

**Part 265 - Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities**

**Subpart A - General**

Sec.

265.1 Purpose, scope, and applicability.

265.2-

265.3 **[Reserved]**

265.4 Imminent hazard action.

**Subpart B - General Facility Standards**

265.10 Applicability.

265.11 Identification number.

265.12 Required notices.

265.13 General waste analysis.

265.14 Security.

265.15 General inspection requirements.

265.16 Personnel training.

265.17 General requirements for ignitable, reactive, or incompatible wastes.

265.18 Location standards.

265.19-

265.29 **[Reserved]**

**Subpart C - Preparedness and Prevention**

265.30 Applicability.

265.31 Maintenance and operation of facility.

265.32 Required equipment.

265.33 Testing and maintenance of equipment.

265.34 Access to communications or alarm system.

265.35 Required aisle space.

265.36 **[Reserved]**

265.37 Arrangements with local authorities.

**Subpart D - Contingency Plan and Emergency Procedures**

265.50 Applicability.

265.51 Purpose and implementation of contingency plan.

265.52 Content of contingency plan.

265.53 Copies of contingency plan.

265.54 Amendment of contingency plan.

265.55 Emergency coordinator.

265.56 Emergency procedures.

**Subpart E - Manifest System, Recordkeeping, and Reporting**

265.70 Applicability.

265.71 Use of manifest system.

265.72 Manifest discrepancies.

- 265.73 Operating record.
- 265.74 Availability, retention, and disposition of records.
- 265.75 Annual report.
- 265.76 Unmanifested waste report.
- 265.77 Additional reports.

**Subpart F - Groundwater Monitoring**

- 265.90 Applicability.
- 265.91 Groundwater monitoring system.
- 265.92 Sampling and analysis.
- 265.93 Preparation, evaluation, and response.
- 265.94 Recordkeeping and reporting.

**Subpart G - Closure and Post-closure**

- 265.110 Applicability.
- 265.111 Closure performance standard.
- 265.112 Closure plan; amendment of plan.
- 265.113 Closure; time allowed for closure.
- 265.114 Disposal or decontamination of equipment, structures and soil.
- 265.115 Certification of closure.
- 265.116 Survey plat.
- 265.117 Post-closure care and use of property.
- 265.118 Post-closure plan; amendment of plan.
- 265.119 Post-closure notices.
- 265.120 Certification of completion of post-closure care.
- 265.121 Post-closure requirements for facilities that obtain enforceable documents in lieu of post-closure permits.

**Subpart H - Financial Requirements**

- 265.140 Applicability.
- 265.141 Definitions of terms used in this subpart.
- 265.142 Cost estimate for closure.
- 265.143 Financial assurance for closure.
- 265.144 Cost estimate for post closure care.
- 265.145 Financial assurance for post closure care.
- 265.146 Use of a mechanism for financial assurance of both closure and post closure care.
- 265.147 Liability requirements.
- 265.148 Incapacity of owners or operators, guarantors, or financial institutions.
- 265.149 **[Reserved]**
- 265.150 **[Reserved]**

**Subpart I - Use and Management of Containers**

- 265.170 Applicability.
- 265.171 Condition of containers.
- 265.172 Compatibility of waste with container.
- 265.173 Management of containers.
- 265.174 Inspections.

- 265.175 **[Reserved]**
- 265.176 Special requirements for ignitable or reactive waste.
- 265.177 Special requirements for incompatible wastes.
- 265.178 Air emission standards.

**Subpart J - Tanks**

- 265.190 Applicability.
- 265.191 Assessment of existing tank system's integrity.
- 265.192 Design and installation of new tank systems or components.
- 265.193 Containment and detection of releases.
- 265.194 General operating requirements.
- 265.195 Inspections.
- 265.196 Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.
- 265.197 Closure and post-closure care.
- 265.198 Special requirements for ignitable or reactive wastes.
- 265.199 Special requirements for incompatible wastes.
- 265.200 Waste analysis and trial tests.
- 265.201 Special requirements for generators of between 100 and 1,000 kg/mo. that accumulate hazardous waste in tanks.

**Subpart K - Surface Impoundments**

- 265.220 Applicability.
- 265.221 Design requirements.
- 265.222 General operating requirements.
- 265.223 Containment system.
- 265.223 Response actions.
- 265.224 **[Reserved]**
- 265.225 Waste analysis and trial tests.
- 265.226 Inspections.
- 265.227 **[Reserved]**
- 265.228 Closure and post-closure care.
- 265.229 Special requirements for ignitable or reactive waste.
- 265.230 Special requirements for incompatible wastes.

**Subpart L - Waste Piles**

- 265.250 Applicability.
- 265.251 Protection from wind.
- 265.252 Waste analysis.
- 265.253 Containment.
- 265.254 Design Requirements.
- 265.255 **[Reserved]**
- 265.256 Special requirements for ignitable or reactive waste.
- 265.257 Special requirements for incompatible wastes.
- 265.258 Closure and post closure care.

**Subpart M - Land Treatment**

- 265.270 Applicability.
- 265.271 **[Reserved]**

- 265.272 General operating requirements.
- 265.273 Waste analysis and soil survey.
- 265.274-
- 265.275 **[Reserved]**
- 265.276 Food chain crops.
- 265.277 **[Reserved]**
- 265.278 Unsaturated zone (zone of aeration) monitoring.
- 265.279 Recordkeeping.
- 265.280 Closure and post-closure.
- 265.281 Special requirements for ignitable or reactive waste.
- 265.282 Special requirements for incompatible wastes.

