

**RESOLUTION OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION**

**WHEREAS,** the Tribal Council has reviewed the proposed ordinance establishing Chapter Two of the Environmental Code and providing for regulation of solid waste and landfills on the Fort Apache Indian Reservation; and

**WHEREAS,** the White Mountain Apache Tribe seeks to be a self-regulating entity in serving to protect the Reservation environment and populace; and

**WHEREAS,** there is a need to establish an enforcement mechanism which will be applicable to all activities conducted by all persons, including the various branches of the White Mountain Apache Tribe, for purposes of solid waste management; and

**WHEREAS,** the Tribal Council recommends that said proposed ordinance attached hereto be posted for public comment as required by the Constitution; and

**WHEREAS,** the Tribal Council further recommends that the proposed ordinance be submitted to the United States Environmental Protection Agency (EPA) for comments and recommendations.

**BE IT RESOLVED** by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the Tribal Council Secretary to post the proposed ordinance establishing Chapter Two of the Environmental Code of the White Mountain Apache Tribe providing for the regulation of solid waste and landfills on the Fort Apache Indian Reservation in each District for ten days as required by the Constitution.

**BE IT FURTHER RESOLVED** that the Tribal Council authorizes the Tribal Environmental Planner to submit the proposed Tribal Solid Waste Landfill Ordinance to the U.S. EPA for its comments and to make necessary changes to the proposed ordinance for reconsideration by the Tribal Council.

**BE IT FURTHER RESOLVED** that the "Tribal Permitting Authority" within the meaning of the proposed ordinance shall be the Tribal Environmental Planner unless and until otherwise changed by the Tribal Council.

**BE IT FURTHER RESOLVED** that the Tribal Environmental Planner and the Office of the Tribal Attorney are directed to prepare and submit a formal "Treatment as a State" or "Tribal Authorization" application to the United States Environmental Protection Agency for approval of the Tribal Solid Waste Landfill Program.

The foregoing resolution was on January 12, 1995, duly adopted by a vote of eight for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (f), (h), (i), (m), (q), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

**RECEIVED**

JAN 30 1995

**FORT APACHE INDIAN AGENCY  
WHITERIVER, ARIZONA**

  
Chairman of the Tribal Council

  
Secretary of the Tribal Council

# SOLID WASTE ORDINANCE

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## ARTICLE II - CRITERIA

### **§2.1 PURPOSE, SCOPE, AND APPLICABILITY**

(a) The purpose of this Article is to establish minimum tribal criteria for all tribal solid waste landfill (TSWLF) units and under the Federal Clean Water Act, as amended, for tribal solid waste landfills that are used to dispose of sewage sludge. These minimum tribal criteria ensure the protection of human health and the environment.

(b) These Criteria apply to owners and operators of new TSWLF units, existing TSWLF units, and lateral expansions, except as otherwise specifically provided in this Chapter.

(c) These Criteria do not apply to tribal solid waste landfill units that did not receive waste after October 9, 1991.

(d) All TSWLF units that received waste after October 9, 1991 but stopped receiving waste before October 9, 1993 are exempt from all the requirements of this Chapter, except the final cover requirement specified in Section 2.60(a). The final cover must be installed within six months of last receipt of wastes. Owners or operators of TSWLF units described in this paragraph that fail to complete cover installation within this six month period will be subject to all the requirements of this Chapter, unless otherwise specified.

(e) All TSWLF units that received waste on or after October 9, 1993 must comply with all requirements of this Chapter unless otherwise specified.

(f)(1) Owners or operators of new TSWLF units, existing TSWLF units, and lateral expansions that dispose of less than twenty [20] tons of tribal solid waste daily, based on an annual average are exempt from subpart D of this section, so long as there is no evidence of existing ground-water contamination from the TSWLF unit, and the TSWLF unit serves:

(i) a community that experiences an annual interruption of at least three consecutive months of surface transportation that prevents access to a regional waste management facility, or

(ii) a community that has no practicable waste management alternative and is located in an area that annually receives less than or equal to 25 inches of precipitation.

(2) Owners or operators of new TSWLF units, existing TSWLF units, and lateral expansions that meet the criteria in paragraph (f)(1)(i) or (f)(1)(ii) of this section must place in the operating record information demonstrating this.

(3) If the owner or operator of a new TSWLF unit, existing TSWLF unit, or lateral expansion has knowledge of ground-water contamination resulting from the unit that has asserted the exemption in paragraph (f)(1)(i) or (f)(1)(ii) of this section, the owner or operator must notify the Tribal Permitting Authority of such contamination and, thereafter, comply with subparts D and E of this part.

(g) Tribal solid waste landfill units failing to satisfy these criteria are considered open dumps for purposes of Tribal solid waste management planning under this Code.

(h) Tribal solid waste landfill units failing to satisfy these criteria constitute open dumps, which are prohibited under this Chapter.

(i) Tribal solid waste landfill units containing sewage sludge and failing to satisfy these Criteria violate sections 309 and 405(e) of the Clean Water Act.

(j) The effective date of this is Ordinance is \_\_\_\_\_.

## §2.2 DEFINITIONS

Unless otherwise noted, all terms contained in this part are defined by their plain meaning. This section contains definitions for terms that appear throughout this part; additional definitions appear in the specific sections to which they apply.

"Active life" means the period of operation beginning with the initial receipt of solid waste and ending at completion of closure activities in accordance with §2.60 of this part.

"Active portion" means that part of a facility or unit that has received or is receiving wastes and that has not been closed in accordance with §2.60 of this part.

"Aquifer" means a geological formation, group of formations, or portion of a formation capable of yielding significant quantities of ground water to wells or springs.

"Commercial solid waste" means all types of solid waste generated by stores, offices, restaurants, warehouses, and other nonmanufacturing activities, excluding residential and industrial wastes.

"Existing TSWLF unit" means any tribal solid waste landfill unit that is receiving solid waste as of the effective date of this Ordinance. Waste placement in existing units must be consistent with past operating practices or modified practices to ensure good management.

"Facility" means all contiguous land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste.

"Ground water" means water below the land surface in a zone of saturation.

"Household waste" means any solid waste (including garbage, trash) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day-use recreation areas). Sanitary waste from septic tanks are not household wastes and may not be deposited in TSWLF units.

"Industrial solid waste" means solid waste generated by manufacturing or industrial processes that is not a hazardous waste regulated under subtitle C of The Resource Conservation & Recover act (RCRA). Such waste may include, but is not limited to, waste resulting from the following manufacturing processes: Electric power generation; fertilizer/agricultural chemicals; food and related products/by-products; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay, and concrete products; textile manufacturing; transportation equipment; and water treatment. This term does not include mining waste or oil and gas waste.

"Lateral expansion" means a horizontal expansion of the waste boundaries of an existing TSWLF unit.

"Leachate" means a liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such waste.

"Tribal solid waste landfill" unit means a discrete area of land or an excavation that receives household waste, and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under §2.2. A TSWLF unit also may receive other types of RCRA subtitle D wastes, such as commercial solid waste, nonhazardous sludge, small quantity generator waste and industrial solid waste. A TSWLF unit may be a new TSWLF unit, an existing TSWLF unit or a lateral expansion. A TSWLF may not receive sanitary waste from septic tanks.

"New TSWLF unit" means any tribal solid waste landfill unit that has not received waste prior to the effective date of this Ordinance.

"Open burning" means the combustion of solid waste without:

- (1) Control of combustion air to maintain adequate temperature for efficient combustion,
- (2) Containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and
- (3) Control of the emission of the combustion products.



"Operator" means the person(s) responsible for the overall operation of a facility or part of a facility.

"Owner" means the person(s) who owns a facility or part of a facility.

"Person" means any individual, trust firm, cooperative, institution, corporation, tribal governmental arm or entity, federal or state government, federal or state agency, bureau or employee acting on behalf of a federal or state government, partnership, association, commission, agency, or instrumentality, and/or any other entity subject to the jurisdiction of the White Mountain Apache Tribe. However, nothing in this Chapter shall constitute of waiver of tribal sovereign immunity, except to the extent that the Tribal Permitting Authority may bring an action against persons pursuant to Article I, section 2.1(b).

"Run-off" means any rainwater, leachate, or other liquid that drains over land from any part of a facility.

"Run-on" means any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

"Saturated zone" means that part of the earth's crust in which all voids are filled with water.

"Sludge" means any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

"Solid waste" means any garbage, or refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permit under 33 U.S.C. 1342, or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

"Uppermost aquifer" means the geologic formation nearest the natural ground surface that is an aquifer, as well as, lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

"Waste management unit boundary" means a vertical surface located at the hydraulically downgradient limit of the unit. This vertical surface extends down into the uppermost aquifer.

## **§2.3 CONSIDERATION OF OTHER FEDERAL LAWS**

The owner or operator of a tribal solid waste landfill unit must comply with any other applicable Federal and Tribal rules, laws, regulations, or other requirements.

§§2.4 - 2.9 [Reserved]

## **SUBPART B -- LOCATION RESTRICTIONS**

### **§2.10 AIRPORT SAFETY**

(a) Owners or operators of new TSWLF units, existing TSWLF units, and lateral expansions that are located within 10,000 feet (3,048 meters) of any airport runway end used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway end used by only piston-type aircraft must demonstrate that the units are designed and operated so that the TSWLF unit does not pose a bird hazard to aircraft.

(b) Owners or operators proposing to site new TSWLF units and lateral expansions located within a five-mile radius of any airport runway end used by turbojet or piston-type aircraft must notify the affected airport and the Federal Aviation Administration (FAA).

(c) The owner or operator must place the demonstration in paragraph (a) of this section in the operating record and notify the TPA that it has been placed in the operating record.

(d) For purposes of this section:

(1) "Airport" means public-use airport open to the public without prior permission and without restrictions within the physical capacities of available facilities.

(2) "Bird hazard" means an increase in the likelihood of bird/aircraft collisions that may cause damage to the aircraft or injury to its occupants.

### **§2.11 FLOODPLAINS**

(a) Owners or operators of new TSWLF units, existing TSWLF units, and lateral expansions located in 100-year floodplains must demonstrate that the unit will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to pose a hazard to human health and the environment. The owner or operator must place the demonstration in the operating record and notify the TPA that it has been placed in the operating record.

