percentages may not add up to 100 percent due to rounding.

Source: EPA, "Economic Impact and Regulatory Flexibility Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks." EPA Office of Underground Storage Tanks, 1992.

Table 2
Summary of Results of
Economic Impact Analysis

	General Purpose Governments				Special Districts			
	Very Large	Large	Medium	Small	Very Large	Large	Medium	Small
Number of UST-Ownning Governments	1,360	3,870	3,643	2,764	840	4,785	6,617	646
<u>Response Under October 1988 Rule</u>								
Number of Governments Demonstrating Financial Responsibility	1,259	3,452	3,249	2,447	778	4,269	5,902	568
Number of USTs Covered By Financial Responsibility	12,791	8,546	4,573	2,585	2,915	15,485	8,384	575
Number of USTs Closed	1,022	1,034	553	336	233	1,874	1,015	80
Annual Cost (\$ millions)	2.2	1.6	1.0	0.4	0.7	2.7	1.8	0.0
<u>Response Under This Rule</u>								
Additional Governments Demonstrating Financial Responsibility	101	396	366	283	62	509	501	47
Additional USTs Remaining in Operation	1,022	977	517	298	230	1,856	715	47
Annual Cost Savings (\$ millions)	1.0	0.7	0.5	0.1	0.4	1.2	0.7	0.0

Source: EPA, Economic Impact Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks (December, 1992).

4. Cost Impacts

The cost impacts of the rule are measured as the difference between the costs of complying with the October 1988 financial responsibility rule and with this rule. Table 2 shows the estimated change from the baseline by type and size of local government.

The annualized total costs of complying with the October 1988 financial responsibility rule are estimated to be about \$10 million, whereas the costs of complying with this rule are about \$5.9 million. The rule, therefore, is estimated to result in an annual net savings of approximately \$4.5 million.¹⁷ Most of the savings result from fewer mandatory closures under the rule than in the baseline, with additional savings earned from the difference between wholesale and retail prices for fuel.¹⁸ EPA estimates that the average annualized savings per local government entity (irrespective of UST ownership) will be about \$54, with an average saving of about \$185 per UST-owning government. Most of the total savings will be realized in the first year, because the revised compliance schedule requires that local governments without financial assurance close their USTs within one year of promulgation of this rule. The Agency estimates that very large general purpose governments will save about \$1.0 million and very large special districts will save approximately \$445,000 under the rule. Very large UST-owning governments are expected to realize savings of more than \$700 each, or about 0.001 percent of their typical annual budgets. The Agency expects that all very large entities estimated to close their USTs in the absence of the rule will be able to demonstrate financial responsibility through the alternative mechanisms promulgated under today's rule.

Small general purpose governments save more relative to their budgets for two reasons: (1) The costs of closure are a larger percentage of their budgets; and (2) those entities with USTs spend

proportionately more on fuel than medium and large entities and, therefore, save proportionately more by reduced fuel costs.¹⁹ In the absence of the rule, EPA estimates that 85 percent of small governments and 90 percent of small districts would be unable to demonstrate financial responsibility and would be forced to close their USTs; under the rule, only an estimated one percent of small general purpose governments and five percent of small special districts are estimated to be forced to close their USTs.

5. Environmental Impacts

The rule has potential environmental impacts as well as economic impacts. As a result of the rule, more local governments may be able to demonstrate financial responsibility through the alternative mechanisms and more tanks may remain in operation. All local government USTs, however, are subject to the requirements established by the UST technical standards rule, which is designed to minimize the human health and environmental risks from underground storage tank operations. In addition, the rule requires local governments to demonstrate the ability to respond to UST releases to minimize potential environmental damages. EPA believes, therefore, that any negative human health and environmental effects resulting from the rule will be minimal.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires all Federal agencies to review the impact of their regulations to determine whether they will have a significant economic impact on a substantial number of small entities. If so, the Agency must prepare a regulatory flexibility analysis. As discussed in the economic impact analysis, EPA has determined that this rule will provide a net benefit to small local governments by reducing their costs of compliance with the financial responsibility provisions of Subtitle I. For this reason, the Agency has concluded that a regulatory flexibility analysis is not necessary.

Nevertheless, EPA, as part of its ongoing effort to be responsive to small entities affected by its regulations, has expanded its analysis of the economic effects associated with this rule. The additional findings support EPA's conclusions that local governments

benefit from the mechanisms promulgated today. The analysis shows, in fact, that small local governments receive an even greater benefit as compared with their larger counterparts.

The Agency estimates that this rule will result in a net savings for local governments of \$4.5 million per year. Most of the savings realized by local governments will be due to a significant decrease in the number of UST closures. In developing this rule, the Agency has sought to reduce the impacts on all governments regardless of size. The worksheet test, however, was specifically designed to recognize that even small local governments may be able to demonstrate the requisite financial strength needed to pay for an UST release. Based on an analysis presented in the EIA, approximately 89 percent of all small general purpose governments (including 98 percent of small counties, 91 percent of small municipalities, and 87 percent of small townships) will be able to demonstrate financial responsibility using the worksheet test.

The use of the governmental guarantee is also particularly suited to small local governments, such as school districts, which often have a substantial governmental relationship with a nearby city or county. EPA has estimated that approximately 59 percent of small school and special districts will be able to obtain guarantees.

Overall, the proportion of USTs owned by small local governments which will be unable to meet the financial responsibility requirement drops from about 12 percent to 2 percent as a result of the additional mechanisms promulgated today.

EPA is also considering adoption of another rule which would provide even more flexibility to small local governments. As described in the *Federal Register* on December 23, 1991 (56 FR 66369), an option considered but not yet proposed would extend the financial responsibility compliance date to 1998 for certain facilities that meet Federal economic criteria. This rule would be designed to benefit the small, possibly rural local governments which provide essential emergency or community services and which may be most in need of an additional extension. Despite these efforts, the Agency recognizes that some small local governments may still have difficulty complying with the financial responsibility and other requirements for underground storage tanks. Therefore, the Agency plans to conduct a study of the overall costs of these requirements and the potential impact of these costs on the ability of small

¹⁷ The estimated costs for a municipal government using a state fund to demonstrate financial responsibility may not accurately reflect the true costs to society for providing state fund coverage. Most state funds impose a mandatory per-gallon fee on all petroleum products used in the state. Thus, all users of petroleum products in the state share in paying the costs associated with the state fund.

¹⁸ The only entities that save under the rule are those that would have closed their USTs in the baseline and choose the self-test under the rule and those entities that use a third party mechanism in the baseline (other than insurance and state funds) and the less costly alternative mechanisms under the rule. Far more entities are in the former category than the latter.

¹⁹ In general, small entities do not own USTs; the Agency estimates that fewer than 3,600 of the more than 50,000 small entities own USTs. EPA infers from this that those entities that do own USTs use them intensively, incurring fuel costs as high as seven percent of their annual budgets.

local governments to retain their USTs. The study would also look into the feasibility of alternative methods of providing fuel (for essential public services) without requiring the ownership of USTs by these governments. In addition, the study would assess the continued availability of State financial assistance and assurance funds and their effects on local governments that own USTs. EPA will use the findings from this study to help monitor the effects of the UST requirements on local governments and to help assess the need for any further Agency guidance or action.

It should be noted that UST closures do not necessarily result in a loss of availability of fuel. Local governments have several means of assuring a continuing fuel supply: Purchase of fuel from retail outlets, use of above-ground tanks (where fire codes permit), and "pooling" of fuel sources with neighboring governments (local or State) that are able to demonstrate financial responsibility. The concern expressed by local governments is the availability of fuel for emergency vehicles when retail stations may be closed. EPA understands that some local governments are participating in "card-lock" arrangements. Under a card-lock arrangement, participants are issued magnetic cards that can then unlock the fuel pump; fuel withdrawal is monitored and charged to the card owner. With this arrangement, no attendant is necessary, and there is 24-hour access to fuel. Some of these alternatives have the added benefit of removing the costs and liability of maintaining USTs from local governments.

One commenter contended that EPA's rationale for not developing a regulatory flexibility analysis for the proposed rule is flawed, arguing that because the proposed rule simply amends the financial responsibility requirement, which initially imposed a burden on the regulated community, the benefits of the proposed rule cannot be accurately assessed in isolation of these requirements. As discussed above, the Agency has used this rule to provide additional flexibility to local governments, and particularly small local governments.

EPA does not, however, consider a baseline of no financial responsibility requirement to be a reasonable baseline for analyzing this rule. After review with regard to the 1988 financial responsibility rule, the Agency determined that although most local governments have adequate stability and financial strength to respond to an UST release, not all local governments

have the resources to meet their UST-related obligations. Given these concerns, EPA believes that exempting all local governments from the financial responsibility requirement would not be consistent with statutory intent.

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 control number 2050-0066. An Information Collection Request document has been prepared by EPA (ICR No. 1359.04) and a copy may be obtained from Sandy Farmer, Information Policy Branch, EPA, 401 M Street, SW. (PM-223Y), Washington, D.C. 20460 or by calling (202) 260-2740. The information collection requirements were approved by the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and assigned OMB control number 2050-0066. The Agency estimated the total annual burden on the regulated community of local governments to be 28,518 hours. The Agency estimated the burden on local government entities for reading the requirements to be 24,188 hours, the reporting or disclosure burden to be 218 hours, and the total recordkeeping burden to be 4,112 hours. The average burden for reading the requirements was estimated to be one hour. The average burden for reporting or disclosure was estimated to be two hours, while only 0.45 percent of all local government UST owners and operators were expected to be required to report each year. The average annual burden to maintain records of the alternative mechanisms was estimated to be 0.17 hours. These burden estimates included all aspects of the collection effort and included time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223Y, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, marked "Attention: Jonathan Gledhill."

VI. Supporting Documents

In addition to supporting material found in the rulemaking docket, EPA

has prepared the following supporting documents to support this rule:

EPA, "Background Document in Support of Financial Self-Test for Local Governments Subject to the Financial Responsibility Requirements of Subtitle I of the Resource Conservation and Recovery Act," U.S. Environmental Protection Agency, Office of Underground Storage Tanks (November, 1992).

EPA, "Economic Impact Analysis of Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks (November, 1992).

EPA, "Response to Comments on the June 18, 1990 Proposed Rule to Provide Additional Mechanisms for Local Government Entities to Demonstrate Financial Responsibility for Underground Storage Tanks," EPA Office of Underground Storage Tanks (November, 1992).

List of Subjects in 40 CFR Part 280

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

Dated: January 15, 1993.

William K. Reilly,
Administrator.

For the reasons set forth in the preamble, part 280 of title 40 of the Code of Federal Regulations is 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, 6991a, 6991b, 6991c, 6991e, 6991f, and 6991h.

2. Section 280.92 is amended by removing the paragraph designations (a) through (o) and adding in alphabetical order three definitions reading as follows:

§ 280.92 Definition of terms.

* * * * *

Chief Financial Officer, in the case of local government owners and operators, means the individual with the overall authority and responsibility for the

collection, disbursement, and use of funds by the local government.

Local government shall have the meaning given this term by applicable state law and includes Indian tribes. The term is generally intended to include: (1) Counties, municipalities, townships, separately chartered and operated special districts (including local government public transit systems and redevelopment authorities), and independent school districts authorized as governmental bodies by state charter or constitution; and (2) Special districts and independent school districts established by counties, municipalities, townships, and other general purpose governments to provide essential services.

Substantial governmental relationship means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from a clear commonality of interest in the event of an UST release such as coterminal boundaries, overlapping constituencies, common ground-water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

3. § 280.94 is amended by revising paragraphs (a) and (b) to read as follows:

§ 280.94 Allowable mechanisms and combinations of mechanisms.

(a) Subject to the limitations of paragraphs (b) and (c) of this section,

(1) An owner or operator, including a local government 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, and

(2) A local government owner or operator may use any one or combination of the mechanisms listed in §§ 280.104 through 280.107 to demonstrate financial responsibility under this subpart for one or more underground storage tanks.

(b) An owner or operator may use a guarantee under § 280.96 or surety bond under § 280.98 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.

4. The following sections are redesignated according to the following table:

Old section no.	New section no.
§ 280.104	§ 280.108.
§ 280.105	§ 280.109.
§ 280.106	§ 280.110.
§ 280.107	§ 280.111.
§ 280.108	§ 280.112.
§ 280.109	§ 280.113.
§ 280.110	§ 280.114.
§ 280.111	§ 280.115.
§ 280.112	§ 280.116.

5. Newly designated §§ 280.109, 280.110, 280.111, 280.112, 280.114, and 280.115 are revised to read as follows:

§ 280.109 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 local government guarantee, 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 or risk retention coverage, except for non-payment or misrepresentation by the insured, 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. Termination for non-payment of premium or misrepresentation by the insured may not occur until a minimum of 10 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 § 280.114, 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).

§ 280.110 Reporting by owner or operator.

(a) An owner or operator must submit the appropriate forms listed in § 280.111(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 (Bankruptcy), 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 § 280.109(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 § 280.111(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).

§ 280.111 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 § 208.113. An owner or operator must maintain such evidence at the underground storage tank site or the owner's or operator's place of work. 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 or §§ 280.104 through 280.107 must maintain a copy of the instrument worded as specified.

(2) An owner or operator using a financial test or guarantee, or a local government financial test or a local government guarantee supported by the local government financial test 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) A local government owner or operator using a local government guarantee under § 280.106(d) must maintain a copy of the signed standby trust fund agreement and copies of any amendments to the agreement.

(5) A local government owner or operator using the local government bond rating test under § 280.104 must maintain a copy of its bond rating published within the last twelve months by Moody's or Standard & Poor's.

(6) A local government owner or operator using the local government guarantee under § 280.106, where the guarantor's demonstration of financial responsibility relies on the bond rating test under § 280.104 must maintain a copy of the guarantor's bond rating published within the last twelve months by Moody's or Standard & Poor's.

(7) 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.

(8) 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).

(9) An owner or operator using a local government fund under § 280.107 must maintain the following documents:

(i) A copy of the state constitutional provision or local government statute, charter, ordinance, or order dedicating the fund, and

(ii) Year-end financial statements for the most recent completed financial

reporting year showing the amount in the fund. If the fund is established under § 280.107(a)(3) using incremental funding backed by bonding authority, the financial statements must show the previous year's balance, the amount of funding during the year, and the closing balance in the fund.

(iii) If the fund is established under § 280.107(a)(3) using incremental funding backed by bonding authority, the owner or operator must also maintain documentation of the required bonding authority, including either the results of a voter referendum (under § 280.107(a)(3)(i)), or attestation by the State Attorney General as specified under § 280.107(a)(3)(ii).

(10) A local government owner or operator using the local government guarantee supported by the local government fund must maintain a copy of the guarantor's year-end financial statements for the most recent completed financial reporting year showing the amount of the fund.

(11)(i) An owner or operator using an assurance mechanism specified in §§ 280.95 through 280.107 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 requirements of subpart H of 40 CFR part 280.

The financial assurance mechanism(s) used to demonstrate financial responsibility 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 accidental releases" or "nonsudden accidental 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]

(ii) 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.)

§ 280.112 Drawing on financial assurance mechanisms.

(a) Except as specified in paragraph (d) of this section, 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 corrective 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

[Signatures]

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.

(d) A governmental entity acting as guarantor under § 280.106(e), the local government guarantee without standby trust, shall make payments as directed by the Director under the circumstances described in § 280.112 (a), (b), and (c).

§ 280.114 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 § 280.111(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) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a local government owner or operator as debtor, the local government owner or operator must notify the Director of the implementing agency by certified mail of such commencement and submit the appropriate forms listed in § 280.111(b) documenting current financial responsibility.

(d) Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming a guarantor providing a local government financial assurance as debtor, such guarantor must notify the local government owner or operator by certified mail of such commencement as required under the terms of the guarantee specified in § 280.106.

(e) 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.

(f) 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.

§ 280.115 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, local government guarantee with standby trust, 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.

6. New § 280.104 is added to read as follows:

§ 280.104 Local government bond rating test.

(a) A general purpose local government owner or operator and/or local government serving as a guarantor may satisfy the requirements of § 280.93 by having a currently outstanding issue or issues of general obligation bonds of \$1 million or more, excluding refunded obligations, with a Moody's rating of Aaa, Aa, A, or Baa, or a Standard & Poor's rating of AAA, AA, A, or BBB. Where a local government has multiple outstanding issues, or where a local government's bonds are rated by both Moody's and Standard and Poor's, the lowest rating must be used to determine eligibility. Bonds that are backed by credit enhancement other than municipal bond insurance may not be considered in determining the amount of applicable bonds outstanding.

(b) A local government owner or operator or local government serving as a guarantor that is not a general-purpose local government and does not have the legal authority to issue general obligation bonds may satisfy the requirements of § 280.93 by having a currently outstanding issue or issues of revenue bonds of \$1 million or more, excluding refunded issues and by also having a Moody's rating of Aaa, A, A, or Baa, or a Standard & Poor's rating of AAA, AA, A, or BBB as the lowest rating for any rated revenue bond issued by the local government. Where bonds are rated by both Moody's and Standard & Poor's, the lower rating for each bond must be used to determine eligibility. Bonds that are backed by credit enhancement may not be considered in determining the amount of applicable bonds outstanding.

(c) The local government owner or operator and/or guarantor must maintain a copy of its bond rating published within the last 12 months by Moody's or Standard & Poor's.

(d) To demonstrate that it meets the local government bond rating test, the chief financial officer of a general purpose local government owner or

operator and/or guarantor must sign 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 local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to

demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental 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 bond rating test:

[List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard & Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of \$1 million. All outstanding general obligation bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR Part 280.104(d) as such regulations were constituted on the date shown immediately below.

[Date] _____
[Signature] _____
[Name] _____

[Title] _____

(e) To demonstrate that it meets the local government bond rating test, the chief financial officer of local government owner or operator and/or guarantor other than a general purpose government must sign 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 local government owner or operator, or guarantor]. This letter is in support of the use of the bond rating test to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or

"nonsudden accidental 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). This local government is not organized to provide general governmental services and does not have the legal authority under state law or constitutional provisions to issue general obligation debt.

Underground storage tanks at the following facilities are assured by this bond rating test: [List for each facility: the name and address of the facility where tanks are assured by the bond rating test].

The details of the issue date, maturity, outstanding amount, bond rating, and bond rating agency of all outstanding revenue bond issues that are being used by [name of local government owner or operator, or guarantor] to demonstrate financial responsibility are as follows: [complete table]

Issue date	Maturity date	Outstanding amount	Bond rating	Rating agency
				[Moody's or Standard & Poor's]

The total outstanding obligation of [insert amount], excluding refunded bond issues, exceeds the minimum amount of \$1 million. All outstanding revenue bonds issued by this government that have been rated by Moody's or Standard & Poor's are rated as at least investment grade (Moody's Baa or Standard & Poor's BBB) based on the most recent ratings published within the last 12 months. The revenue bonds listed are not backed by third-party credit enhancement or are insured by a municipal bond insurance company. Neither rating service has provided notification within the last 12 months of downgrading of bond ratings below investment grade or of withdrawal of bond rating other than for repayment of outstanding bond issues.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR Part 280.104(e) as such regulations were constituted on the date shown immediately below.

[Date] _____
[Signature] _____

[Name] _____
[Title] _____

(f) The Director of the implementing agency may require reports of financial condition at any time from the local government owner or operator, and/or local government guarantor. If the Director finds, on the basis of such reports or other information, that the local government owner or operator, and/or guarantor, no longer meets the local government bond rating test requirements of § 280.104, the local government owner or operator must obtain alternative coverage within 30 days after notification of such a finding.

(g) If a local government owner or operator using the bond rating test to provide financial assurance finds that it no longer meets the bond rating test requirements, the local government owner or operator must obtain

alternative coverage within 150 days of the change in status.

7. New § 280.105 is added to read as follows:

§ 280.105 Local government financial test.

(a) A local government owner or operator may satisfy the requirements of § 280.93 by passing the financial test specified in this section. To be eligible to use the financial test, the local government owner or operator must have the ability and authority to assess and levy taxes or to freely establish fees and charges. To pass the local government financial test, the owner or operator must meet the criteria of paragraphs (b)(2) and (b)(3) of this section based on year-end financial statements for the latest completed fiscal year.

(b)(1) The local government owner or operator must have the following information available, as shown in the year-end financial statements for the latest completed fiscal year:

(i) **Total revenues:** Consists of the sum of general fund operating and non-operating revenues including net local taxes, licenses and permits, fines and forfeitures, revenues from use of money and property, charges for services, investment earnings, sales (property, publications, etc.), intergovernmental revenues (restricted and unrestricted), and total revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity. For purposes of this test, the calculation of total revenues shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers), liquidation of investments, and issuance of debt.

(ii) **Total expenditures:** Consists of the sum of general fund operating and non-operating expenditures including public safety, public utilities, transportation, public works, environmental protection, cultural and recreational, community development, revenue sharing, employee benefits and compensation, office management, planning and zoning, capital projects, interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues. For purposes of this test, the calculation of total expenditures shall exclude all transfers between funds under the direct control of the local government using the financial test (interfund transfers).

(iii) **Local revenues:** Consists of total revenues (as defined in paragraph (b)(1)(i) of this section) minus the sum of all transfers from other governmental entities, including all monies received from Federal, state, or local government sources.

(iv) **Debt service:** Consists of the sum of all interest and principal payments on all long-term credit obligations and all interest-bearing short-term credit obligations. Includes interest and principal payments on general obligation bonds, revenue bonds, notes, mortgages, judgments, and interest bearing warrants. Excludes payments on non-interest-bearing short-term obligations, interfund obligations, amounts owed in a trust or agency capacity, and advances and contingent loans from other governments.

(v) **Total funds:** Consists of the sum of cash and investment securities from all funds, including general, enterprise, debt service, capital projects, and special revenue funds, but excluding employee retirement funds, at the end of the local government's financial reporting year. Includes Federal securities, Federal agency securities, state and local government securities, and other securities such as bonds, notes and mortgages. For purposes of this test, the calculation of total funds shall exclude agency funds, private trust funds, accounts receivable, value of real property, and other non-security assets.

(vi) **Population:** Consists of the number of people in the area served by the local government.

(2) The local government's year-end financial statements, if independently audited, cannot include an adverse auditor's opinion or a disclaimer of opinion. The local government cannot have outstanding issues of general obligation or revenue bonds that are rated as less than investment grade.

(3) The local government owner or operator must have a letter signed by the chief financial officer worded as specified in paragraph (c) of this section.

(c) To demonstrate that it meets the financial test under paragraph (b) of this section, the chief financial officer of the local government owner or operator, 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). This letter is in support of the use of the local government financial test to demonstrate financial responsibility for (insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage") caused by (insert: "sudden accidental releases" and/or "nonsudden accidental 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 [List for each facility: the name and address of the facility where tanks assured by this financial test are located. 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 by the tank identification number provided in the notification

submitted pursuant to 40 CFR Part 280.22 or the corresponding state requirements.]

This owner or operator has not received an adverse opinion, or a disclaimer of opinion from an independent auditor on its financial statements for the latest completed fiscal year. Any outstanding issues of general obligation or revenue bonds, if rated, have a Moody's rating of Aaa, Aa, A, or Baa or a Standard and Poor's rating of AAA, AA, A, or BBB; if rated by both firms, the bonds have a Moody's rating of Aaa, Aa, A, or Baa and a Standard and Poor's rating of AAA, AA, A, or BBB.

Worksheet for Municipal Financial Test

Part I: Basic Information

1. Total Revenues

a. Revenues (dollars) _____

Value of revenues excludes liquidation of investments and issuance of debt. Value includes all general fund operating and non-operating revenues, as well as all revenues from all other governmental funds including enterprise, debt service, capital projects, and special revenues, but excluding revenues to funds held in a trust or agency capacity.

b. Subtract interfund transfers (dollars) _____

c. Total Revenues (dollars) _____

2. Total Expenditures

a. Expenditures (dollars) _____

Value consists of the sum of general fund operating and non-operating expenditures including interest payments on debt, payments for retirement of debt principal, and total expenditures from all other governmental funds including enterprise, debt service, capital projects, and special revenues.

b. Subtract interfund transfers (dollars) _____

c. Total Expenditures (dollars) _____

3. Local Revenues

a. Total Revenues (from 1c) (dollars) _____

b. Subtract total intergovernmental transfers (dollars) _____

c. Local Revenues (dollars) _____

4. Debt Service

a. Interest and fiscal charges (dollars) _____

b. Add debt retirement (dollars) _____

c. Total Debt Service (dollars) _____

5. Total Funds (Dollars) _____

(Sum of amounts held as cash and investment securities from all funds, excluding amounts held for employee retirement funds, agency funds, and trust funds)

6. Population (Persons) _____

Part II: Application of Test

7. Total Revenues to Population

a. Total Revenues (from 1c) _____

b. Population (from 6) _____

c. Divide 7a by 7b _____

d. Subtract 417 _____

- e. Divide by 5,212 _____
 f. Multiply by 4.095 _____
8. Total Expenses to Population
 a. Total Expenses (from 2c) _____
 b. Population (from 6) _____
 c. Divide 8a by 8b _____
 d. Subtract 524 _____
 e. Divide by 5,401 _____
 f. Multiply by 4.095 _____
9. Local Revenues to Total Revenues
 a. Local Revenues (from 3c) _____
 b. Total Revenues (from 1c) _____
 c. Divide 9a by 9b _____
 d. Subtract .695 _____
 e. Divide by .205 _____
 f. Multiply by 2.840 _____
10. Debt Service to Population
 a. Debt Service (from 4d) _____
 b. Population (from 6) _____
 c. Divide 10a by 10b _____
 d. Subtract 51 _____
 e. Divide by 1,038 _____
 f. Multiply by -1.866 _____
11. Debt Service to Total Revenues
 a. Debt Service (from 4d) _____
 b. Total Revenues (from 1c) _____
 c. Divide 11a by 11b _____
 d. Subtract .068 _____
 e. Divide by .259 _____
 f. Multiply by -3.533 _____
12. Total Revenues to Total Expenses
 a. Total Revenues (from 1c) _____
 b. Total Expenses (from 2c) _____
 c. Divide 12a by 12b _____
 d. Subtract .910 _____
 e. Divide by .899 _____
 f. Multiply by 3.458 _____
13. Funds Balance to Total Revenues
 a. Total Funds (from 5) _____
 b. Total Revenues (from 1c) _____
 c. Divide 13a by 13b _____
 d. Subtract .891 _____
 e. Divide by 9.156 _____
 f. Multiply by 3.270 _____
14. Funds Balance to Total Expenses
 a. Total Funds (from 5) _____
 b. Total Expenses (from 2c) _____
 c. Divide 14a by 14b _____
 d. Subtract .866 _____
 e. Divide by 6.409 _____
 f. Multiply by 3.270 _____
15. Total Funds to Population
 a. Total Funds (from 5) _____
 b. Population (from 6) _____
 c. Divide 15a by 15b _____
 d. Subtract 270 _____
 e. Divide by 4,548 _____
 f. Multiply by 1.866 _____
16. Add 7f + 8f + 9f + 10f + 11f + 12f + 13f + 14f + 15f + 4.937 _____

I hereby certify that the financial index shown on line 16 of the worksheet is greater than zero and that the wording of this letter is identical to the wording specified in 40 CFR Part 280.105(c) as such regulations were constituted on the date shown immediately below.