#### **Subpart N - Landfills**

- 265.300 Applicability.
- 265.301 Design requirements.
- 265.302 General operating requirements.
- 265.303-
- 265.308 **[Reserved]**
- 265.309 Surveying and recordkeeping.
- 265.310 Closure and post closure care.
- 265.311 **[Reserved]**
- 265.312 Special requirements for ignitable or reactive waste.
- 265.313 Special requirements for incompatible wastes.
- 265.314 Special requirements for liquid bulk and containerized liquids.
- 265.315 Special requirements for containers.
- 265.316 Disposal of small containers of hazardous waste in overpacked drums (lab packs).

#### **Subpart O - Incinerators**

- 265.340 Applicability.
- 265.341 Waste analysis
- 265.342-
- 265.344 **[Reserved]**
- 265.345 General operating requirements.
- 265.346 **[Reserved]**
- 265.347 Monitoring and inspection.
- 265.348-
- 265.350 **[Reserved]**
- 265.351 Closure.
- 265.352 Interim status incinerators burning particular hazardous wastes.
- 265.353-
- 265.369 **[Reserved]**

#### **Subpart P - Thermal Treatment**

- 265.370 Other thermal treatment.
- 265.371-
- 265.372 **[Reserved]**
- 265.373 General operating requirements.
- 265.374 **[Reserved]**

- 265.375 Waste analysis.
- 265.376 **[Reserved]**
- 265.377 Monitoring and inspections.
- 265.378-
- 265.380 **[Reserved]**
- 265.381 Closure.
- 265.382 Open burning: waste explosives.
- 265.383 Interim status thermal treatment devices burning particular hazardous wastes.

**Subpart Q - Chemical, Physical, and Biological Treatment**

- 265.400 Applicability.
- 265.401 General operating requirements.
- 265.402 Waste analysis and trial tests.
- 265.403 Inspections.
- 265.404 Closure.
- 265.405 Special requirements for ignitable or reactive waste.
- 265.406 Special requirements for incompatible wastes.

**Subpart W - Drip Pads**

- 265.440 Applicability.
- 265.441 Assessment of existing drip pad integrity.
- 265.442 Design and installation of new drip pads.
- 265.443 Design and operating requirements.
- 265.444 Inspections.
- 265.445 Closure.

**Subpart AA -- Air Emission Standards for Process Vents**

- 265.1030 Applicability.
- 265.1031 Definitions.
- 265.1032 Standards: Process vents.
- 265.1033 Standards: Closed-vent systems and control devices.
- 265.1034 Test methods and procedures.
- 265.1035 Recordkeeping requirements.
- 265.1036 -- 265.1049 **[Reserved]**

**Subpart BB -- Air Emission Standards for Equipment Leaks**

- 265.1050 Applicability.
- 265.1051 Definitions.
- 265.1052 Standards: Pumps in light liquid service.
- 265.1053 Standards: Compressors.
- 265.1054 Standards: Pressure relief devices in gas/vapor service.
- 265.1055 Standards: Sampling connecting systems.
- 265.1056 Standards: Open-ended valves or lines.
- 265.1057 Standards: Valves in gas/vapor service or in light liquid service.
- 265.1058 Standards: Pumps and valves in heavy liquid service, pressure relief devices in light liquid or heavy liquid service, and flanges and other connectors.

- 265.1059 Standards: Delay of repair.
- 265.1060 Standards: Closed-vent systems and control devices.
- 265.1061 Alternative standards for valves in gas/vapor service or in light liquid service: percentage of valves allowed to leak.
- 265.1062 Alternative standards for valves in gas/vapor service or in light liquid service: skip period leak detection and repair.
- 265.1063 Test methods and procedures.
- 265.1064 Recordkeeping requirements.
- 265.1065 -- 265.1079 **[Reserved]**

**Subpart CC - Air Emission Standards for Tanks, Surface Impoundments, and Containers**

- 265.1080 Applicability.
- 265.1081 Definitions.
- 265.1082 Schedule for implementation of air emission standards.
- 265.1083 Standards: General.
- 265.1084 Waste determination procedures.
- 265.1085 Standards: Tanks.
- 265.1086 Standards: Surface impoundments.
- 265.1087 Standards: Containers.
- 265.1088 Standards: Closed-vent systems and control devices.
- 265.1089 Inspection and monitoring requirements.
- 265.1090 Recordkeeping requirements.
- 265.1091 **[Reserved]**

**Subpart DD - Containment Buildings**

- 265.1100 Applicability.
- 265.1101 Design and operating standards.
- 265.1102 Closure and post-closure care.
- 265.1103-265.1110 **[Reserved]**.

**Subpart EE - Hazardous Waste Munitions and Explosives Storage**

- 265.1200 Applicability.
- 265.1201 Design and operating standards.
- 265.1202 Closure and post-closure care.

**Appendices**

- Appendix I - Recordkeeping and Instructions
- Appendix II - **[Reserved]**
- Appendix III - DNREC Interim Primary Drinking Water Standards
- Appendix IV - Tests for Significance
- Appendix V - Examples of Potentially Incompatible Waste

**Subpart A - General****Section 265.1 Purpose, scope, and Applicability.**

(a) The purpose of this Part is to establish minimum state standards which define the acceptable management of hazardous waste during the period of interim status and until certification of final closure or, if the facility is subject to post-closure requirements, until post-closure responsibilities are fulfilled.

(b) Except as provided in §265.1080(b), the standards of this part, and of §§ 264.552, 264.553, and 264.554, apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status under 7 Del. C., §6307(g) and §122.10 of these regulations until either a permit is issued under 7 Del. C., Chapter 63 or until applicable Part 265 closure and post-closure responsibilities are fulfilled, and to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by 7 Del. C., Chapter 63 and/or failed to file Part A of the permit application as required by §122.10(e) and (g). These standards apply to all treatment, storage, or disposal of hazardous waste at these facilities after the effective date of these regulations, except as specifically provided otherwise in this part or Part 261 of these regulations.