(b) For purposes of this section:

(1) "Floodplain" means the lowland and relatively flat areas adjoining inland and coastal waters, including flood-prone areas of offshore islands, that are inundated by the 100-year flood.

(2) "100-year flood" means a flood that has a 1-percent or greater chance of recurring in any given year or a flood of a magnitude equalled or exceeded once in 100 years on the average over a significantly long period.

(3) "Washout" means the carrying away of solid waste by waters of the base flood.

## §2.12 WETLANDS

(a) New TSWLF units and lateral expansions shall not be located in wetlands, unless the owner or operator can make the following demonstrations to the TPA:

(1) Where applicable under section 404 of the Federal Clean Water Act or applicable Tribal wetlands laws, the presumption that a practicable alternative to the proposed landfill is available which does not involved wetlands is clearly rebutted.

(2) The construction and operation of the TSWLF unit will not:

(i) Cause or contribute to violations of any applicable Tribal or Reservation water quality standard,

(ii) Violate any applicable toxic effluent standard or prohibition under Section 307 of the Clean Water Act,

(iii) Jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of a critical habitat, protected under applicable tribal laws and policies or such federal laws which may be applicable.

(iv) Violate any requirement under the Marine Protection, Research, and Sanctuaries Act of 1972 for the protection of a marine sanctuary;

(3) The TSWLF unit will not cause or contribute to significant degradation of wetlands. The owner/operator must demonstrate the integrity of the TSWLF unit and its ability to protect ecological resources by addressing the following factors:

- (i) Erosion, stability, and migration potential of native wetland soils, muds and deposits used to support the TSWLF unit;

- (ii) Erosion, stability, and migration potential of dredged and fill materials used to support the TSWLF unit;
  - (iii) The volume and chemical nature of the waste managed in the TSWLF unit;
  - (iv) Impacts on fish, wildlife, and other aquatic resources and their habitat from release of the solid waste;
  - (v) The potential effects of catastrophic release of waste to the wetland and the resulting impacts on the environment; and
  - (vi) Any additional factors, as necessary, to demonstrate that ecological resources in the wetland are sufficiently protected.
- (4) To the extent required under section 404 of the Clean Water Act or applicable Tribal wetlands laws, steps have been taken to attempt to achieve no net loss of wetlands (as defined by acreage and function) by first avoiding impacts to wetlands to the maximum extent practicable as required by paragraph (a)(1) of this section, then minimizing unavoidable impacts to the maximum extent practicable, and finally offsetting remaining unavoidable wetland impacts through all appropriate and practicable compensatory mitigation actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands); and
- (5) Sufficient information is available to make a reasonable determination with respect to these demonstrations.
- (b) For purposes of this section, *wetlands* means those areas that are defined in 40 CFR 232.2(r).

### **§2.13 FAULT AREAS**

- (a) New TSWLF units and lateral expansions shall not be located within 200 feet (60 meters) of a fault that has had displacement in Holocene time unless the owner or operator demonstrates to the TPA that an alternative setback distance of less than 200 feet (60 meters) will prevent damage to the structural integrity of the TSWLF unit and will be protective of human health and the environment.
- (b) For the purposes of this section:
- (1) "Fault" means a fracture or a zone of fractures in any material along which strata on one side have been displaced with respect to that on the other side.
  - (2) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(3) "Holocene" means the most recent epoch of the Quaternary period, extending from the end of the Pleistocene Epoch to the present.

## **§2.14 SEISMIC IMPACT ZONES**

(a) New TSWLF units and lateral expansions shall not be located in seismic impact zones, unless the owner or operator demonstrates to the TPA that all containment structures, including liners, leachate collection systems, and surface water control systems, are designed to resist the maximum horizontal acceleration in lithified earth material for the site. The owner or operator must place the demonstration in the operating record and notify the TPA that it has been placed in the operating record.

(b) For the purposes of this section:

(1) "Seismic impact zone" means an area with a ten percent or greater probability that the maximum horizontal acceleration in lithified earth material, expressed as a percentage of the earth's gravitational pull paragraph (g) of this section, will exceed 0.10g in 250 years.

(2) "Maximum horizontal acceleration in lithified earth material" means the maximum expected horizontal acceleration depicted on a seismic hazard map, with a 90 percent or greater probability that the acceleration will not be exceeded in 250 years, or the maximum expected horizontal acceleration based on a site-specific seismic risk assessment.

(3) "Lithified earth material" means all rock, including all naturally occurring and naturally formed aggregates or masses of minerals or small particles of older rock that formed by crystallization of magma or by induration of loose sediments. This term does not include man-made materials, such as fill, concrete, and asphalt, or unconsolidated earth materials, soil, or regolith lying at or near the earth surface.

## **§2.15 UNSTABLE AREAS**

(a) Owners or operators of new TSWLF units, existing TSWLF units, and lateral expansions located in an unstable area must demonstrate that engineering measures have been incorporated into the TSWLF unit's design to ensure that the integrity of the structural components of the TSWLF unit will not be disrupted. The owner or operator must place the demonstration in the operating record and notify the TPA that it has been placed in the operating record. The owner or operator must consider the following factors, at a minimum, when determining whether an area is unstable:

(1) On-site or local soil conditions that may result in significant differential settling;

(2) On-site or local geologic or geomorphologic features; and

(3) On-site or local human-made features or events (both surface and subsurface).

(b) For purposes of this section:

(1) "Unstable area" means a location that is susceptible to natural or human-induced events or forces capable of impairing the integrity of some or all of the landfill structural components responsible for preventing releases from a landfill. Unstable areas can include poor foundation conditions, areas susceptible to mass movements, and Karst terranes.

(2) "Structural components" means liners, leachate collection systems, final covers, run-on/run-off systems, and any other component used in the construction and operation of the TSWLF that is necessary for protection of human health and the environment.

(3) "Poor foundation conditions" means those areas where features exist which indicate that a natural or man-induced event may result in inadequate foundation support for the structural components of an TSWLF unit.

(4) "Areas susceptible to mass movement" means those areas of influence (i.e., areas characterized as having an active or substantial possibility of mass movement) where the movement of earth material at, beneath, or adjacent to the TSWLF unit, because of natural or man-induced events, results in the downslope transport of soil and rock material by means of gravitational influence. Areas of mass movement include, but are not limited to, landslides, avalanches, debris slides and flows, soil fluctuation, block sliding, and rock fall.

(5) "Karst terranes" means areas where karst topography, with its characteristic surface and subterranean features, is developed as the result of dissolution of limestone, dolomite, or other soluble rock. Characteristic physiographic features present in karst terranes include, but are not limited to, sinkholes, sinking streams, caves, large springs, and blind valleys.

## **§2.16 CLOSURE OF EXISTING TSWLFS**

(a) Existing TSWLF units that cannot make the demonstration specified in §§2.10(a) pertaining to airports, 2.11(a) pertaining to floodplains, or 2.15(a) pertaining to unstable areas, must close by October 9, 1996, in accordance with §2.60 of this part and

conduct post-closure activities in accordance with §2.61 of this part.

(b) The deadline for closure required by paragraph (a) of this section may be extended up to two years if the owner or operator demonstrates to the TPA that:

- (1) There is no available alternative disposal capacity;
- (2) There is no immediate threat to human health and the environment.

**Note to Subpart B:** Owners or operators of TSWLFs should be aware that the Tribe may have adopted a Tribal Wellhead Protection Program in accordance with section 1428 of the Safe Drinking Water Act. Such Tribal wellhead protection programs may impose additional requirements on owners or operators of TSWLFs than those set forth in this part.

§§2.17 - 2.19 [Reserved]

**SUBPART C -- OPERATING CRITERIA**  
**§2.20 PROCEDURES FOR EXCLUDING**  
**THE RECEIPT OF HAZARDOUS WASTE**

(a) Owners or operators of all TSWLF units must implement a program at the facility for detecting and preventing the disposal of regulated hazardous wastes as defined in 40 CFR Part 261 of this chapter and polychlorinated biphenyls (PCB) wastes as defined in 40 CFR Part 761 of this chapter. This program must include, at a minimum:

- (1) Random inspections of incoming loads unless the owner or operator takes other steps to ensure that incoming loads do not contain regulated hazardous wastes or PCB wastes;
- (2) Records of any inspections;
- (3) Training of facility personnel to recognize regulated hazardous waste and PCB wastes; and
- (4) Notification of the EPA Regional Administrator if a regulated hazardous waste or PCB waste is discovered at the facility.

(b) For purposes of this section, "regulated hazardous waste" means a solid waste that is a hazardous waste, as defined in 40 CFR 261.3, that is not excluded from regulation as a hazardous waste under 40 CFR 261.4(b) or was not generated by a conditionally exempt small quantity generator as defined in §261.5 of this chapter.

## **§2.21 COVER MATERIAL REQUIREMENTS**

(a) Except as provided in paragraph (b) of this section, the owners or operators of all TSWLF units must cover disposed solid waste with six inches of earthen material at the end of each operating day, or at more frequent intervals if necessary, to control disease vectors, fires, odors, blowing litter, and scavenging.

(b) Alternative materials of an alternative thickness (other than at least six inches of earthen material) may be approved by the TPA if the owner or operator demonstrates that the alternative material and thickness control disease vectors, fires, odors, blowing litter, and scavenging without presenting a threat to human health and the environment.

(c) The TPA may grant a temporary waiver from the requirement of paragraph (a) and (b) of this section if the owner or operator demonstrates that there are extreme seasonal climatic conditions that make meeting such requirements impractical.

## **§2.22 DISEASE VECTOR CONTROL**

(a) Owners or operators of all TSWLF units must prevent or control on-site populations of disease vectors using techniques appropriate for the protection of human health and the environment.

(b) For purposes of this section, "disease vectors" means any rodents, flies, mosquitoes, or other animals, including insects, capable of transmitting disease to humans.