[Date]
 [Signature]

[Name]
 [Title]

(d) If a local government owner or operator using the test to provide financial assurance finds that it 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.

(e) The Director of the implementing agency may require reports of financial condition at any time from the local government owner or operator. If the Director finds, on the basis of such reports or other information, that the local government owner or operator no longer meets the financial test requirements of § 280.105 (b) and (c), the owner or operator must obtain alternate coverage within 30 days after notification of such a finding.

(f) If the local government owner or operator fails to obtain alternate assurance within 150 days of finding that it 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 it no longer meets the requirements of the financial test, the owner or operator must notify the Director of such failure within 10 days.

8. New § 280.106 is added to read as follows:

§ 280.106 Local government guarantee.

(a) A local government 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 either the state in which the local government owner or operator is located or a local government having a "substantial governmental relationship" with the owner and operator and issuing the guarantee as an act incident to that relationship. A local government acting as the guarantor must:

(1) demonstrate that it meets the bond rating test requirement of § 280.104 and deliver a copy of the chief financial officer's letter as contained in § 280.104(c) to the local government owner or operator; or

(2) demonstrate that it meets the worksheet test requirements of § 280.105 and deliver a copy of the chief financial officer's letter as contained in § 280.105(c) to the local government owner or operator; or

(3) demonstrate that it meets the local government fund requirements of § 280.107(a), § 280.107(b), or § 280.107(c) and deliver a copy of the

chief financial officer's letter as contained in § 280.107 to the local government owner or operator.

(b) If the local government guarantor is unable to demonstrate financial assurance under any of §§ 280.104, 280.105, 280.107(a), 280.107(b), or 280.107(c), at the end of the financial reporting year, the guarantor shall send by certified mail, before cancellation or non-renewal of the guarantee, notice to the owner or operator. 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 § 280.114(c).

(c) The guarantee agreement must be worded as specified in paragraph (d) or (e) of this section, depending on which of the following alternative guarantee arrangements is selected:

(1) If, in the default or incapacity of the owner or operator, the guarantor guarantees to fund a standby trust as directed by the Director of the implementing agency, the guarantee shall be worded as specified in paragraph (d) of this section.

(2) If, in the default or incapacity of the owner or operator, the guarantor guarantees to make payments as directed by the Director of the implementing agency for taking corrective action or compensating third parties for bodily injury and property damage, the guarantee shall be worded as specified in paragraph (e) of this section.

(d) If the guarantor is a state, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee With Standby Trust Made by a State

Guarantee made this [date] by [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor is a state.

(2) [Local government 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 Part 280 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) Guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [local government 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 part 280.112, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government 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 fund in accordance with the provisions of 40 CFR part 280.112, 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"] accidental 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 part 280.112 to satisfy such judgment(s), award(s), or settlement agreement(s) up to the limits of coverage specified above.

(4) 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.

(5) 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.

(6) Guarantor agrees to remain bound under this guarantee for so long as [local government 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.

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

(a) Any obligation of [local government 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: local government owner or operator] arising from, and in the course of, employment by [insert: local government 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: local government 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 part 280.93.

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

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR part 280.106(d) 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: _____

If the guarantor is a local government, the local government guarantee with standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee With Standby Trust Made by a Local Government

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

Recitals

(1) Guarantor meets or exceeds (select one: the local government bond rating test requirements of 40 CFR part 280.104, the local government financial test requirements of 40 CFR part 280.105, or the local government fund under 40 CFR part 280.107(a), 280.107(b), or 280.107(c)).

(2) [Local government 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 Part 280 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) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties that:

In the event that [local government 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 part 280.112, in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government 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 fund in accordance with the provisions of 40 CFR part 280.112, 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"] accidental 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 part 280.112 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 or exceed the requirements of the financial responsibility mechanism specified in paragraph (1), guarantor shall send within 120 days of such failure, by certified mail,

notice to [local government 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 [local government 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 [local government 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: local government owner or operator] arising from, and in the course of, employment by [insert: local government 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: local government 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 Part 280.93.

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

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(d) 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: _____

(e) If the guarantor is a state, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee Without Standby Trust Made by a State

Guarantee made this [date] by [name of state], herein referred to as guarantor, to [the state implementing agency] and to any and all third parties, and obliges, on behalf of [local government owner or operator].

Recitals

(1) Guarantor is a state.

(2) [Local government 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 Part 280 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) Guarantor guarantees to [implementing agency] and to any and all third parties and obliges that:

In the event that [local government 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 written instructions from the [Director] shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government 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 make funds available to pay for corrective actions 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"] accidental 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 make

funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

(4) 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.

(5) 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.

(6) Guarantor agrees to remain bound under this guarantee for so long as [local government 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. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

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

(a) Any obligation of [local government 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: local government owner or operator] arising from, and in the course of, employment by [insert: local government 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: local government 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 Part 280.93.

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

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(e) 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: _____

If the guarantor is a local government, the local government guarantee without standby trust must be worded exactly as follows, except that instructions in brackets are to be replaced with relevant information and the brackets deleted:

Local Government Guarantee Without Standby Trust Made by a Local Government

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

Recitals

(1) Guarantor meets or exceeds [select one: the local government bond rating test requirements of 40 CFR part 280.104, the local government financial test requirements of 40 CFR part 280.105, the local government fund under 40 CFR part 280.107(a), 280.107(b), or 280.107(c)].

(2) [Local government 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 Part 280 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) Incident to our substantial governmental relationship with [local government owner or operator], guarantor guarantees to [implementing agency] and to any and all third parties and obliges that:

In the event that [local government 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 written instructions from the [Director] shall make funds available to pay for corrective actions and compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

In the event that the [Director] determines that [local government 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 make funds available to pay for corrective actions 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"] accidental 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 make funds available to compensate third parties for bodily injury and property damage in an amount not to exceed the coverage limits specified above.

(4) Guarantor agrees that if at the end of any fiscal year before cancellation of this guarantee, the guarantor fails to meet or exceed the requirements of the financial responsibility mechanism specified in paragraph (1), guarantor shall send within 120 days of such failure, by certified mail, notice to [local government 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 [local government 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. If notified of a probable release, the guarantor agrees to remain bound to the terms of this guarantee for all charges arising from the release, up to the coverage limits specified above, notwithstanding the cancellation of the guarantee with respect to future releases.

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

(a) Any obligation of [local government 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: local government owner or operator] arising from, and in the course of, employment by [insert: local government 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: local government 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 Part 280.93.

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

I hereby certify that the wording of this guarantee is identical to the wording specified in 40 CFR Part 280.106(e) 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: _____

9. New § 280.107 is added to read as follows:

§ 280.107 Local government fund.

A local government owner or operator may satisfy the requirements of § 280.93 by establishing a dedicated fund account that conforms to the requirements of this section. Except as specified in paragraph (b), a dedicated fund may not be commingled with other funds or otherwise used in normal operations. A dedicated fund will be considered eligible if it meets one of the following requirements:

(a) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order to pay 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 and is funded for the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage; or

(b) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance, or order as a contingency fund for general emergencies, including taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks, and is funded for five times the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used

in combination with other mechanism(s) that provide the remaining coverage. If the fund is funded for less than five times the amount of coverage required under § 280.93, the amount of financial responsibility demonstrated by the fund may not exceed one-fifth the amount in the fund; or

(c) The fund is dedicated by state constitutional provision, or local government statute, charter, ordinance or order to pay 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. A payment is made to the fund once every year for seven years until the fund is fully-funded. This seven year period is hereafter referred to as the "pay-in-period." The amount of each payment must be determined by this formula:

$$\frac{TF - CF}{Y}$$

Where TF is the total required financial assurance for the owner or operator, CF is the current amount in the fund, and Y is the number of years remaining in the pay-in-period, and;

(1) The local government owner or operator has available bonding authority, approved through voter referendum (if such approval is necessary prior to the issuance of bonds), for an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund. This bonding authority shall be available 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, or

(2) The local government owner or operator has a letter signed by the appropriate state attorney general stating that the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws. The letter must also state that prior voter approval is not necessary before use of the bonding authority.

(d) To demonstrate that it meets the requirements of the local government fund, the chief financial officer of the local government owner or operator and/or guarantor must sign 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 local government owner or operator, or guarantor]. This letter is in support of the use of the local government fund mechanism to demonstrate financial responsibility for [insert: "taking corrective action" and/or "compensating third parties for bodily injury and property damage"] caused by [insert: "sudden accidental releases" and/or "nonsudden accidental 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 local government fund mechanism: [List for each facility: the name and address of the facility where tanks are assured by the local government fund].

[Insert: "The local government fund is funded for the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanism(s) that provide the remaining coverage." or "The

local government fund is funded for ten times the full amount of coverage required under § 280.93, or funded for part of the required amount of coverage and used in combination with other mechanisms(s) that provide the remaining coverage," or "A payment is made to the fund once every year for seven years until the fund is fully-funded and [name of local government owner or operator] has available bonding authority, approved through voter referendum, of an amount equal to the difference between the required amount of coverage and the amount held in the dedicated fund" or "A payment is made to the fund once every year for seven years until the fund is fully-funded and I have attached a letter signed by the State Attorney General stating that (1) the use of the bonding authority will not increase the local government's debt beyond the legal debt ceilings established by the relevant state laws and (2) that prior voter approval is not necessary before use of the bonding authority".

The details of the local government fund are as follows:

Amount in Fund (market value of fund at close of last fiscal year): _____

[If fund balance is incrementally funded as specified in § 280.107(c), insert: Amount added to fund in the most recently completed fiscal year: _____]

Number of years remaining in the pay-in period: _____

A copy of the state constitutional provision, or local government statute, charter, ordinance or order dedicating the fund is attached.

I hereby certify that the wording of this letter is identical to the wording specified in 40 CFR 280.107(d) as such regulations were constituted on the date shown immediately below.

[Date]

[Signature]

[Name]

[Title]

[FR Doc. 93-2824 Filed 2-17-93; 8:45 am]

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Thursday
February 18, 1993

Part III

**Environmental
Protection Agency**

40 CFR Parts 168 and 169
Final Pesticide Export Policy Statement;
Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 168 and 169

[OPP-170003; FRL 4000-1]

RIN 2070-AC09

Pesticide Export Policy

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: This document sets forth the final version of EPA's revised pesticide export policy. This policy replaces EPA's existing pesticide export policies, which were published in the *Federal Register* on May 14, 1975 and on July 28, 1980. This policy eliminates an exemption provided in the 1980 policy from the requirement to obtain a purchaser acknowledgement statement, clarifies the requirements for labeling exported pesticides, and clarifies the requirements affecting the export of research and development pesticides. EPA believes that these changes and clarifications will increase the usefulness of information on exported U.S. pesticides sent to other countries, and simplify compliance with the export requirements. The policy also discusses whether certain information about unregistered pesticides submitted to EPA will be considered confidential. Changes to EPA's program to notify countries of U.S. pesticide regulatory actions are discussed. EPA is broadening the scope of actions which will trigger international notifications, and is prioritizing the timing of transmitting these notices to other governments. The policy also presents a new system for transmittal of international notices, whereby EPA will be transmitting advance copies of the notices directly to countries and the State Department will notify the appropriate embassies.

EFFECTIVE DATE: This policy is effective April 19, 1993, except for § 168.75 which will be effective June 1, 1993.

FOR FURTHER INFORMATION CONTACT: For information about the FIFRA section 17(a) requirements regarding labeling of pesticides intended for export and procedures for exporting unregistered pesticides contact: Stephen Howie, Office of Compliance Monitoring (EN-342W), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460 U.S.A.; telephone (703) 308-8290; facsimile (703) 308-8218.

For further information about FIFRA section 17(b) notification programs or EPA's international pesticide activities contact: Deborah Hartman, Office of

Pesticide Programs (H-7501C), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460 U.S.A.; telephone (703) 305-7102; facsimile (703) 305-6244.

SUPPLEMENTARY INFORMATION:

Electronic Availability: This document is available as an electronic file on *The Federal Bulletin Board* at 9 a.m. on the date of publication in the *Federal Register*. By modem dial (202) 512-1387 or call (202) 512-1530 for disks or paper copies. This file is also available in Postscript, Wordperfect and ASCII.

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I. Summary

This policy discusses the requirement to obtain a purchaser acknowledgement statement for exporters of unregistered pesticides. This policy also allows certain unregistered pesticides to be exported for research and development (R&D) purposes without meeting the purchaser acknowledgement statement requirement, if the use in the country of import does not exceed the limits specified in criteria provided in this policy. Exporters are required to maintain records to substantiate claims that their products fit the exemption for R&D products.

EPA is also clarifying certain labeling requirements. Certain label statements which in the past had to be bilingual, may now be required to be multilingual, if applicable. The policy clarifies that all unregistered pesticides must have labels/labeling with the statement "Not Registered for Use in the United States

of America." The policy also clarifies that research and development pesticide products must meet the labeling requirements of section 17(a)(1). The policy allows exporters to add explanatory language to use classification statements to explain the restricted status of the product.

The policy sets new procedures that exporters must follow to obtain and transmit purchaser acknowledgement statements. The final policy requires per-shipment purchaser acknowledgement statements, but also provides an alternative means for satisfying this statutory requirement. More information is required in the purchaser acknowledgement statements, and the policy also discusses new procedures for the transmittal of purchaser acknowledgement statements.

EPA's notifications to other countries about pesticide regulatory actions are discussed. The policy provides that EPA will immediately notify countries about all regulatory actions taken on the basis of health or environmental concerns, and also provide countries with an annual summary of all pesticide regulatory actions. The policy explains that EPA will directly notify countries of the actions in advance and the State Department will notify embassies.

The policy also describes EPA's projects to support environmental protection and safe pesticide use in other countries. The policy discusses the scope of EPA's international technical assistance projects to support environmental protection and safe pesticide use in other countries. The United Nations' Prior Informed Consent procedures concerning banned and severely restricted pesticides are also discussed.

II. Background

A. Statement of EPA's Goals for International Pesticide Activities

EPA has two major goals for its international pesticide activities: To ensure the safety of the U.S. food supply; and to enhance the protection of public health and the environment from unreasonable adverse effects of pesticides, both in the United States and throughout the world, by promoting the sound management and regulation of pesticides. Specifically, EPA intends to take actions:

1. To protect the American consumer from illegal residues of pesticides on imported food products by informing countries who export food to the United States of our regulatory requirements, and by working with other U.S. agencies to ensure the quality of imported food.

2. To encourage international adoption of standards consistent with sound scientific risk assessment and to coordinate U.S. approaches, to the extent permitted by U.S. law, with those of other governments and international organizations.

3. To inform other governments about U.S. pesticide regulations and to assist them in the development of their own regulatory programs so as to better protect their public's health and environment.

4. To consider the work of other governments' regulatory programs in conducting our own regulatory reviews, so that we may benefit from this work, and promote internationally consistent regulations.

B. Legal Authority

This notice sets forth EPA's final policy concerning the export of pesticide products and the notification to other countries of significant regulatory actions affecting pesticide sale and use in the United States. Section 17 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) contains the legal authority for EPA to carry out these policies. The provisions of FIFRA section 17 concerning exports of pesticides were first enacted in the Federal Environmental Pesticide Control Act of 1972, (Pub. L. 92-516) which amended FIFRA. The provisions for export notification (section 17(a)) were added in amendments to FIFRA through the Federal Pesticide Act of 1978 (Pub. L. 95-396).

An important part of section 17 is the provision of information to foreign purchasers and other governments concerning the registration status of pesticide products in the United States and EPA's conclusions regarding the safety of certain pesticide products. Section 17 of FIFRA currently mandates three systems of notification:

- (1) Labeling on exported products.
 - (2) A notice to the foreign purchaser as well as the importing country of the export of an unregistered pesticide.
 - (3) A notice to all countries of certain regulatory control actions taken by EPA.
- Section 17 also directs EPA to participate in international efforts in pesticide research and regulation. The provisions of section 17 concerning pesticide exports are presented below.

1. *FIFRA section 17(a)*. FIFRA section 17(a) provides as follows:

(a) *Pesticides and Devices Intended for Export*. Notwithstanding any other provision of this Act, no pesticide or device or active ingredient used in producing a pesticide intended solely for export to any foreign country shall be deemed in violation of this Act—

(1) when prepared or packed according to the specifications or directions of the foreign purchaser, except that producers of such pesticides and devices and active ingredients used in producing pesticides shall be subject to sections 2(p), 2(q)(1)(A), (C), (D), (E), (G), and (H), 2(q)(2)(A), (B), (C) (i) and (iii), and (D), 7, and 8 of this Act; and

(2) in the case of any pesticide other than a pesticide registered under section 3 or sold under section 6(a)(1) of this Act, if prior to export, the foreign purchaser has signed a statement acknowledging that the purchaser understands that such pesticide is not registered for use in the United States and cannot be sold in the United States under this Act. A copy of that statement shall be transmitted to an appropriate official of the government of the importing country.

EPA interprets section 17(a) to provide authority for EPA to establish the specific requirements for labeling of exported pesticides and to establish the specific requirements and procedures for obtaining and distributing purchaser acknowledgement statements set forth in this policy.

2. *FIFRA section 17(b)*. FIFRA section 17(b) provides as follows:

(b) *Cancellation Notices Furnished to Foreign Governments*.—Whenever a registration, or a cancellation or suspension of the registration of a pesticide becomes effective, or ceases to be effective, the Administrator shall transmit through the State Department notification thereof to the governments of other countries and to appropriate international agencies. Such notification shall, upon request, include all information related to the cancellation or suspension of the registration of the pesticide and information concerning other pesticides that are registered under section 3 of this Act and that could be used in lieu of such pesticide.

3. *FIFRA section 17(d)*. FIFRA section 17(d) provides as follows:

(d) *Cooperation in International Efforts*.—The Administrator shall, in cooperation with the Department of State and any other appropriate Federal agency, participate and cooperate in any international efforts to develop improved pesticide research and regulations.

C. Global Pesticide Market; Exports from United States; Pesticide Usage; Agricultural Imports

EPA estimates that 4 billion pounds of conventional pesticides (measured as active ingredients) are produced and used in the world annually. (Conventional pesticides include chemicals (other than wood preservatives) produced for, and marketed primarily as pesticides: this estimate excludes sulfur, petroleum distillates, and chlorine, all of which have substantial use both as pesticides and non-pesticides.) About three-fourths of the pesticides produced world-wide (3 billion pounds) is used for

agricultural purposes. The remainder (about 1 billion pounds) is used for non-agricultural purposes.

The United States, along with other industrialized countries such as Germany and the United Kingdom, is a major exporter of pesticides. In 1989, the United States exported approximately 380 million pounds of active ingredient pesticides; this figure represents approximately 29 percent of overall U.S. pesticide production, and approximately 10 percent of the total world pesticide consumption, not including wood preservatives or disinfectants. An analysis conducted by the U.S. Department of Agriculture's Economic Research Service (ERS) estimates that in 1989, total U.S. pesticide sales were \$6.5 billion, of which \$2.0 billion were identified as export sales. The United States is also a major importer of agricultural commodities. In general, imports comprise about 15 percent of total U.S. agricultural product consumption. For certain items—coffee, bananas and cocoa, for example—imports are a much higher percentage of the total U.S. consumption. Pesticides are used in the production and storage of many of the imported food commodities that Americans consume.

D. Reasons for Review of EPA's 1980 Export Policy

1. *Health/environmental concerns*. EPA undertook a review of its export policy at a time of growing public concern both about pesticide residues, particularly in imported foods, and also about the contribution of American-made pesticides to health and environmental problems in the developing world. EPA is concerned about food safety, the quality of the global environment and about public health around the world, and believes that it was appropriate to review its policies to see how it could better address these health and environmental concerns.

In the United States and the international community, some have expressed the view that the United States should not permit the export of pesticides that are not registered for use in the United States. This view appears to be based on the perception that pesticides which are not registered for use in the United States, and which are manufactured in the United States for export to other countries, are inherently more dangerous than those that are registered for use here.

FIFRA provides EPA with only limited authority to prohibit pesticide exports. As a matter of policy, however, the Agency's position is that banning

exports of unregistered pesticides will not necessarily solve the problems associated with pesticide use and misuse in other countries. The Agency's views in this regard have been based, in part, on the following four premises. First, controlling the export of products from the United States alone will not resolve the problems associated with pesticide use in developing countries. The United States is one of many pesticide exporters-exporting approximately 10 percent of the total world pesticide consumption. Many countries, including some developing countries, have the manufacturing capability to produce and export pesticides which have been banned or which are unregistered in the United States.

Second, EPA believes that it may be more effective to concentrate on controlling the management and use of all pesticide products, in order to reduce unnecessary exposure, rather than categorically banning certain classes of U.S. pesticides from international trade. Third, EPA's regulatory decisions are based upon risk/benefit evaluations specific to the United States. The risk/benefit balance in other countries may differ from the United States due to differences in growing conditions and pest control problems, as well as public health and environmental considerations. Thus, the fact that a pesticide is not registered in the United States may provide little indication of whether the pesticide poses a serious health or environmental threat when used in other countries. Fourth, pesticide manufacturers may not seek to register a product in the United States simply because there is no need for it here. For example, the product may control a pest that is not a problem in this country or may be used on crops not commonly grown here. For these reasons, EPA strongly supports upgrading information and technical assistance to other countries to help them make sound decisions on pesticide use and regulation.

Concern about the export of banned or unregistered pesticides has been linked to fears that food imported into the United States will contain illegal residues of pesticides which cannot be used here. This possibility has been termed the "Circle of Poison." Data gathered from residue monitoring programs, however, do not lend support to the "Circle of Poison" theory. Although the data base is not as extensive as many would like, the results of food monitoring programs show that imported foods generally do not contain either elevated levels or a large number of pesticide residues,

relative to domestic food samples. Furthermore, the levels that are found do not generally present any significant public health threat. (See statistics from food import monitoring programs, discussed below.) EPA, the Food and Drug Administration (FDA), and the U.S. Department of Agriculture (USDA) have several programs in place to ensure the safety of imported food. These agencies are working together to address public concerns about the "Circle of Poison" and to share information to strengthen their monitoring and enforcement programs. These programs will be discussed briefly below.

a. *FDA's programs.* Under the Federal Food, Drug, and Cosmetic Act (FFDCA), EPA is responsible for setting tolerances (maximum permissible residue levels) for pesticides in or on food and feed crops and in processed foods. While EPA establishes these tolerances, the FDA is responsible for enforcing tolerances. Under a surveillance monitoring program, FDA samples individual lots of domestically produced and imported foods and analyzes them for pesticide residues. Using five multi-residue testing methods routinely, FDA can detect and measure about half of the pesticides with EPA tolerances, as well as others that have no tolerances, plus numerous metabolites, impurities, and alteration products of both registered and non-registered products. For those pesticides with U.S. tolerances, single residue testing methods are available to test for those residues not detected by the multi-residue methods. Single residue methods are also used for surveys for specific pesticides of concern. The analytical methods used to measure the residues are generally capable of determining levels well below tolerance values. EPA's policy is that the Agency will not grant a food use registration under FIFRA or a tolerance under FFDCA unless there is a validated analytical method for detecting and measuring residues.

The FDA imposes various sanctions on domestic and imported foods found to contain illegal residues of pesticides. Domestic foods are subject to seizure or injunction and imported foods may be detained at the port of entry when illegal residues are found. In the case of imports, "automatic detention" may also be invoked as a result of a single violative shipment. Automatic detention presumes that the violative condition may persist in subsequent shipments of the same food (same shipper or grower, same growing season). For this reason, subsequent shipments are automatically detained and required to be accompanied by a valid certificate of

analysis from a private laboratory before they are allowed to enter the country.

The most recent statistics on FDA monitoring activities, which were compiled for Fiscal Year 1991 (October 1, 1990 through September 30, 1991) show that 19,082 samples were analyzed under the regulatory monitoring approach. Of these, 8466 were domestic and 10,616 were imports.

FDA collects two categories of samples—"surveillance" and "compliance" samples. Most samples gathered are surveillance samples—collected when there is no reason to suspect that a particular shipment contains illegal residues. Compliance samples are taken for follow-up when a residue problem is known or suspected.

Of the 9,933 import surveillance samples analyzed, 69% had no residues detected, less than 1% had over-tolerance residues, and 2% had residues for which there was no tolerance for that particular pesticide/commodity combination. Fruits and vegetables accounted for 78% of the import surveillance samples. Of the fruits and vegetables tested, 65% and 68% of samples, respectively, had no residues detected. Each group had less than 1% of samples with over-tolerance residues. One percent of the fruit samples and 3% of the vegetables samples had residues for which there was no tolerance. No residues were found in 90% of the milk/dairy products group, and no samples were violative.

The majority of illegal residues found result from use of a pesticide on a particular commodity for which there is no tolerance, although tolerances for residues of that pesticide may exist for other commodities. In cases where no tolerance existed, or where the residues were over the tolerance level, sanctions were imposed.

FDA acquires information on pesticide usage in countries exporting food to the United States for use in planning and conducting its pesticide monitoring activities. FDA's primary source for such data has been the Battelle World Agrochemical Data Bank, a computer data base containing foreign usage data for about 20–25 countries. The Pesticide Monitoring Improvements Act of 1988 requires FDA to negotiate with the governments of major exporting countries for pesticide usage data, with the aim of enhancing FDA's ability to direct analysis toward those residues of specific pesticides known or thought to have been used on particular commodities. Since the passage of the Pesticide Monitoring Improvements Act, FDA has expanded its coverage of imported foods sampled, testing a wider range of foods. EPA will also be able to

regularly provide FDA and USDA with information concerning which countries are receiving certain pesticides from exporters in the United States, in accordance with the provisions of EPA's Class Determination 1-91, Identity of the Importing Country, (included in today's policy), FIFRA section 17(a)(2), and the regulations governing disclosure of business information to other Federal agencies at 40 CFR 2.209. (The confidential status of information submitted to EPA in purchaser acknowledgement statements is discussed in Unit III.C. of this preamble.)

b. *USDA's programs.* Responsibility for monitoring meat and poultry exported to the United States to ensure that it is wholesome and accurately labeled, in accordance with U.S. standards, belongs to USDA. The Food Safety and Inspection Service (FSIS) of USDA implements inspection and sampling programs as required by the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act.

Federal meat and poultry inspection laws require countries exporting meat or poultry to the United States to impose inspection requirements at least equal to U.S. requirements. USDA's Foreign Programs Division evaluates foreign meat and poultry inspection programs through system reviews, including on-site reviews of plants in exporting countries. FSIS also conducts port of entry reinspection of meat and poultry products exported to the United States. Imported meat and poultry products are sampled for food chemistry and microbiological hazards as well as chemical residues (including pesticides) and drug residues. During 1990, 14,170 residue samples of imported product were analyzed for drug and chemical residues. Only 11 samples were found to contain violative levels.