(c) The requirements of this part do not apply to:

(1) A person disposing of hazardous waste by means of ocean disposal subject to a permit issued under the Marine Protection, Research, and Sanctuaries Act;  
[Comment: These Part 265 regulations do apply to the treatment or storage of hazardous waste before it is loaded onto an ocean vessel for incineration or disposal at sea, as provided in paragraph (b) of this section.]

(2) **Reserved.**

(3) The owner or operator of a POTW which treats, stores, or disposes of hazardous waste;  
[Comment: The owner or operator of a facility under paragraph (c)(3) of this Section is subject to the requirements of Part 264 of these regulations to the extent they are included in a permit by rule granted to such a person under Part 122.60 of these regulations.]

(4) A person who treats, stores, or disposes of hazardous waste in a State with a RCRA hazardous waste program authorized under Subparts A or B of 40 CFR Part 271, except that the requirements of this part will continue to apply:

(i) As stated in paragraph (c)(2) of this section, if the authorized State with a RCRA hazardous waste program does not cover disposal of hazardous waste by means of underground injection; or

(ii) To a person who treats, stores, or disposes of hazardous waste in a State authorized under Subparts A or B of 40 CFR Part 271 if the State has not been authorized to carry out the requirements and prohibitions applicable to the treatment, storage, or disposal of hazardous waste at his facility which are imposed pursuant to the Hazardous and Solid Waste Act Amendments of 1984. The requirements and prohibitions that are applicable until a State receives authorization to carry them out include all Federal program requirements identified in §271.1(j).

(5) The owner or operator of a facility permitted, licensed, or registered by the State to manage municipal or industrial solid waste, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this part by §261.5 of these regulations; or of these regulations provides otherwise;

(6) The owner or operator of a facility managing recyclable materials described in §261.6(a)(2), (3), and (4) of these regulations (except to the extent they are referred to in Part 279 or Subparts C, D, F, or G of Part 266 of these regulations).

(7) A generator accumulating waste onsite in compliance with §262.34 of these regulations, except to the extent the requirements are included in §262.34 of these regulations;

(8) A farmer disposing of waste pesticides from his own use in compliance with §262.70 of these regulations; or

## §265.1

(9) The owner or operator of a totally enclosed treatment facility, as defined in §260.10.

(10) The owner or operator of an elementary neutralization unit or a wastewater treatment unit as defined in §260.10 of these regulations, provided that if the owner or operator is diluting hazardous ignitable (D001) wastes (other than the D001 High TOC Subcategory defined in §268.40 of these regulations, Table Treatment Standards for Hazardous Wastes), or reactive (D003) waste, to remove the characteristic before land disposal, the owner/operator must comply with the requirements set out in §265.17(b).

(11)(i) Except as provided in paragraph (c)(11)(ii) of this section, a person engaged in treatment or containment activities during immediate response to any of the following situations:

(A) A discharge of a hazardous waste;

(B) An imminent and substantial threat of a discharge of a hazardous waste;

(C) A discharge of a material which when discharged, becomes a hazardous waste; or

(D) An immediate threat to human health, public safety, property, or the environment, from the known or suspected presence of military munitions, other explosive material, or an explosive device, as determined by an explosive or munitions emergency response specialist as defined in 40 CFR, 260.10.

(ii) An owner or operator of a facility otherwise regulated by this part must comply with all applicable requirements of Subparts C and D.

(iii) Any person who is covered by paragraph (c)(11)(i) of this section and who continues or initiates hazardous waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part and Parts 122-124 of these regulations for those activities.

(iv) In the case of an explosives or munitions emergency response, if a Federal, State, Tribal or local official acting within the scope of his or her official responsibilities, or an explosives or munitions emergency response specialist, determines that immediate removal of the material or waste is necessary to protect human health or the environment, that official or specialist may authorize the removal of the material or waste by transporters who do not have EPA identification numbers and without the preparation of a manifest. In the case of emergencies involving military munitions, the responding military emergency response specialist's organizational unit must retain records for three years identifying the dates of the response, the responsible persons responding, the type and description of material addressed, and its disposition.

(12) A transporter storing manifested shipments of hazardous waste in containers meeting the requirements of §262.30 at a transfer facility for a period of ten days or less.

(13) The addition of absorbent material to waste in a container (as defined in §260.10 of these regulations) or the addition of waste to the absorbent material in a container provided that these actions occur at the time waste is first placed in the containers; and §265.17(b), §265.171, and §265.172 are complied with.

(14) Universal waste handlers and universal waste transporters (as defined in 260.10) handling the wastes listed below. These handlers are subject to regulation under Part 273, when handling the below listed universal wastes.

(i) Batteries as described in §273.2;

(ii) Pesticides as described in §273.3 of these regulations;

(iii) Thermostats as described in §273.4 of these regulations; and

(iv) Lamps as described in §273.5 of these regulations.

(d) The following hazardous wastes must not be managed at facilities subject to regulation under this part.