## **§2.23 EXPLOSIVE GASES CONTROL**

(a) Owners or operators of all TSWLF units must ensure that:

(1) The concentration of methane gas generated by the facility does not exceed 25 percent of the lower explosive limit for methane in facility structures (excluding gas control or recovery system components); and

(2) The concentration of methane gas does not exceed the lower explosive limit for methane at the facility property boundary.

(b) Owners or operators of all TSWLF units must implement a routine methane



monitoring program to ensure that the standards of paragraph (a) of this section are met.

(1) The type and frequency of monitoring must be determined based on the following factors:

- (i) Soil conditions;
- (ii) The hydrogeologic conditions surrounding the facility;
- (iii) The hydraulic conditions surrounding the facility; and
- (iv) The location of facility structures and property boundaries.

(2) The minimum frequency of monitoring shall be quarterly.

(c) If methane gas levels exceeding the limits specified in paragraph (a) of this section are detected, the owner or operator must:

(1) Immediately take all necessary steps to ensure protection of human health and notify the TPA;

(2) Within seven days of detection, place in the operating record the methane gas levels detected and a description of the steps taken to protect human health; and

(3) Within 60 days of detection, implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, and notify the TPA that the plan has been implemented. The plan shall describe the nature and extent of the problem and the proposed remedy.

(4) The TPA may establish alternative schedules for demonstrating compliance with paragraphs (c)(2) and (3) of this section.

(d) For purposes of this section, "lower explosive limit" means the lowest percent by volume of a mixture of explosive gases in air that will propagate a flame at 25<sup>0</sup>C and atmospheric pressure.

## **§2.24 AIR CRITERIA**

(a) Owners or operators of all TSWLFs must ensure that the units do not violate any applicable requirements developed under a Tribal Implementation Plan (TIP) or Federal Implementation Plan (FIP) approved or promulgated by the Administrator pursuant to section 110 of the Clean Air Act, as amended.

(b) Open burning of solid waste, except for the infrequent burning of agricultural wastes, silvicultural wastes, landclearing debris, diseased trees, or debris from emergency clean-up operations, is prohibited at all TSWLF units.

## **§2.25 ACCESS REQUIREMENTS**

Owners or operators of all TSWLF units must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment.

## **§2.26 RUN-ON/RUN-OFF CONTROL SYSTEMS**

(a) Owners or operators of all TSWLF units must design, construct, and maintain:

(1) A run-on control system to prevent flow onto the active portion of the landfill during the peak discharge from a 25-year storm;

(2) A run-off control system from the active portion of the landfill to collect and control at least the water volume resulting from a 24-hour, 25-year storm.

(b) Run-off from the active portion of the landfill unit must be handled in accordance with §2.27(a) of this part.

## **§2.27 SURFACE WATER REQUIREMENTS**

TSWLF units shall not:

(a) Cause a discharge of pollutants into waters of the United States, including wetlands, that violates any requirements of the Clean Water Act, including, but not limited to, the National Pollutant Discharge Elimination System (NPDES) requirements, pursuant to section 402.

(b) Cause the discharge of a nonpoint source of pollution to waters of the United States, including wetlands, that violates any requirement of an area-wide or Reservation-wide water quality management plan that has been approved under section 208 or 319 of the Clean Water Act, as amended.

## §2.28 LIQUIDS RESTRICTIONS

(a) Bulk or noncontainerized liquid waste may not be placed in TSWLF units unless:

(1) The waste is household waste other than septic waste; or

(2) The waste is leachate or gas condensate derived from the TSWLF unit and the TSWLF unit, whether it is a new or existing TSWLF or lateral expansion, is designed with a composite liner and leachate collection system as described in §2.40 (a)(2) of this part. The owner or operator must place the demonstration in the operating record and notify the TPA that it has been placed in the operating record.

(b) Containers holding liquid waste may not be placed in a TSWLF unit unless:

(1) The container is a small container similar in size to that normally found in household waste;

(2) The container is designed to hold liquids for use other than storage; or

(3) The waste is household waste.

(c) For purposes of this section:

(1) "Liquid waste" means any waste material that is determined to contain "free liquids" as defined by Method 9095 (Paint Filter Liquids Test), as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Pub. No. SW-846).

(2) "Gas condensate" means the liquid generated as a result of gas recovery process(es) at the TSWLF unit.

## §2.29 RECORDKEEPING REQUIREMENTS

(a) The owner or operator of a TSWLF unit must record and retain near the facility in an operating record or in an alternative location approved by the TPA the following information as it becomes available:

- (1) Any location restriction demonstration required under Subpart B of this part;
  - (2) Inspection records, training procedures, and notification procedures required in §2.20 of this part;
  - (3) Gas monitoring results from monitoring and any remediation plans required by §2.23 of this part;
  - (4) Any TSWLF unit design documentation for placement of leachate or gas condensate in a TSWLF unit as required under §2.28(a)(2) of this part;
  - (5) Any demonstration, certification, finding monitoring, testing, or analytical data required by Subpart E of this part;
  - (6) Closure and post-closure care plans and any monitoring, testing, or analytical data as required by §§2.60 and 2.61 of this part; and
  - (7) Any cost estimates and financial assurance documentation required by Subpart G of this part.
  - (8) Any information demonstrating compliance with small community exemption as required by §2.1(f)(2).
- (b) The owner/operator must notify the TPA when the documents from paragraph (a) of this section have been placed or added to the operating record, and all information contained in the operating record must be furnished upon request to the TPA or be made available at all reasonable times for inspection by the TPA.
- (c) The TPA can set alternative schedules for recordkeeping and notification requirements as specified in paragraphs (a) and (b) of this section, except for the notification requirements in §2.10(b) and §2.55(g)(1)(iii).

§§2.30 - 2.39 [Reserved]

**SUBPART D -- DESIGN CRITERIA**  
**§2.40 DESIGN CRITERIA**

- (a) New TSWLF units and lateral expansions shall be constructed:
  - (1) In accordance with a design approved by the TPA or as specified in §2.40(e).

The design must ensure that the concentration values listed in Table 1 of this section will not be exceeded in the uppermost aquifer at the relevant point of compliance, as specified by the TPA under paragraph (d) of this section, or

(2) With a composite liner, as defined in paragraph (b) of this section and a leachate collection system that is designed and constructed to maintain less than a 30-cm depth of leachate over the liner.

(b) For purposes of this section, "composite liner" means a system consisting of two components; the upper component must consist of a minimum 30-mil flexible membrane liner (FML), and the lower component must consist of at least a two-foot layer of compacted soil with a hydraulic conductivity of no more than  $1 \times 10^{-7}$  cm/sec. FML components consisting of High Density Polyethylene (HDPE) shall be at least 60-mil thick. The FML component must be installed in direct and uniform contact with the compacted soil component.

(c) When approving a design that complies with paragraph (a)(1) of this section, the TPA shall consider at least the following factors:

- (1) The hydrogeologic characteristics of the facility and surrounding land;
- (2) The climatic factors of the area; and
- (3) The volume and physical and chemical characteristics of the leachate.

(d) The relevant point of compliance specified by the TPA shall be no more than 150 meters from the waste management unit boundary and shall be located on land owned by the owner of the TSWLF unit. In determining the relevant point of compliance, TPA shall consider at least the following factors:

- (1) The hydrogeologic characteristics of the facility and surrounding land;
- (2) The volume and physical and chemical characteristics of the leachate;
- (3) The quantity, quality, and detection, of flow of ground water;
- (4) The proximity and withdrawal rate of the ground-water users;
- (5) The availability of alternative drinking water supplies;
- (6) The existing quality of the ground water, including other sources of contamination and their cumulative impacts on the ground water and whether groundwater is currently used or reasonably expected to be used for drinking water;

- (7) Public health, safety, and welfare effects; and
- (8) Practicable capability of the owner or operator.

**TABLE 1**

Chemical	<u>MCL (mg/l)</u>
Arsenic	0.05
Barium	1.0
Benzene	0.005
Cadmium	0.01
Carbon tetrachloride	0.005
Chromium (hexavalent)	0.05
2,4-Dichlorophenoxy acetic acid	0.1
1,4-Dichlorobenzene	0.075
1,2-Dichloroethane	0.005
1,1-Dichloroethylene	0.007
Endrin	0.0002
Fluoride	4
Lindane	0.004
Lead	0.05
Mercury	0.002
Methoxychlor	0.1
Nitrate	10
Selenium	0.01
Silver	0.05
Toxaphene	0.005
1,1,1-Trichloromethane	0.2
Trichloroethylene	0.005
2,4,5-Trichlorophenoxy acetic acid	0.01
Vinyl Chloride	0.002

**SUBPART E -- GROUND-WATER  
MONITORING AND CORRECTIVE ACTION  
§2.50 APPLICABILITY**

(a) The requirements in this part apply to TSWLF units, except as provided in paragraph (b) of this section.

(b) Ground-water monitoring requirements under §2.51 through §2.55 of this Article

may be suspended by the TPA for a TSWLF unit if the owner or operator can demonstrate that there is no potential for migration of hazardous constituents from that TSWLF unit to the uppermost aquifer (as defined in §2.2) during the active life of the unit and the post-closure care period. This demonstration must be certified by a qualified ground-water scientist and approved by the TPA, and must be based upon:

- (1) Site-specific field collected measurements, sampling, and analysis of physical, chemical, and biological processes affecting contaminant fate and transport, and
- (2) Contaminant fate and transport predictions that maximize contaminant migration and consider impacts on human health and environment.

(c) Owners and operators of TSWLF units must comply with the ground-water monitoring requirements of this part according to the following schedule unless an alternative schedule is specified under paragraph (d) of this section:

(1) Existing TSWLF units and lateral expansions less than one mile from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§2.51 - 2.55 immediately;

(2) Existing TSWLF units and lateral expansions greater than one mile but less than two miles from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§2.51 - 2.55 by October 9, 1995;

(3) Existing TSWLF units and lateral expansions greater than two miles from a drinking water intake (surface or subsurface) must be in compliance with the ground-water monitoring requirements specified in §§2.51 - 2.55 by October 9, 1996.

(4) New TSWLF units must be in compliance with the ground-water monitoring requirements specified in §§2.51 - 2.55 before waste can be placed in the unit.