2. *Congressional oversight.* In April 1989, the General Accounting Office issued a report to the Chairman of the Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, of the U.S. House of Representatives, entitled, *PESTICIDES: Export of Unregistered Pesticides is not Adequately Monitored by EPA* (GAO/RCED-89-128). GAO identified problems in EPA's monitoring program regarding the section 17(a) purchaser acknowledgement statement requirement and reported that foreign countries were not being adequately notified on pesticides of concern in the United States pursuant to section 17(b). GAO recommended to the EPA Administrator that EPA take actions to strengthen its oversight of pesticide

exports, including: (1) monitoring compliance with purchaser acknowledgement statement requirements; (2) changing its enforcement policy concerning the export of unregistered pesticides under section 17(a); and (3) developing criteria and procedures to improve preparation and issuance of section 17(b) notices of control actions, specifically addressing the issue of what constitutes a "significant action" involving a pesticide.

GAO was critical of an exemption to the purchaser acknowledgement statement requirement of section 17(a), established in a 1980 Policy Statement (45 FR 50274), July 28, 1980. This 1980 policy exempted exporters of unregistered pesticide products which were "similar in composition and use pattern to a federally registered product" from the purchaser acknowledgement requirements of section 17(a)(2). GAO concluded that this policy exempted the majority of pesticide exports from the notice requirement, and also concluded that the exemption made it extremely difficult for EPA to monitor compliance with section 17(a).

On May 3, 1989, the Environment, Energy, and Natural Resources Subcommittee, held a hearing on the topic of pesticide exports. In addition to the issues raised in the GAO report, the Subcommittee requested that EPA officials discuss: trends in U.S. pesticide production and exports; EPA's performance and policies relating to the implementation, monitoring, and enforcement of section 17 of FIFRA; EPA's responsibilities under the FFDCA to establish pesticide tolerances (maximum level of pesticide residue permitted on food or feed); efforts by EPA to assist FDA and USDA in the identification of potentially adulterated food imports; U.S. involvement in international discussions relating to the Prior Informed Consent (PIC) concept (57 FR 58390, December 9, 1992); and EPA's efforts to provide technical assistance to foreign countries.

EPA officials testified at the hearing that EPA's implementation of the notification procedures needed improvement and agreed to review its program and propose alternatives that would be more effective in communicating to other governments the potential risks associated with certain pesticides. EPA also indicated that it had already concluded that notification systems alone would not resolve the types of problems associated with the use of pesticides in developing countries and therefore had also allocated a portion of its limited

resources to providing technical assistance to developing countries. This export policy review was initiated at the conclusion of that hearing. On February 12, 1990 (55 FR 4956), EPA published proposed policy changes entitled the *Pesticide Export Policies Review* and proposed amendments to the 1980 policy. The proposals discussed possible revisions to export labeling requirements, confidentiality provisions, and international pesticide notifications.

On March 28, 1990, the Committee on Agriculture, Nutrition, and Forestry, of the U.S. Senate held a hearing on pesticide exports. The Committee invited EPA to address proposed legislation, the proposed *Pesticide Export Reform Act of 1990* (S. 2227), as well as EPA's February 12, 1990 export policy proposals. At the hearing, EPA officials testified in support of strengthening the provisions of FIFRA governing the export of pesticides to address growing concerns about international trade in banned and severely restricted pesticides. EPA expressed support for amending section 17 of FIFRA to enable EPA to more fully implement the prior informed consent procedure of the United Nations Food and Agriculture Organization (FAO) and Environment Programme (UNEP).

At the hearing, the February 12, 1990 proposed policy changes were discussed, along with EPA's efforts to develop education and training workshops in pesticide regulation and management for other countries, especially developing countries. EPA also stated its wish to be consistent with the international Prior Informed Consent (PIC) procedures. (See 55 FR 4962.) PIC procedures are described in more detail in Unit III.E. of this preamble. (Copies of EPA's testimony for this and subsequent Congressional hearings on the export of pesticides are included in the public record for this policy statement, as discussed in Unit V of this preamble.)

EPA believes that improvements to current law are necessary to improve or help to ensure FDA and USDA have the ability to monitor imported food for illegal pesticide residues, regardless of the origin of the pesticide. Suggestions proposed to Congress by EPA would help to ensure that unregistered pesticides have been reviewed and approved by an OECD country, and that the data supporting the approval are available to potential importing countries to assist their decision-making. While EPA supports improvements to the current law, this policy statement is based upon current FIFRA requirements.

III. Discussion of the 1980 Policy, the 1990 Proposal, Public Comments, and Responses to Comments

EPA received 40 sets of comments on its February 12, 1990 policy proposals: 18 from pesticide companies and industry, including trade associations; 2 from environmental organizations; 16 from foreign governments, 1 from a representative of the Organization for Economic Cooperation and Development (OECD); 1 from a consulting firm, and 2 from United States government agencies. The comments addressed all of the general areas of the proposed policy revisions. A brief discussion of the 1980 Export Policy, EPA's 1990 proposal, comments received and EPA's responses are presented below.

A. Section 17(a)(1)-Label and Labeling Requirements for Exported Pesticide Products

1. *Applicability of the label statement "Not Registered for Use in the United States of America" required by section 17(a)(1).* — a. *1980 policy.* EPA's 1980 policy provided that in accordance with FIFRA section 17(a)(1), all unregistered pesticides must have labels or labeling which contain the statement "Not Registered for Use in the United States of America." The statement must be conspicuous and readable. The 1980 policy also required that this statement appear in both English and the language of the importing country.

b. *1990 proposal.* EPA proposed clarifying that all unregistered products must comply with the labeling provisions of section 17(a)(1), and that all products not bearing a valid EPA registration number must state "Not Registered for Use in the United States of America" on their labels or labeling. The statement must be conspicuous and readable, and meet the requirements for multilingual labels as defined in § 168.65(b)(4) of this policy.

c. *Comments.* A number of industry representatives commented on the applicability of this requirement and ways to improve its utility. Three commentators thought that the "Not Registered for Use in the United States" labeling statement requirement did not currently apply to products which are claimed to be similar in composition and use to a U.S. registered product, and favored continuing that approach. Three other commentators also supported this approach. Two commentators suggested that EPA allow the statement to be expanded either to account for variations or to be reworded or supplemented, e.g., "this product is similar to a registered product..." The

remaining commentators on this issue stated that the language "Not Registered for Use in the United States of America" should not be required on immediate product packaging since it would require relabeling in the importing country or the country of distribution. They suggested that exporters should be allowed to place this statement on the outside labeling, i.e., on the shipping or packaging containers.

d. *Response.* Section 2(q)(1)(H) of FIFRA requires that each unregistered exported product have the statement "Not Registered for Use in the United States of America" on the product label. Due to the range of interpretations expressed in the comments, EPA believes there is a need to clarify that point in this policy.

The statute prescribes that the label of an exported unregistered product must bear the statement "Not Registered for Use in the United States of America." Alternative statements which do not clearly inform the reader that the product is unregistered would not meet this requirement. EPA agrees, however, that certain additional clarifying language could improve the usefulness of this statement, since the meaning of the term "not registered" may be unclear to handlers and users of pesticides in other countries. Therefore, EPA has decided that exporters may add language to the label to explain why the product is not considered to be a registered product in the United States. For example, where a particular product is unregistered because a labeled exported use includes a crop not included in the U.S. registration, it would be acceptable to add the statement "Not registered for Use on [unregistered use crop] in the United States of America." It would also be permissible to add clarifying language after the statement "Not Registered for Use in the United States of America" such as "For research use only."

In addition, EPA would not object to language which clarifies the registration status, such as adding the statement "No Longer Registered for Use in the United States of America" or adding information regarding the reason why the registration was dropped. The labeling statement must not, however, obscure the fact that the product is not registered for use in the United States and cannot be sold for use in the United States. EPA will consider as misbranded any exported unregistered product which does not contain the basic statement "Not Registered for Use in the United States of America" or to which any added labeling language is false or misleading, as in suggesting that the product is in fact registered.

As described elsewhere in this policy, the statement "Not Registered For Use in the United States of America" may be included on the supplemental labeling, rather than on the immediate product packaging.

2. *Applicability of the labeling requirement to research and development products.* — a. *1980 policy.* The 1980 policy specifically stated that research quantities of pesticides are subject to the policy's labeling provisions.

b. *1990 proposal.* EPA proposed to clarify that the labeling requirements of section 17(a)(1) applied to all exported pesticides without exception. EPA believed that clarification was necessary to ensure that exported R&D pesticide products that are exempted from other provisions of section 17 of FIFRA still meet the labeling requirements of section 17(a)(1).

c. *Comments.* Some commentators stated that it was their understanding that research and development (R&D) pesticides were not considered to be pesticides under FIFRA, according to the provisions of 40 CFR part 172 (Experimental Use Permits), and that such substances would therefore not be subject to any FIFRA requirements including labeling. Commentators also stated that since these chemicals would be used under highly controlled conditions by highly skilled individuals there would be little need for the required labeling. Commentators noted that since these products were still in the developmental stage, many of the required statements could not be made.

Two environmental groups disagreed with the concept of exempting R&D chemicals from any labeling requirements. They believed that there should be tighter regulation of R&D chemicals because less is known about them than is known about commercial products.

d. *Response.* EPA disagrees with those commentators who stated that R&D pesticides are not pesticides regulated under FIFRA. The Agency does regulate R&D pesticides under FIFRA, even though the Agency may have determined that certain R&D pesticides would not be subject to all the requirements of FIFRA (e.g., See 40 CFR part 152).

In addition, EPA does not find any of the arguments against labeling requirements for R&D pesticides to be compelling. The minimal identity and safety information required on export labeling in section 17(a)(1), is useful in ensuring that such pesticides are properly identified during shipment and upon arrival in the importing country. The Agency believes that it is important

to treat R&D pesticides that are exported consistently with our treatment of R&D pesticides in the United States. Therefore, when R&D pesticides are exported, such R&D pesticides are subject to the FIFRA section 17(a)(1) labeling requirements described in this policy.

In addition, the Agency has determined that in order to protect confidentiality, the exporter may choose to use coded information to identify the ingredients on the labeling of exported pesticide products shipped for R&D purposes. (See 40 CFR 168.65(b)(1)(iv) of this document.)

3. Supplemental labeling. Under section 2(p) of FIFRA, labels are written, printed, or graphic material "on or attached to the pesticide...or any of its containers or wrappers." Labeling, including supplemental labeling, refers to labels and any written, printed, or graphic material accompanying the pesticide or device at any time or to which reference is made on the label.

a. 1980 policy. In the 1980 policy, exporters were allowed to use supplemental labeling to meet label requirements when there were conflicts between United States and foreign label requirements. The 1980 policy provided that supplemental labeling may be attached to or accompany the product container or shipping container. The policy emphasized that the Agency intended to be as flexible as possible on this issue. Exporters were permitted to use a variety of types of labeling to comply with the requirements of FIFRA, as long as the labels or labeling, when taken together, conform to the FIFRA section 17(a)(1) requirements.

b. 1990 proposal. EPA proposed maintaining its 1980 policy regarding supplemental labeling of exported pesticides. This policy allows the placement of label statements either on the label or on the labeling (i.e., attached material) as long as the labels and labeling, taken together, fulfill the requirements of FIFRA section 17(a)(1). EPA alternatively proposed to clarify that certain language had to appear on the immediate container unless there was a direct conflict with foreign labeling requirements.

c. Comments. The majority of commenters favored continuing the 1980 policy, but also indicated a need for clarification of when supplemental labeling is allowed, what may be included in supplemental labeling, and what supporting documentation may be needed to allow the Agency to ensure compliance.

While one foreign government commented in favor of continuing the existing policy, most of the comments

on supplemental labeling were received from industry. All of the comments from industry representatives supported reducing the label requirements for exported pesticide products, and allowing exporters to place the majority of the required statements on attached labeling. Two commenters stated that exporters should be allowed to place all bilingual or multilingual statements on supplemental labeling, and that it should be permissible to place on immediate containers, labels only in the language of the country of intended use. One commenter stated that the policy should explicitly allow this. Two commenters stated that if the purchasing country was different from the country of final destination, the purchaser would never see the immediate containers and thus labeling in their language would be of no use. The commenters said that placing U.S.-required statements on immediate containers would simply mean that those containers would have to be relabeled at a later date.

Three commenters stated that the proposed multilingual requirement for labels (55 FR 4971) would cause problems unless supplemental labeling were generally allowed. Two cited situations where such products would have to be repackaged or reprocessed overseas before final sale and use. The other commenters mentioned that having several translations on the label would take up too much space and crowd the labels. Two commenters stated that imposing U.S. product label requirements would interfere with the ability of foreign governments to regulate pesticides. One of these commenters suggested that requiring U.S. labeling statements on exported products would insult foreign national sovereignty. The other stated that their customers were incredulous that certain FIFRA-required statements would have to be on the immediate container labels of products they purchased from U.S. manufacturers. Two commenters said that once a product is exported, EPA would not be able to enforce label provisions.

d. Response. The Agency continues to support the position stated in its 1980 policy statement that EPA will allow exporters to meet the labeling requirements in FIFRA by the use of supplemental labeling. By this policy, EPA makes it possible for exporters to also meet the label and labeling requirements of foreign purchasers and regulatory authorities.

EPA agrees with commenters who state that it should be permissible to label immediate containers in accordance with the requirements of the

country of intended use, and to include any FIFRA required statements on supplemental labeling which must accompany shipping containers. EPA also agrees that the multilingual labeling requirements may be met through supplemental labeling. The multilingual requirement is intended to ensure that appropriate information is available to all persons who come in contact with a pesticide, and attaching that information to shipping containers will accomplish this purpose while the pesticide is being transported. This also allows the product to be labeled in a manner that is considered appropriate by the importing country.

Finally, EPA believes that it is not appropriate to require evidence that a FIFRA label actually conflicts with the labeling requirements of a foreign country in order to allow supplemental labeling. The government of a foreign country may prefer or require that the label be only in the language of their country, that the label present certain information in a specified format, or that the label conform to an accepted international label scheme.

Consequently, EPA has decided that the labeling requirements under section 17(a)(1) may be met either with a label attached to the product container or with supplemental labeling attached to the shipping containers. The supplemental labeling must be attached to the immediate product container or the shipping container at all times when it is shipped or held for shipping in the United States. For example, placing required information on the supplemental labeling of exported pesticides would be considered appropriate in the following situations: where the immediate pesticide containers are labeled to meet foreign purchaser requirements or international labeling conventions; where the producer uses supplemental labeling to meet multilingual labeling requirements; or where the producer believes there may be problems meeting the labeling requirements of foreign countries if U.S. labeling information is included on the immediate product containers. The exporter must only determine which labeling provisions are not met through information on the label attached to the immediate container and meet those requirements through supplemental labeling. Where the supplemental labeling and container labeling taken together meet the FIFRA requirements, the shipment will be considered to be in compliance with FIFRA.

4. Expansion of Language Requirements for Labels from Bilingual to Multilingual — a. 1980 policy. FIFRA

section 2(q)(1)(E) requires that "any word, statement, or other information" required pursuant to its authority must be "...in such terms as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase and use." EPA's 1980 policy statement interpreted this language to require bilingual statements, in English and the language of the importing country, for: (i) The warning and caution statements, (ii) the ingredient statement, (iii) where required, the word "poison" and the statement of practical treatment, and if required, (iv) the statement "Not Registered for Use in the United States of America."

The 1980 policy stated that "any language in which official government business is conducted in the country or which is the predominantly spoken language of the country is acceptable as the second language on the label." 45 FR 50275 (July 28, 1980.)

EPA's authority to establish bilingual labeling requirements for exported pesticides was affirmed by an EPA administrative law judge. See *In the Matter of Shield-Brite Corporation*, (Docket No. FIFRA-90-H-02, June 28, 1991).

b. *1990 Proposal.* EPA proposed to require that labeling statements, which are currently required to be bilingual, be multilingual. As such, the labeling statements would have to appear in English, in the language of the purchaser's country, and if different, in the language of the country of final destination. This was done to address those situations where a product is exported to more than one country, as well as when the country of final destination is different from the country to which it is initially exported.

c. *Comments.* EPA received a number of comments on this issue. Approximately 12 commentators supported retaining the current bilingual labeling requirements. Two environmental groups and two countries strongly supported multilingual labeling. One commentator suggested that all precautionary statements be multilingual. Nine industry commentators strongly objected to multilingual labeling as impractical, unnecessary, burdensome, and stated that it would put the United States at a competitive disadvantage. Two countries favored multilingual labeling, stating the importance of readable labels at use sites. Another country stated that it had its own strict requirements for labeling to be in its own language, but did not explain whether bilingual or multilingual label statements were permitted. One country responded that

it expected labels to be in its own language.

Pesticide industry commentators expressed strong objections to this proposal and expressed a preference for bilingual labeling. Several stated that only English and the language of the country of final destination should be on the label since the intermediate country only transfers the pesticide. Other industry commentators stated that the label should be bilingual but not in the language of the country of final destination because this is often not known.

Several commentators stated that this requirement would cause problems in the case of reformulated technical active ingredients, since labeling of technical products would not be sent with the reformulated products. In addition, it is often difficult to anticipate the final destinations when technical products are shipped from the United States.

d. *Response.* EPA believes that multilingual labeling is required for the communication of important information on the safe and effective handling of pesticides. However, EPA acknowledges that there are likely to be situations where it is impractical for the U.S. exporter to know the identity of each country to which a pesticide may eventually be shipped. Therefore, an exporter must only include the language of each country to which the exporter knows, or can reasonably be expected to know, that the product will be shipped. For this reason, EPA is qualifying the requirement by adding the phrase "if known, or reasonably ascertainable" when referring to the need to include the language of the country of final destination.

Examples of when the exporter can reasonably be expected to know the destinations of a shipment, include but are not limited to the following: there is documentation in the exporter's files, e.g., sales or shipping contracts, which specify the destination of the specific shipment; an exporter's history of transactions with a particular customer would indicate where particular pesticides have been shipped and indicate where this shipment is likely to go; there is documentation in the exporter's files which indicates that a pesticide is being shipped to a country as an intermediate destination and will be reshipped to other countries for importation, in which case the other countries are considered the final destination.

EPA acknowledges that where a product is a concentrated active ingredient shipped to a foreign purchaser for reformulation, the U.S. exporter may not be able to anticipate

all possible reformulations and their destination. For example, if a technical grade active ingredient is exported for reformulation into end-use products in the importing country, the exporter may not know where the end-use products will be shipped. In this case, the exporter would only be required to label the product in English, and the language of the importing country. Note, however, that if the exporter knows, or can be reasonably expected to know, that the active ingredient is being shipped to an intermediary who will ship it to another country where reformulation would take place, multilingual labeling would be required in English, in the language of the country of the intermediary, and in the language of the country of the reformulator, who is considered to be the final destination.

Although EPA believes that multilingual labeling will help to communicate more information to people who come into contact with pesticides during shipment, handling, and use, EPA also recognizes that there are limitations to the usefulness of multilingual labeling. Some users of pesticides may not be able to read, and for those people, pictures or symbols may be more effective in conveying use and safety information. As such, EPA has reviewed and strongly supports the Guidelines on Good Labeling Practice developed by the Food and Agriculture Organization of the United Nations, March 1985. These guidelines were prepared with the intention of assisting people who prepare pesticide labels, in communicating the essential elements of the safe and effective use of pesticides to end-users.

The FAO guidelines recommend communicating information on hazard by using the pictorial representations indicating toxicity, flammability, explosiveness, oxidation, irritancy, and corrosiveness. In addition, international symbols used to indicate various physical properties have been combined with short hazard classification statements, used in the World Health Organization (WHO) Hazard Classification System. WHO's hazard classification is based on the hazard presented by the formulated product (e.g., a WHO Class Ia pesticide active ingredient could be in Class II when formulated.)

The guidelines also recommend using color coding, based on the toxicity of the product, and should be linked to the WHO Recommended Classification of Pesticides by Hazard. The FAO guidance suggests placing a band at the bottom of the label, occupying not less than 15% of the label area, in the

appropriate color for the hazard classification. For pesticides which fall into the WHO Class Ia or Ib, red is recommended. Pesticides which are classified as WHO Class II should have a yellow band, and pesticides in WHO Class III, a blue band. Pesticides in WHO Class III which are technical products unlikely to present hazard in normal use (Table 5 of WHO classification Guidance), should have a green band.

EPA is considering whether to also require the WHO hazard classification, along with the appropriate color code and pictograms, on the label or labeling of pesticides for export. This issue may be addressed in a future Federal Register.

Producers of pesticide products for export are reminded that they may label products according to WHO guidelines in order to meet the requirements of foreign purchasers, as long as the labeling requirements of section 17(a)(1) as described in this policy are met. If necessary, supplemental labeling as described in this policy may be used in order to meet the labeling requirements of section 17(a)(1) when immediate containers are labeled in accordance with WHO guidelines.

5. Modification of the use classification statements.— *a. 1980 policy.* FIFRA section 2(q)(2) requires that pesticide product labels contain a statement of the use classification under which the product is registered. The 1980 policy stated that the use classification must appear on the labeling of the pesticide; e.g., for restricted use pesticides, the statement "Restricted Use Pesticide" must appear on the label or labeling. However, summary statements regarding the terms of the restriction, e.g., "For retail sale to and application only by Certified Applicators..." were not required.

b. 1990 proposal. EPA did not propose any changes to the use classification statement labeling requirement.

c. Comments. A number of commentors requested clarification of what information EPA might allow to explain use classification statements to make them more understandable in other countries. Several commentors both from industry and environmental groups stated that terminology normally included in the use classification statement of products registered in the United States would be confusing to importing countries. Some commentors stated that the term "restricted use pesticide" might be confused with the UNEP/FAO term "severely restricted" which has a different meaning from "restricted use pesticide" under FIFRA.

A suggested modification was that EPA allow the exporter to include the terms of the restriction with this statement.

d. Response. In the 1980 policy statement, EPA stated that all of the conditions applicable to a use classification need not be listed on the labeling. EPA believed that such conditions may not have much meaning outside of the United States. For example, the statement "For retail sale to and use only by Certified Applicators..." would have little meaning to someone not familiar with U.S. pesticide regulations. The comments EPA received suggested that even the basic terms used in use classifications (e.g., "restricted use pesticide") can result in confusion. Therefore, EPA agrees that some clarifications should be allowed, as long as they do not obscure the classification statement. Thus, it is permissible to add explanatory language which accurately explains the meaning of a use classification. For example, the statement "restricted use pesticide" may be expanded to read: "Restricted in the United States of America to use by certified applicators" or "Restricted Use Pesticide. In the United States this product is restricted to use by applicators determined by each state to be competent in pesticide application, and human health and environmental consequences of misuse." Note, however, that if such explanatory language falsely represents or is misleading regarding the use classification in the United States, the product will be considered misbranded. EPA also wishes to point out that a use classification should only be listed if one has been assigned pursuant to the U.S. registration.

6. Identities of parties required on the label. The 1990 proposal provided guidance on elements which must appear on the label or labeling of each exported product (55 FR 4971, February 12, 1990.) Under "Identity of Parties," the proposal read: "Name and address of the producer, registrant (if any), and the person for whom the pesticide was produced, must appear in the labeling." This sentence should have read "Name and address of the producer, registrant (if any), or the person for whom the pesticide was produced must appear in the labeling." The correct language is being used in the final policy.

B. FIFRA Section 17(a)(2)-Procedures for Exporting Unregistered Pesticides—Purchaser Acknowledgement Statements

1. Similar in composition and use exemption.— *a. 1980 policy.* The 1980 policy created an exemption from the

requirement to obtain a purchaser acknowledgement statement for unregistered pesticides which were minor variations on formulations registered in the United States, which contained only active ingredients registered in the United States, and which had similar use patterns to U.S. registered products. To be considered similar to a U.S. registered product in composition and use pattern, a pesticide product had to contain the same active ingredient or combination of active ingredients, and be in the same category of toxicity as a federally registered product. The use pattern also had to be similar to the use pattern of the federally registered product to which it was being compared.

b. 1990 proposal. EPA proposed to modify or to eliminate the existing exemption from the purchaser acknowledgement requirement for products substantially similar in composition and use to currently registered products. If the exemption were retained, EPA proposed that the burden of substantiating the claim remain with the exporter, and that any similarity claims be supported by documentation. The Agency was also considering whether such documentation should be maintained in records which would be made available to EPA upon request, or whether the documentation should be submitted to the Agency.

c. Comments. Two environmental groups advocated eliminating the exemption, citing the ambiguity of the exemption criteria, the burden of proving compliance with whatever criteria might be adopted, and the opinion that the exemption appears to be a "loophole" for unregistered products. The commentors suggested that the regulated community should not decide which products did and did not require notification. One foreign government also supported eliminating the exemption due to the ambiguity of the exemption criteria. One industry commentor stated that the exemption created problems for the regulated community and stated that if the exemption were retained, it must be better defined.

One foreign government and an OECD representative supported keeping the exemption to preserve the utility of notices sent to foreign governments. However, they expressed enforcement concerns if the exemption is maintained, since they felt that it would be difficult to ensure that the exemption is properly used.

Most of the industry commentors were in favor of maintaining the exemption. Several of these commentors

said that removal of the exemption would result in increased burden but they did not elaborate beyond the estimates EPA published in its proposed policy. In addition, some commentators believed that eliminating the exemption would result in potential trade disadvantages since foreign firms would not be required by their governments to obtain such notifications. Several stated that they did not perceive any potential benefits from the elimination of the exemption.

Proponents of the exemption cited instances where products, which are otherwise identical to U.S. registered pesticides, would be subject to notification as "unregistered" because of: (1) Relabeling or repackaging to conform with metric weight formulations, including possible rounding-off differences resulting in slightly different technical active or inert concentrations; (2) minor inert modifications including color or odor modifications to meet customer specifications; and (3) labeling for uses for which there are no U.S. applications such as for certain tropical crops. Some commentators pointed out that in these cases the relevant safety data which would apply to registered pesticides are just as applicable to the unregistered "similar" products. It was stated that custom blending to meet foreign formulation requirements would often result in products that are not identical to the U.S. product, although the product is otherwise the same.

Many proponents of the exemption stated that a clearer definition of "similar" was needed. Several asked that explicit criteria be made available. One stated that EPA needed to propose such a clarification for public comment. Most commentators from industry did not object to the proposal that exporters maintain records to substantiate similarity claims, but many objected to a reporting requirement.

d. *Response.* EPA has concluded that the exemption should be eliminated. As was pointed out by some commentators, the exemption creates compliance problems for industry and has also proven to be difficult for the Agency to enforce. EPA believes that elimination of the exemption is the best way to resolve the difficulties associated with compliance, both for the regulated community and for EPA. In addition, the Agency believes that elimination of the exemption will provide the importing countries with better information on pesticides exported from the United States.

At the time that EPA published the proposed policy it believed that compliance and enforcement problems

could be partially solved by clarifying that the burden of proof lies with the person asserting similarity. However, even with such provisions, including requiring the exporter to substantiate claims of similarity, EPA has determined that arriving at consistent interpretations would still be extremely burdensome for the Agency, and confusing to the regulated community and other governments.

In the proposed policy, EPA expressed concern about whether eliminating the exemption would raise problems in terms of increased burden on exporters and the governments of countries receiving the purchaser acknowledgement statements in terms of the number of notices that may be required. EPA explicitly requested comments on this issue, including any potential benefits to importing countries. While several commentators mentioned increased burden, none provided information beyond the estimates presented by EPA. Those burden estimates were small and not judged to be important enough to offset the compliance and clarity problems associated with the exemption. EPA believes that only a small number of additional notices would be required annually, and the burden imposed by each notice is not large. EPA does not, therefore, find the arguments based on increased burden on exporters to be compelling.