(1) EPA Hazardous Wastes Nos. F020, F021, F022, F023, F026, or F027 unless:

(i) The wastewater treatment sludge is generated in a surface impoundment as part of the plant's wastewater treatment system:

- (ii) The waste is stored in tanks or containers:
  - (iii) The waste is stored or treated in waste piles that meet the requirements of §264.250(c) as well as all other applicable requirements of Subpart L of this part:
  - (iv) The waste is burned in incinerators that are certified pursuant to the standards and procedures in §265.352; or
  - (v) The waste is burned in facilities that thermally treat the waste in a device other than an incinerator and that are certified pursuant to the standards and procedures in §265.383.
- (e) The requirements of this part apply to owners or operators of all facilities which treat, store or dispose of hazardous waste referred to in Part 268, and the Part 268 standards are considered material conditions or requirements of the Part 265 interim status standards.
- (f) Section 266.205 of these regulations identifies when the requirements of this part apply to the storage of military munitions classified as solid waste under §266.202 of these regulations. The treatment and disposal of hazardous waste military munitions are subject to the applicable permitting, procedural, and technical standards in Parts 260 through 268 and 122.
- (Amended November 21, 1985; May 8, 1986; August 29, 1988; August 10, 1990, August 1, 1995, July 23, 1996, January 1, 1999, June 2, 2000)

**Section 265.2-265.3 [Reserved]**

**Section 265.4 Imminent Hazard Action.**

Notwithstanding any other provisions of these regulations, enforcement actions may be brought pursuant to 7 Del. C., §6308.

**Subpart B - General Facility Standards**

**Section 265.10 Applicability.**

The regulations in this subpart apply to owners and operators of all hazardous waste facilities, except as §265.1 provides otherwise.

**Section 265.11 Identification Number.**

- (a) Every facility owner or operator must apply to the Secretary for an EPA identification number on "State of Delaware Notification of Regulated Waste Activity Form (8700-12)" in accordance with the notification procedures.
- (b) A facility must submit a subsequent State of Delaware Notification of Regulated Waste Activity Form (8700-12) whenever there is a change in name, mailing address, contact person, contact address, telephone number, ownership, type of regulated waste activity, or changes in the description of regulated wastes managed or permanently ceases the regulated waste activity. This subsequent notification must be submitted to the Secretary no less than 10 days prior to implementation of the change(s).

**Section 265.12 Required Notices.**

- (a)(1) The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source must notify the Regional Administrator in writing at least four weeks in advance of the date the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

(2) The owner or operator of a recovery facility that has arranged to receive hazardous waste subject to Part 262, Subpart H must provide a copy of the tracking document bearing all required signatures to the notifier, to the Office of Enforcement and Compliance Assurance, Office of Compliance, Enforcement Planning, Targeting and Data Division (2222A), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460 and to the competent authorities of all other concerned countries within three working days of receipt of the shipment. The original of the signed tracking document must be maintained at the facility for at least three years.

(3) A copy of the signed tracking document must also be submitted to the DNREC Secretary.

(b) Before transferring ownership or operation of a facility during its operation life, or of a disposal facility during the post-closure care period, the owner or operator must notify the new owner or operator in writing of the requirements of this part and Part 122 of these regulations.

[Comment: An owner's or operator's failure to notify the new owner or operator of the requirements of this part in no way relieves the new owner or operator of his obligation to comply with all applicable requirements.]  
(Amended August 21, 1997, January 1, 1999)

### **Section 265.13 General Waste Analysis.**

(a)(1) Before an owner or operator treats, stores, or disposes of any hazardous wastes, he must obtain a detailed chemical and physical analysis of a representative sample of the wastes. At a minimum, the analysis must contain all the information which must be known to treat, store, or dispose of the waste in accordance with the requirements of this part and Part 268 of these regulations.

(2) The analysis may include data developed under Part 261 of these regulations, and existing published or documented data on the hazardous waste or on waste generated from similar processes.

[Comment: For example, the facility's records of analyses performed on the waste before the effective date of these regulations, or studies conducted on hazardous waste generated from processes similar to that which generated the waste to be managed at the facility, may be included in the data base required to comply with paragraph (a)(1) of this section. The owner or operator of an off-site facility may arrange for the generator of the hazardous waste to supply part of the information required by paragraph (a)(1) of this section, except as otherwise specified in §268.7 (b) and (c) of these regulations. If the generator does not supply the information, and the owner or operator chooses to accept a hazardous waste, the owner or operator is responsible for obtaining the information required to comply with this section.]

(3) The analysis must be repeated as necessary to ensure that it is accurate and up to date. At a minimum, the analyst must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the hazardous waste has changed; and

(ii) For off-site facilities, when the results of the inspection required in paragraph (a)(4) of this section indicate that the hazardous waste received at the facility does not match the waste designated on the accompanying manifest or shipping paper.

(4) The owner or operator of an offsite facility must inspect and, if necessary, analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper.

(b) The owner or operator must develop and follow a written waste analysis plan which describes the procedures which he will carry out to comply with paragraph (a) of this section. He must keep this plan at the facility. At a minimum, the plan must specify:

(1) The parameters for which each hazardous waste will be analyzed and the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this section);

(2) The test methods which will be used to test for these parameters;

## §265.14

(3) The sampling method which will be used to obtain a representative sample of the waste to be analyzed. A representative sample may be obtained using either:

- (i) One of the sampling methods described in Appendix I of Part 261 of these regulations; or
- (ii) An equivalent sampling method.

(4) The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date;

(5) For off-site facilities, the waste analyses that hazardous waste generators have agreed to supply; and

(6) Where applicable, the methods which will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 265.200, 265.225, 265.252, 265.273, 265.314, 265.341, 265.375, 265.402, 265.1034(d), 265.1063(d), 265.1084, and 268.7 of these regulations.