(d) The TPA may specify an alternative schedule for the owners or operators of existing TSWLF units and lateral expansions to comply with the ground-water monitoring requirements specified in §§2.51 - 2.55. This schedule must ensure that 50 percent of all existing TSWLF units are in compliance immediately and all existing TSWLF units are in compliance by October 9, 1996. In setting the compliance schedule, the TPA must consider potential risks posed by the unit to human health and the environment. The following factors should be considered in determining potential risk:

- (1) Proximity of human and environmental receptors;
- (2) Design of the TSWLF unit;

- (3) Age of the TSWLF unit;
- (4) The size of the TSWLF unit;
- (5) Types and quantities of wastes disposed including sewage sludge; and
- (6) Resource value of the underlying aquifer, including:
  - (i) Current and future uses;
  - (ii) Proximity and withdrawal rate of users; and
  - (iii) Ground-water quality and quantity.
- (e) Once established at a TSWLF unit, ground-water monitoring shall be conducted throughout the active life and post-closure care period of that TSWLF unit as specified in §2.61.
- (f) For the purposes of this subpart, a qualified ground-water scientist is a scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering and has sufficient training and experience in ground-water hydrology and related fields as may be demonstrated by Tribal registration, professional Certifications, or completion of accredited university programs that enable that individual to make sound professional judgements regarding ground-water monitoring, contaminant fate and transport, and corrective-action.
- (g) The TPA may establish alternative schedules for demonstrating compliance with §2.51(d)(2), pertaining to notification of placement of certification in operating record; §2.54(c)(1), pertaining to notification that statistically significant increase (SSI) notice is in operating record; §2.54(c)(2) and (3), pertaining to an assessment monitoring program; §2.55(b), pertaining to sampling and analyzing Appendix II constituents; §2.55(d)(1), pertaining to placement of notice (Appendix II constituents detected) in record and notification of notice in record; §2.55(d)(2), pertaining to sampling for Appendix I and II to this part; §2.55(g), pertaining to notification (and placement of notice in record) of SSI above ground-water protection standard; §§2.55(g)(1)(iv) and 2.56(a), pertaining to assessment of corrective measures; §2.57(a), pertaining to selection of remedy and notification of placement in record; §2.58(c)(4), pertaining to notification of placement in record (alternative corrective action measures); and §2.58(f), pertaining to notification of placement in record (certification of remedy completed).

## **§2.51 GROUND-WATER MONITORING SYSTEMS**



(a) A ground-water monitoring system must be installed that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield ground-water samples from the uppermost aquifer (as defined in §2.2) that:

(1) Represent the quality of background ground water that has not been affected by leakage from a unit. A determination of background quality may include sampling of wells that are not hydraulically upgradient of the waste management area where:

(i) Hydrogeologic conditions do not allow the owner or operator to determine what wells are hydraulically upgradient; or

(ii) Sampling at other wells will provide an indication of background ground-water quality that is as representative or more representative than that provided by the upgradient wells; and

(2) Represent the quality of ground water passing the relevant point of compliance specified by the TPA under §2.40(d). The downgradient monitoring system must be installed at the relevant point of compliance specified by the TPA under §2.40(d). When physical obstacles preclude installation of ground-water monitoring wells at the relevant point of compliance at existing units, the down-gradient monitoring system may be installed at the closest practicable distance hydraulically down-gradient from the relevant point of compliance specified by the TPA under §2.40 that ensure detection of groundwater contamination in the uppermost aquifer.

(b) The TPA may approve a multi-unit ground-water monitoring system instead of separate ground-water monitoring systems for each TSWLF unit when the facility has several units, provided the multi-unit ground-water monitoring system meets the requirement of §2.51(a) and will be as protective of human health and the environment as individual monitoring systems for each TSWLF unit, based on the following factors:

- (1) Number, spacing, and orientation of the TSWLF units;
- (2) Hydrogeologic setting;
- (3) Site history;
- (4) Engineering design of the TSWLF units, and
- (5) Type of waste accepted at the TSWLF units.

(c) Monitoring wells must be cased in a manner that maintains the integrity of the monitoring well bore hole. This casing must be screened or perforated and packed with gravel or sand, where necessary, to enable collection of ground-water samples. The annular space (i.e., the space between the bore hole and well casing) above the sampling

depth must be sealed to prevent contamination of samples and the ground water.

(1) The owner or operator must notify the TPA that the design, installation, development, and decommission of any monitoring wells, piezometers and other measurement, sampling, and analytical devices documentation has been placed in the operating record; and

(2) The monitoring wells, piezometers, and other measurement, sampling, and analytical devices must be operated and maintained so that they perform to design specifications throughout the life of the monitoring program.

(d) The number, spacing, and depths of monitoring systems shall be:

(1) Determined based upon site-specific technical information that must include thorough characterization of:

(i) Aquifer thickness, ground-water flow rate, ground-water flow direction including seasonal and temporal fluctuations in ground-water flow; and

(ii) Saturated and unsaturated geologic units and fill materials overlying the uppermost aquifer, materials comprising the uppermost aquifer, and materials comprising the confining unit defining the lower boundary of the uppermost aquifer; including, but not limited to: thicknesses, stratigraphy, lithology, hydraulic conductivities, porosities and effective porosities.

(2) Certified by a qualified ground-water scientist or approved by the TPA. Within 14 days of this certification, the owner or operator must notify the TPA that the certification has been placed in the operating record.

## §2.52 [Reserved]

## §2.53 GROUND-WATER SAMPLING AND ANALYSIS REQUIREMENTS

(a) The ground-water monitoring program must include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of ground-water quality at the background and downgradient wells installed in compliance with §2.51(a) of this part. The owner or operator must notify the TPA that the sampling and analysis program documentation has been placed in the operating record and the program must include procedures and techniques for:

- (1) Sample collection;
  - (2) Sample preservation and shipment;
  - (3) Analytical procedures;
  - (4) Chain of custody control; and
  - (5) Quality assurance and quality control.
- (b) The ground-water monitoring program must include sampling and analytical methods that are appropriate for ground-water sampling and that accurately measure hazardous constituents and other monitoring parameters in ground-water samples. Ground-water samples shall not be field-filtered prior to laboratory analysis.
- (c) The sampling procedures and frequency must be protective of human health and the environment.
- (d) Ground-water elevations must be measured in each well immediately prior to purging, each time ground water is sampled. The owner or operator must determine the rate and direction of ground-water flow each time ground water is sampled. Ground-water elevations in wells which monitor the same waste management area must be measured within a period of time short enough to avoid temporal variations in ground-water flow which could preclude accurate determination of ground-water flow rate and direction.
- (e) The owner or operator must establish background ground-water quality in a hydraulically upgradient or background well(s) for each of the monitoring parameters or constituents required in the particular ground-water monitoring program that applies to the TSWLF unit, as determined under §2.54(a), or §2.55(a) of this part. Background ground-water quality may be established at wells that are not located hydraulically upgradient from the TSWLF unit if it meets the requirements of §2.51(a)(1).
- (f) The number of samples collected to establish ground-water quality data must be consistent with the appropriate statistical procedures determined pursuant to paragraph (g) of this section. The sampling procedures shall be those specified under §2.54(b) for detection monitoring, §2.55(b) and (d) for assessment monitoring, and §2.56(b) of corrective action.
- (g) The owner or operator must specify in the operating record one of the following statistical methods to be used in evaluating ground-water monitoring data for each hazardous constituent. The statistical test chosen shall be conducted separately for each hazardous constituent in each well.

(1) A parametric analysis of variance (ANOVA) followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method must include estimation and testing of the contrasts between each compliance well's mean and the background mean levels for each constituent.

(2) An analysis of variance (ANOVA) based on ranks followed by multiple comparisons procedures to identify statistically significant evidence of contamination. The method must include estimation and testing of the contrasts between each compliance well's median and the background median levels for each constituent.

(3) A tolerance or prediction interval procedure in which an interval for each constituent is established from the distribution of the background data, and the level of each constituent in each compliance well is compared to the upper tolerance or prediction limit.

(4) A control chart approach that gives control limits for each constituent.

(5) Another statistical test method that meets the performance standards of §2.53(h). The owner or operator must place a justification for this alternative in the operating record and notify the TPA of the use of this alternative test. The justification must demonstrate that the alternative method meets the performance standards of §2.53(h).

(h) Any statistical method chosen under §2.53(g) shall comply with the following performance standards, as appropriate:

(1) The statistical method used to evaluate ground-water monitoring data shall be appropriate for the distribution of chemical parameters or hazardous constituents. If the distribution of the chemical parameters or hazardous constituents is shown by the owner or operator to be inappropriate for a normal theory test, then the data should be transformed or a distribution-free theory test should be used. If the distributions for the constituents differ, more than one statistical method may be needed.

(2) If an individual well comparison procedure is used to compare an individual compliance well constituent concentration with background constituent concentrations or a ground-water protection standard, the test shall be done at a Type I error level no less than 0.01 for each testing period. If a multiple comparisons procedure is used, the Type I experiment wise error rate for each testing period shall be no less than 0.05; however, the Type I error of no less than 0.01 for individual well comparisons must be maintained. This performance standard does not apply to tolerance intervals, prediction intervals, or control charts.

(3) If a control chart approach is used to evaluate ground-water monitoring data, the specific type of control chart and its associated parameter values shall be protective of human health and the environment. The parameters shall be determined after considering

the number of samples in the background data base, the data distribution, and the range of the concentration values for each constituent of concern.

(4) If a tolerance interval or a predictional interval is used to evaluate ground-water monitoring data, the levels of confidence and, for tolerance intervals, the percentage of the population that the interval must contain, shall be protective of human health and the environment. These parameters shall be determined after considering the number of samples in the background data base, the data distribution, and the range of the concentration values for each constituent of concern.

(5) The statistical method shall account for data below the limit of detection with one or more statistical procedures that are protective of human health and the environment. Any practical quantitation limit (pql) that is used in the statistical method shall be the lowest concentration level that can be reliably achieved within specified limits of precision and accuracy during routine laboratory operating conditions that are available to the facility.

(6) If necessary, the statistical method shall include procedures to control or correct for seasonal and spatial variability as well as temporal correlation in the data.