EPA was concerned that eliminating the exemption might detract from the usefulness of the purchaser acknowledgement statements to receiving governments. Since transmittals of statements to foreign governments will be made by EPA, (See discussion of EPA's transmittal of section 17(a) notices, in Unit III.B.6. of this preamble) the Agency intends to continue to review its internal procedures to determine if there are ways to increase the usefulness of the statements to other governments, and to make them easier to process. For example, EPA is considering attaching a revised cover sheet, with more detailed information than the one currently used, which would explain the purpose of the purchaser acknowledgement statements to help countries distinguish them from other international notifications, such as section 17(b) and PIC notices. EPA may also specially identify statements which the Agency has reason to believe may be of specific interest to importing countries, such as statements associated with chemicals which are identified on international lists as posing special concerns. EPA believes that such steps may largely offset any potential burden or loss of utility to other governments

that could otherwise result from elimination of the exemption.

For the purposes of FIFRA section 17(a), EPA will consider products to be registered if they are registered under section 3 of FIFRA, or if they were once registered and are being sold under section 6(a)(1) of FIFRA. Except as discussed in this policy, any variations in the formula of the export product from the formula of the U.S. registered product, or any uses or claims on the export product's label which are not consistent with the uses or claims stated on the label of the U.S. registered product, render the export product "unregistered" and subject to all the requirements for exporting an unregistered product pursuant to FIFRA section 17(a). As discussed later in this section, certain modifications to the labeling, packaging, or composition will not cause an otherwise registered product produced solely for export to be considered unregistered.

Applications for pesticide registrations under FIFRA must be accompanied by a copy of the product's proposed labeling, including uses and claims, and a full description of tests made and results thereof in support of such claims. A pesticide's formulation, uses and claims which are stated on its labeling are all essential components of the pesticide's U.S. registration. EPA believes that the product labeling is an important reference point for determining whether or not any pesticide product, including one produced for export, is registered in the United States. EPA's pesticide labeling regulations specifically require that an approved product label must be attached to the immediate pesticide product container. This is to ensure that the label information is transmitted and understood under customary conditions of sale and use.

EPA understands that when pesticide products are exported, it may not be practical to label the immediate container with the U.S. label without defeating the packaging or labeling needs of the foreign purchaser. For example, the purchaser may need to label the product container with a label meeting the requirements of the country of import. Although EPA believes that the labeling is critical in identifying a product as registered, it is not EPA's intent to consider exported products unregistered simply for failing to attach the U.S. approved label to the immediate product container. Therefore, EPA will allow registered products to still be considered registered for the purposes of this policy when the labeling approved under the U.S. registration is not directly attached to

the immediate product container, as long as that labeling accompanies the product at all times, i.e., as supplemental labeling. If an exported product does not bear the FIFRA section 3 labeling either on the immediate product container or as supplemental labeling, it will not be considered registered for the purposes of this policy. The sale or distribution of such a product without meeting the acknowledgement statement requirements of section 17(a)(2) will constitute the sale and distribution of an unregistered pesticide in violation of FIFRA section 12(a). (Note: section 2(q)(1)(C) of FIFRA precludes any person from exporting a product that is in imitation of, or is offered for sale under the name of, another pesticide. This means that a person cannot use the pesticide product labeling approved under another person's registration in order to export their own product as a "registered" product.)

When a product is claimed to be a registered product, and is accompanied with the approved U.S. labeling, any labeling material which is in addition to the U.S. label (as would be the case when the immediate container is labeled in accordance with foreign purchaser specifications) must be compatible with the U.S. labeling. Except as discussed in this policy, if the product labeling indicates a different formulation from the registered product, or states new uses or claims, the product will be considered to be a different product and not registered under FIFRA. The presence of contradictory labeling statements associated with the same product will also render that product misbranded.

Export product labeling that states information concerning composition, claims or uses which are within the scope allowed by the U.S. label will not be considered to be in conflict with the U.S. label. For example, if the export label of a U.S. registered product lists some, but not all, of the U.S. registered uses or crop applications, the registration status for purposes of this policy would not be affected. Similarly, if the export product label states application rates that are allowed under FIFRA when the registered product is used in the United States, the product would still be considered registered.

If the export labeling states application rates in metric units, the product's regulatory status will not change if the metric measurements are an accurate conversion from the U.S. units. An exporter of a U.S. registered pesticide may add new uses to the label of that product for export purposes, without triggering the requirements of

section 17(a)(2), as long as the new uses are within the same general use patterns as those for the registered product. (Pesticide use patterns are listed in Appendix A to part 158-Data Requirements for Registration: Use Pattern Index. The general pesticide use patterns are: terrestrial food crop and terrestrial nonfood crop; greenhouse food crop and greenhouse nonfood crop; aquatic food crop and aquatic nonfood crop; indoor use; and forestry use.) Adding new uses to the label which change the use pattern, such as changes from non-food to food use, outdoor to indoor use, or terrestrial to aquatic use, render the product unregistered and subject to the requirements of section 17 for unregistered products. If the new use added to the label is a food or feed use, a tolerance must already be established for the use of that pesticide in or on that commodity or the product will be considered unregistered and subject to the requirements of section 17(a)(2).

If the export product label contains statements regarding the formulation or composition of the product which differ from that allowable under the U.S. registration (i.e. statements that differ from the statement of ingredients listed in the certified statement of formula), the product will be considered unregistered. For example, EPA will consider any stated concentrations of any active ingredients which fall outside the certified limits for that product to render that product unregistered. EPA will also consider the product to be unregistered when the label statements indicate the presence of active or inert ingredients which are not in the U.S. registered product, or when the label does not list active or inert ingredients which are in the U.S. registered product. EPA may determine such products to be misbranded and adulterated. EPA wishes to emphasize that except as provided in this policy, any differences in formulation or composition between the exported product and that indicated in the confidential statement of formula for the registered product, including inert ingredients, will cause the exported product to be considered unregistered. In addition, any differences in formula or composition must be reflected in records which show the complete formula of the export product, in accordance with the requirements of 40 CFR 169.2 and this policy.

EPA recognizes that certain modifications to the composition of an export product should not render the export product "unregistered" and thus subject to the requirements of FIFRA section 17(a)(2). Therefore, EPA has decided that a change in the color or

fragrance of the export product will not affect the product's registration status, as long as certain conditions are met. The change in color must result only from the addition of a dye included on the list of the chemicals exempted from the requirement of a tolerance at 40 CFR 180.1001, and the dye must not be a List 1 inert. (List 1 inerts are those inerts which the Agency has identified as presenting toxicological concerns. The classification of inerts is explained in EPA's Policy Statement on Inert Ingredients in Pesticide Products, 52 FR 13305, April 22, 1987.) The change in fragrance must result only from the addition of a chemical included on the list of chemicals exempted from the requirement of a tolerance (40 CFR 180.1001) and the added chemical must not be a List 1 inert. In addition, the change in fragrance must not result in a pesticide product containing a food or food-like fragrance. (See "Food Fragrances in Pesticide Formulations," EPA's Office of Pesticide Programs Policy and Criteria Notice number 2155.1, November 20, 1975.)

EPA also recognizes that there are instances where a company may need to slightly modify the composition of one of its U.S. registered products for export purposes. EPA will not consider a company's modification of its registered product to render that product "unregistered" in the following situation. An exporter, who is also the registrant and/or manufacturer of a U.S. registered pesticide, (other than pesticide products intended for public health uses which are required or conditionally required to submit efficacy data pursuant to section 158.640), may decrease the percentage of the active ingredient(s) of that product by adding a List 4 inert ingredient, without causing that product to be considered "unregistered" and triggering the requirement to obtain a purchaser acknowledgement statement. In EPA's Policy Statement on Inert Ingredients in Pesticide Products, EPA included inert ingredients on List 4-a list of inert ingredients posing minimal hazard or risk-if the inert ingredients were generally regarded as innocuous. (52 FR 13305, April 22, 1987.)

Such limited modifications may only be made by the registrant and/or the manufacturer of the U.S. registered product. As discussed above, EPA's 1980 Pesticide Export Policy exempted exporters of unregistered pesticide products from the purchaser acknowledgement statement requirement for products which the exporter claimed were "similar in composition and use pattern to a federally registered product." EPA has

concluded that only the registrant and/or the manufacturer of the product may be able to legitimately claim that its export product is the same composition as its own federally registered product, except for the addition of List 4 inert ingredients. EPA has concluded this because only the registrant and/or manufacturer have access to the product's confidential statement of formula thereby making it possible for them to know the extent to which the modified product differs from the registered product. Pesticide exporters are no longer permitted to claim that their product is similar to another company's registered product and thereby exempt themselves from the purchaser acknowledgement statement requirement.

EPA's pesticide registration regulations also provide that certain changes may be made to a product's composition, labeling or packaging, without notification to or approval by the Agency. (See 40 CFR 152.46(b)). These changes include any changes in package size and label net contents, provided no change in use directions or requirement for child-resistant packaging would be necessary for the product to be registered for use in the United States. For example, if child-resistant packaging is required for a particular pesticide product in the United States, and the product will be exported without child-resistant packaging, the product would be considered unregistered and therefore subject to all the requirements of FIFRA section 17(a), including the requirement for a purchaser acknowledgement statement.

If an exporter needed to repackage a product in a size to meet a foreign purchaser's specifications, that modification would not affect the registration status of the export product. Other modifications to the label used for export purposes which will not affect the export product's registration status are: the use of metric units for net contents, dosages, and other numeric expressions; the use of a different format for the label, provided that the information does not contradict the U.S. label; revision of non-mandatory U.S. label statements, consistent with 40 CFR part 156, including additions or changes required by other Federal statutes or regulations; a change of the name or address of the registrant, except for a change resulting from transfer of ownership, which requires that a registrant keep his name and address current with the Agency; and any correction of typographical or printing errors that appeared on the U.S. labeling. (See 40 CFR 152.46(b)).

Finally, EPA recognizes that there may be situations where minor discrepancies between an export label and the U.S. registered label result from the translation of statements or the conversion of units. Where such differences are not significant, EPA does not believe that they should affect the registration status of the product for purposes of export. However, except as provided in this policy, differences which indicate new uses or claims would be considered to be significant and to render the product unregistered. EPA wishes to emphasize particularly that warning or cautionary statements that translate to a lower level of warning or caution than that indicated on the U.S. labeling will be considered to be significantly different.

EPA believes that in addition to the flexibility discussed above, this policy will provide importing countries with clearer, more accurate information on the registration status of the pesticides being exported from the United States, consistent with the requirements of the statute.

2. EPA treatment of exports of unregistered pesticides for research purposes. — a. 1980 policy. The 1980 policy stated that experimental use products will be considered unregistered, therefore requiring signed purchaser acknowledgement statements prior to export. However, small amounts of pesticides exported only for research purposes would be considered exempt from the purchaser acknowledgement statement requirement.

b. 1990 proposal. EPA proposed that pesticide products exported solely for research purposes would not be considered to be in violation if no purchaser acknowledgement statement was sent if the exporter met certain recordkeeping requirements to substantiate the claim that a product is shipped for research purposes. In addition, EPA proposed that the exporter should bear the burden of demonstrating that the pesticide qualifies for the research exemption.

c. Comments. Two environmental groups stated that research and development (R&D) products should not be exempt from the requirements of section 17(a)(2). They stated that such products constitute "unknowns" and that consequently it is very important that foreign governments be aware of their importation. Other commentors stated that R&D chemicals tended to be small quantities which would not cause great potential health or environmental risks.

One industry commentor stated that it would be simpler to obtain the purchaser acknowledgement statement

than to substantiate R&D use abroad, and consequently supported eliminating the exemption. However, all other industry commentors who addressed this issue stated that the exemption should be maintained, and that export for small scale R&D use could be substantiated. Several supporters of the exemption mentioned that requiring purchaser acknowledgement statements where R&D chemicals are being exported for testing, would provide the locations of potential markets to their competitors, and cause a company competitive harm. Several commentors stated that it was their belief that R&D pesticides were not "pesticides" under the meaning of FIFRA, as stated at 40 CFR 172.3, and hence were exempt from any of the requirements of section 17 including both labeling and acknowledgement statements. (See discussion in Unit III.A.2.d. of this preamble.) Some commentors stated that they did not believe that there was a great need for notification of other governments of R&D exports because R&D products are used in tightly controlled situations by highly qualified persons. They did not believe that there was a significant chance for misuse or other risks.

Finally, some commentors were concerned that if there is no exemption for the export of R&D products, particularly if notices are made publicly available, product confidentiality could be jeopardized. These commentors pointed out that proprietary knowledge is treated differently in some foreign countries than it is in the United States. Therefore disclosure of the identity of research products carries a much greater risk of competitive harm internationally than would be the case in the United States.

d. Response. As discussed earlier, EPA disagrees with the commentors who stated that exported R&D pesticides are not considered to be pesticides under FIFRA. Research pesticidal products are considered to be pesticides regulated under FIFRA, unless EPA makes determinations otherwise that are applicable to the specific products in question.

EPA does, however, believe that under many research conditions involving small quantities, R&D pesticides will be used in a manner that renders the risk of potential adverse effects to human health or the environment negligible.

EPA acknowledges the concerns that some commentors had regarding the export of "unknown" pesticides to countries without their governments having the benefit of purchaser acknowledgement statements. EPA

believes that governments should be notified when there are large-scale research and development applications or applications where there is a strong potential for direct human or dietary exposure. For the reasons stated above, however, EPA does not believe that it is useful to impose this requirement in the case where only small scale controlled uses are intended.

Consequently, EPA will not consider exports of R&D pesticides intended for small-scale research application (as defined below) to be in violation of section 17(a)(2) if no purchaser acknowledgement statement was sent. EPA believes that it is critical to define what is meant by small-scale research applications and is addressing this issue in this policy.

3. Definition of small-scale research application. — a. **1980 policy.** The 1980 policy did not include any specific definition of small-scale research product application.

b. **1990 proposal.** EPA proposed to provide specific criteria to define when an R&D export would not be considered to be in violation of the purchaser acknowledgement requirements of section 17(a)(2) of FIFRA. These criteria were based on the scope of the application and other factors relating to possible human contact or dietary exposure rather than on the physical quantity involved since the actual amounts of pesticide could vary considerably based on type of pesticide, concentration, and other factors. Exports of pesticides for research purposes in quantities that would not normally require notification of EPA and issuance of an experimental use permit if the use were in the United States, would not be considered to be subject to the purchaser acknowledgement requirement of section 17(a)(2).

c. **Comments.** One foreign government and several industry commentators expressed general approval of EPA's proposed criteria for defining small-scale R&D quantities based on use, although one of the commentators suggested that a closer adherence to the criteria cited at 40 CFR 172.3 should be used. Another stated that there needed to be some further clarification of what was intended in the criteria, i.e., that the limits on proposed use be on a "per-country" rather than a "per-pesticide" basis.

One commentator suggested that it was not appropriate to use the proposed criteria. The commentator stated that these criteria were designed for the United States, and only accurately define research applications in the United States. They would not,

therefore, necessarily be applicable worldwide.

d. **Response.** EPA acknowledges that the regulation of R&D pesticides may vary in different countries, but believes that the advantages of using a single set of criteria that are consistent with those in place for similar testing of R&D pesticides in the United States outweigh any disadvantages. The Agency did not wish to use significantly different criteria from those used in the United States unless there were compelling reasons to do so.

EPA agrees that it is necessary to clarify how to interpret these criteria when there are multiple shipments to multiple countries. EPA believes that the most consistent approach is to consider separately product shipments within a calendar year to multiple countries. If the R&D use of the product shipped within a given calendar year by an exporter to a particular country exceeds the criteria stated in this policy, EPA will consider failure to submit a purchaser acknowledgement statement to be a violation of section 17(a)(2). For example, if within a calendar year, an exporter is shipping a pesticide for research purposes, and the product may be used on more than 10 acres (4.05 hectares) within the country of import, EPA would consider failure to submit purchaser acknowledgement statements regarding those shipments to be violations of section 17(a)(2). If a shipment, or series of shipments over the course of a calendar year to a foreign purchaser for R&D use in one country meets the criteria outlined above, separate shipments to other countries would be considered separately.

The comments generally favored the proposed criteria, and EPA is therefore including the proposed criteria in the final policy. EPA is clarifying that these criteria concern only the acknowledgement requirements and are not pertinent to other FIFRA requirements, such as labeling required under section 17(a)(1).

4. Substantiation and/or verification of small-scale R&D exports. — a. **1980 policy.** The 1980 policy did not include any specific criteria for defining small-scale pesticide export for research purposes only.

b. **1990 Proposal.** EPA proposed that records substantiating claims for small-scale R&D pesticide exports be retained for 3 years and be available for inspection, or, alternatively, that information substantiating such claims be submitted to the Agency.

c. **Comments.** Several commentators stated a strong preference for a recordkeeping requirement rather than any new reporting requirements. One

commentor stated that reporting on a case-by-case basis could be acceptable. Another commentor stated that the small quantities of R&D shipments would in themselves indicate the R&D nature of the intended use.

d. **Response.** Since EPA has limited ability to review actual use once pesticides are exported, the Agency must rely on records substantiating the intended use. EPA may determine that any shipment or series of shipments of an unregistered pesticide, for which small-scale R&D purposes cannot be substantiated, is in violation of the requirements of section 17(a)(2).

EPA believes that examination of appropriate records will be adequate to determine whether small-scale R&D criteria are met. Records to support claims of this nature must contain at least the following information: (1) identify the product and quantity shipped in a given year to a given purchaser in a specified country; (2) include a detailed description of use patterns (i.e., application rates, sites, dosages, etc.) which are consistent with the premise that the shipped quantity would be used within the R&D criteria; and (3) contain confirmation, such as signed statements from the purchaser, letters of transmittal, etc., which indicates that the shipment(s) of the product were to be used for R&D purposes consistent with the quantity shipped and the described uses. EPA does not believe that records which only show the quantity of product shipped are sufficient for substantiating R&D intent, since a quantity that would qualify as "research" for one type of product or use may represent a commercial-sized quantity for a different product or use.

EPA has reconsidered the proposed 3-year duration for record retention and instead is requiring that the records must be retained for the period specified at 40 CFR 169.2(h). This is being done to be consistent with other recordkeeping requirements for these products. At the time of publication of this notice, this period is 2 years.

5. Timing of Purchaser Acknowledgement Statements. — a. **1980 policy.** Section 17(a)(2) requires that before exporting a pesticide which is not registered for use in the United States, the purchaser must acknowledge in writing its understanding that the product is not registered for use in the United States and cannot be sold in the United States.

Under EPA's existing policy, an exporter of an unregistered product must have a copy of the signed statement prior to the export of the first shipment each year of an unregistered

product to a particular purchaser for each country.

b. *1990 proposal.* In the 1990 proposal, EPA stated that it was examining its policy of requiring annual submissions of the purchaser acknowledgement statement. EPA proposed maintaining the current system of annual submissions, as described above, but also requested comment on the option of requiring purchaser acknowledgement statements for each shipment.

c. *Comments.* Twelve commentors strongly supported maintaining the current system. Most commentors believed that the current system of annual submissions should be continued. They contended that per-shipment notification would create a large paperwork burden, delays in shipment, and trade disadvantages. One foreign government commented that annual submissions would meet their needs.

One commentator supported per-shipment notifications, or alternatively, the requirement of a detailed annual summary, specifying the quantity shipped and the dates, to show the flow of shipments over the entire year. The commentator suggested that EPA could require the information to be provided at the beginning of the year's shipments and updated if anticipated shipments deviate from the initial projections. The commentator stated that such a notification system has worked reasonably well under the hazardous waste export program pursuant to the Resource, Conservation and Recovery Act (RCRA), and has the significant additional benefit of providing much more useful information to other governments, U.S. agencies, and the public.

Another commentator requested that EPA require exporters to submit the signed statements to EPA within 10 working days of receipt or prior to the first shipment, not within 7 days of receipt as currently required.

d. *Response.* EPA has decided that purchaser acknowledgement statements must be submitted on a per-shipment basis unless the exporter complies with all of the provisions of an alternative approach as provided in this policy. The alternative approach requires the exporter to obtain a purchaser acknowledgement statement prior to the first shipment of each unregistered pesticide to a particular purchaser in a foreign country, and to submit to EPA an annual summary of all shipments of that product to that purchaser.

EPA believes that the Congressional intent underlying the purchaser acknowledgement statement

requirement was that countries receive information concerning each shipment of unregistered pesticides to their country. Section 17(a)(2) requires that the foreign purchaser sign a statement acknowledging awareness of the registration status of the product and that the exporter submit this statement to EPA prior to export of an unregistered pesticide. Since section 17(a)(2) specifies that no unregistered pesticide shall be exported without a signed purchaser acknowledgement statement, it is EPA's interpretation that this section requires that there be a purchaser acknowledgement statement for every shipment.

At one time, EPA believed that annual submission of a notice for the first shipment in the calendar year to each purchaser in each country was adequate to meet this requirement, because it would provide regular notification to foreign governments. In the 1980 policy, EPA did not consider per-shipment submissions to be advantageous and therefore exercised its enforcement discretion and allowed one submission per year per purchaser per country for the first shipment. However, EPA agrees with the commentator who stated that per-shipment notifications would provide useful information. Consequently, EPA is changing its policy to require per-shipment notifications, so that more information about shipments of unregistered pesticides will be available to purchasers and other governments.

EPA recognizes that per-shipment purchaser acknowledgement statements would present a greater burden than the current system. EPA therefore believes that an alternative approach would provide essential information while minimizing the administrative and paperwork burden.

Under the alternative approach, rather than submitting per-shipment purchaser acknowledgement statements, exporters would be permitted to satisfy the purchaser acknowledgement statement requirement as follows. The exporter would submit to EPA a signed purchaser acknowledgement statement for the first shipment each calendar year of an unregistered pesticide to a particular purchaser in a particular country. The exporter would attach to that first purchaser acknowledgement statement sent to EPA, a certification signed by the exporter that export did not take place until a signed acknowledgement statement was received, and provide information which can be used to identify any research and development products (other than those exempt from the purchaser acknowledgement statement

requirement, as described at 40 CFR 168.75(b)(2)) referred to by code names in the purchaser acknowledgement statement. In addition, the exporter must include in the signed certification a statement certifying that, for that calendar year, the exporter will submit an annual summary using the procedures detailed in this policy.

Under this alternative approach, the exporter would be required to submit to EPA an annual shipping summary at the end of the year, which summarizes the dates and destinations of all shipments of that pesticide to each particular purchaser exported during the previous calendar year. The annual summary must include the purchaser's name and address, the date of the purchaser's signature in the purchaser acknowledgement statement submitted to EPA during the previous calendar year, the known destinations of the shipment, and the identity of the product and active ingredient(s). The annual summary must be submitted to EPA by March 1st of each year. EPA does not believe the annual summary would be very burdensome because the information should be readily available to exporters in their records of shipments, which they are already required to maintain under 40 CFR 169.2.

EPA will send a copy of the annual shipping summary to the appropriate government officials after it is received.

EPA considered requesting that information on the quantity of pesticides exported be included in the annual summary. EPA believes that while quantity information may be useful in providing more information about exports, it is not necessary to implement section 17(a)(2). In addition, EPA has concluded that this information may be entitled to protection as confidential business information, as discussed in Unit III.C. of this preamble. For these reasons, and for the reasons discussed in Unit III.B.8 of this preamble (Information Requirements for the Purchaser Acknowledgement Statement), EPA has decided not to require it.

In summary, the section 17(a)(2) requirement for a purchaser acknowledgement statement can be met by exporters complying with either of the following two options: (1) Submit a purchaser acknowledgement statement for each shipment of unregistered pesticides; or (2) submit a purchaser acknowledgement statement for the first shipment each year of a particular pesticide to a particular purchaser for each importing country, including the appropriate certification, and submit a report to EPA which lists the dates and

destinations of all shipments exported during the previous calendar year.

The procedures that an exporter of unregistered pesticides must follow in obtaining and transmitting the foreign purchaser acknowledgement statements are set forth in 40 CFR 168.75.

e. Effective date for 40 CFR 168.75. Under both the per-shipment option and the annual reporting option for complying with section 17(a)(2), the schedule for obtaining and transmitting purchaser acknowledgement statements is based on the calendar year. However, because this policy has been published several months into a new calendar year, exporters may have already sent EPA purchaser acknowledgement statements under the provisions of EPA's 1980 Pesticide Export Policy. In order to facilitate compliance with this policy, the effective date for the new purchaser acknowledgement statement requirements is June 1, 1993. Thus, all the requirements of 40 CFR 168.75 will be applicable as if June 1 was the start of the 1993 calendar year. Beginning June 1, 1993, exporters must submit purchaser acknowledgement statements on a per-shipment basis, unless the exporter complies with the provisions of the alternative approach of annual reporting procedures as provided in this policy. Under the per-shipment approach, the exporter will have to obtain, prior to each shipment of an unregistered pesticide product to a country, a signed purchaser acknowledgement statement, in accordance with 40 CFR 168.75(c)(2)(i). The exporter must submit the signed purchaser acknowledgement statement to EPA in accordance with the requirements of this policy.

If the exporter chooses the annual reporting procedures, he or she must comply with all the requirements specified in 40 CFR 168.75(c)(2)(ii) effective June 1, 1993. The exporter must obtain, prior to the first shipment occurring after June 1, 1993, of an unregistered pesticide product to a particular purchaser in a country, a signed purchaser acknowledgement statement in accordance with 40 CFR 168.75(c)(2)(ii).

In addition to the purchaser acknowledgement statement for the first shipment, the exporter must submit a certification that he or she is choosing the annual summary compliance option. The exporter must submit the signed purchaser acknowledgement statement and certification in accordance with the requirements of this policy. In March 1994, the exporter choosing the annual reporting option for the June 1, 1993 through the December 31, 1993 period must submit to EPA a summary of

shipments of each pesticide to each purchaser sent during that period.

In subsequent years, the period for exporters choosing the annual reporting option will be the calendar year. (Purchaser acknowledgement statements submitted to EPA during the period January 1, 1992 through May 31, 1993, will be governed by the policy published in 1980 (45 FR 50274, July 28, 1980).)

6. EPA's transmittal of purchaser acknowledgement statements. — a. 1980 policy. The 1980 policy did not discuss EPA's transmittal of purchaser acknowledgement statements. Under that policy, EPA sent copies of the purchaser acknowledgement statement to the Department of State. Along with the purchaser acknowledgement statement, EPA sent a cover sheet which identified the registration status of the pesticide. (The status is identified as: not registered; denied registration; canceled; or registration status unknown.) The State Department then transmitted the purchaser acknowledgement statement with EPA's cover sheet, to the U.S. diplomatic post in the importing country, which in turn sent it to an appropriate government official in that country.

b. 1990 proposal. EPA proposed sending purchaser acknowledgement statements directly from EPA to officials in importing countries, and if different, the country or countries of final destination, if known.

c. Comments. All commentors supported the idea of direct transmittal of purchaser acknowledgement statements to foreign governments, citing improved timeliness and efficiency.

d. Response. EPA intends to implement this approach and has made arrangements to do so. These notices will, therefore, be transmitted directly by EPA to appropriate officials of the country of import and, where reported, to the countries of final destination or intended use. EPA will also send a copy of the annual shipping summary, as discussed in the response to the previous comment, to the appropriate officials after it is received.