(7) For surface impoundments exempted from land disposal restrictions under §268.4(a) of these regulations, the procedures and schedule for:

(i) The sampling of impoundment contents;

(ii) The analysis of test data; and,

(iii) The annual removal of residues which are not delisted under §260.22 of these regulations or which exhibit a characteristic of hazardous waste and either:

(A) Do not meet applicable treatment standards of Part 268, Subpart D; or

(B) Where no treatment standards have been established;

(1) Such residues are prohibited from land disposal under §268.32 or 7 Del. C., Chapter 63; or

(2) Such residues are prohibited from land disposal under §268.33(f).

(8) For owners and operators seeking an exemption to the air emission standards of Subpart CC of this part in accordance with §265.1083.

(i) If direct measurement is used for the waste determination, the procedures and schedules for waste sampling and analysis, and the results of the analysis of test data to verify the exemption.

(ii) If knowledge of the waste is used for the waste determination, any information prepared by the facility owner or operator or by the generator of the hazardous waste, if the waste is received from off-site, that is used as the basis for knowledge of the waste.

(c) For off-site facilities, the waste analysis plan required in paragraph (b) of this section must also specify the procedures which will be used to inspect and, if necessary, analyze each movement of hazardous waste received at the facility to ensure that it matches the identity of the waste designated on the accompanying manifest or shipping paper. At a minimum, the plan must describe:

(1) The procedures which will be used to determine the identity of each movement of waste managed at the facility; and

(2) The sampling method which will be used to obtain a representative sample of the waste to be identified, if the identification method includes sampling.

(3) The procedures that the owner or operator of an offsite landfill receiving containerized hazardous waste will use to determine whether a hazardous waste generator or treater has added a biodegradable sorbent to the waste in the container.

(Amended June 19, 1992, August 1, 1995, August 21, 1997, January 1, 1999)

### **Section 265.14 Security.**

(a) The owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, unless:

(1) Physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility, and

## §265.15

(2) Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of the part.

(b) Unless exempt under paragraphs (a)(1) and (a)(2) of this section, a facility must have:

(1) A 24-hour surveillance system (e.g., television monitoring or surveillance by guards of facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or

(2)(i) An artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and

(ii) A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

[Comment: The requirements of paragraph (b) of this section are satisfied if the facility or plant within which the active portion is located itself has a surveillance system, or a barrier and a means to control entry, which complies with the requirements of paragraph (b)(1) or (b)(2) of this section.]

(c) Unless exempt under paragraphs (a)(1) and (a)(2) of this section, a sign with the legend, "Danger - Unauthorized Personnel Keep Out," must be posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to this active portion. The legend must be written in English and in any other language predominant in the area surrounding the facility (e.g., facilities in counties bordering the Canadian province of Quebec must post signs in French; facilities in counties bordering Mexico must post signs in Spanish, and must be legible from a distance of at least 25 feet. Existing signs with a legend other than "Danger-Unauthorized Personnel Keep Out" may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the active portion, and that entry onto the active portion can be dangerous.

[Comment: See §265.117(b) for discussion of security requirements at disposal facilities during the postclosure care period.]

### **Section 265.15 General Inspection Requirements.**

(a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing- or may lead to - (1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

(b)(1) The owner or operator must develop and follow a written schedule for inspecting all monitoring equipment, safety and emergency equipment, security devices, and operation and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, the frequency should be based on the rate of deterioration of the equipment and the probability of an environmental or human health incident if the deterioration, malfunction, or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use. At a minimum, the inspection schedule must include the items and frequencies called for in §§ 265.174, 265.193, 265.195, 265.226, 265.260, 265.278, 265.304, 265.347, 265.377, 265.403, 265.1033, 265.1052, 265.1053, 265.1058, and 265.1084 through 265.1090 of this part, where applicable.

(c) The owner or operator must remedy any deterioration or malfunction of equipment or structures which the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, remedial action must be taken immediately.

(d) The owner or operator must record inspections in an inspection log or summary. He must keep the records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, and notation of the observations made, and the date and nature of any repairs or other remedial actions.

(Amended August 29, 1988, August 1, 1995, January 1, 1999, August 23, 1999)

### **Section 265.16 Personnel Training.**

(a)(1) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensure that facility's compliance with the requirements of this part. The owner or operator must ensure that this program includes all the elements described in the document required under paragraph (d)(3) of this section.

(2) This program must be directed by a person trained in hazardous waste management procedures, and must include instruction which teaches facility personnel hazardous waste management procedures (including contingency plan implementation) relevant to the positions in which they are employed.

(3) At a minimum, the training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems, including where applicable:

(i) Procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;

(ii) Key parameters for automatic waste feed cut-off systems;

(iii) Communications or alarm systems;

(iv) Response to fires or explosions;

(v) Response to groundwater contamination incidents and

(vi) Shutdown of operations.

(b) Facility personnel must successfully complete the program required in paragraph (a) of this section within six months after the effective date of these regulations or six months after the date of their employment or assignment to a facility, or to a new position at a facility, whichever is later. Employees hired after the effective date of these regulations must not work in unsupervised positions until they have completed the training requirements of paragraph (a) of this section.

(c) Facility personnel must take part in an annual review of the initial training required in paragraph (a) of this section.

(d) The owner or operator must maintain the following documents and records at the facility:

(1) The job title for each position at the facility related to hazardous waste management, and the name of the employee filling each job;

(2) A written job description for each position listed under paragraph (d)(1) of this section. This description may be consistent in its degree of specificity with description for other similar positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualification, and duties of facility personnel assigned to each position;

(3) A written description of the type and amount of both introductory and continuing training that will be given to each person filling a position listed under paragraph (d)(1) of this section;

(4) Records that document that the training or job experience required under paragraphs (a), (b), and (c) of this section has been given to, and completed by, facility personnel.