(i) The owner or operator must determine whether or not there is a statistically significant increase over background values for each parameter or constituent required in the particular ground-water monitoring program that applies to the TSWLF unit, as determined under §§2.54(a) or 2.55(a) of this part.

(1) In determining whether a statistically significant increase has occurred, the owner or operator must compare the ground-water quality of each parameter or constituent at each monitoring well designated pursuant to §2.51(a)(2) to the background value of that constituent, according to the statistical procedures and performance standards specified under paragraphs (g) and (h) of this section.

(2) Within a reasonable period of time after completing sampling and analysis, the owner or operator must determine whether there has been a statistically significant increase over background at each monitoring well.

#### **§2.54 DETECTION MONITORING PROGRAM**

(a) Detection monitoring is required at TSWLF units at all ground-water monitoring wells defined under §§2.51(a)(1) and (a)(2) of this part. At a minimum, a detection monitoring program must include the monitoring for the constituents listed in Appendix I of this part.

(1) The TPA may delete any of the Appendix I monitoring parameters for a TSWLF unit if it can be shown that the removed constituents are not reasonably expected to be contained in or derived from the waste contained in the unit.

(2) The TPA may establish an alternative list of inorganic indicator parameters for a TSWLF unit, in lieu of some or all of the heavy metals (constituents 1-15 in Appendix I to this part), if the alternative parameters provide a reliable indication of inorganic releases from the TSWLF unit to the ground water. In determining alternative parameters, the Director shall consider the following factors:

(i) The types, quantities, and concentrations of constituents in waste managed at the TSWLF unit;

(ii) The mobility, stability, and persistence of waste constituents or their reaction products in the unsaturated zone beneath the TSWLF unit;

(iii) The detectability of indicator parameters, waste constituents, and reaction products in the ground water; and

(iv) The concentration or values and coefficients of variation of monitoring parameters or constituents in the groundwater background.

(b) The monitoring frequency for all constituents listed in Appendix I to this part, or in the alternative list approved in accordance with paragraph (a)(2) of this section, shall be at least semiannual during the active life of the facility (including closure) and the post-closure period. A minimum of four independent samples from each well (background and downgradient) must be collected and analyzed for the Appendix I constituents, or the alternative list approved in accordance with paragraph (a)(2) of this section, during the first semiannual sampling event. At least one sample from each well (background and downgradient) must be collected and analyzed during subsequent semiannual sampling events.

The TPA may specify an appropriate alternative frequency for repeated sampling and analysis for Appendix I constituents, or the alternative list approved in accordance with paragraph (a)(2) of this section, during the active life (including closure) and the post-closure care period. The alternative frequency during the active life (including closure) shall be no less than annual. The alternative frequency shall be based on consideration of the following factors:

- (1) Lithology of the aquifer and unsaturated zone;
- (2) Hydraulic conductivity of the aquifer and unsaturated zone;
- (3) Ground-water flow rates;
- (4) Minimum distance between upgradient edge of the TSWLF unit and downgradient monitoring well screen (minimum distance of travel); and
- (5) Resource value of the aquifer.

(c) If the owner or operator determines, pursuant to §2.53(g) of this part, that there

is a statistically significant increase over background for one or more of the constituents listed in Appendix I to this part, or in the alternative list approved in accordance with paragraph (a)(2) of this section, at any monitoring well at the boundary specified under §2.51(a)(2), the owner or operator:

(1) Must, within 14 days of this finding, place a notice in the operating record indicating which constituents have shown statistically significant changes from background levels, and notify the Tribal director that this notice was placed in the operating record; and

(2) Must establish an assessment monitoring program meeting the requirements of §2.55 of this part within 90 days except as provided for in paragraph (c)(3) of this section.

(3) The owner/operator may demonstrate that a source other than a TSWLF unit caused the contamination or that the statistically significant increase resulted from error in sampling, analysis, statistical evaluation, or natural variation in ground-water quality. A report documenting this demonstration must be certified by a qualified ground-water scientist or approved by the TPA and be placed in the operating record. If a successful demonstration is made and documented, the owner or operator may continue detection monitoring as specified in this section. If, after 90 days, a successful demonstration is not made, the owner or operator must initiate an assessment monitoring program as required in §2.55.

### **§2.55 ASSESSMENT MONITORING PROGRAM**

(a) Assessment monitoring is required whenever a statistically significant increase over background has been detected for one or more of the constituents listed in Appendix I or in the alternative list approved in accordance with §2.54(a)(2).

(b) Within 90 days of triggering an assessment monitoring program, and annually thereafter, the owner or operator must sample and analyze the ground water for all constituents identified in Appendix II of this part. A minimum of one sample from each downgradient well must be collected and analyzed during each sampling event. For any constituent detected in the downgradient wells as the result of the complete Appendix II analysis, a minimum of four independent samples from each well (background and downgradient) must be collected and analyzed to establish background for the new constituents.

The TPA may specify an appropriate subset of wells to be sampled and analyzed for Appendix II constituents during assessment monitoring. The TPA may delete any of the Appendix II monitoring parameters for a TSWLF unit if it can be shown that the

removed constituents are not reasonably expected to be in or derived from the waste contained in the unit.

(c) The TPA may specify an appropriate alternate frequency for repeated sampling and analysis for the full set of Appendix II constituents required by §2.55(b) of this part, during the active life (including closure) and post-closure care of the unit considering the following factors:

- (1) Lithology of the aquifer and unsaturated zone;
- (2) Hydraulic conductivity of the aquifer and unsaturated zone;
- (3) Ground-water flow rates;
- (4) Minimum distance between upgradient edge of the TSWLF unit and downgradient monitoring well screen (minimum distance of travel);
- (5) Resource value of the aquifer; and
- (6) Nature (fate and transport) of any constituents detected in response to this section.

(d) After obtaining the results from the initial or subsequent sampling events required in paragraph (b) of this section, the owner or operator must:

- (1) Within 14 days, place a notice in the operating record identifying the Appendix II constituents that have been detected and notify the TPA that this notice has been placed in the operating record;
- (2) Within 90 days, and on at least a semiannual basis thereafter, resample all wells specified by §2.51(a) to this part, conduct analyses for all constituents in Appendix I to this part or in the alternative list approved in accordance with §2.54(a)(2), and for those constituents in Appendix II to this part that are detected in response to paragraph (b) of this section, and record their concentrations in the facility operating record. At least one sample from each well (background and downgradient) must be collected and analyzed during these sampling events.

The TPA may specify an alternative monitoring frequency during the active life (including closure) and the post closure period for the constituents referred to in this paragraph. The alternative frequency for Appendix I constituents, or the alternative list approved in accordance with §2.54(a)(2), during the active life (including closure) shall be no less than annual. The alternative frequency shall be based on consideration of the factors specified in paragraph (c) of this section;



(3) Establish background concentrations for any constituents detected pursuant to paragraphs (b) or (d)(2) of this section; and

(4) Establish ground-water protection standards for all constituents detected pursuant to paragraph (b) or (d) of this section. The ground-water protection standards shall be established in accordance with paragraphs (h) or (i) of this section.

(e) If the concentrations of all Appendix II constituents are shown to be at or below background values, using the statistical procedures in §2.53(g), for two consecutive sampling events, the owner or operator must notify the TPA of this finding and may return to detection monitoring.

(f) If the concentrations of any Appendix II constituents are above background values, but all concentrations are below the ground-water protection standard established under paragraphs (h) or (i) of this section, using the statistical procedures in §2.53(g), the owner or operator must continue assessment monitoring in accordance with this section.

(g) If one or more Appendix II constituents are detected at statistically significant levels above the ground-water protection standard established under paragraphs (h) or (i) of this section in any sampling event, the owner or operator must, within 14 days of this finding, place a notice in the operating record identifying the Appendix II constituents that have exceeded the ground-water protection standard and notify the TPA and all appropriate local government officials that the notice has been placed in the operating record. The owner or operator also:

(1)(i) Must characterize the nature and extent of the release by installing additional monitoring wells as necessary;

(ii) Must install at least one additional monitoring well at the facility boundary in the direction of contaminant migration and sample this well in accordance with §2.55(d)(2);

(iii) Must notify all persons who own the land or reside on the land that directly overlies any part of the plume of contamination if contaminants have migrated off-site if indicated by sampling of wells in accordance with §2.55(g)(1); and

(iv) Must initiate an assessment of corrective measures as required by §2.56 of this part within 90 days; or

(2) May demonstrate that a source other than a TSWLF unit caused the contamination, or that the SSI resulted from error in sampling, analysis, statistical evaluation, or natural variation in ground-water quality. A report documenting this demonstration must be certified by a qualified ground-water scientist or approved by the

TPA and placed in the operating record. If a successful demonstration is made the owner or operator must continue monitoring in accordance with the assessment monitoring program pursuant to §2.55, and may return to detection monitoring if the Appendix II constituents are at or below background as specified in §2.55(e). Until a successful demonstration is made, the owner or operator must comply with §2.55(g) including initiating an assessment of corrective measures.

(h) The owner or operator must establish a ground-water protection standard for each Appendix II constituent detected in the ground-water. The ground-water protection standard shall be:

(1) For constituents for which a maximum contaminant level (MCL) has been promulgated under section 1412 of the Safe Drinking Water Act (codified) under 40 CFR part 141, the MCL for that constituent;

(2) For constituents for which MCLs have not been promulgated, the background concentration for the constituent established from wells in accordance with §2.51(a)(1); or

(3) For constituents for which the background level is higher than the MCL identified under subparagraph (h)(1) of this section or health based levels identified under §2.55(i)(1), the background concentration.

(i) The TPA may establish an alternative ground-water protection standard for constituents for which MCLs have not been established. These ground-water protection standards shall be appropriate health based levels that satisfy the following criteria:

(1) The level is derived in a manner consistent with Agency guidelines for assessing the health risks of environmental pollutants (51 FR 33992, 34006, 34014, 34028, September 24, 1986);

(2) The level is based on scientifically valid studies conducted in accordance with the Toxic Substances Control Act Good Laboratory Practice Standards (40 CFR part 792) or equivalent;

(3) For carcinogens, the level represents a concentration associated with an excess lifetime cancer risk level (due to continuous lifetime exposure) with the  $1 \times 10^{-4}$  to  $1 \times 10^{-6}$  range; and

(4) For systemic toxicants, the level represents a concentration to which the human population (including sensitive subgroups) could be exposed to on a daily basis that is likely to be without appreciable risk of deleterious effects during a lifetime. For purposes of this subpart, systemic toxicants include toxic chemicals that cause effects other than cancer or mutation.