EPA has decided that the appropriate governmental official to receive section 17(a) notifications will be the person named as the designated national authority (DNA) for pesticide notifications in the international prior informed consent program (PIC). The DNA has the responsibility for both receiving and disseminating information associated with the PIC procedures. Countries may participate in PIC as either an importing country or an exporting country. Exporting countries

are expected to participate in PIC for the purposes of participating in information exchange procedures and export control features. For countries which are not participating in PIC, EPA will ascertain the names of the appropriate persons to receive the section 17(a) notifications.

7. Format of the purchaser acknowledgement statement. — a. 1980 policy. The 1980 policy set forth a recommended content for purchaser acknowledgement statements, but did not recommend or require a specific format.

b. 1990 proposal. The Agency solicited comments on whether the purchaser acknowledgement statement would be more useful if a specific format were required, or if a particular form were provided, e.g., a form similar to the accepted international form for notification under the PIC program.

c. Comments. Nine commentors supported the idea of a standardized format. Four industry commentors expressed strong reservations with using a form or format that closely resembles PIC notification forms for banned or severely restricted pesticides. They pointed out that not all unregistered products are banned or severely restricted and that using a form that closely resembled the PIC notification for banned or severely restricted chemicals would be confusing and misleading. Two commentors suggested following a format designated by FAO/UNEP as the basis for a standardized format for the purchaser acknowledgement statement.

d. Response. EPA believes that standardization of purchaser acknowledgement statements would improve the consistency of submitted information and the familiarity of foreign governments with a given format thus expediting review and reducing misunderstandings. Purchaser acknowledgement statements vary greatly in quality and content. Many do not adequately identify the pesticide being shipped or the country of the purchaser. Even though this information is currently required, the lack of a standardized format may make compliance more difficult. EPA believes that a specific format will facilitate compliance, improve information transmittal from exporters, and strengthen the Agency's ability to manage the information contained in purchaser acknowledgement statements.

One of the reasons EPA is considering a format or form for the purchaser acknowledgement statement is to improve the utility of the information provided by the purchaser acknowledgement statements to foreign governments. The Agency agrees with

those commentators who suggested that it would be misleading for the form or format to closely resemble another form which transmits different information. Any forms and/or format which EPA may develop will be reviewed to assure that they cannot be mistaken for PIC notification forms dealing with banned or severely restricted chemicals.

EPA is considering developing and making available purchaser acknowledgement forms in different languages. EPA believes that multilingual purchaser acknowledgement statements would ensure that the documents could be understood by the widest possible audience. If these forms are developed, it is EPA's intent that they will be published in the Federal Register for comment. Until the forms are available, any format that is clearly understandable and includes the required information is acceptable. In the interim, EPA plans to provide a cover sheet in French, English or Spanish (the official languages of the PIC system) with each purchaser acknowledgement statement EPA transmits to importing governments. EPA believes that cover sheets in the appropriate language will aid countries in understanding and using the information in the purchaser acknowledgement statement.

8. Information requirements for the purchaser acknowledgement statement. — a. *1980 policy.* In EPA's 1980 Policy, the Agency stated that the purchaser acknowledgement statement must include the following information:

- (1) The exporter's name and address.
- (2) The foreign purchaser's name and address.
- (3) The name of the product and the active ingredient.
- (4) An indication that the purchaser understands that the product is not registered for use in the United States and cannot be sold in the United States.
- (5) The destination of the export shipment if different from the purchaser's address.

- (6) The foreign purchaser's signature.
- (7) The date of the signature.

b. *1990 proposal.* EPA proposed that more information be provided in purchaser acknowledgement statements. Specifically, EPA proposed that the country or countries of final destination be identified in the purchaser acknowledgement statement, so that EPA could begin to send these notices directly to the regulatory officials in these countries. In some instances, this would represent a broadening of the requirement in the 1980 policy, which only required "the destination" of the shipment to be included.

c. *Comments.* There were only a few comments specifically addressing this issue. One commentator supported the proposed expansion to include the country of final destination, while another commentator proposed that the purchaser acknowledgement statements be expanded to include information about the quantity and frequency of the shipments. Commentors from both industry and other governments stated that the country of final destination will often not be known by the exporter at the time of shipment.

d. *Response.* EPA considered other information which could be included in a purchaser acknowledgement statement in order to make the notifications clearer and more useful to other governments. EPA is requiring, as part of this final policy, that exporters provide the Chemical Abstracts Service (CAS) registry number for each active ingredient in a product, the International Union of Pure and Applied Chemists (IUPAC) chemical name for each active ingredient, and other known chemical or common names by which the product is known. The Agency believes this information is necessary for adequate identification of the product and active ingredients. In addition, the identity of the country of final destination should be included in the purchaser acknowledgement statement, to the extent this information is known to, or reasonably ascertainable by, the exporter.

On April 25, 1991, EPA issued a class determination finding that the identity of the country of final destination is not entitled to confidential treatment. A copy of the class determination is reprinted in Unit III.C. of this preamble.

EPA acknowledges that the country of final destination may not be known by the exporter at the time of shipment. As with requirements regarding multilingual language on labels, this requirement is contingent on the exporter having actual knowledge of the country of final destination, or if it can be determined that the information was reasonably ascertainable to the exporter.

In response to the comment received, EPA considered requiring information about the quantity of shipments in purchaser acknowledgement statements. EPA agrees that information about the quantity of unregistered pesticides exported would be useful to other countries, to EPA and to other agencies, and in responding to inquiries from Congress and the public. Information about the quantity of pesticides shipped would give importing countries valuable information for regulating pesticide use in their countries. However, EPA's authority to require quantity

information under FIFRA section 17(a)(2) is subject to question and requiring this information could create difficulties in protecting confidential business information from release as required by FIFRA. Therefore, EPA will not require quantity information to be included in the purchaser acknowledgement statements.

9. *Language requirements for purchaser acknowledgement statements.* — a. *1980 policy.* The 1980 policy did not contain any language requirements for the exporter to meet to satisfy the purchaser acknowledgement statement requirement of section 17(a)(2).

b. *1990 proposal.* EPA proposed requiring that purchaser acknowledgement statements be written in English, the language of the purchaser's country, and the languages of the country or countries of final destination. In the case where more than one language is involved because the product is shipped to more than one destination, EPA proposed that the exporter must submit either a multilingual statement to EPA, or multiple statements in all required languages. EPA believed that these changes would assist the purchasers and the importing governments in understanding the contents and significance of the purchaser acknowledgement statements.

c. *Comments.* EPA received many comments on its proposal to make the purchaser acknowledgement statement multilingual. Four governments and the OECD representative supported the proposal, although the latter wondered how EPA would know all of the intended destinations and hence required languages. One environmental group and one industry commentator also supported the proposal.

Most of the commentators from industry objected to the proposal that purchaser acknowledgement statements be multilingual, and some objected to the minimal bilingual proposal as well. Many of the arguments were identical to those raised regarding the proposal that labeling be multilingual. (See 55 FR 4971.) For example, it was pointed out that the country of final destination would not always be known as in the case of an active ingredient exported for reformulation. One commentator stated that the burden of translating the purchaser acknowledgement statements might be disproportionately high on small businesses who may not have multilingual or bilingual staff. Another stated that a foreign purchaser may be reluctant to sign a statement which included language which the purchaser cannot read. This commentator believed

that the requirement of multilingual or bilingual purchaser acknowledgement statement would in practice require foreign purchasers to be adept in all of the languages on the purchaser acknowledgement statement. Most of the industry commentators did not object to the minimal proposed bilingual requirement.

d. Response. EPA believes that multilingual purchaser acknowledgement statements would be very useful in communicating necessary information as evidenced by the support for this proposal from foreign governments. However, the numerous comments raised by industry indicate that there are practical problems which need to be addressed. EPA also recognizes that requiring exporters to translate purchaser acknowledgement statements into different languages would place a new burden on industry, particularly small businesses. As noted earlier, EPA is considering developing forms for exporters to use as purchaser acknowledgement statements which are already in different languages. The forms could be developed in English, French, and Spanish, which are the official languages of the PIC program. EPA believes that this approach would be more efficient than requiring each exporter to develop its own multilingual purchaser acknowledgement statements. Due to the number of practical problems to be worked out, EPA does not have such forms at this time, and EPA is considering publication of a proposal on this issue at a later date.

As discussed above in Unit III.B.7. on format of the purchaser acknowledgement statement, until multilingual purchaser acknowledgement statement forms can be developed, EPA plans to include a cover sheet in the appropriate language with each purchaser acknowledgement statement the Agency transmits. There will be no requirement for the purchaser acknowledgement statement to be in multiple languages at this time. However, if the foreign purchaser signs a purchaser acknowledgement statement in their own language, it must be accompanied by an English translation when it is submitted to EPA by the exporter.

C. Confidentiality

1. Information treated as confidential.—a. 1980 policy. EPA's 1980 policy statement permitted exporters to claim all the information required in the purchaser acknowledgement statement as trade secrets or confidential business information (CBI). In the past, and in accordance with its 1980 policy

statement, EPA treated information submitted in purchaser acknowledgement statements as confidential within the meaning of its regulations on business confidentiality at 40 CFR part 2, subpart B, when such information had been claimed confidential by the exporter.

b. January 12, 1990 policy statement. In the Federal Register Notice regarding the confidentiality of certain information submitted under sections 7 and 17(a)(2) of FIFRA, dated January 12, 1990 (55 FR 1261), EPA clarified that section 7(d) of FIFRA excludes the names of the pesticides or active ingredients used in producing pesticides produced, sold, or distributed at an establishment, from protection as confidential business information. In addition, EPA stated that the names of producers of unregistered pesticides are a matter of public record under FIFRA section 4. The notice also explained that since unregistered pesticides generally may be manufactured only for the export market, the fact that a company has submitted a purchaser acknowledgement statement to EPA under section 17(a)(2) for a given pesticide could therefore be determined from public information. Accordingly, the identity of the producer of the unregistered pesticide product, and if applicable, the name of the active ingredient would no longer be accorded confidential treatment by EPA.

c. Comments and response. Several commentators in response to the January 12, 1990 notice stated that no information in a purchaser acknowledgement statement should be confidential, asserting that the information was readily accessible to interested parties either in published reports or upon request.

d. 1990 proposal. The proposed policy on section 17(a) clarified that certain information contained in purchaser acknowledgement statements will not be entitled to confidential treatment. Specifically, the proposed policy clarified that the name and address of the exporter, and the name of the product and the active ingredient will not be considered confidential. In addition, EPA proposed to issue a class determination under 40 CFR 2.207 concerning the confidentiality of country of final destination as reported on purchaser acknowledgement statements. EPA also requested comment on whether a similar determination should be made for information identifying the foreign purchaser.

e. Comments. Several commentators stated that disclosure of the country of import and the country of destination,

coupled with the non-confidential name of the exported product would be an unfair public disclosure of a company's marketing position. They stated that this would provide an unfair advantage to foreign-based competitors. Some commentators explained in detail the public sources for this information. They explained that the cost of obtaining the information from other sources would not be prohibitively high for well-financed exporters. Exporters stated that while public sources of the information existed, they were not as accurate or as detailed as the information which EPA would make available, should the information be deemed non-confidential.

f. Response. EPA's research and inquiries suggest that destination information is generally already a matter of public record. Some countries publish lists identifying monthly pesticide imports, including information on the name or type of pesticide, the exporting company, and the exporting country. Other countries make this information available on request. Information on international markets for particular pesticides is widely available through advertising by U.S. exporters.

In addition, compilations exist which list pesticides and their regulatory status throughout the world, such as volumes published jointly by the Agricultural Requisites Scheme for Asia and the Pacific and the International Cooperation Center for Agricultural Research and Development. Private publishers provide information on pesticide exports at a substantial cost. Battelle publishes "World Pesticide Programs" reports which provide detailed information on pesticide use in foreign countries. "Agrow World Crop Protection News" offers market planning and development information and lists pesticides registered in various countries. The Port Import/Export Reporting Service (PIERS) database of the Journal of Commerce provides information on all shipments leaving the United States. Information available to customers of PIERS includes commodity exported (although the precise identity of the pesticide may not be given), manufacturer or shipper, destination and estimated quantity.

In addition to the availability of destination information in many public sources, EPA believes that treating the country of destination as non-confidential would have public health and environmental benefits. EPA intends to send copies of the purchaser acknowledgement statements to all the countries of destination identified by the exporters on the statement.

Information that particular pesticides are being shipped to their country should provide countries with information useful in monitoring and controlling imported pesticides.

One commentator stated that information on quantities shipped should not be confidential. The 1980 policy did not require information on the quantity of pesticides exported to be submitted as part of the purchaser acknowledgement statement. EPA considered requiring information on quantity in the purchaser acknowledgement statement, and treating this information as non-confidential. Many companies objected to the disclosure of any information on the quantity of pesticide exported. Several companies were concerned that information about quantity sold would substantially harm their companies' competitive positions by revealing information about their market share. These companies claim that any public data about quantity is either estimated or in obscure sources and not currently available in a form that would provide the significant advantage to competitors that EPA's reports would provide.

After research and analysis of this issue, EPA has concluded that while quantity information may be useful in providing more information about exports, it is not necessary to implement section 17(a)(2).

EPA also requested comment on whether a similar determination should be made for information identifying the foreign purchaser. The name and address of the foreign purchaser may be entitled to confidential treatment if it reveals information about the customer list of the pesticide company. However, if the foreign purchaser is merely a distributor for the pesticide company in the foreign country, then this information would not generally be considered privileged.

Several groups commented that there should be no confidential information in a purchaser acknowledgement statement. They claimed that this information may be publicly available or estimated in international trade magazines or other services. EPA believes that companies have a valid interest in protecting information which could divulge their customers or marketing strategies, and thus not all information in a purchaser acknowledgement statement should be treated as non-confidential. One commentator stated that only financial information should be protected as confidential. EPA believes that this is too narrow an interpretation. For example, courts have held that any information that could reveal market

share is confidential business information.

Many commentators were concerned about the release of any information on research and development products. Companies indicated that confidentiality would be essential for such shipments to avoid revealing information which could be invaluable to competitors. These commentators stated that information about R&D products including the chemical identity of the research product, the quantity being shipped, the potential use pattern, and the country of final destination should be confidential. Several exporters explained that new products are often developed simultaneously in different countries before the patent status of new research materials has been settled. Most countries, unlike the United States, have a first-to-file patent law, not a first-event law. This means that the identity of an unpatented research compound could be patented without proving that the filer discovered the compound first. Therefore, premature release of R&D information could jeopardize the U.S. producer's patent rights to a new product. Companies also commented that public disclosure would allow competitors to learn about the new areas of chemistry being explored by the exporter. Competitors could explore these new areas and compromise the exporter's competitive advantage in research.

Other commentators stated that R&D information relevant to public health and the environment should not be withheld from the public in the country of import or the public in the United States.

2. Confidentiality of R&D information. EPA believes that companies' concerns that the premature release of information about research and development products may lead to a potential loss of patent rights are valid concerns. Therefore, EPA has concluded that information about research and development products is generally entitled to confidential treatment.

3. Class determination. Based on the considerations discussed above, and in accordance with its regulations at 40 CFR 2.207, on April 25, 1991, EPA issued a Class Determination (1-91, Identity of Importing Country Under FIFRA section 17(a)(2).), concluding that information on the identity of the importing country, reported to EPA in purchaser acknowledgement statements, is not entitled to confidential treatment under 5 U.S.C. 552(b)(4) of the Freedom of Information Act or FIFRA. The effect of a class determination is to make known the Agency's position regarding

the manner in which information within the class will be treated in accordance with the provisions of EPA's confidentiality regulations. Publication of this class determination is not sufficient grounds to release information claimed confidential since both 40 CFR 2.204(e)(1) and 40 CFR 2.205(f)(2) require that before release of information claimed to be confidential, notice must be given by certified mail or by other means by which the date of receipt of the notice can be verified.

Any companies who have previously claimed information about the destination of their export shipments to be confidential, will receive the notice provided for in EPA's regulations before the Agency releases this information. (40 CFR 2.204(d)(2) or 40 CFR 2.205(f)).

Persons submitting the information specified in the purchaser acknowledgement statement may assert a claim of business confidentiality by marking the information claimed confidential as "FIFRA Confidential Business Information." Information so claimed will not be disclosed, with the exception of disclosure to the foreign governments, except in accordance with the procedures set forth in 40 CFR part 2, 7 U.S.C. 136(h), and this policy statement. Notwithstanding any claim of confidentiality, the purchaser acknowledgement statement will continue to be forwarded to the appropriate foreign government officials in its entirety, as required by section 17(a)(2).

In summary, the following information will generally not be considered confidential: (a) The fact that a producer makes a registered or unregistered pesticide product; (b) the fact that an acknowledgement statement or other notice of export has been filed by an exporter; (c) the identity of the unregistered exported product; and, if applicable, the identity of the active ingredients of the pesticide; and (d) the identity of the importing country and the country or countries of final destination, if known. Information subject to the following class determination 1-91 will not be considered confidential and claims of confidentiality for this information will be denied.

Class Determination 1-91

Identity of Importing Country Under FIFRA Section 17(A)(2)

I. Background

Section 17(a)(2) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) sets out the conditions under which pesticides not registered for use in the United States may be exported to other countries. Under that provision and the Environmental

Protection Agency (EPA) statement of policy governing its implementation (45 FR 50274, July 28, 1980), a pesticide which is not registered under section 3 or sold under section 6(a)(1) of FIFRA may be exported only if, prior to export, (1) the foreign purchaser signs a statement acknowledging it understands that the pesticide is unregistered and cannot be sold in the United States and (2) a copy of the acknowledgement statement has been transmitted to EPA for sending to the government of the importing country. Under EPA's policy, these requirements apply only to the first shipment of each unregistered pesticide to a particular purchaser in a given country annually.

EPA's 1980 policy statement permitted exporters to claim as confidential business information required to be reported to EPA on the foreign purchaser's acknowledgement statement. The information required to be reported is as follows:

- (a) Name and address of the exporter;
- (b) Name and address of the foreign purchaser;
- (c) Name of the product and the active ingredient and an indication that the purchaser understands that the product is not registered for use in the United States;
- (d) Destination of the export shipment if different than purchaser's address;
- (e) Signature of the foreign purchaser; and
- (f) Date of the foreign purchaser's signature.

In the past, and in accordance with that policy statement, EPA has treated this information as confidential when so claimed by the exporter. However, EPA issued another policy statement on January 12, 1990 (55 FR 1261) addressing the confidentiality status of information reported to EPA under section 7 of FIFRA which necessarily affected the confidentiality of certain information reported under section 17(a)(2).

Specifically, because section 7 mandates that certain information is not entitled to confidential treatment, the fact that a company has submitted a notice under section 17(a)(2) for a given pesticide is necessarily public as well. (The active ingredient of that pesticide is also public information).

This class determination addresses the confidentiality of the identity of the importing country of the unregistered pesticide export. It does not address the status of information about the foreign purchaser, information reported about research and development products, or quantity of shipment information which may be recorded on the purchaser acknowledgement statement.

II. Findings

Under EPA's regulations on business confidentiality at 40 CFR 2.207, I have authority to issue class determinations concerning entitlement of business information to confidential treatment. In the case of the information reported to EPA under FIFRA section 17(a)(2) concerning the identity of importing country I have found:

(1) EPA possesses numerous notices filed under FIFRA section 17(a)(2) and will continue to receive such notices in the future.

(2) The information reported concerning importing country is of the same nature and therefore can be treated similarly for the purpose of this determination.

(3) A class determination will serve a useful purpose by simplifying EPA responses to Freedom of Information Act (FOIA) requests for information contained in the notices, reducing the burden of individual determinations and informing requesters and affected businesses of EPA's position in advance.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions in the Act. One exemption is for "trade secrets" and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. 552(b)(4). The matter to be decided in this class determination is whether the identities of importing countries reported under FIFRA section 17(a)(2) are entitled to be withheld from disclosure under this exemption of the FOIA.

The information in question is clearly commercial information obtained from a person. The issue is whether this information is trade secret or otherwise confidential within the meaning of 5 U.S.C. 552(b)(4) and EPA's business confidentiality regulations at 40 CFR part 2, Subpart B.

Before EPA may conclude that information is exempt from disclosure as trade secret or confidential commercial information, the Agency must find that the information is in fact maintained in confidence by the business and is not publicly available. If it is not maintained in confidence or is publicly available, it is not entitled to confidential treatment and EPA must disclose the information.

The weight of evidence shows that destination information on unregistered pesticides is publicly available for many such exports. For example, some countries publish lists identifying monthly imports including information on the name or type of pesticide, the exporting country and the exporting company. Other countries make this information available on request.

Also widely available is information on international markets for particular pesticides. There is widespread advertising by United States exporters on billboards and in stores in foreign countries for pesticides sold in those countries but not registered in the United States. Similar advertising appears in domestic and foreign publications.

There also exist compilations listing pesticides and their regulatory status throughout the world, such as three volumes published jointly by the Agricultural Requisites Scheme for Asia and the Pacific and the International Co-operation Centre for Agricultural Research and Development covering Asia, the Pacific, and Africa.

In addition, considerable information on destination of pesticide exports is available from private publishers at a cost which is high but not prohibitively so for pesticide manufacturers. For example, Battelle publishes "World Pesticide Programme" reports which provide detailed information on pesticide use in foreign countries. "Agrow World Crop Protection News" offers market planning and development information and

lists pesticides registered in various countries.

Finally, the Port Import/Export Reporting Service (PIERS) database of the Journal of Commerce provides information on all shipments leaving the United States. Information available to customers of PIERS varies in the level of detail provided, but may include commodity exported, manufacturer or shipper, destination and quantity.

Therefore, it appears that in many instances destination information on unregistered pesticide exports is not maintained in confidence and is in fact available to the public. For those exports, destination information is not entitled to confidential treatment by EPA. Since this determination must cover all notices received under section 17(a)(2), however, it is necessary to continue the confidentiality analysis to apply to those exports for which destination information may in fact be held in confidence.

Information that has been kept in confidence may be entitled to confidential treatment under 5 U.S.C. 552(b)(4) if it meets one of the tests set out in *National Parks Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Under Morton, commercial or financial information may be withheld from disclosure if revealing the information would be likely (1) to impair the ability of the government to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the submitter of the information.

The first test is not applicable to export destination information because such information is required to be submitted to EPA under FIFRA 17(a)(2) and EPA's policy statement. Therefore, the information is not voluntarily submitted and EPA's ability to obtain it in the future would not be impaired by disclosure. Accordingly, the applicable Morton test is the second one, whether disclosure of this information would be likely to cause substantial harm to the competitive position of the submitter.

Country of destination information other than information concerning pesticides in the research and development stage is not the type of information that would likely cause substantial competitive harm to a submitter if it were released. If not coupled with information about quantity shipped, the identity of the country of destination does not reveal specific information about the company's customer list or market share. While an argument can be made that releasing information concerning research products could enable competitors to learn new areas of chemistry being explored by the exporter and thwart "first to file" patent laws, no similar argument can be made for pesticides in an established market. Therefore, under the second Morton test, information identifying the country of destination of unregistered pesticide exports is not entitled to confidential treatment.

III. Conclusion

For the foregoing reasons, I find that information reported to EPA under FIFRA section 17(a)(2) on unregistered pesticide exports identifying the importing country is not entitled to confidential treatment under 5 U.S.C. 552(b)(4) or FIFRA

Date April 25, 1991.

Craig B. Annear

Associate General Counsel

D. FIFRA Section 17(b) Notification Programs

1. *Background.* — a. *EPA's 1975 notice.* In 1975, EPA issued a **Federal Register** notice interpreting the section 17(b) international notification requirement to apply to "information having international significance." (40 FR 20987, May 14, 1975). In that notice, EPA indicated that notices to foreign governments would be sent under two conditions: (1) whenever the Agency registers, under the authority of section 3, a pesticide that contains any new active ingredient or entails a new use, and (2) when cancellation or suspension of a pesticide becomes effective and is determined to be of international significance. In the latter instances, EPA indicated that such determinations would be made by applying general guidance on a case-by-case basis.

In the 1975 notice, EPA also indicated what types of action would be considered to be of international significance.

1. Actions resulting from a review of the pesticide; actions resulting from findings of risk.

2. Actions resulting from decisions to reduce or revoke tolerances under the FFDCA.

3. Actions involving issuance of a new policy applicable to the entire pesticide industry.

4. Actions which may have widespread environmental, economic or political implications.

b. *Current practice.* EPA has generally limited section 17(b) notices to cancellations or suspensions undertaken for health or environmental reasons, and for selected actions which place significant restrictions on a pesticide's use, usually at the conclusion of a Special Review. The section 17(b) notices, as currently designed, discuss in general the health or environmental concerns which prompted the action, and offer to provide additional information upon request. The notices are fairly brief, about three pages in length, and are written in terms easily understood by people who may not be familiar with the U.S. pesticide regulatory program or laws.

Under the current system, EPA's Office of Pesticide Programs prepares a notice and sends it to the Department of State for transmittal to other governments. The State Department transmits a cable to all diplomatic posts, directing embassies to inform the host government of the information in the

cable. The embassy then contacts an appropriate government office in the host country and informs the office of the information contained in the cable. Each embassy may handle the notification differently, depending upon individual circumstances. Some notify the Environment Ministry, some inform the Agricultural Ministry, while others may inform the Foreign Ministry which then in turn is expected to inform the pesticide regulatory body. Some embassies may simply provide a copy of the cable, some may set up a meeting to discuss the notice, while others may prepare a formal diplomatic communique to transmit the information.

c. *EPA's goals.* EPA wants to ensure that other governments have information on regulatory actions taken on the basis of public health or environmental concerns involving a pesticide's use. Such information can assist other governments in making informed decisions on the continued use of pesticides in their own countries. EPA believes that providing increased information on pesticide regulatory actions will also help further health and environmental protection goals worldwide. EPA also believes that informing other governments will assist with efforts toward international harmonization, as information about EPA's pesticide regulatory activities may prompt similar actions abroad.

EPA has reviewed the section 17(b) notification program to determine how it fits in with EPA's international goals. EPA wants to inform foreign growers of any U.S. pesticide regulatory action which may affect their ability to export food legally to the United States. If the United States informs other governments of the regulatory actions that the United States has taken with respect to pesticides, those governments may use that information to inform exporting producers or to regulate the application of pesticides on crops destined for export to the United States.

EPA has determined that revisions to its international notification system are warranted. Revisions to the final policy focus on the following areas: The scope of the international section 17(b) transmittals; the frequency of such transmittals and the content of the notifications; and the transmittal process itself. These areas are discussed in greater detail below.

d. *1990 proposal.* EPA requested comment on proposed revisions to its policy on notification of foreign governments of certain types of pesticide regulatory actions. FIFRA section 17(b) requires international notifications whenever a registration,

cancellation, or suspension of a pesticide's registration becomes effective, or ceases to be effective. Since a major objective of EPA's review of its section 17(b) policy was to improve the utility of the notification process to recipients, EPA sent copies of the proposal out for comment to foreign countries and international organizations.