(e) Training records on current personnel must be kept until closure of the facility. Training records on former employees must be kept for at least three years from the date the employee last worked at the facility. Personnel training records may accompany personnel transferred within the same company.

**Section 265.17 General Requirements for Ignitable, Reactive, or Incompatible Wastes.**

(a) The owner or operator must take precautions to prevent accidental ignition or reaction of ignitable or reactive waste. This waste must be separated and protected from sources of ignition or reaction including but not limited to: open flames, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, or mechanical), spontaneous ignition (e.g., from heat-producing chemical reactions), and radiant heat. While ignitable or reactive waste is being handled, the owner or operator must confine smoking and open flame to specially designated locations. "No Smoking" signs must be conspicuously placed wherever there is a hazard from ignitable or reactive waste.

(b) Where specifically required by other sections of this part, the treatment, storage, or disposal of ignitable or reactive waste, and the mixture or commingling of incompatible wastes, or incompatible wastes and materials, must be conducted so that it does not:

- (1) Generate extreme heat or pressure, fire or explosion, or violent reaction;
- (2) Produce uncontrolled toxic mists, fumes, dusts, or gases in sufficient quantities to threaten human health;
- (3) Produce uncontrolled flammable fumes or gases in sufficient quantities to pose a risk of fire or explosions;
- (4) Damage the structural integrity of the device or facility containing the waste; or
- (5) Through other like means threaten human health or the environment.

**Section 265.18 Location Standards.**

The placement of any hazardous waste in a salt dome, salt bed formation, underground mine or cave is prohibited.

(Amended May 8, 1986)

**Section 265.19 Construction quality assurance program.**

(a) CQA program. (1) A construction quality assurance (CQA) program is required for all surface impoundment, waste pile, and landfill units that are required to comply with §§ 265.221(a), 265.254, and 265.301(a). The program must ensure that the constructed unit meets or exceeds all design criteria and specifications in the permit. The program must be developed and implemented under the direction of a CQA officer who is a registered professional engineer.

(2) The CQA program must address the following physical components, where applicable:

- (i) Foundations;
- (ii) Dikes;
- (iii) Low-permeability soil liners;
- (iv) Geomembranes (flexible membrane liners);
- (v) Leachate collection and removal systems and leak detection systems; and
- (vi) Final cover systems.

(b) Written CQA plan. Before construction begins on a unit subject to the CQA program under paragraph (a) of this section, the owner or operator must develop a written CQA plan. The plan must identify steps that will be used to monitor and document the quality of materials and the condition and manner of their installation. The CQA plan must include:

- (1) Identification of applicable units, and a description of how they will be constructed.

## §265.31

(2) Identification of key personnel in the development and implementation of the CQA plan, and CQA officer qualifications.

(3) A description of inspection and sampling activities for all unit components identified in paragraph (a)(2) of this section, including observations and tests that will be used before, during, and after construction to ensure that the construction materials and the installed unit components meet the design specifications. The description must cover: Sampling size and locations; frequency of testing; data evaluation procedures; acceptance and rejection criteria for construction materials; plans for implementing corrective measures; and data or other information to be recorded and retained in the operating record under §265.73.

(c) Contents of program. (1) The CQA program must include observations, inspections, tests, and measurements sufficient to ensure:

(i) Structural stability and integrity of all components of the unit identified in paragraph (a)(2) of this section;

(ii) Proper construction of all components of the liners, leachate collection and removal system, leak detection system, and final cover system, according to permit specifications and good engineering practices, and proper installation of all components (e.g., pipes) according to design specifications;

(iii) Conformity of all materials used with design and other material specifications under §§ 264.221, 264.251, and 264.301 of these regulations.

(2) The CQA program shall include test fills for compacted soil liners, using the same compaction methods as in the full-scale unit, to ensure that the liners are constructed to meet the hydraulic conductivity requirements of §§ 264.221(c)(1), 264.251(c)(1), and 264.301(c)(1) of these regulations in the field. Compliance with the hydraulic conductivity requirements must be verified by using in-situ testing on the constructed test fill. The test fill requirement is waived where data are sufficient to show that a constructed soil liner meets the hydraulic conductivity requirements of §§ 264.221(c)(1), 264.254(c)(1), and 264.301(c)(1) of these regulations in the field.

(d) Certification. The owner or operator of units subject to § 265.19 must submit to the Secretary by certified mail or hand delivery, at least 30 days prior to receiving waste, a certification signed by the CQA officer that the CQA plan has been successfully carried out and that the unit meets the requirements of §§ 265.221(a), 265.254, or 265.301(a). The owner or operator may receive waste in the unit after 30 days from the Secretary's receipt of the CQA certification unless the Secretary determines in writing that the construction is not acceptable, or extends the review period for a maximum of 30 more days, or seeks additional information from the owner or operator during this period. Documentation supporting the CQA officer's certification must be furnished to the Secretary upon request.

(Amended August 1, 1995)

### **Section 265.20 - 265.29 [Reserved]**

### **Subpart C - Preparedness and Prevention**

#### **Section 265.30 Applicability.**

The regulations in this subpart apply to owners and operators of all hazardous waste facilities, except as §265.1 provides otherwise.

#### **Section 265.31 Maintenance and Operation of Facility.**

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned, sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

(Amended August 29, 1988)

**Section 265.32 Required Equipment.**

All facilities must be equipped with the following, unless none of the hazards posed by waste handled at the facility could require a particular kind of equipment specified below:

- (a) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;
- (b) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or State or local emergency response teams;
- (c) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and
- (d) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

**Section 265.33 Testing and Maintenance of Equipment.**

All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

**Section 265.34 Access to Communication or Alarm System.**

- (a) Whenever hazardous waste is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required under §265.32.
- (b) If there is even just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, unless such a device is not required under §265.32.