(j) In establishing ground-water protection standards under paragraph (i) of this section, the TPA may consider the following:

- (1) Multiple contaminants in the ground water;
- (2) Exposure threats to sensitive environmental receptors; and
- (3) Other site-specific exposure or potential exposure to ground water.

### **§2.56 ASSESSMENT OF CORRECTIVE MEASURES**

(a) Within 90 days of finding that any of the constituents listed in Appendix II have been detected at a statistically significant level exceeding the ground-water protection standards defined under §2.55(h) or (i) of this part, the owner or operator must initiate an assessment of corrective measures. Such an assessment must be completed within a reasonable period of time.

(b) The owner or operator must continue to monitor in accordance with the assessment monitoring program as specified in §2.55.

(c) The assessment shall include an analysis of the effectiveness of potential corrective measures in meeting all of the requirements and objectives of the remedy as described under §2.57, addressing at least the following:

- (1) The performance, reliability, ease of implementation, and potential impacts of appropriate potential remedies, including safety impacts, cross-media impacts, and control of exposure to any residual contamination;
- (2) The time required to begin and complete the remedy;
- (3) The costs of remedy implementation; and
- (4) The institutional requirements such as Tribal permit requirements or other environmental or public health requirements that may substantially affect implementation of the remedy(s).

(d) The owner or operator must discuss the results of the corrective measures assessment, prior to the selection of remedy, in a public meeting with interested and affected parties.

## §2.57 SELECTION OF REMEDY

(a) Based on the results of the corrective measures assessment conducted under §2.56, the owner or operator must select a remedy that, at a minimum, meets the standards listed in paragraph (b) of this section. The owner or operator must notify the TPA, within 14 days of selecting a remedy, a report describing the selected remedy has been placed in the operating record and how it meets the standards in paragraph (b) of this section.

(b) Remedies must:

- (1) Be protective of human health and the environment;
- (2) Attain the ground-water protection standard as specified pursuant to §§2.55(h) or (i);
- (3) Control the source(s) of releases so as to reduce or eliminate, to the maximum extent practicable, further releases of Appendix II constituents into the environment that may pose a threat to human health or the environment; and
- (4) Comply with standards for management of wastes as specified in §2.58(d).

(c) In selecting a remedy that meets the standards of §2.57(b), the owner or operator shall consider the following evaluation factors:

- (1) The long- and short-term effectiveness and protectiveness of the potential remedy(s), along with the degree of certainty that the remedy will prove successful based on consideration of the following:
  - (i) Magnitude of reduction of existing risks;
  - (ii) Magnitude of residual risks in terms of likelihood of further releases due to waste remaining following implementation of a remedy;
  - (iii) The type and degree of long-term management required, including monitoring, operation, and maintenance;
  - (iv) Short-term risks that might be posed to the community, workers, or the environment during implementation of such a remedy, including potential threats to human health and the environment associated with excavation, transportation, and redisposal or containment;
  - (v) Time until full protection is achieved;

(vi) Potential for exposure of humans and environmental receptors to remaining wastes, considering the potential threat to human health and the environment associated with excavation, transportation, redisposal, or containment;

(vii) Long-term reliability of the engineering and institutional controls; and

(viii) Potential need for replacement of the remedy.

(2) The effectiveness of the remedy in controlling the source to reduce further releases based on consideration of the following factors:

(i) The extent to which containment practices will reduce further releases;

(ii) The extent to which treatment technologies may be used.

(3) The ease or difficulty of implementing a potential remedy(s) based on consideration of the following types of factors:

(i) Degree of difficulty associated with constructing the technology;

(ii) Expected operational reliability of the technologies;

(iii) Need to coordinate with and obtain necessary approvals and permits from other agencies;

(iv) Availability of necessary equipment and specialists; and

(v) Available capacity and location of needed treatment, storage, and disposal services.

(4) Practicable capability of the owner or operator, including a consideration of the technical and economic capability.

(5) The degree to which community concerns are addressed by a potential remedy(s).

(d) The owner or operator shall specify as part of the selected remedy a schedule(s) for initiating and completing remedial activities. Such a schedule must require the initiation of remedial activities within a reasonable period of time taking into consideration the factors set forth in paragraphs (d) (1-8). The owner or operator must consider the following factors in determining the schedule of remedial activities:

(1) Extent and nature of contamination;

(2) Practical capabilities of remedial technologies in achieving compliance with ground-water protection standards established under §§2.55(g) or (h) and other objectives of the remedy;

(3) Availability of treatment or disposal capacity for wastes managed during implementation of the remedy;

(4) Desirability of utilizing technologies that are not currently available, but which may offer significant advantages over already available technologies in terms of effectiveness, reliability, safety, or ability to achieve remedial objectives;

(5) Potential risks to human health and the environment from exposure to contamination prior to completion of the remedy;

(6) Resource value of the aquifer including:

(i) Current and future uses;

(ii) Proximity and withdrawal rate of users;

(iii) Ground-water quantity and quality;

(iv) The potential damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituent;

(v) The hydrogeologic characteristic of the facility and surrounding land;

(vi) Ground-water removal and treatment costs; and

(vii) The cost and availability of alternative water supplies.

(7) Practicable capability of the owner or operator.

(8) Other relevant factors.

(e) The TPA may determine that remediation of a release of an Appendix II constituent from a TSWLF unit is not necessary if the owner or operator demonstrates to the TPA that:

(1) The ground-water is additionally contaminated by substances that have originated from a source other than a TSWLF unit and those substances are present in concentrations such that cleanup of the release from the TSWLF unit would provide no significant reduction in risk to actual or potential receptors; or

- (2) The constituent(s) is present in ground water that:
    - (i) Is not currently or reasonably expected to be a source of drinking water; and
    - (ii) Is not hydraulically connected with waters to which the hazardous constituents are migrating or are likely to migrate in a concentration(s) that would exceed the ground-water protection standards established under §2.55(h) or (i); or
  - (3) Remediation of the release(s) is technically impracticable; or
  - (4) Remediation results in unacceptable cross-media impacts.
- (f) A determination by the TPA pursuant to paragraph (e) of this section shall not affect the authority of the TPA to require the owner or operator to undertake source control measures or other measures that may be necessary to eliminate or minimize further releases to the ground-water, to prevent exposure to the ground-water, or to remediate the ground-water to concentrations that are technically practicable and significantly reduce threats to human health or the environment.

### **§2.58 IMPLEMENTATION OF THE CORRECTIVE ACTION PROGRAM**

- (a) Based on the schedule established under §2.57(d) for initiation and completion of remedial activities the owner/operator must:
  - (1) Establish and implement a corrective action ground-water monitoring program that:
    - (i) At a minimum, meet the requirements of an assessment monitoring program under §2.55;
    - (ii) Indicate the effectiveness of the corrective action remedy; and
    - (iii) Demonstrate compliance with ground-water protection standard pursuant to paragraph (e) of this section.
  - (2) Implement the corrective action remedy selected under §2.57; and
  - (3) Take any interim measures necessary to ensure the protection of human health and the environment. Interim measures should, to the greatest extent practicable, be consistent with the objectives of and contribute to the performance of any remedy that

may be required pursuant to §2.57. The following factors must be considered by an owner or operator in determining whether interim measures are necessary:

- (i) Time required to develop and implement a final remedy;
- (ii) Actual or potential exposure of nearby populations or environmental receptors to hazardous constituents;
- (iii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
- (iv) Further degradation of the ground-water that may occur if remedial action is not initiated expeditiously;
- (v) Weather conditions that may cause hazardous constituents to migrate or be released;
- (vi) Risks of fire or explosion, or potential for exposure to hazardous constituents as a result of an accident or failure of a container or handling system; and
- (vii) Other situations that may pose threats to human health and the environment.

(b) An owner or operator may determine, based on information developed after implementation of the remedy has begun or other information, that compliance with requirements of §2.57(b) are not being achieved through the remedy selected. In such cases, the owner or operator must implement other methods or techniques that could practicably achieve compliance with the requirements, unless the owner or operator makes the determination under §2.58(c).

(c) If the owner or operator determines that compliance with requirements under §2.57(b) cannot be practically achieved with any currently available methods, the owner or operator must:

- (1) Obtain certification of a qualified ground-water scientist or approval by the TPA that compliance with requirements under §2.57(b) cannot be practically achieved with any currently available methods;
- (2) Implement alternate measures to control exposure of humans or the environment to residual contamination, as necessary to protect human health and the environment; and
- (3) Implement alternate measures for control of the sources of contamination, or for removal or decontamination of equipment, units, devices, or structures that are:
  - (i) Technically practicable; and



- (ii) Consistent with the overall objective of the remedy.
- (4) Notify the TPA within 14 days that a report justifying the alternative measures prior to implementing the alternative measures has been placed in the operating record.
- (d) All solid wastes that are managed pursuant to a remedy required under §2.57, or an interim measure required under §2.58(a)(3), shall be managed in a manner:
  - (1) That is protective of human health and the environment; and
  - (2) That complies with applicable tribal and federal requirements.
- (e) Remedies selected pursuant to §2.57 shall be considered complete when:
  - (1) The owner or operator complies with the ground-water protection standards established under §§2.55(h) or (i) at all points within the plume of contamination that lie beyond the ground-water monitoring well system established under §2.51(a).
  - (2) Compliance with the ground-water protection standards established under §§2.55(h) or (i) has been achieved by demonstrating that concentrations of Appendix II constituents have not exceeded the ground-water protection standard(s) for a period of three consecutive years using the statistical procedures and performance standards in §2.53(g) and (h). The TPA may specify an alternative length of time during which the owner or operator must demonstrate that concentrations of Appendix II constituents have not exceeded the ground-water protection standard(s) taking into consideration:
    - (i) Extent and concentration of the release(s);
    - (ii) Behavior characteristics of the hazardous constituents in the ground-water;
    - (iii) Accuracy of monitoring or modeling techniques, including any seasonal, meteorological, or other environmental variabilities that may affect the accuracy; and
    - (iv) Characteristics of the ground-water.
- (3) All actions required to complete the remedy have been satisfied.
- (f) Upon completion of the remedy, the owner or operator must notify the TPA within 14 days that a certification that the remedy has been completed in compliance with the requirements of §2.58(e) has been placed in the operating record. The certification must be signed by the owner or operator and by a qualified ground-water scientist or approved by the TPA.
- (g) When, upon completion of the certification, the owner or operator determines

that the corrective action remedy has been completed in accordance with the requirements under paragraph (e) of this section, the owner or operator shall be released from the requirements for financial assurance for corrective action under §2.73.