EPA proposed to broaden the scope of section 17(b) notifications to include all actions taken on the basis of health or environmental concerns, to increase the frequency and to amend the transmittal process for the notifications.

1. *Scope of section 17(b) notification program.* EPA proposed to expand the scope of actions subject to international notification to include all regulatory actions taken on the basis of health and environmental criteria so that countries receive important information about pesticide risks. EPA also proposed that countries should be notified of all major actions which affect pesticide use, including actions which eliminate all registrations for an active ingredient or substantially change a pesticide tolerance.

a. *Types of regulatory decisions.* Every year, EPA takes thousands of different types of regulatory actions affecting pesticide products. These actions encompass routine, noncontroversial decisions, as well as regulatory actions that involve highly contentious issues, and those which address serious concerns about public health and environmental risks. EPA considered a number of factors in determining which regulatory actions should be subject to the notification requirement, and in determining how the information should be transmitted. Among the factors to be considered are: statutory requirements; EPA's policy goals for international pesticide efforts; consistency with international activities; the value of the information to the recipient; and competing demands on EPA's and other agencies' resources.

b. *Legislative mandate.* A literal reading of section 17(b) (see Unit II.B.2 of this preamble) could require thousands of notifications annually: every time EPA amends a registration; cancels a registration for failure to pay maintenance fees; or cancels a registration at the request of a registrant. EPA believes that this requirement should be interpreted consistent with the intent of Congress to provide meaningful information to other countries (S. Rept. No. 92-1540, 92nd Cong. 2d Sess. at 33 (1972)).

In the 1975 Notice, EPA noted that the legislative history of section 17(b)

indicates that notices should serve a useful purpose. EPA went on to conclude that it would not serve a useful purpose to transmit notices for all of the actions which could conceivably fall within the scope of this requirement, and in fact, that notification of routine actions would likely lessen the impact of information having international significance. This interpretation has guided EPA in its decisions to transmit notices.

In the February 1990 Federal Register notice, EPA proposed that section 17(b) notices should encompass all actions taken on the basis of health or environmental considerations. EPA also proposed that section 17(b) should encompass all major actions which affect pesticide use. This would include actions affecting foreign growers who wish to export food to the United States.

c. Comments. All commentors on this issue supported expanding the scope of actions subject to section 17(b) notifications. Two commentors supported the scope of actions for section 17(b) actions as proposed, including an annual summary of the actions that meet EPA's criteria. Two commentors suggested sending notices for all new registrations. Another commentor suggested sending notices for all partial cancellations and suspensions. Three commentors supported sending notices on those pesticides withdrawn from the market for other than health or environmental reasons.

d. Response. EPA proposed that section 17(b) notices should be sent for proposed and final suspensions and cancellations taken as a result of the pesticide's potential to cause unreasonable adverse effects (FIFRA sections 6(b) and 6(c)). EPA believes that information about final actions taken on the basis of health and environmental criteria would be the most critical for timely international notifications and will continue to send such notices under section 17(b).

However, EPA will continue to advise other nations about major proposed actions so that they will be aware of emerging health and safety concerns, and will have an opportunity to participate in the regulatory process. These notices allow other countries an opportunity to participate in our decisions, and they set an example we are encouraging other countries to follow. Moreover, sending these notices would be consistent with the U.S. negotiating positions in the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA), and such

notifications would be required once these agreements are adopted.

Partial cancellations or suspensions which occur for administrative reasons, e.g., failure of the registrant to pay the fee required would not impart particularly significant information to the recipients of the notices. However, because this information may still be of interest to other countries, a summary of all pesticide regulatory actions will be sent annually, including the actions for which no section 17(b) notices would be prepared on a routine basis, as described in this section.

EPA has decided to expand the scope of actions which will trigger section 17(b) notifications, to include a general category of other actions which EPA determines to be of international significance. This addition is designed to provide the Agency with the flexibility to report on any regulatory actions which may not clearly fit into other categories on the list of actions triggering a section 17(b) notice, as listed below.

(1) Final suspensions/cancellations as a result of the potential to cause unreasonable adverse effects (sections 6(b) and 6(c)).

(2) Denial of a tolerance following a formal finding that the tolerance does not meet the statutory safety standard.

(3) Denial of an application to register a pesticide product following a formal finding that the risks outweigh the benefits.

(4) Voluntary cancellations of a registration where there is evidence of health or environmental concerns (section 6(f)).

(5) Voluntary withdrawals of registration applications, registrations, or tolerance petitions, where there is evidence of health or environmental problems prior to the withdrawal.

(6) Reregistration actions-issuance of a reregistration eligibility decision document (section 4(g)(2)).

(7) Final actions to establish a new tolerance or exemption from a tolerance, to revoke a tolerance or exemption, or to amend a tolerance.

(8) All registrations of a new active ingredient and (if different) the first food use registration of an active ingredient.

(9) All other actions which eliminate all or virtually all significant registrations for an active ingredient including:

(i) Final cancellations for failure of a registrant to meet conditions of registration.

(ii) Voluntary cancellations.

(iii) Cancellations for failure to pay the fee required to reregister or maintain registration.

(iv) Cancellations resulting from other activity under FIFRA section 4.

(12) Any other pesticide regulatory actions which EPA deems to be of international significance. No section 17(b) notices would be prepared on a routine basis for the following actions. However, these actions will still be included in the annual summary of pesticide regulatory actions.

(1) Registrations of new uses of a pesticide.

(2) Registration of new products with uses similar to existing registered uses (known as "me-too" registrations).

(3) Suspensions for failure to submit data under FIFRA section 3(c)(2)(B) that do not result in the elimination of all or virtually all uses of an active ingredient.

(4) Cancellation/suspensions that do not result in elimination of the registration of all or virtually all uses of the active ingredient or are not taken for health and environmental reasons (e.g., voluntary cancellation of a product by a company because of insufficient funds or unwillingness to meet data requirements for reregistration.)

(5) Voluntary withdrawals of petitions for tolerances within 75 days after receipt of a notification from EPA of deficiencies in the data required to support the petition. (See EPA's notice of policy concerning abandoned and incomplete pesticide petitions for tolerances or food and feed additive petitions, 56 FR 43759 (September 4, 1991).)

2. Timing and frequency of section 17(b) notifications.-(a) *1990 Proposal.* EPA proposed that the timing of section 17(b) notices should depend upon the potential effect of the action taken. Notifications of regulatory actions based on health and/or environmental concerns should be transmitted as soon as possible after such actions are taken. The Agency also proposed to send an annual summary of pesticide regulatory actions taken during the year.

(b) *Comments.* Ten commentors supported the option EPA proposed to transmit notices of urgent health and environment concerns immediately and to prepare an annual report summarizing these notices and listing less urgent actions taken during the year. One commentor supported maintaining the current system of sending section 17(b) notices as soon as possible after the action occurs.

(c) *Response.* EPA will prioritize the section 17(b) notices to ensure that those dealing with significant health and/or environmental concerns are transmitted immediately. The Agency will also prepare an annual summary of all pesticide regulatory actions and

transmit it to countries. The annual summary will list pesticide regulatory actions published in the **Federal Register** during the year.

3. *Transmittal of section 17(b) notices.*

(a) *Current practice.* EPA transmits both section 17(a) and section 17(b) notices through the State Department. The section 17(a) notices are sent by the State Department to the appropriate embassy for the country of import. The State Department also sends copies of section 17(b) notices to all embassies for delivery to contacts within each country. FIFRA section 17(b) provides that EPA shall transmit section 17(b) notifications through the State Department.

The current practice of transmittal has proved to be a timeconsuming and somewhat inefficient process. The State Department orders all the cables it transmits in terms of priority. Information about domestic regulatory actions is usually of a lower priority than diplomatic activities. Further, embassies may lack sufficient staff to forward the notices quickly to the appropriate government officials in the receiving countries. The current process often delays receipt by foreign governments of information about U.S. pesticide actions.

(b) *1990 proposal.* The Agency proposed to transmit section 17(b) notices directly to the appropriate officials in other governments, with copies of the notices provided to the State Department to keep them informed about the communication.

(c) *Comments.* All commentors except one supported the direct transmittal of section 17(b) notices. The commentor who opposed EPA's direct transmittal of the notices stated that since the statute requires EPA to go through the State Department in transmitting notices, they could not condone EPA's proposal to act on discretionary authority and not follow the explicit statutory provision.

(d) *Response.* EPA will continue to send section 17(b) notices to the State Department for transmittal to embassies. In addition, EPA will send advance notices of actions covered by section 17(b) requirements directly to the appropriate officials in other governments. EPA will also prepare an annual summary of actions covered by section 17(b). EPA will send the annual summary of actions directly to appropriate officials in other governments and simultaneously to the State Department.

4. *Content and format of the section 17(b) notices.* The section 17(b) notices currently contain a summary of the action taken, an explanation of the health or environmental reasons

prompting the action, and the legislative and regulatory background for the action. The notices state that additional information is available upon request, usually in the form of a technical support document or fact sheet. There is no current standardized format for section 17(b) notices.

a. *1990 proposal.* In the proposed policy statement, EPA proposed expanding the content of the section 17(b) notifications and solicited comment on the kinds of information which should be included in the notices and the appropriate format, particularly for the annual summary that will include listings of all actions taken during a calendar year. EPA stated that it intends to comply with recommendations for formats made by international organizations when revising the EPA notices, and requested comments on this point.

b. *Comment.* The Agency received few comments on this issue. Two commentors stated that the information in section 17(b) notices should be easily understood, not just a copy of the **Federal Register** notice describing the action. In addition, the same commentors agreed with EPA's proposal to follow an internationally agreed upon format, when possible. Three commentors suggested including the name, address, telephone and Facsimile (FAX) number of EPA contacts with the notice.

c. *Response.* EPA agrees with all comments on this issue. EPA believes it would be useful to expand the information contained in section 17(b) notices. For example, in some cases more information about alternative pesticides, handling, storage and disposal could be provided. EPA has decided to expand the information it includes in section 17(b) notifications to the extent it is available, and consistent with the need for prompt notification. EPA is also considering providing Spanish and French translations of section 17(b) notices upon request. (English, Spanish, and French are the official languages FAO/UNEP will use in implementing PIC notification procedures.)

EPA plans to incorporate, to the extent possible, some of the information used in the FAO/UNEP notification of control action form for section 17(b) notifications. EPA will clearly indicate that the notice is pursuant to section 17(b) of FIFRA, so as not to confuse the recipient. The FAO/UNEP form includes the following information: the Chemical Abstract System registry number of each active ingredient, trade names and the chemical nomenclature used by the International Union of Pure

and Applied Chemists (IUPAC), a description of the regulatory action to ban or severely restrict the active ingredient and a reference to the national document ordering such action, a description of reasons for the action relevant to protection of health and the environment, and a discussion of known alternatives.

EPA will also notify the FAO/UNEP Secretariat, using notification of control action forms, of all final actions which meet the internationally-agreed upon definitions of "banned or severely restricted for health or environmental reasons." This will place all relevant information into an international data base and information exchange procedure.

E. *Section 17(d) Activities*

1. *Prior Informed Consent System.* In 1989, FAO and UNEP jointly adopted procedures to augment their existing guidelines for notification and information exchange among countries. The procedures are known as Prior Informed Consent (PIC) for trade in pesticides and industrial chemicals which have been banned or severely restricted (57 FR 58390, December 9, 1992). FAO will manage the program for pesticides, while UNEP will manage the program for industrial chemicals. The information exchange system, of which PIC is a part, also includes procedures for information exchange on regulatory actions which do not fall within the definitions of banned or severely restricted.

The primary objective of the PIC procedure is to establish a system in which participating importing countries will get information concerning chemicals whose use is banned or severely restricted in other countries; decide whether to allow, restrict, or stop the future imports of such chemicals; and notify other countries on a formal basis of their decision concerning importation and use. The fundamental principle of the PIC system is that international shipment of a chemical that is banned or severely restricted in order to protect human health or the environment should not proceed without the agreement or contrary to the decision of the designated national authority in the importing country.

The PIC procedures require that countries banning or severely restricting a pesticide or industrial chemical for health or environmental reasons (including voluntary withdrawals and refusal to grant first registration when these actions are taken for health or environmental reasons) notify the FAO/UNEP joint program.

All participating countries will receive information on the health or environmental reasons why bans or severe restrictions have been placed on the use of chemicals or pesticides. Upon request, they may also receive further information and/or technical assistance that may be helpful as they make a decision regarding continued use in their countries. Participating importing countries then notify FAO/UNEP of their decisions on whether the import of a PIC chemical will be allowed in the future, and if so, under what conditions. The PIC system provides a mechanism for formal dissemination of the decisions of importing countries to exporting countries. Exporting countries are requested to share the responsibility for controlling the export of such chemicals, and to communicate the decisions of participating importing countries to their export industries.

The United States is a strong supporter of the PIC procedures. In the February 12, 1990 proposal, EPA requested comment on how best to facilitate industry compliance with PIC under FIFRA, which as noted above, provides limited authority for EPA to prohibit pesticide exports if section 17 labeling and notification requirements are met. EPA received two comments on this issue. One country, and one private group commented that self-policing or self-auditing techniques would not be adequate to ensure shipments do not occur contrary to the decisions of importing countries. One of the commentors stated that statutory obligations, supported by official inspections and audits are necessary to ensure compliance with PIC.

EPA agrees that FIFRA should be amended to provide EPA with statutory authority to implement PIC fully with respect to United States pesticide exports. Acknowledging that under current FIFRA authority, the Agency has limited authority to prohibit pesticide exports, EPA intends to implement the PIC system as fully as possible, consistent with U.S. law.

On December 9, 1992, EPA published a *Federal Register* notice announcing the Agency's participation in the PIC procedures, and discussing EPA's submission of two lists of chemicals which are either banned or severely restricted in the United States. The notice also discusses EPA's plan to hold a public forum to discuss U.S. involvement—that of government, industry, and the public—in the PIC process, as well as the Agency's international notification programs under FIFRA and TSCA. (57 FR 58390.)

2. Consistency between section 17(b) notifications and PIC implementation.

Generally, EPA's section 17(b) notification program covers a much broader range of regulatory actions than the notices which countries will be required to submit under the PIC procedures. The PIC system focuses on two categories of regulatory actions: pesticides and industrial chemicals which are "banned" or "severely restricted."

The *FAO International Code of Conduct on the Distribution and Use of Pesticides* defines "banned" as "a pesticide for which all registered uses have been prohibited by final governmental regulatory action, or for which all requests for registration or equivalent action for all uses have, for health or environmental reasons, not been granted."

The *Code of Conduct* defines "severely restricted" as "a limited ban—a pesticide for which virtually all registered uses have been prohibited by final governmental regulatory action but certain specified registered uses remain authorized."

Countries are not to report on proposed actions. Only pesticides and industrial chemicals which have been banned or severely restricted by a final government action, or due to voluntary cancellation by industry, may be listed. (However, voluntary cancellations should only be reported to FAO/UNEP where there is clear evidence that the pesticide is withdrawn for health and/or environmental reasons.)

EPA plans to review draft section 17(b) notices as they arise to see whether the actions described in the notices would also trigger notification under the PIC system. EPA has considered whether notification through the PIC procedures can or should substitute for direct notification to foreign governments of section 17(b) notices. EPA believes that allowing this substitution in those cases where the regulatory action described in the section 17(b) notice would also trigger a PIC notice will reduce the burden and cost to EPA and avoid possible confusion to those receiving and managing duplicative information. Therefore, the Agency intends to use PIC procedures to transmit notices to countries participating in PIC who have established a designated national authority on the FAO/UNEP list, rather than send duplicative section 17(b) notices.

For countries which do not have a designated national authority, EPA will obtain information on the appropriate person to contact and transmit section 17(b) notices as described in this final policy statement.

3. *Supporting environmental protection in other countries.* EPA's efforts to assist in the protection of public health and the environment in other nations follow two tracks. First, EPA provides information through the notification programs mandated by FIFRA section 17. Secondly, EPA supports the development of decision-making capabilities and regulatory infrastructures in pesticide importing countries.

There are many ongoing projects designed to assist the development of effective pesticide regulatory systems and to promote safer pesticide use in developing countries.

One example is EPA's work with the U.S. Agency for International Development (AID) to develop a comprehensive pilot program to improve pest and pesticide management in Central America. The overall goals of the project are to enhance public health, environmental protection and food safety in both the United States and Central American countries. The project will be coordinated with ongoing activities under the auspices of FAO to establish an international system of information exchange and "prior informed consent" with respect to international trade in pesticides and other efforts to strengthen the regulatory capabilities of developing countries.

Collaboration between EPA and AID will focus on the following three areas:

(a) *Strengthening Regulatory Institutions* by providing training, technical assistance, and information to the Central American national and regional entities involved in the regulation of pesticide importation, distribution, use and disposal.

(b) *Support for AID Food Export Programs* by providing information that will assist Central American countries in meeting U.S. pesticide tolerance requirements.

(c) *Pesticide management and safety training*, including the development of training and technical assistance programs designed to promote and encourage the adoption of appropriate pest management practices.

In connection with the development of the pilot project, EPA organized and conducted a workshop with AID in San Jose, Costa Rica in November 1990. The workshop focused on the U.S. pesticide regulatory system, with the aim of familiarizing Central American countries with regulatory requirements and procedures, particularly as they apply to foods intended for export to the United States. The Agency for International Development, the U.S. Food and Drug Administration, and the

U.S. Department of Agriculture all participated.

Another component of the Central American project is the development of joint FDA-EPA laboratory assessment and enhancement activities, which will include a survey of current laboratory capabilities in the region, technical assistance and training in analytical methods and quality control, access to pesticide reference standards, and other forms of technical cooperation.

During 1991, EPA officials participated in interagency meetings with Mexican governmental officials in Mexico City and in Washington, DC to exchange information on regulatory procedures as well as specific chemicals of concern, to discuss plans for upgrading pesticide regulation and enforcement, and to explore proposals for reducing violative residues on food imported into the United States.

In 1990, EPA, at the request of AID and USDA, participated in a AID-organized disposal workshop for West African countries in Niamey, Niger. The focus of the workshop was mitigation of environmental problems resulting from storage and disposal of pesticides. In 1990, EPA provided technical assistance in storage and disposal to Guinea Bissau.

Other examples of EPA's recent international pesticide activities include: co-sponsoring regional workshops with the United Nations' FAO, on strengthening pesticide regulation in Asia and the Pacific Islands, Latin America and the Caribbean; participation in an international meeting in Beijing, China, on international harmonization of pesticide tolerance levels; and numerous other international technical meetings. EPA continues to host numerous international visitors to provide training in a variety of areas, including regulatory development, data evaluation, decision methods and procedures for pesticide regulation; and to provide expert staff participation in international workshops and technical assistance activities.

EPA has also developed projects jointly with the U.S. Peace Corps. Through a Memorandum of Understanding (MOU) signed with the U.S. Peace Corps in September of 1989, EPA has provided technical assistance through the provision of EPA expert trainers and training materials and participation in training needs assessments. EPA participated in an assessment of pesticide use and regulation in Ecuador and Paraguay, particularly with respect to the Peace Corps volunteer sites and positions. In 1990, EPA conducted training on

pesticide safety for 28 Peace Corps volunteers in Ecuador, and provided bilingual training materials on pesticide application and safety, for this and future training.

4. *Harmonizing U.S. and international standards.* EPA recognizes that protecting the global environment and the public health of all peoples must be a truly cooperative international effort. Through participation in the activities of international organizations, EPA promotes the development of consistent methods and standards to meet these common objectives. Encouraging the development of pesticide standards which promote effective environmental and public health protection worldwide also serve to minimize unnecessary disruption of international trade. While EPA recognizes that environmental regulation which is not based on sound science and risk management policy should not be used to enact unfair trade barriers, EPA will not relax science-based standards which protect public health or the environment in order to harmonize them with standards established elsewhere.

EPA participates in activities aimed at promoting harmonization of science-based pesticide regulatory requirements and resolving problems that may result from differing standards that may raise allegations of unjustified restrictions on international trade. Examples of these activities are: the provision of information on proposed regulatory actions (e.g., cancellations, suspensions, tolerances or tolerance revocations); EPA's participation in the General Agreement on Trade and Tariffs (GATT) Uruguay Round negotiations on sanitary and phytosanitary measures; discussions in connection with the negotiation of a North American Free Trade Agreement; the Rome Conference on Food Standards, Chemicals in Food and Trade, (an international meeting jointly sponsored by FAO and the World Health Organization (WHO) in March 1991); and in numerous FAO expert meetings and Government Consultations. In addition, EPA actively supports the Joint Meeting on Pesticide Residues (JMPR) and the Codex Committee on Pesticide Residues (CCPR), providing resources and temporary expert advisors to assist in scientific deliberations. EPA also participates in periodic meetings with its counterparts in Canada, the United Kingdom, and the European Community to discuss pesticide regulation and food safety issues.

IV. Technical Amendment

A. *Revising Section 169.2(h)(3) to Conform With the Requirements of this Policy*

Section 169.2(h) contains recordkeeping requirements for exporters of pesticides, devices, and active ingredients used in producing pesticides intended solely for export to any foreign country. The second sentence of paragraph 3 of section 169.2(h) discusses the requirement to obtain a foreign purchaser acknowledgement statement pursuant. EPA is deleting this sentence in order to make section 169.2(h) consistent with this policy.

V. Public Record

EPA has established a public record for this final policy statement under docket number OPP-170003. Included in the record are two proposed policies (dockets number OPP-170000 and 170001), as well as copies of public comments received on the proposed policy statements. The record is available for inspection in Room 1128, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, Virginia.

VI. Other Regulatory Requirements

A. *Executive Order 12991*

Under Executive Order 12991, EPA must judge whether an action is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. EPA has determined that this policy does not constitute a major action because it does not meet any of the criteria set forth and defined in section 1(b) of the Order. Costs were estimated based on existing program experience, including the number of annual submissions presently made to EPA that would be affected by changes.

This policy was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12991. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection in the public file at the Public Docket location listed under the Public Record section cited above.

B. *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, (5 U.S.C. 605(b)), EPA has determined that this policy will not have a significant economic impact on a substantial number of small businesses. The recordkeeping required would easily be satisfied by the normal invoices that are a necessary part of all overseas transactions. The purchaser acknowledgement statements required

to be signed could be included with sales contracts signed by the foreign purchaser. The cost of reporting to the Agency as shown in the information collection burden statement is minimal. A requirement that the purchaser acknowledgement statement be multilingual was not included in the final policy for a number of reasons, including comments that the cost to small businesses could be prohibitive.

C. Paperwork Reduction Act

This policy amends provisions of the foreign purchaser acknowledgement statement requirement of the export policy for unregistered pesticides, which is currently cleared by the Office of Management and Budget (OMB) under control number 2070-0027. The information collection requirements imposed by this policy statement have been submitted to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. A copy of the information collection request (ICR) document may be obtained from the Information Policy Branch of the Office of Policy, Planning and Evaluation (OPPE) of EPA at the address given below.

Annual respondent burden for this collection of information is estimated to average .92 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. An estimated 976 responses annually are anticipated, for a total annual burden of 895 hours. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

List of Subjects 40 CFR Parts 168 and 169

Advertising, Exports, Labeling, Pesticides and pests, Policy statements, Reporting and recordkeeping requirements.

Dated: January 19, 1993.

William K. Reilly,
Administrator.

Therefore, 40 CFR chapter I, parts 168 and 169 are amended as follows:

PART 168—[AMENDED]

In part 168;

a. The authority citation for part 168 continues to read as follows:

Authority: 7 U.S.C. 136–136y.

Subpart C [Reserved]

b. Subpart C is added and reserved.

3. Subpart D is added to read as follows.

Subpart D — Export Policy and Procedures for Exporting Unregistered Pesticides

Sec.

168.65 Pesticide export label and labeling requirements.

168.75 Procedures for exporting unregistered pesticides— purchaser acknowledgement statement requirement.

168.85 Other export requirements.

§ 168.65 Pesticide export label and labeling requirements.

(a) *General.* This section describes how EPA interprets and will enforce the requirements of FIFRA section 17(a)(1). Every exported pesticide, device, and active ingredient used in producing a pesticide (see § 152.3 of this chapter for the definition of "active ingredient" and "pesticide") must bear a label or labeling which meets the requirements of FIFRA section 17(a)(1). This requirement applies to all such pesticides, devices, or active ingredients, regardless of whether the export is for commercial or research use. In the case of unregistered pesticides, including research substances which are being exported for testing, the labeling requirements of this section continue to apply independently of whether the exporter must submit a purchaser acknowledgement statement under FIFRA section 17(a)(2) as described at § 168.75 of this chapter. In addition, information which will satisfy FIFRA section 2(q)(1)(E), (G), and (H) and section 2(q)(2)(A) and (D) must appear in English and in the appropriate foreign languages, on the label or labeling as described in paragraph (b)(4) of this section. The required label and labeling statements may be met through either immediate container labels, accompanying supplemental labeling as described in paragraph (c) of this section, or a combination of the two.

(b) *Specific requirements.* The labels and labeling of any exported pesticides, devices, and active ingredients used in producing pesticides must meet the requirements regarding label and labeling content, correct representation, and understandability as stated in this paragraph.

(1) *Label contents.* The term "label" means the written, printed, or graphic matter on or attached to the immediate container of the pesticide, device, or active ingredient used in producing a pesticide. In the case that the immediate container is enclosed in an outer container or wrapper through which the label cannot be read, the label must also be on such outer container or wrapper. Except as provided in paragraph (c) of this section, the immediate container of the pesticide, device, or active ingredient used in producing a pesticide must bear a conspicuous and readable label which includes:

(i) *EPA pesticide producing establishment number.* The producing establishment registration number must be present but may appear anywhere on the label or immediate container in accordance with the establishment registration labeling requirements set forth in § 156.10(f) of this chapter.

(ii) *Warning or caution statements.* Warning or caution statements must appear on the label and must be adequate for the protection of persons handling the pesticide, device, or active ingredients including warnings regarding general toxicological hazards and environmental, physical, or chemical hazards. Warning and caution statements must appear in English and in the appropriate foreign languages, as described in paragraph (b)(4) of this section. Where the U.S. warning or caution statement, as translated, is obviously inappropriate to protect residents of the importing country, (for example, where a statement calls for a gas mask meeting the specification of the U.S. Bureau of Mines) an equivalent caution must be substituted.

(iii) *The statement "Not Registered for Use in the United States of America."* The labels of all pesticides, devices, and active ingredients which are not registered for use in the United States under FIFRA section 3 must prominently display the following statement: "Not Registered for Use in the United States of America." The statement must appear in English and in appropriate foreign languages, as described in paragraph (b)(4) of this section. It is permissible to append explanatory text which qualifies the statement by pointing out the reasons for the unregistered status. Examples of possible additional statements are "Not Registered for Use on...", "No Longer Registered for Use...", or "Not Registered...because..." Such additions must not be misleading or misrepresent the registration status of the pesticide. The statement "Not Registered For Use in the United States of America" must also be present.

(A) A pesticide is considered registered for the purposes of the section 17(a)(1) requirement only when:

(1) A label and labeling approved under a current FIFRA section 3 registration for the product is either attached to the immediate product container or accompanies the product at all times as supplemental labeling as provided in paragraph (c) of this section.