**Section 265.35 Required Aisle Space.**

The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, unless aisle space is not needed for any of these purposes.

**Section 265.36 [Reserved]**

**Section 265.37 Arrangements with Local Authorities.**

- (a) The owner or operator must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and potential need for the services of these organizations:
  - (1) Arrangements to familiarize police, fire departments, and emergency responses teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;
  - (2) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(3) Agreements with State emergency response teams, emergency response contractors, and equipment suppliers; and

(4) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(b) Where State or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operation record.

#### **Subpart D - Contingency Plan and Emergency Procedures.**

##### **Section 265.50 Applicability.**

The regulations in this subpart apply to owners and operators of all hazardous waste facilities, except as §265.1 provides otherwise.

##### **Section 265.51 Purpose and Implementation of Contingency Plan.**

(a) Each owner or operator must have a printed contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.

(b) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(Amended January 1, 1999)

##### **Section 265.52 Content of Contingency Plan.**

(a) The contingency plan must describe the actions facility personnel must take to comply with §265.51 and §265.56 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

(b) If the owner or operator has already prepared a Spill Prevention, Control, and countermeasures (SPCC) Plan in accordance with 40 CFR Part 112 or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this part.

(c) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to §265.37.

(d) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see §265.55), and this list must be kept up to date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(e) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list and a brief outline of its capabilities.

(f) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

(Amended August 21, 1997)

### **Section 265.53 Copies of Contingency Plan.**

A printed copy of the contingency plan and all provisions to the plan must be:

- (a) Maintained at the facility and made available immediately upon request; and
- (b) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services. Documentation of written submission must be maintained at the facility.

(Amended July 23, 1996, January 1, 1999)

### **Section 265.54 Amendment of Contingency Plan.**

The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

- (a) Applicable regulations are revised;
- (b) The plan fails in an emergency;
- (c) The facility changes-in its design, construction, operation, maintenance, or other circumstances-in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous constituents, or changes the responses necessary in an emergency;
- (d) The list of emergency coordinators changes; or
- (e) The list of emergency equipment changes.

### **Section 265.55 Emergency Coordinator.**

At all times, there must be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan.

[Comment: The emergency coordinator's responsibilities are more fully spelled out in §265.56. Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of waste(s) handled by the facility, and type and complexity of the facility.]

### **Section 265.56 Emergency Procedures.**

(a) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately;

(1) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(2) Immediately, notify DNREC at (302) 739-5072 or (800) 662-8802 and other appropriate state and local agencies with designated response roles. The facility will during this notification identify the following:

- (i) Name and telephone number of reporter;
- (ii) Name and address of facility;
- (iii) Time and type of incident (e.g., release, fire);
- (iv) Name and quantity of material(s) involved, to the extent known;

(v) The extent of injuries, if any; and

(vi) The possible hazards to human health, or the environment outside the facility.

(b) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and a real extent of any release materials. He may do this by observation or review of facility records or manifests and, if necessary, by chemical analysis.

(c) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (e.g., the effects of any toxic, irritating, or asphyxiation gases that are generated, or the effects of any hazardous surface water run-offs from water or chemical agents used to control fire and heat-induced explosions).

(d) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(1) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(2) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area (in the applicable regional contingency plan under Part 1510 of 40 CFR, or the National Response Center (using their 24 hour toll free number (800) 424-8802) and the Department of Natural Resources and Environmental Control of Delaware (using the nos. (302) 739-5072 or (800) 662-8802). The report must include:

(i) Name and telephone number of reporter.

(ii) Name and address of facility.

(iii) Time and type of incident (e.g., release, fire).

(iv) Name and quantity of material(s) involved, to the extent known.

(v) The extent of injuries, if any; and

(vi) The possible hazards to human health, or the environment, outside the facility.

(e) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous waste at the facility. These measures must include, where applicable, stopping processes and operations, collection and containing released waste, and removing or isolating containers.

(f) If the facility stops operations in response to a fire, explosion or release, the emergency coordinator must monitor for leaks, pressure build-up, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(g) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

[Comment: Unless the owner or operator can demonstrate, in accordance with §261.3(c) or (d) of these regulations, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of these regulations.]

(h) The emergency coordinator must ensure that in the affected area(s) of the facility:

(1) No waste that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(2) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(i) The owner or operator must notify the Secretary and appropriate State and local authorities, that the facility is in compliance with paragraph (h) of this section before operations are resumed in the affected area(s) of the facility.

(j) The owner or operator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Secretary. The report must include:

- (1) Name, address, and telephone number of the owner or operator;
  - (2) Name, address, and telephone number of the facility;
  - (3) Date, time, and type of incident (e.g., fire, explosion);
  - (4) Name and quantity of material(s) involved;
  - (5) The extent of injuries, if any;
  - (6) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and
  - (7) Estimated quantity and disposition of recovered material that resulted from the incident.
- (Amended August 29, 1988)

### **Subpart E - Manifest System, Recordkeeping, and Reporting**

#### **Section 265.70 Applicability.**

The regulations in this subpart apply to owners and operators of both on-site and off-site facilities, except as §265.1 provides otherwise. Sections 265.71, 265.72, and 265.76 do not apply to owners and operators of on-site facilities that do not receive any hazardous waste from off-site sources, and to owners and operators of off-site facilities with respect to waste military munitions exempted from manifest requirements under §266.203(a) of these regulations.