**§2.59 [Reserved]**

**SUBPART F -- CLOSURE AND  
POST-CLOSURE CARE  
§2.60 CLOSURE CRITERIA**

(a) Owners or operators of all TSWLF units must install a final cover system that is designed to minimize infiltration and erosion. The final cover system must be comprised of an erosion layer underlain by an infiltration layer as follows:

(1) The infiltration layer must be comprised of a minimum of 18 inches of earthen material that has a permeability less than or equal to the permeability of any bottom liner system or natural subsoils present, or a permeability no greater than  $1 \times 10^{-5}$  cm/sec, whichever is less, and

(2) The erosion layer must consist of a minimum 6 inches of earthen material that is capable of sustaining native plant growth.

(b) The TPA may approve an alternative final cover design that includes:

(1) An infiltration layer that achieves an equivalent reduction in infiltration as the infiltration layer specified in paragraph (a)(1) of this section, and

(2) An erosion layer that provides equivalent protection from wind and water erosion as the erosion layer specified in (a)(2) of this section.

(c) The owner or operator must prepare a written closure plan that describes the steps necessary to close all TSWLF units at any point during its active life in accordance with the cover design requirements in §2.60(a) or (b), as applicable. The closure plan, at a minimum, must include the following information:

(1) A description of the final cover, designed in accordance with §2.60(a) and the methods and procedures to be used to install the cover;

(2) An estimate of the largest area of the TSWLF unit ever requiring a final cover as required under §2.60(a) at any time during the active life;

- (3) An estimate of the maximum inventory of wastes ever on-site over the active life of the landfill facility; and
- (4) A schedule for completing all activities necessary to satisfy the closure criteria in §2.60.
- (d) The owner or operator must notify the TPA that a closure plan has been prepared and placed in the operating record no later than the effective date of this part, or by the initial receipt of waste, whichever is later.
- (e) Prior to beginning closure of each TSWLF unit as specified in §2.60(f), an owner or operator must notify the TPA that a notice of the intent to close the unit has been placed in the operating record.
- (f) The owner or operator must begin closure activities of each TSWLF unit no later than 30 days after the date on which the TSWLF unit receives the known final receipt of wastes or, if the TSWLF unit has remaining capacity and there is a reasonable likelihood that the TSWLF unit will receive additional wastes, no later than one year after the most recent receipt of wastes. Extensions beyond the one-year deadline for beginning closure may be granted by the TPA if the owner or operator demonstrates that the TSWLF unit has the capacity to receive additional wastes and the owner or operator has taken and will continue to take all steps necessary to prevent threats to human health and the environment from the unclosed TSWLF unit.
- (g) The owner or operator of all TSWLF units must complete closure activities of each TSWLF unit in accordance with the closure plan within 180 days following the beginning of closure as specified in paragraph (f) of this section. Extensions of the closure period may be granted by the TPA if the owner or operator demonstrates that closure will, of necessity, take longer than 180 days and he has taken and will continue to take all steps to prevent threats to human health and the environment from the unclosed TSWLF unit.
- (h) Following closure of each TSWLF unit, the owner or operator must notify the TPA that a certification, signed by an independent registered professional engineer or approved by TPA, verifying that closure has been completed in accordance with the closure plan, has been placed in the operating record.
- (i)(1) Following closure of all TSWLF units, the owner or operator must record a notation on the deed to the landfill facility property, or some other instrument that is normally examined during title search, and notify the TPA that the notation has been recorded and a copy has been placed in the operating record.
- (2) The notation on the deed must in perpetuity notify any potential purchaser of

the property that:

- (i) The land has been used as a landfill facility; and
- (ii) Its use is restricted under §2.61(c)(3).
- (j) The owner or operator may request permission from the TPA to remove the notation from the deed if all wastes are removed from the facility.

### **§2.61 POST-CLOSURE CARE REQUIREMENTS**

(a) Following closure of each TSWLF unit, the owner or operator must conduct post-closure care. Post-closure care must be conducted for 30 years, except as provided under paragraph (b) of this section, and consist of at least the following:

(1) Maintaining the integrity and effectiveness of any final cover, including making repairs to the cover as necessary to correct the effects of settlement, subsidence, erosion, or other events, and preventing run-on and run-off from eroding or otherwise damaging the final cover;

(2) Maintaining and operating the leachate collection system in accordance with the requirements in §2.40. The TPA may allow the owner or operator to stop managing leachate if the owner or operator demonstrates that leachate no longer poses a threat to human health and the environment;

(3) Monitoring the ground water in accordance with the requirements of subpart E of this part and maintaining the ground-water monitoring system, if applicable; and

(4) Maintaining and operating the gas monitoring system in accordance with the requirements of §2.23.

(b) The length of the post-closure care period may be:

(1) Decreased by the TPA if the owner or operator demonstrates that the reduced period is sufficient to protect human health and the environment and this demonstration is approved by the TPA; or

(2) Increased by the TPA if the TPA determines that the lengthened period is necessary to protect human health and the environment.

(c) The owner or operator of all TSWLF units must prepare a written post-closure

plan that includes, at a minimum, the following information:

- (1) A description of the monitoring and maintenance activities required in §2.61(a) for each TSWLF unit, and the frequency at which these activities will be performed;
- (2) Name, address, and telephone number of the person or office to contact about the facility during the post-closure period; and
- (3) A description of the planned uses of the property during the post-closure period. Post-closure use of the property shall not disturb the integrity of the final cover, liner(s), or any other components of the containment system, or the function of the monitoring systems unless necessary to comply with the requirements in this Article.

The TPA may approve any other disturbance if the owner or operator demonstrates that disturbance of the final cover, liner or other component of the containment system, including any removal of waste, will not increase the potential threat to human health or the environment.

- (d) The owner or operator must notify the TPA that a post-closure plan has been prepared and placed in the operating record no later than the effective date of this Chapter or by the initial receipt of waste, whichever is later.
- (e) Following completion of the post-closure care period for each TSWLF unit, the owner or operator must notify the TPA that a certification, signed by an independent registered professional engineer or approved by the TPA, verifying that post-closure care has been completed in accordance with the post-closure plan, has been placed in the operating record.

**§§2.62 - 2.69 [Reserved]**

**SUBPART G -- FINANCIAL  
ASSURANCE CRITERIA  
§2.70 APPLICABILITY AND  
EFFECTIVE DATE**

- (a) The requirements of this section apply to owners and operators of all TSWLF units, except an owner or operator who is the Federal government whose debts and liabilities are the debts and liabilities of the United States.
- (b) The requirements of this section are effective immediately.

## **§2.71 FINANCIAL ASSURANCE FOR CLOSURE**

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party to close the largest area of all TSWLF units ever requiring a final cover as required under §2.60 at any time during the active life in accordance with the closure plan. The owner or operator must notify the TPA that the estimate has been placed in the operating record.

(1) The cost estimate must equal the cost of closing the largest area of all TSWLF units ever requiring a final cover at any time during the active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see §2.60(c)(2) of this part).

(2) During the active life of the TSWLF unit, the owner or operator must annually adjust the closure cost estimate for inflation.

(3) The owner or operator must increase the closure cost estimate and the amount of financial assurance provided under paragraph (b) of this section if changes to the closure plan or TSWLF unit conditions increase the maximum cost of closure at any time during the remaining active life.

(4) The owner or operator may reduce the closure cost estimate and the amount of financial assurance provided under paragraph (b) of this section if the cost estimate exceeds the maximum cost of closure at any time during the remaining life of the TSWLF unit. The owner or operator must notify the TPA that the justification for the reduction of the closure cost estimate and the amount of financial assurance has been placed in the operating record.

(b) The owner or operator of each TSWLF unit must establish financial assurance for closure of the TSWLF unit in compliance with §2.74. The owner or operator must provide continuous coverage for closure until released from financial assurance requirements by demonstrating compliance with §2.60(h) and (i).

## **§2.72 FINANCIAL ASSURANCE FOR POST-CLOSURE CARE**

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct post-closure care for the TSWLF unit in compliance with the post-closure plan developed under §2.61 of this part. The post-closure cost estimate used to demonstrate financial assurance in paragraph (b) of this

section must account for the total costs of conducting post-closure care, including annual and periodic costs as described in the post-closure plan over the entire post-closure care period. The owner or operator must notify the TPA that the estimate has been placed in the operating record.

(1) The cost estimate for post-closure care must be based on the most expensive costs of post-closure care during the post-closure care period.

(2) During the active life of the TSWLF unit and during the post-closure care period, the owner or operator must annually adjust the post-closure cost estimate for inflation.

(3) The owner or operator must increase the post-closure care cost estimate and the amount of financial assurance provided under paragraph (b) of this section if changes in the post-closure plan or TSWLF unit conditions increase the maximum costs of post-closure care.

(4) The owner or operator may reduce the post-closure cost estimate and the amount of financial assurance provided under paragraph (b) of this section if the cost estimate exceeds the maximum costs of post-closure care remaining over the post-closure care period. The owner or operator must notify the TPA that the justification for the reduction of the post-closure cost estimate and the amount of financial assurance has been placed in the operating record.

(b) The owner or operator of each TSWLF unit must establish, in a manner in accordance with §2.74, financial assurance for the costs of post-closure care as required under §2.61 of this part. The owner or operator must provide continuous coverage for post-closure care until released from financial assurance requirements for post-closure care by demonstrating compliance with 2.61(e).