(2) The formula of the exported product is the same as the formula of the U.S. registered product (within certified limits). In addition, a change in the color or fragrance of the export product will not affect the product's registration status, as long as the following conditions are met:

(i) The change in color must result only from the addition of a dye included on the list of the chemicals exempted from the requirement of a tolerance at § 180.1001, and the dye must not be a List 1 inert. (List 1 inerts are those inerts which the Agency has identified as presenting toxicological concerns. The classification of inerts is explained in EPA's Policy Statement on Inert Ingredients in Pesticide Products, which can be obtained from the Office of Pesticide Programs public docket, Room 1128, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, Virginia 22202.)

(ii) The change in fragrance must result only from the addition of a chemical included on the list of chemicals exempted from the requirement of a tolerance (§ 180.1001) and the chemical must not be a List 1 inert.

(iii) The change in fragrance must not result in a pesticide product containing a food or food-like fragrance. (See "Food Fragrances in Pesticide Formulations," EPA's Office of Pesticide Programs Policy and Criteria Notice number 2155.1, November 20, 1975 which can be obtained from the Office of Pesticide Programs public docket, Room 1128, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, Virginia 22202.)

(iv) Any differences in color or fragrance of the export product in accordance with this section must be reflected in records which show the complete formula of the export product in accordance with the requirements of § 169.2 and this policy.

(3) No statements which appear on any of the product labels or labeling add new uses or claims or in any way contradict the approved FIFRA section 3 labeling. However, certain minor changes may be made to a product's labeling or packaging without affecting the registration status of the product, as specified in § 152.46(b) of this chapter.

(iv) *The ingredient statement.* The ingredient statement must appear on the label in English and in appropriate foreign languages (as described in paragraph (b)(4) of this section). If the English language description of the ingredients is easily identifiable and likely to be understood by the ordinary individual, the foreign language ingredient statement need not be included on the label. In the case of pesticide products, devices and active ingredients shipped solely for research and development purposes, it is permissible to use coded identification of ingredients on the label in order to protect confidentiality, in accordance with the requirements of §§ 168.75(c) and 168.85(a).

(v) *Identity of parties.* The name and address of the producer, registrant (if any), or the person for whom the pesticide was produced, must appear on the label.

(vi) *Weight or measure.* The net weight must appear on the label in either English or metric units.

(vii) *Additional warning for highly toxic pesticides.* If the pesticide, device or active ingredient is highly toxic to humans, the skull and crossbones, the word "Poison", and a statement of practical treatment must appear on the label. The word "Poison" and the statement of practical treatment shall be in English and in the appropriate foreign languages, as described in paragraph (b)(4) of this section. The skull and crossbones may be in red or black. For criteria on what pesticides are highly toxic, see § 156.10(h) of this chapter.

(2) *Use classification statement.* In addition to the label contents described in paragraph (b)(1) of this section, the labeling must include a use classification statement, if a use classification has been assigned under a FIFRA section 3 registration. The use classification shall accurately describe the use classification applicable to the U.S. registered use of the pesticide, device or active ingredient (e.g., "Restricted Use Pesticide"). Summary statements describing the use classification, e.g., "For retail sale to and use only by Certified Applicators...", or explaining what such terms mean are not required, but may be included if such statements do not result in false representation of the U.S. regulatory status of the pesticide. The use classification information may appear on the product label or on the labeling accompanying the pesticide product during shipment.

(3) *Misrepresentation.* The labeling shall not make false or misleading

representations or represent the product as an imitation of other products.

(4) *Understandability.* The required statements must be expressed in such terms as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase and use. To satisfy this section, certain information described in paragraph (b)(4)(i) of this section, which appears on the labeling of all exported pesticide products, devices and active ingredients must appear in English, in an acceptable language of the country of import as defined in paragraph (b)(4)(ii) of this section, and in an acceptable language of the country of final destination, if known or reasonably ascertainable by the exporter. When there are several official languages or dialects in a country, the language which is predominately spoken or written, or a language in which official government business is conducted, will be acceptable.

(i) *Information required to be multilingual.* The following labeling information must be multilingual:

(A) The warning and caution statements.

(B) Where required, the statement "Not Registered for Use in the United States of America."

(C) The ingredient statement.

(D) Where required in accordance with paragraph (b)(1)(vii) of this section, the word "Poison" and the statement of practical treatment in case of poisoning.

(ii) *Acceptable languages.* In all cases, English must be one of the languages used on the label or labeling. In addition, either the language which is used to conduct official government business, or the predominantly spoken or written language of the country of import must appear on the labeling. In each case where a country of final destination is known, the language which is used to conduct official government business or which is predominantly spoken in that country, if different from the language of the country of import, shall also appear on the labeling. In any case where English is predominantly spoken or written or is the language used to conduct official government business in a country, no other language need be included to meet the multiple language requirement of this paragraph.

(c) *Supplemental labeling.* A pesticide, device or active ingredient intended for export will not be considered in violation of the labeling requirements of FIFRA when the label and/or labeling requirements stated in paragraph (b) of this section are met by supplemental labeling. Supplemental labeling must be attached to the

immediate product container or the shipping container of the pesticide, device or active ingredient at all times when it is shipped or held for shipment to meet export label requirements. Supplemental labeling must meet all of the label requirements in paragraph (b) of this section which are not met by the immediate product labels.

Supplemental labeling will satisfy the labeling requirements of FIFRA only if the following conditions are met:

(1) *Applicability.* The use of supplemental labeling applies to any situation where the labeling requirements specified in this section are not met fully on the product label which is attached to the immediate product container. Any required label or labeling statement not met on the immediate container may be met through supplemental labeling.

(2) *Labeling contents and relation to shipment.* If supplemental labeling is used to meet any of the labeling requirements of FIFRA section 17(a)(1), it must meet all of the requirements in paragraph (b) of this section which are not met by the label on the immediate product container. Thus, the supplemental labeling, together with the immediate product container label will meet all of the requirements of paragraph (b) of this section. Where used, supplemental labeling must be attached to or accompany the product shipping container of the pesticide, device, or active ingredient used in producing a pesticide at all times when shipped or held for shipment in the United States.

§ 168.75 Procedures for exporting unregistered pesticides-purchaser acknowledgement statements.

This section describes how EPA interprets and will enforce requirements of FIFRA section 17(a)(2). Section 17(a)(2) provides that any person exporting a pesticide other than a pesticide registered for use under FIFRA section 3 or sold under FIFRA section 6(a)(1), shall obtain a statement signed by the foreign purchaser prior to export, acknowledging that the purchaser understands that such pesticide is not registered for use in the United States and cannot be sold in the United States. Section 17(a)(2) requires that a copy of the statement be transmitted to an appropriate official of the government of the importing country.

(a) *Products subject to the requirement.* EPA will not consider an exporter of an unregistered pesticide to be in violation of FIFRA section 17(a)(2) if, prior to export of the pesticide, the exporter submits to EPA a statement signed by the foreign purchaser which

affirms that the purchaser is aware that the pesticide is not registered for use in the United States and cannot be sold for use in the United States. The exporter must also include with the submission of the purchaser acknowledgement statement to EPA, a certification signed by the exporter affirming that the export did not occur until the statement signed by the foreign purchaser was obtained by the exporter. Except as provided in paragraph (b) of this section, all pesticide products produced for export which cannot be sold for use in the United States in the form that they are produced for export, are considered to be unregistered pesticides. This includes pesticides which are of a different formulation, including composition (except for variation within certified limits), or type of formulation, and pesticides which are packaged for use patterns for which they are not registered, which may be evidenced by package type or label use statements. This also includes unregistered products which are under development as pesticidal products and which are being exported for research testing.

(b) *Exceptions.* Under the specific circumstances discussed below, EPA will not treat a registered product which has been modified slightly for export purposes, as unregistered for the purposes of the purchaser acknowledgement statement requirement. Any changes to the registered product for export purposes must be documented in accordance with the record-keeping requirements at § 169.2 of this chapter and this policy.

(1) *Labeling on Immediate Product.* EPA will not treat as unregistered for the purposes of section 17(a)(2), a registered pesticide product which cannot be sold or distributed for use in the United States because its immediate product container does not bear a label approved under a FIFRA section 3 registration, but which could be sold or distributed in the United States with the approved label attached to the immediate product container, provided that the label and labeling approved under a current FIFRA section 3 registration for the product is either attached to the immediate product container or accompanies the product at all times as supplemental labeling as provided in paragraph (c) of this section.

(2) *Packaging.* (i) Certain changes may be made to a product's labeling or packaging without affecting the registration status of the product, as specified in § 152.46(b) of this chapter and this policy. These changes include any changes in package size and label net contents, provided no change in use

directions or requirement for child-resistant packaging would be necessary for the product to be registered for use in the United States. For example, if child-resistant packaging is required for a particular pesticide product in the United States, and the product will be exported without child-resistant packaging, the product would be considered unregistered and therefore subject to all the requirements of FIFRA section 17(a), as described in § 168.75 of this chapter including the requirement for a purchaser acknowledgement statement.

(ii) If an exporter needed to repackage a product in a size to meet a foreign purchaser's specifications, that modification would not affect the registration status of the export product. Other modifications to the label used for export purposes which will not affect the export product's registration status are: the use of metric units for net contents, dosages, and other numeric expressions; the use of a different format for the label, provided that the information does not contradict the U.S. label; revision of non-mandatory U.S. label statements, consistent with 40 CFR part 156, including additions or changes required by other Federal statutes or regulations; a change of the name or address of the registrant, except for a change resulting from transfer of ownership, which requires that a registrant keep his name and address current with the Agency; and any correction of typographical or printing errors that appeared on the U.S. labeling. (See § 152.46(b)).

(3) *Labeling statements.* The following statements which appear on any of the product labels or labeling will not affect the status of the product, provided that they do not contradict the approved FIFRA section 3 labeling:

(i) It is permissible to add explanatory language which accurately explains the meaning of a use classification. For example, the statement "restricted use pesticide" may be expanded to read: "Restricted in the United States of America to use by certified applicators" or "Restricted Use Pesticide. In The United States this product is restricted to use by applicators determined by each state to be competent in pesticide application and the human health and environmental consequences of misuse." If the explanatory language falsely represents or is misleading regarding the U.S. use classification, the product will be considered misbranded. In addition, a use classification can only be listed if one has been assigned pursuant to the U.S. registration.

(ii) An exporter who is also the manufacturer of a U.S. registered

pesticide may add new uses to the label of that product for export purposes, without triggering the requirements of section 17(a)(2), as long as the new uses are within the same general use patterns as those for the registered product. (Pesticide use patterns are listed in Appendix A to 40 CFR part 158-Data Requirements for Registration: Use Pattern Index. The general pesticide use patterns are: terrestrial food crop and terrestrial nonfood crop; greenhouse food crop and greenhouse nonfood crop; aquatic food crop and aquatic nonfood crop; indoor use; and forestry use.) Adding new uses to the label which change the use pattern, such as changes from non-food to food use, outdoor to indoor use, or terrestrial to aquatic use, render the product unregistered and subject to the requirements of section 17 for unregistered products. If the new use added to the label is a food or feed use, a tolerance must already be established for the use of that pesticide in or on that commodity.

(4) *Composition.* EPA will not treat a registered product as unregistered for the purposes of the purchaser acknowledgement statement requirement under the following specific circumstances:

(i) The formula of the exported product is within certified limits of the formula of the U.S. registered product.

(ii) An exporter, who is also the manufacturer of a U.S. registered pesticide, may decrease the percentage of the active ingredient(s) of that product by adding a List 4 inert ingredient, without causing the product to be treated as "unregistered" and triggering the requirement to obtain a purchaser acknowledgement statement as a condition for export. In EPA's Policy Statement on Inert Ingredients in Pesticide Products, EPA included inert ingredients on List 4-a list of inert ingredients posing minimal hazard or risk-if the inert ingredients were generally regarded as innocuous. The provisions of this paragraph do not apply to those pesticide products intended for public health uses which are required or conditionally required to submit efficacy data pursuant to § 158.640 of this chapter. Any differences in formula or composition caused by adding a List 4 inert must be reflected in records which show the complete formula of the export product in accordance with the requirements of § 169.2 and this policy.

(iii) A change in the color or fragrance of the export product will not affect the product's registration status as long as the following conditions are met. The change in color must result only from the addition of a dye included on the

list of the chemicals exempted from the requirement of a tolerance at § 180.1001, and the dye must not be a List 1 inert. (List 1 inerts are those inerts which the Agency has identified as presenting toxicological concerns. The classification of inerts is explained in EPA's Policy Statement on Inert Ingredients in Pesticide Products. The change in fragrance must result only from the addition of a chemical included on the list of chemicals exempted from the requirement of a tolerance (§ 180.1001) and the chemical must not be a List 1 inert. The change in fragrance must not result in a pesticide product containing a food or food-like fragrance. (See "Food Fragrances in Pesticide Formulations," EPA's Office of Pesticide Programs Policy and Criteria Notice number 2155.1, November 20, 1975.) Any difference in color or fragrance of the export product in accordance with this section must be reflected in records which show the complete formula of the export product in accordance with the requirements of § 169.2 and this policy.

(5) *Research and development products.* An unregistered pesticide product exported only for research and development purposes is subject to the notification requirements of this section, unless its use fits within the criteria described in this paragraph.

(i) An unregistered pesticide product exported solely for research and development purposes will not be considered to be in violation of the notification requirements if the export of the research and development product:

(A) Would not involve land uses of more than 10 acres (4.05 hectares), or be used on or affect food or feed crops which are intended for consumption.

(B) Would not involve aquatic uses of more than 1 acre (0.405 hectares), or any aquatic uses which involve water used for irrigation, drinking or recreation, or be used on or affect plants or animals taken for food or feed from such waters.

(C) Would not involve tests on animals intended for food or feed.

(ii) Shipments to different purchasers, to different countries of final destination, or which occur more than a calendar year apart will be evaluated separately. When determining whether total shipments exceed the criteria described in this paragraph, EPA will evaluate the total amount of shipments by a single exporter during a calendar year for use in a particular country.

(iii) An exporter bears the burden of demonstrating that the product meets these criteria before the research product is shipped. This may be met by documenting before the product is

shipped and maintaining records for the time period required by § 169.2(h) of this chapter from the date of the last shipment relevant to such records. The records to be maintained consist of:

(A) The identity of the purchaser and country of intended use of the research product.

(B) The amount shipped.

(C) The intended research use by the purchaser, including the type of application site, rate of application, and measures taken for protection of humans from direct or dietary exposure.

(c) *Procedures.* An exporter of an unregistered pesticide product must submit a purchaser acknowledgement statement to EPA containing the information stated in paragraph (c)(1) of this section, and a statement signed by the exporter certifying that the exportation did not occur until the signed acknowledgement statement had been obtained from the purchaser. If the foreign purchaser signs a purchaser acknowledgement statement in their own language, it must be accompanied by an English translation when it is submitted to EPA by the exporter. These statements shall be submitted in accordance with one of the two options for submission described in paragraph (c)(2) of this section.

(1) *Contents of the purchaser acknowledgement statements.* The purchaser acknowledgement statement must include the following information in a format that is clearly understandable:

(i) Name, address, and EPA identification number, if applicable, of the exporter.

(ii) Name and address of the foreign purchaser.

(iii) Identity of the product and the active ingredient(s), including:

(A) The Chemical Abstract Services (CAS) Registry number for each active ingredient.

(B) The chemical nomenclature for each active ingredient as used by the International Union of Pure and Applied Chemists (IUPAC).

(C) Other known chemical or common names; or if the export involves a research product, a code name or identification number that can be used by EPA to identify the product from the exporter's records. If a code name or identification number is used, additional information must be attached to the certification statement submitted with the purchaser acknowledgement statement which will enable EPA to identify the product. This attached information may be claimed as confidential, and EPA will not forward this information with the purchaser

acknowledgement statement to foreign governments.

(iv) If known or reasonably ascertainable, the country or countries of final destination of the export shipment, i.e., where the exported pesticide is intended to be used, if different from the country of the foreign purchaser's address.

(v) A statement that indicates that the foreign purchaser understands that the product is not registered for use in the United States and cannot be sold in the United States.

(vi) The signature of the foreign purchaser.

(vii) The date of the foreign purchaser's signature.

(2) *Reporting options.* At the discretion of the exporter, the requirements of paragraph (c)(1) of this section may be met on a per-shipment or annual basis, as stated in paragraphs (c)(2)(i) and (c)(2)(ii) of this section. If the procedures in paragraph (c)(2)(ii) of this section are not followed, EPA will consider paragraph (c)(2)(i) of this section, requiring pershipment purchaser acknowledgement statements, to be applicable in full. Where paragraph (c)(2)(i) of this section is applicable, each shipment which does not meet the requirements of that paragraph will be considered to be a separate violation of FIFRA.

(i) *Per-shipment purchaser acknowledgment statement.* Unless the exporter chooses to follow the procedures described in paragraph (c)(2)(ii) of this section for the annual reporting procedures, the exporter must obtain and submit to EPA, a signed purchaser acknowledgement statement prior to each shipment of an unregistered pesticide according to the following procedures:

(A) Prior to each shipment in a calendar year of an unregistered pesticide product to a particular purchaser in a foreign country, the exporter must provide the foreign purchaser with instructions about the required information on a purchaser acknowledgement statement, and inform the foreign purchaser that the pesticide product cannot be exported from the United States until the exporter has received from the foreign purchaser a properly completed, signed, and dated acknowledgement statement.

(B) The exporter must obtain, prior to each shipment in a calendar year of an unregistered pesticide product to a particular purchaser in a foreign country, a signed purchaser acknowledgement statement which contains the information set forth in paragraph (c)(1) of this section.

(C) The exporter must sign a statement certifying that export did not take place until a signed purchaser acknowledgement statement was received. The exporter must also specify the chemical identity of any research product which is referred to by code in the purchaser acknowledgement statement. The information regarding the specific identity of research products, which may be included in the statement or consist of an attachment to the certification, may be claimed as confidential.

(D) The exporter must submit the signed acknowledgement statement from the foreign purchaser, and the accompanying certification by the exporter including attachments, to EPA within 7 working days of the exporter's receipt of the purchaser acknowledgement statement, or by the date of export, whichever occurs first. This information must be transmitted to the following address:
U.S. Environmental Protection Agency,
Office of Pesticide Programs, (H-7501C), 401
M Street, SW, Washington, DC 20460,
Attention: Purchaser Acknowledgement
Statement.

(ii) *Annual reporting procedures.* Unless the exporter chooses to follow the per-shipment reporting option described in paragraph (c)(2)(i) of this section, the exporter must follow the procedures for annual summary reporting which include the requirement of a purchaser acknowledgement statement for the first shipment each calendar year of an unregistered pesticide product to a particular purchaser, and an annual summary of shipments to that purchaser. The annual summary reporting procedures are as follows:

(A) Prior to the first shipment each calendar year of an unregistered pesticide product to a particular purchaser in a foreign country, the exporter must provide the foreign purchaser with instructions about the required information on a purchaser acknowledgement statement, and inform the foreign purchaser that the pesticide product cannot be exported from the United States until the exporter has received from the foreign purchaser a properly completed, signed, and dated purchaser acknowledgement statement.

(B) The exporter must obtain, prior to the first shipment each calendar year of an unregistered pesticide product to a particular purchaser in a foreign country, a signed purchaser acknowledgement statement which contains the information set forth in paragraph (c)(1) of this section.

(C) The exporter must sign a statement certifying that export did not

take place until a signed purchaser acknowledgement statement was received, indicating that this statement is for the first shipment to a particular purchaser in a specific country for that calendar year, and that the exporter will meet all the purchaser acknowledgement statement requirements as described in this paragraph (c)(2)(ii) of this section. The exporter must also specify the chemical identity of any research product which is referred to by code in the purchaser acknowledgement statement. The information regarding the specific identity of research products, which may be included in the statement or consist of an attachment to the certification, may be claimed as confidential.

(D) The exporter must submit the signed acknowledgement statement from the foreign purchaser, and the accompanying certification by the exporter including attachments, to EPA within 7 working days of the exporter's receipt of the purchaser acknowledgement statement, or by the date of export, whichever occurs first. This information must be transmitted to the following address:
U.S. Environmental Protection Agency,
Office of Pesticide Programs, (H-7501C), 401
M Street, SW, Washington, DC 20460,
Attention: Purchaser Acknowledgement
Statement.

(E) The exporter, who has chosen to comply with the requirements of this paragraph instead of providing per-shipment purchaser acknowledgement statements in accordance with paragraph (c)(2)(i) of this section, must submit an annual summary report to EPA. An annual summary report is required for each unregistered pesticide exported within the preceding calendar year. The report must be in writing, signed by the exporter, and include the following information:

(1) Name, address, and EPA identification number if applicable, of the exporter.

(2) Name and address of the foreign purchaser, and the date the purchaser acknowledgement statement, submitted to EPA during the previous calendar year, was signed by the purchaser.

(3) The identity of the product and the active ingredients, including: the Chemical Abstract Services (CAS) registry number for each active ingredient, the chemical nomenclature for each active ingredient used by the International Union of Pure and Applied Chemists (IUPAC), and other known chemical or common names, or if the export involves a research product, the code name or identification number that can be used by EPA to

identify the product from the exporter's records.

(4) The dates of each shipment of the pesticide exported to the foreign purchaser during that calendar year.

(5) If known, or reasonably ascertainable, the country or countries of final destination of the export shipments, i.e., where the exported pesticide was intended to be used, if different from the foreign purchaser's address.

(F) The exporter shall submit the annual summary no later than March 1st of the following calendar year. The annual summary shall be sent to the following address:

U. S. Environmental Protection Agency,
Office of Pesticide Programs, H-7501C, 401
M Street, SW., Washington, DC 20460,
Attention: Annual Summary of Exports.

(iii) *Confidentiality claims.* Persons submitting the information specified in the purchaser acknowledgement statement may assert a claim of business confidentiality by marking the information claimed confidential as "FIFRA Confidential Business Information." Information so claimed will not be disclosed, with the exception of disclosure to the foreign governments, except in accordance with the procedures set forth in 40 CFR part 2, 7 U.S.C. 136(h), and this policy statement. If such claim is not asserted, EPA may disclose the information to the public without providing further notice prior to disclosure or an opportunity to object. Notwithstanding any claim of confidentiality, the purchaser acknowledgement statement will continue to be forwarded to the appropriate foreign government officials in its entirety, as required by section 17(a)(2).

(3) *Recordkeeping.* Except as specifically stated, the requirement to retain records under part 169 of this chapter applies to all pesticide producers, regardless of whether a particular product is intended for export. All records shall be maintained in accordance with the time period required by § 169.2(h) of this chapter. Producers must also maintain certain records pertaining to pesticide products intended for export. In addition to the requirement that a copy of the purchaser

acknowledgement statement be kept, as stated at § 169.2(h)(3) of this chapter, the following records must be maintained:

(i) Copies of the instructions provided to foreign purchasers in accordance with paragraphs (c)(2)(i)(A) and (c)(2)(ii)(A) of this section.

(ii) Copies of signed purchaser acknowledgement statements obtained according to paragraphs (c)(2)(i)(B) and (c)(2)(ii)(B) of this section.

(iii) Copies of the certification from the exporter; and copies of any accompanying information regarding the identity of coded R&D products.

(d) *Agency transmission of purchaser acknowledgement statements.* EPA will transmit a copy of each purchaser acknowledgement statement to the appropriate government official in each of the intended destination countries. After receipt of the Annual Summary the following calendar year, EPA will also transmit a copy of that document to the appropriate government official in each of the intended destination countries. In the case that no Annual Summary has been received within 30 days of the date at which such summary is required to be submitted, EPA will send written notification to the appropriate government official indicating that no summary was submitted, and may also take enforcement action against the exporter.

§ 168.85 Other export requirements.

This section describes other requirements found in regulations that apply to exporters of pesticides, devices, and active ingredients used in producing a pesticide.

(a) *Recordkeeping and inspection.* Exporters of pesticides, devices and active ingredients must keep records and permit inspections of those records in accordance with part 169 of this chapter. Exporters must keep records of the product labeling used, including the EPA registered labeling, any foreign labeling on or attached to the product when shipped, and, as applicable, any supplemental labeling used. Producers of pesticides for export shall maintain these records in a manner that shows exactly which labels and labeling accompanied each shipment of a

pesticide product to a foreign country. As stated at § 168.75(c), when research product identity information appears on the labeling in an encoded manner, information translating the code shall be maintained in records. These records shall be maintained for the time period required by § 169.2(h) of this chapter following the last export of such pesticides. All records required by part 169 of this chapter shall be made available for inspection and copying by EPA or its duly authorized representatives.

(b) *Pesticide production establishment requirements.* Exporters of pesticides, devices, and active ingredients must submit annual reports to EPA in accordance with part 167 of this chapter, concerning those products that are exported. All products required to be labeled "Not Registered for Use in the United States of America" must be reported as unregistered production regardless of whether a purchaser acknowledgement statement is required.

PART 169 [AMENDED]

2. In part 169

a. The authority citation for part 169 continues to read as follows:

Authority: 7 U.S.C. 136f and 136w.

b. Section 169.2 is amended by revising paragraph (h)(3) and the flush text that immediately follows paragraph (h)(3) to read as follows:

§ 169.2 Maintenance of records.

* * * * *

(h) * * *

(3) For any pesticide other than a pesticide registered under section 3 or sold under section 6(a)(1) of the Act, copies of a statement signed by the foreign purchaser of the pesticide acknowledging that the purchaser understands that such pesticide is not registered for use in the United States and cannot be sold in the United States under this Act.

These records shall be retained for a period of 2 years after expiration of the contract.

* * * * *

[FR Doc. 93-3703 Filed 2-17-93; 8:45 am]

BILLING CODE 6560-50-F

Federal Register

Thursday
February 18, 1993

Part IV

Environmental Protection Agency

Premanufacture Notices; Monthly Status
Report for DECEMBER 1992

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-53162; FRL-4184-4]

Premanufacture Notices; Monthly Status Report for DECEMBER 1992

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(d)(3) of the Toxic Substances Control Act (TSCA) requires EPA to issue a list in the **Federal Register** each month reporting the premanufacture notices (PMNs) and exemption request pending before the Agency and the PMNs and exemption requests for which the review period has expired since publication of the last monthly summary. This is the report for December 1992.

Nonconfidential portions of the PMNs and exemption request may be seen in the TSCA Public Docket Office NE-G004 at the address below between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

ADDRESSES: Written comments, identified with the document control number "(OPPTS-53162)" and the specific PMN and exemption request number should be sent to: Document Processing Center (TS-790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. 201ET, Washington, DC 20460 (202) 260-1532.

FOR FURTHER INFORMATION CONTACT:

Susan B. Hazen, Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460 (202) 260-3725.

SUPPLEMENTARY INFORMATION: The monthly status report published in the **Federal Register** as required under section 5(d)(3) of TSCA (90 Stat. 2012 (15 U.S.C. 2504)), will identify: (a) PMNs received during December; (b) PMNs received previously and still under review at the end of December; (c) PMNs for which the notice review period has ended during December; (d) chemical substances for which EPA has received a notice of commencement to manufacture during December; and (e) PMNs for which the review period has been suspended. Therefore, the December 1992 PMN Status Report is being published.