### **§2.73 FINANCIAL ASSURANCE FOR CORRECTIVE ACTION**

(a) An owner or operator of a TSWLF unit required to undertake a corrective action program under §2.58 of this part must have a detailed written estimate, in current dollars, of the cost of hiring a third party to perform the corrective action in accordance with the program required under §2.58 of this part. The corrective action cost estimate must account for the total costs of corrective action activities as described in the corrective action plan for the entire corrective action period. The owner or operator must notify the TPA that the estimate has been placed in the operating record.

(1) The owner or operator must annually adjust the estimate for inflation until the

corrective action program is completed in accordance with §2.58(f) of this part.

(2) The owner or operator must increase the corrective action cost estimate and the amount of financial assurance provided under paragraph (b) of this section if changes in the corrective action program or TSWLF unit conditions increase the maximum costs of corrective action.

(3) The owner or operator may reduce the amount of the corrective action cost estimate and the amount of financial assurance provided under paragraph (b) of this section if the cost estimate exceeds the maximum remaining costs of corrective action. The owner or operator must notify the TPA that the justification for the reduction of the corrective action cost estimate and the amount of financial assurance has been placed in the operating record.

(b) The owner or operator of each TSWLF unit required to undertake a corrective action program under §2.58 of this part must establish, in a manner in accordance with §2.74, financial assurance for the most recent corrective action program. The owner or operator must provide continuous coverage for corrective action until released from financial assurance requirements for corrective action by demonstrating compliance with §2.58(f) and (g).

## **§2.74 ALLOWABLE MECHANISMS**

The mechanisms used to demonstrate financial assurance under this section must ensure that the funds necessary to meet the costs of closure, post-closure care, and corrective action for known releases will be available whenever they are needed. Owners and operators must choose from the options specified in paragraphs (a) through (j) of this section.

(a) Trust Fund. (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund which conforms to the requirements of this paragraph. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or Tribal agency. A copy of the trust agreement must be placed in the facility's operating record.

(2) Payments into the trust fund must be made annually by the owner or operator over the term of the initial permit or over the remaining life of the TSWLF unit, whichever is shorter, in the case of a trust fund for closure or post-closure care, or over one-half of the estimated length of the corrective action program in the case of corrective action for known releases. This period is referred to as the pay-in period.



(3) For a trust fund used to demonstrate financial assurance for closure and post-closure care, the first payment into the fund must be at least equal to the current cost estimate for closure or post-closure care, except as provided in paragraph (j) of this section, divided by the number of years in the pay-in period as defined in paragraph (a)(2) of this section. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{\text{CE}-\text{CV}}{\text{Y}}$$

where CE is the current cost estimate for closure or post-closure care (updated for inflation or other changes), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) For a trust fund used to demonstrate financial assurance for corrective action, the first payment into the trust fund must be at least equal to one-half of the current cost estimate for corrective action, except as provided in paragraph (j) of this section, divided by the number of years in the corrective action pay-in period as defined in paragraph (a)(2) of this section. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{\text{RB}-\text{CV}}{\text{Y}}$$

where RB is the most recent estimate of the required trust fund balance for corrective action (i.e., the total costs that will be incurred during the second half of the corrective action period), CV is the current value of the trust fund, and Y is the number of years remaining on the pay-in period.

(5) The initial payment into the trust fund must be made before the initial receipt of waste or before the effective date of this Chapter, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §2.58.

(6) If the owner or operator establishes a trust fund after having used one or more alternate mechanisms specified in this section, the initial payment into the trust fund must be at least the amount that the fund would contain if the trust fund were established initially and annual payments made according to the specifications of this paragraph and §270.74(a) of this section, as applicable.

(7) The owner or operator, or other person authorized to conduct closure, post-closure care, or corrective action activities may request reimbursement from the trustee for these expenditures. Requests for reimbursement will be granted by the trustee only if sufficient funds are remaining in the trust fund to cover the remaining costs of closure, post-closure care, or corrective action, and if justification and documentation of the cost is placed in the operating record. The owner or operator must notify the TPA

that the documentation of the justification for reimbursement has been placed in the operating record and that reimbursement has been received.

(8) The trust fund may be terminated by the owner or operator only if the owner or operator substitutes alternate financial assurance as specified in this section or if he is no longer required to demonstrate financial responsibility in accordance with the requirements of §§2.71(b), 2.72(b), or 2.73(b).

(b) Surety Bond Guaranteeing Payment or Performance. (1) An owner or operator may demonstrate financial assurance for closure or post-closure care by obtaining a payment or performance surety bond which conforms to the requirements of this paragraph. An owner or operator may demonstrate financial assurance for corrective action by obtaining a performance bond which conforms to the requirements of this paragraph. The bond must be effective before the initial receipt of waste or before the effective date of this Chapter, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §2.58. The owner or operator must notify the TPA that a copy of the bond has been placed in the operating record. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The penal sum of the bond must be in an amount at least equal to the current closure, post-closure care or corrective action cost estimate, whichever is applicable, except as provided in §2.74(k).

(3) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(4) The owner or operator must establish a standby trust fund. The standby trust fund must meet the requirements of §2.74(a) except the requirements for initial payment and subsequent annual payments specified in §2.74(a)(2), (3), (4) and (5).

(5) Payments made under the terms of the bond will be deposited by the surety directly into the standby trust fund. Payments from the trust fund must be approved by the trustee.

(6) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner and operator and to the TPA 120 days in advance of cancellation. If the surety cancels the bond, the owner or operator must obtain alternate financial assurance as specified in this section.

(7) The owner or operator may cancel the bond only if alternate financial assurance is substituted as specified in this section or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with §§2.71(b), 2.72(b) or 2.73(b).

(c) Letter of Credit. (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this paragraph. The letter of credit must be effective before the initial receipt of waste or before the effective date of this Chapter, whichever is later, in the case of closure and post-closure care, or no later than 120 days after the corrective action remedy has been selected in accordance with the requirements of §2.58. The owner or operator must notify the TPA that a copy of the letter of credit has been placed in the operating record. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a Federal or Tribal agency.

(2) A letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: name, and address of the facility, and the amount of funds assured, must be included with the letter of credit in the operating record.

(3) The letter of credit must be irrevocable and issued for a period of at least one year in an amount at least equal to the current cost estimate for closure, post-closure care or corrective action, whichever is applicable, except as provided in §2.74(a). The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless the issuing institution has cancelled the letter of credit by sending notice of cancellation by certified mail to the owner and operator and to the TPA 120 days in advance of cancellation. If the letter of credit is cancelled by the issuing institution, the owner or operator must obtain alternate financial assurance.

(4) The owner or operator may cancel the letter of credit only if alternate financial assurance is substituted as specified in this section or if the owner or operator is released from the requirements of this section in accordance with §§2.71(b), 2.72(b) or 2.73(b).

(d) Insurance. (1) An owner or operator may demonstrate financial assurance for closure and post-closure care by obtaining insurance which conforms to the requirements of this paragraph. The insurance must be effective before the initial receipt of waste or before the effective date of this Chapter, whichever is later. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more Tribals. The owner or operator must notify the TPA that a copy of the insurance policy has been placed in the operating record.

(2) The closure or post-closure care insurance policy must guarantee that funds will be available to close the TSWLF unit whenever final closure occurs or to provide post-closure care for the TSWLF unit whenever the post-closure care period begins, whichever is applicable. The policy must also guarantee that once closure or post-closure care begins, the insurer will be responsible for the paying out of funds to the owner or operator or other person authorized to conduct closure or post-closure care, up to an

amount equal to the face amount of the policy.

(3) The insurance policy must be issued for a face amount at least equal to the current cost estimate for closure or post-closure care, whichever is applicable, except as provided in §2.74(a). The term "face amount" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(4) An owner or operator, or any other person authorized to conduct closure or post-closure care, may receive reimbursements for closure or post-closure expenditures, whichever is applicable. Requests for reimbursement will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of closure or post-closure care, and if justification and documentation of the cost is placed in the operating record. The owner or operator must notify the TPA that the documentation of the justification for reimbursement has been placed in the operating record and that reimbursement has been received.

(5) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided that such consent is not unreasonably refused.

(6) The insurance policy must provide that the insurer may not cancel, terminate or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the owner and operator and to the TPA 120 days in advance of cancellation. If the insurer cancels the policy, the owner or operator must obtain alternate financial assurance as specified in this section.

(7) For insurance policies providing coverage for post-closure care, commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amount of the policy, less any payments made, multiplied by an amount equivalent to 85 percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. Treasury for 26-week Treasury securities.

(8) The owner or operator may cancel the insurance policy only if alternate financial assurance is substituted as specified in this section or if the owner or operator is no longer required to demonstrate financial responsibility in accordance with the requirements of §2.71(b), 2.72(b) or 2.73(b).

(e) Corporate Financial Test.

[reserved]

(f) Local Government Financial Test.

[reserved]

(g) Corporate Guarantee.

[Reserved]

(h) Local Government Guarantee.

[Reserved]

(i) Tribal Approved Mechanism. An owner or operator may satisfy the requirements of this section by obtaining any other mechanism that meets the criteria specified in §2.74(l), and that is approved by the TPA.

(k) Use of Multiple Financial Mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. The mechanisms must be as specified in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of this section, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current cost estimate for closure, post-closure care or corrective action, whichever is applicable. The financial test and a guarantee provided by a corporate parent, sibling, or grandparent may not be combined if the financial statements of the two firms are consolidated.

(l) The language of the mechanisms listed in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of this section must ensure that the instruments satisfy the following criteria:

(1) The financial assurance mechanisms must ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed;

(2) The financial assurance mechanisms must ensure that funds will be available in a timely fashion when needed;

(3) The financial assurance mechanisms must be obtained by the owner or operator by the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, in the case of closure and post-closure care, and no later than 120 days after the corrective action remedy has been selected in accordance with the requirements

of §2.58, until the owner or operator is released from the financial assurance requirements under §§2.71, 2.72 and 2.73.

(4) The financial assurance mechanisms must be legally valid, binding, and enforceable under Tribal and Federal law.