Dated: February 9, 1993.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

Premanufacture Notice Monthly Status Report for DECEMBER 1992

I. 146 Premanufacture notices and exemption requests received during the month:

PMN No.

P 93-0206 P 93-0207 P 93-0208 P 93-0209 P 93-0210 P 93-0211 P 93-0212 P 93-0213 P 93-0214 P 93-0215 P 93-0216 P 93-0217 P 93-0218 P 93-0219 P 93-0220 P 93-0221 P 93-0222 P 93-0223 P 93-0224 P 93-0225 P 93-0226 P 93-0227 P 93-0228 P 93-0229 P 93-0230 P 93-0231 P 93-0232 P 93-0233 P 93-0234 P 93-0235 P 93-0236 P 93-0237 P 93-0238 P 93-0239 P 93-0240 P 93-0241 P 93-0242 P 93-0243 P 93-0244 P 93-0245 P 93-0246 P 93-0247 P 93-0248 P 93-0249 P 93-0250 P 93-0251 P 93-0252 P 93-0253 P 93-0254 P 93-0255 P 93-0256 P 93-0257 P 93-0258 P 93-0259 P 93-0260 P 93-0261 P 93-0262 P 93-0263 P 93-0264 P 93-0265 P 93-0266 P 93-0267 P 93-0268 P 93-0269 P 93-0270 P 93-0271 P 93-0272 P 93-0273 P 93-0274 P 93-0275 P 93-0276 P 93-0277 P 93-0278 P 93-0279 P 93-0280 P 93-0281 P 93-0282 P 93-0283 P 93-0284 P 93-0285 P 93-0286 P 93-0287 P 93-0288 P 93-0289 P 93-0290 P 93-0291 P 93-0292 P 93-0293 P 93-0294 P 93-0295 P 93-0296 P 93-0297 P 93-0298 P 93-0299 P 93-0300 P 93-0301 P 93-0302 P 93-0303 P 93-0304 P 93-0305 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IV. 45 Chemical substances for which EPA has received notices of commencement to manufacture

PMN No.	Identity/Generic Name	Date of Commencement
P 83-0370	8-Acetyl-3-dodecyl-7,7,9,9-tetramethyl-1,3,8-triazaspiro 4,5 decane-2,4-dione	December 7, 1983.
P 84-0660	G Substituted aryl olefin	February 9, 1988.
P 84-0704	G Substituted alkyl arene	January 24, 1988.
P 85-0296	G Silicone ester polyacrylate	November 4, 1992.
P 85-1211	Benzolic acid, 2-(3-phenyl, butylidene) amino, methyl ester	November 2, 1992.
P 88-0998	G Fluorene-containing diaromatic amine	March 3, 1992.
P 88-1616	G Carboxylated novolak acrylate	January 5, 1989.
P 89-0134	G Aspergillus oryzae	November 4, 1992.
P 89-0837	Phosphorylated polyester	March 5, 1990.
P 90-0159	N-(2,4,6-tribromophenyl) maleimide	November 5, 1992.
P 90-1635	Benzenepropanoic acid, 3-(2H-benzotriazol-2-yl)-5-(1,1-dimethylethylethyl)-4-hydroxyl-, C ₇₋₉ alkyl, branched and linear, esters	January 18, 1991.
P 90-1731	G Substituted triazole	June 3, 1992.
P 91-0043	G Aromatic amine	April 16, 1992.
P 91-0895	G Zirconium IV (di neosilkanolate, di) perp amino benzoato-O	November 24, 1992.
P 91-0868	G Silylated polyazamide	November 10, 1992.
P 91-1112	G Basic dye toner SM	January 21, 1992.
P 91-1154	Bacillus subtilis	November 4, 1992.
P 91-1321	G Methyl polychloro aliphatic ketone	August 29, 1992.
P 92-0144	G Cross-linked resorcinol resin	November 11, 1992.
P 92-0212	G Azo-substituted naphthalene trisulfonic acid	November 12, 1992.
P 92-0343	G 1,3,5-Triazin-2-amine, 4-dimethylamino-6-substituted-	July 28, 1992.
P 92-0344	G 1,3,5-Triazin-2-amine, 4-dimethylamino-6-substituted-	September 22, 1992.
P 92-0416	G N-Butyl methacrylate, polymer with methacrylic acid, methyl methacrylate, glycidyl methacrylate derivative and 2-hydroxyethyl methacrylate derivative	October 23, 1992.
P 92-0417	G Ester of diazo naphthoquinone	October 23, 1992.
P 92-0594	G Alkanediolic acid, product with substituted anhydrides and alkine diols	November 13, 1992.
P 92-0786	G Aryl alkyl alcohol	October 23, 1992.
P 92-0790	G Metal complex of azo dye	October 13, 1992.
P 92-0858	G Substituted aromatic azo dye	November 7, 1992.
P 92-1022	G Modified acrylate polymer	October 1, 1992.
P 92-1099	G Rubber modified polyamide	October 3, 1992.
P 92-1114	G Hexamethylmelamine condensate with alcohols and their ethoxylates, stearamide and polyester	November 6, 1992.
P 92-1205	G Amino-function alkoxysilane	November 2, 1992.
P 92-1217	G Polyester polyether modified polyurethane with basic groups, compound with carboxylic acid	November 25, 1992.
P 92-1220	G Polymeric aromatic diimide with substituted tetracarboxylic acid	November 10, 1992.
P 92-1224	Maleic anhydride; butoxyethoxyethanol; diethylene glycol	November 4, 1992.
P 92-1235	G Substituted aniline substituted aromaticizing haloaromaticpyrazole	November 10, 1992.
P 92-1289	G Alkyl methacrylates, aminoalkyl methacrylate copolymer, partial salt	November 12, 1992.
P 92-1290	G Amide/acrylate copolymer	November 5, 1992.
P 92-1334	G Diazonaphthoquinone sulfonic esters with aromatic polyhydroxy compound	November 17, 1992.
P 92-1336	G Cresol novolek	November 18, 1992.
P 92-1349	Tall oil, maleated, esters with triethanolamine	November 24, 1992.
P 92-1397	G Polyamide adduct	November 30, 1992.
Y 92-0002	Tall oil fatty acids; distilled tall oil sylvatol; sorbitol; glycerine; mono pentaerythritol; phthalic anhydride; maleic anhydride	November 17, 1992.
Y 92-0078	G Olefin copolymer	October 23, 1992.
Y 92-0190	Adipic acid and phthalic anhydride, polymer with propylene glycol, coco fatty acid ester	November 16, 1992.

**V. 22 Premanufacture notices for which
the period has been suspended.**

PMN No.

P 91-0818 P 92-0003 P 92-0217 P 92-
0652 P 92-0755 P 92-0998 P 92-1447
P 92-1449 P 92-1454 P 92-1455 P 92-
1485 P 92-1488 P 92-1489 P 92-1503
P 92-1504 P 92-1505 P 92-1506 P 93-
0014 P 93-0036 P 93-0037 P 93-0038
Y 93-0022

[FR Doc. 93-3797 Filed 2-17-93; 8:45 am]

BILLING CODE 6560-50-F

Federal Register

Thursday
February 18, 1993

Part V

Environmental Protection Agency

Premanufacture Notices; Monthly Status
Report for January 1993

[OPPTS-53163; FRL-4571-3]

Premanufacture Notices; Monthly Status Report for January 1993

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(d)(3) of the Toxic Substance Control Act (TSCA) requires EPA to issue a list in the **Federal Register** each month reporting the premanufacture notices (PMNs) and exemption request pending before the Agency and the PMNs and exemption requests for which the review period has expired since publication of the last monthly summary. This is the report for January 1993.

Nonconfidential portions of the PMNs and exemption request may be seen in the TSCA Public Docket Office NE-G004 at the address below between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

ADDRESSES: Written comments, identified with the document control number "[OPPT-53163]" and the specific PMN and exemption request number should be sent to: Document Processing Center (TS-790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. 201ET, Washington, DC 20460 (202) 260-1532.

FOR FURTHER INFORMATION CONTACT:

Susan B. Hazen, Director, Environmental Assistance Division (TS-799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460 (202) 260-3725.

SUPPLEMENTARY INFORMATION: The monthly status report published in the **Federal Register** as required under section 5(d)(3) of TSCA (90 Stat. 2012 (15 U.S.C. 2504)), will identify: (a) PMNs received during January; (b) PMNs received previously and still under review at the end of January; (c) PMNs for which the notice review period has ended during January; (d) chemical substances for which EPA has received a notice of commencement to manufacture during January; and (e) PMNs for which the review period has been suspended. Therefore, the January 1993 PMN Status Report is being published.

Dated: February 11, 1993.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

Premanufacture Notice Monthly Status Report for JANUARY 1993**I. 138 Premanufacture notices and exemption requests received during the month:****PMN No.**

P 93-0326 P 93-0362 P 93-0363 P 93-0364 P 93-0365 P 93-0366 P 93-0367 P 93-0368 P 93-0369 P 93-0370 P 93-0371 P 93-0372 P 93-0373 P 93-0374 P 93-0375 P 93-0376 P 93-0377 P 93-0378 P 93-0379 P 93-0380 P 93-0381 P 93-0382 P 93-0383 P 93-0384 P 93-0385 P 93-0386 P 93-0387 P 93-0388 P 93-0389 P 93-0390 P 93-0391 P 93-0392 P 93-0393 P 93-0394 P 93-0395 P 93-0396 P 93-0397 P 93-0398 P 93-0399 P 93-0400 P 93-0401 P 93-0402 P 93-0403 P 93-0404 P 93-0405 P 93-0406 P 93-0407 P 93-0408 P 93-0409 P 93-0410 P 93-0411 P 93-0412 P 93-0413 P 93-0414 P 93-0415 P 93-0416 P 93-0417 P 93-0418 P 93-0419 P 93-0420 P 93-0421 P 93-0422 P 93-0423 P 93-0424 P 93-0425 P 93-0426 P 93-0427 P 93-0428 P 93-0429 P 93-0430 P 93-0431 P 93-0432 P 93-0433 P 93-0434 P 93-0435 P 93-0436 P 93-0437 P 93-0438 P 93-0439 P 93-0440 P 93-0441 P 93-0442 P 93-0444 P 93-0445 P 93-0446 P 93-0447 P 93-0449 P 93-0450 P 93-0451 P 93-0452 P 93-0453 P 93-0454 P 93-0455 P 93-0456 P 93-0457 P 93-0459 P 93-0460 P 93-0461 P 93-0462 P 93-0463 P 93-0464 P 93-0465 P 93-0466 P 93-0467 P 93-0468 P 93-0469 P 93-0470 P 93-0471 P 93-0472 P 93-0473 P 93-0474 P 93-0475 P 93-0476 P 93-0477 P 93-0478 P 93-0479 P 93-0480 P 93-0481 P 93-0482 P 93-0483 P 93-0484 P 93-0485 P 93-0486 P 93-0487 P 93-0488 P 93-0489 P 93-0490 P 93-0491 P 93-0492 P 93-0493 P 93-0494 P 93-0495 P 93-0498 Y 93-0045 Y 93-0046 Y 93-0047 Y 93-0048 Y 93-0049

II. 293 Premanufacture notices received previously and still under review at the end of the month:**PMN No.**

P 83-0370 P 84-0660 P 84-0704 P 84-1145 P 85-0619 P 85-1331 P 86-0066 P 86-1315 P 86-1489 P 86-1662 P 87-0323 P 88-0998 P 88-0999 P 88-1616 P 88-1937 P 88-1938 P 88-1980 P 88-1982 P 88-1984 P 88-1985 P 88-1999 P 88-2000 P 88-2001 P 88-2212 P 88-2213 P 88-2228 P 88-2229 P 88-2230 P 88-2236 P 88-2484 P 88-2518 P 88-2529 P 88-2540 P 89-0321 P 89-0632 P 89-0721 P 89-0769 P 89-0775 P 89-0867 P 89-0957 P 89-0958 P 89-0959 P 89-1038 P 89-1058 P 90-0009 P 90-0158 P 90-0211 P 90-0261 P 90-0262 P 90-0263 P 90-0372 P 90-0441 P 90-

0550 P 90-0559 P 90-0564 P 90-0581 P 90-0608 P 90-1280 P 90-1318 P 90-1319 P 90-1320 P 90-1321 P 90-1322 P 90-1422 P 90-1454 P 90-1527 P 90-1564 P 90-1592 P 90-1687 P 90-1745 P 90-1893 P 91-0043 P 91-0107 P 91-0108 P 91-0109 P 91-0110 P 91-0111 P 91-0112 P 91-0113 P 91-0228 P 91-0242 P 91-0243 P 91-0244 P 91-0245 P 91-0246 P 91-0247 P 91-0248 P 91-0503 P 91-0514 P 91-0548 P 91-0572 P 91-0619 P 91-0659 P 91-0689 P 91-0701 P 91-0818 P 91-0826 P 91-0914 P 91-0915 P 91-0939 P 91-0940 P 91-0941 P 91-1009 P 91-1010 P 91-1014 P 91-1015 P 91-1116 P 91-1117 P 91-1118 P 91-1131 P 91-1163 P 91-1190 P 91-1191 P 91-1206 P 91-1210 P 91-1297 P 91-1298 P 91-1299 P 91-1324 P 91-1367 P 91-1368 P 91-1369 P 91-1386 P 91-1394 P 91-1409 P 92-0003 P 92-0031 P 92-0032 P 92-0033 P 92-0044 P 92-0048 P 92-0129 P 92-0217 P 92-0244 P 92-0245 P 92-0246 P 92-0247 P 92-0248 P 92-0249 P 92-0250 P 92-0251 P 92-0314 P 92-0396 P 92-0412 P 92-0471 P 92-0477 P 92-0478 P 92-0545 P 92-0546 P 92-0547 P 92-0548 P 92-0549 P 92-0550 P 92-0551 P 92-0552 P 92-0595 P 92-0599 P 92-0606 P 92-0624 P 92-0625 P 92-0649 P 92-0652 P 92-0660 P 92-0688 P 92-0714 P 92-0776 P 92-0777 P 92-0787 P 92-0804 P 92-0813 P 92-0918 P 92-0919 P 92-0998 P 92-0999 P 92-1003 P 92-1009 P 92-1029 P 92-1079 P 92-1086 P 92-1116 P 92-1117 P 92-1118 P 92-1119 P 92-1125 P 92-1136 P 92-1222 P 92-1255 P 92-1294 P 92-1295 P 92-1296 P 92-1298 P 92-1307 P 92-1308 P 92-1313 P 92-1316 P 92-1324 P 92-1337 P 92-1345 P 92-1352 P 92-1357 P 92-1364 P 92-1369 P 92-1394 P 92-1447 P 92-1449 P 92-1454 P 92-1455 P 92-1485 P 92-1489 P 92-1503 P 92-1504 P 92-1505 P 92-1506 P 93-0002 P 93-0014 P 93-0015 P 93-0017 P 93-0036 P 93-0037 P 93-0038 P 93-0040 P 93-0050 P 93-0066 P 93-0067 P 93-0068 P 93-0083 P 93-0094 P 93-0096 P 93-0097 P 93-0122 P 93-0123 P 93-0124 P 93-0126 P 93-0136 P 93-0153 P 93-0161 P 93-0168 P 93-0173 P 93-0174 P 93-0175 P 93-0177 P 93-0184 P 93-0185 P 93-0186 P 93-0187 P 93-0188 P 93-0189 P 93-0190 P 93-0191 P 93-0193 P 93-0200 P 93-0201 P 93-0202 P 93-0204 P 93-0205 P 93-0212 P 93-0213 P 93-0214 P 93-0215 P 93-0226 P 93-0227 P 93-0228 P 93-0246 P 93-0251 P 93-0252 P 93-0253 P 93-0254 P 93-0255 P 93-0256 P 93-0257 P 93-0276 P 93-0277 P 93-0282 P 93-0305 P 93-0307 P 93-0313 P 93-0314 P 93-0315 P 93-0316 P 93-0317 P 93-0318 P 93-0333 P 93-0339 P 93-0341 P 93-0343 P 93-0349 P 93-0352 P 93-0353 P 93-0357 P 93-0358 P 93-0360 P 93-0361 Y 93-0035

III. 131 Premanufacture notices and exemption request for which the notice review period has ended during the month. (Expiration of the notice review period does not signify that the chemical has been added to the inventory).

PMN No.

P 88-2212 P 88-2213 P 88-2228 P 88-2229 P 88-2230 P 88-2236 P 88-2529
P 89-0321 P 91-1000 P 91-1011 P 91-1012 P 91-1013 P 91-1324 P 92-0168
P 92-0471 P 92-0509 P 92-0755 P 92-1055 P 92-1079 P 92-1112 P 92-1113

P 92-1136 P 92-1316 P 92-1337 P 92-1449 P 92-1488 P 93-0002 P 93-0003
P 93-0004 P 93-0005 P 93-0006 P 93-0007 P 93-0008 P 93-0009 P 93-0010
P 93-0011 P 93-0012 P 93-0013 P 93-0016 P 93-0017 P 93-0018 P 93-0019
P 93-0020 P 93-0021 P 93-0022 P 93-0023 P 93-0024 P 93-0025 P 93-0026
P 93-0027 P 93-0028 P 93-0029 P 93-0030 P 93-0031 P 93-0032 P 93-0033
P 93-0034 P 93-0035 P 93-0039 P 93-0041 P 93-0042 P 93-0043 P 93-0044
P 93-0045 P 93-0046 P 93-0047 P 93-0048 P 93-0049 P 93-0050 P 93-0051
P 93-0052 P 93-0053 P 93-0054 P 93-0055 P 93-0056 P 93-0057 P 93-0058
P 93-0059 P 93-0060 P 93-0062 P 93-0063 P 93-0064 P 93-0065 P 93-0069
P 93-0070 P 93-0071 P 93-0072 P 93-0073 P 93-0074 P 93-0075 P 93-0076
P 93-0077 P 93-0078 P 93-0079 P 93-0080 P 93-0081 P 93-0082 P 93-0084
P 93-0085 P 93-0086 P 93-0087 P 93-0088 P 93-0089 P 93-0090 P 93-0091
P 93-0092 P 93-0093 P 93-0095 P 93-0096 P 93-0097 P 93-0099 P 93-0100
P 93-0101 P 93-0102 P 93-0103 P 93-0104 P 93-0105 P 93-0106 Y 93-0035
Y 93-0036 Y 93-0037 Y 93-0038 Y 93-0039 Y 93-0040 Y 93-0041 Y 93-0042
Y 93-0043 Y 93-0044 Y 93-0045 Y 93-0046 Y 93-0047

IV. 83 CHEMICAL SUBSTANCES FOR WHICH EPA HAS RECEIVED NOTICES OF COMMENCEMENT TO MANUFACTURE

PMN No.	Identity/Generic Name	Date of Commencement
P 85-0054	G organotin compound	January 15, 1988.
P 85-0090	G polymer of dimethyl terephthalate; ethylene glycol; dimethyl 5-sulfoisophthalate, sodium salt; and polyethylene glycol	June 17, 1985.
P 85-1060	1-oxaspiro (4,5) deca-3,8-diene, 2,7-dimethyl-10-(1-methylethyl)-	December 2, 1992.
P 87-0001	G aliphatic polycarboxylic acid metal salt	December 31, 1986.
P 87-0002	G substituted polyester of neophenyl glycol	February 10, 1988.
P 87-0003	G polymer of styrene with substituted acrylate and methacrylate	February 10, 1988.
P 87-0645	G blocked catalyst	June 2, 1987.
P 87-0855	G phenylmethyl substituted bis(phenyl)isobenzofuranone	November 19, 1992.
P 88-1907	G Urethane modified epoxy resin dispersion	November 24, 1992.
P 88-1956	G Alkyl capped polyethylene glycol fatty acid ester	December 3, 1992.
P 88-2042	G Substituted-substituted-substituted-benzene polymer, aminomethylated, quarternized, chloride salt	December 19, 1992.
P 88-2458	G Tin chelate	September 18, 1992.
P 88-2613	G Organic rare earth salt	December 16, 1992.
P 89-0396	G Sulfur bridged substituted phenols	October 23, 1990.
P 89-0460	Mixed esters of 1,6-hexanedioic acid, isodecyl alcohol and alkenes, C ₆ -C ₁₀ hydroformylation products high boiling	November 5, 1992.
P 90-0002	G Disubstituted diheteropolycyclic, metal salt	September 19, 1990.
P 90-0274	G Alkylamine carboxylate	October 22, 1990.
P 90-0333	2-(2'-Hydroxy-5'-methacryloyloxyethylphenyl)-2H-benzotriazole	November 24, 1992.
P 90-0335	G 2-substituted benzotriazole	November 19, 1992.
P 90-0419	G Poly(oxy-1,2,-alkane)a-Hydrox-w-hydroxy, ester with rosin	November 19, 1992.
P 90-1339	G Amine functional polyurethane polyol	December 1, 1992.
P 90-1840	G Aromatic aminoether	November 19, 1992.
P 91-0144	G Organotin compound	February 12, 1991.
P 91-0172	G Metal alkyl dione diaquo	February 20, 1991.
P 91-0358	G Maleinized polyalkene	December 10, 1992.
P 91-0663	G Aromatic polyamic acid	November 23, 1992.
P 91-1248	G Modified butadiene-vinylidene chloride polymer	December 7, 1992.
P 91-1291	G Polysulfide acrylate	November 20, 1992.
P 92-0028	G Phosphorothioic acid ester branched amine salts	October 18, 1992.
P 92-0205	G Substituted phosphoric acid	February 11, 1992.
P 92-0235	G Polyester resin solution	November 30, 1992.
P 92-0295	G Acrylic copolymer	November 12, 1992.
P 92-0442	G Aryl-alkyl substituted nitrogen heterocycle	December 10, 1992.
P 92-0467	Aluminum, hydroxy(29H,31H-phthalocyanato(2-)-N29,N20, N32, N32)-, chloro sulfo derivs., sodium salts	November 19, 1992.
P 92-0614	G Styrene acrylic oxayoline copolymer	November 17, 1992.
P 92-0667	G Oligoester of aliphatic acid glycidylester and inorganic acid	November 13, 1992.
P 92-0671	2-Methylpropanoic acid, sodium salt	November 5, 1992.
P 92-0693	G Acrylic resin	July 14, 1992.
P 92-0750	G Polymer of a mixed aryl epoxide with a bis aryl pyrrole-2,5-dione	November 13, 1992.

IV. 83 CHEMICAL SUBSTANCES FOR WHICH EPA HAS RECEIVED NOTICES OF COMMENCEMENT TO MANUFACTURE—
Continued

PMN No.	Identity/Generic Name	Date of Commencement
P 92-0807	G Azo dyestuff	September 12, 1992.
P 92-0820	G Polymer of alkyl methacrylates	November 17, 1992.
P 92-0846	G Fatty acids, a few C ₅ , C ₇₋₁₀ , straight chain and branched, esters with poly(hydroxymethyl) alkanes	November 11, 1992.
P 92-0847	G Aliphatic polyimide	November 19, 1992.
P 92-0860	G Substituted polyolefin	December 1, 1992.
P 92-0882	G 2-Hydroxyethyl cellulose, vinyl phosphonic acid graft polymer	December 22, 1992.
P 92-0912	G 1,3-Benzenedicarboxylic acid polymer, with hexanediol acid and 1,2-hexanediol, poly(oxy(methyl-1,2-ethanediyl)-A-hydroxy-W-hydroxy-,3-hydroxy-2-(hydroxymethyl)-2-ethyl	September 16, 1992.
P 92-0916	G Organosilyl-functional silica	November 17, 1992.
P 92-0929	G Polymer salt of alkyl propenoates, substituted alkyl propenoates, ethenyl benzene and ethylene carboxylic acid	November 18, 1992.
P 92-1010	G Substituted alkoxy cyclohexadiene	November 23, 1992.
P 92-1030	G Alkyl substituted urea	November 15, 1992.
P 92-1037	G Aminofunctional siloxanecopolymer	October 20, 1992.
P 92-1080	G Vinyltoluene methacrylate resin	October 31, 1992.
P 92-1100	G Polyester polycarbonate	December 12, 1992.
P 92-1105	G Modified rosin, hydrocarbon resin	November 10, 1992.
P 92-1124	G Polymer of formaldehyde-methyl phenol and diazo salt	October 14, 1992.
P 92-1130	G Acrylic resin	October 14, 1992.
P 92-1158	G Fluoromethylene-vinylether copolymer	December 2, 1992.
P 92-1196	Vanadium oxide	November 30, 1992.
P 92-1235	G Substituted aniline substituted aromatic heterocyclic haloaromatic pyrazole	November 10, 1992.
P 92-1238	G Amino substituted heteromonocycle, hydrochloride salt	November 10, 1992.
P 92-1251	2,5-Furandione, polymer with ethenylbenzene, (1-methyl ethyl)benzene 6 bis (1-methyl-1-phenyl ethyl)pyroxide; aqueous ammonia	November 30, 1992.
P 92-1277	G Bis(amidesubstituted thio benzene)	November 23, 1992.
P 92-1278	G Copolymer of acrylic and methacrylic esters	November 14, 1992.
P 92-1301	G Acrylic resin	November 15, 1992.
P 92-1312	G Alkoxyated alcohol	November 19, 1992.
P 92-1314	Reaction product of 1,3-butadiene, homopolymer, oligomeric with 2,5-furandione	December 5, 1992.
P 92-1339	G Enthoxylated thiol ether	December 1, 1992.
P 92-1350	Tail oil, maleated, compounds with diethylenetriamine tail oil reaction products	December 23, 1992.
P 92-1351	G Polyol ester	November 18, 1992.
P 92-1356	Benzene, chloromethyl reaction products with toluene	November 19, 1992.
P 92-1360	G Trialkoxylated amidocarboxylic silane	December 14, 1992.
P 92-1367	G Amino acrylate copolymer	December 5, 1992.
P 92-1396	G Mono azo benzene sulfonated naphthalene substituted triazine dyestuff	December 4, 1992.
P 92-1424	G Polyurethane based on polyisocyanates, polyols and polyamines	December 14, 1992.
P 92-1442	G Modified polymer of butyl acrylate and ethyl acrylate	December 18, 1992.
Y 92-0104	Conjugated linoleic acid; styrene; acrylic acid; methyl methacrylate	April 4, 1992.
Y 92-0138	G Polyester	December 19, 1992.
Y 92-0185	G Modified acrylic resin	November 20, 1992.
Y 92-0193	G Vinyl acetate-ethylene-acrylate copolymer	November 27, 1992.
Y 93-0003	G Hydroxy functional acrylic polymer	December 18, 1992.
Y 93-0004	G Fatty acid isophthalate alkyl polymer	December 4, 1992.
Y 93-0005	G Acrylated, styrenated alkyl polymer	December 15, 1992.
Y 93-0010	G Hydroxy functional acrylic polymer	November 23, 1992.

**V. 19 Premanufacture notices for which
the Period has been suspended.**

PMN No.

P 92-1055 P 92-1324 P 92-1337 P 92-
1503 P 92-1504 P 92-1505 P 92-1506
P 93-0014 P 93-0015 P 93-0040 P 93-
0050 P 93-0066 P 93-0067 P 93-0068
P 93-0094 P 93-0161 P 93-0173 P 93-
0174 P 93-0175

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