(Amended August 29, 1988, January 1, 1999)

#### **Section 265.71 Use of Manifest System.**

(a) If a facility receives hazardous waste accompanied by a manifest, the owner or operator, or his agent, must:

(1) Sign and date each copy of the manifest to certify that the hazardous waste covered by the manifest was received; complete all information on Part B of the manifest form.

(2) Note any significant discrepancies in the manifest (as defined in §265.72(a)) on each copy of the manifest;

[Comment: DNREC does not intend that the owner or operator of a facility whose procedures under §265.13(c) include waste analysis must perform that analysis before signing the manifest and giving it to the transporter. Section 265.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis).

(3) Immediately give the transporter at least one copy of the signed manifest:

(4) Within thirty (30) days after the delivery send a copy of the manifest to the generator and to the State(s) in which the generator and facility are located; and

(5) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

(b) If a facility receives from a rail or water (bulk shipment) transporter, hazardous waste which is accompanied by a shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator's certification, and signatures), the owner or operator, or his agent, must:

(1) Sign and date each copy of the manifest or shipping paper (if the manifest has not been received) to certify that the hazardous waste covered by the manifest or shipping paper was received.

(2) Note any significant discrepancies (as defined in §265.72(a)) in the manifest or shipping paper (if the manifest has not been received) on each copy of the manifest or shipping paper;

## §265.72

[Comment: DNREC does not intend that the owner or operator of a facility whose procedures under §265.13(c) include waste analysis must perform that analysis before signing the shipping paper and giving it to the transporter. Section 265.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis.]

(3) Immediately give the rail or water (bulk shipment) transporter at least one copy of the manifest or shipping paper (if the manifest has not been received).

(4) Within thirty (30) days after delivery send a copy of the signed and dated manifest/shipping paper to the generator and to the State(s) in which the generator and the facility are located; however, if the manifest has not been received within 30 days after delivery, the owner or operator, or his agent, must sign and date the manifest and return the appropriate portions to the generator and to the State(s) in which the generator and facility are located in lieu of the shipping paper; and

[Comment: Section 262.23(c) of these regulations requires the generator to send at least four (4) copies of the manifest to the facility when hazardous waste is sent by the rail or water (bulk shipment).]

(5) Retain at the facility a copy of the manifest and shipping paper (if signed in lieu of the manifest at the time of delivery) or at least three years from the date of delivery.

(c) Whenever a shipment of hazardous waste is initiated from a facility, the owner or operator of that facility must comply with the requirements of Part 262 of these regulations.

[Comment: The provisions of §262.34 are applicable to the on-site accumulation of hazardous waste by generators. Therefore, the provisions of §262.34 only apply to owners or operators who are shipping hazardous waste which they generated at that facility.]

(d)(1) Within three working days of the receipt of a shipment subject to Part 262, Subpart H, the owner or operator of facility must provide a copy of the tracking document bearing all required signatures to the notifier, to the Office of Enforcement and Compliance Assurance, Office of Compliance, Enforcement Planning, Targeting and Data Division (2222A), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, and to competent authorities of all other concerned countries. The original copy of the tracking document must be maintained at the facility for at least three years from the date of signature.

(2) A copy of the signed tracking document must also be submitted to the DNREC Secretary.

(Amended January 1, 1999)

### **Section 265.72 Manifest Discrepancies.**

(a) Manifest discrepancies are differences between the quantity or type of hazardous waste designated on the manifest or shipping paper, and the quantity or type of hazardous waste a facility actually receives. Significant discrepancies in quantity are: (1) for bulk waste, variations greater than 10 percent in weight, and (2) for batch waste, any variation in piece count, such as a discrepancy of one drum in a truckload. Significant discrepancies in type are obvious differences which can be discovered by inspection or waste analysis, such as waste solvent substituted for waste acid, or toxic substituted for waste acid, or toxic constituents not reported on the manifest or shipping paper.

(b) Upon discovering a significant discrepancy, the owner or operator must attempt to reconcile the discrepancy with the waste generator or transporter (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after receiving the waste, the owner or operator must immediately submit to the Secretary a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

**Section 265.73 Operating Record.**

(a) The owner or operator must keep a written operation record at his facility.

(b) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:

(1) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by Appendix I;

(2) The location of each hazardous waste within the facility and the quantity at each location. For disposal facilities, the location and quantity of each hazardous waste must be recorded on a map or diagram of each cell or disposal area. For all facilities, this information must include cross-references to specific manifest document numbers, if the waste was accompanied by a manifest;

[Comment: See §§ 265.119, 265.279, and 265.309 for related requirements.]

(3) Records and results of waste analysis, waste determinations, and trial tests performed as specified in §§ 265.13, 265.200, 265.225, 265.252, 265.273, 265.314, 265.341, 265.375, 265.402, 265.1034, 265.1063, 265.1084, 268.4(a) and 268.7 of these regulations.

(4) Summary reports and details of all incidents that require implementing the contingency plan as specified in §265.56(j);

(5) Records and results of inspections as required by §265.15(d) (except these data need be kept only three years);

(6) Monitoring, testing or analytical data, and corrective action where required by Subpart F of this part and by §§ 265.19, 265.90, 265.94, 265.191, 265.193, 265.195, 265.222, 265.223, 265.226, 265.255, 265.259, 265.260, 265.276, 265.278, 265.280(d)(1), 265.302 through 265.304, 265.347, 265.377, 265.1034(c) through 265.1034(f), 265.1035, 265.1063(d) through 265.1063(i), 265.1064, and 265.1083 through 265.1090 of this part.

[Comment: As required by §265.94, monitoring data at disposal facilities must be kept throughout the post-closure period.]

(7) All closure cost estimates under §265.142 and, for disposal facilities, all post-closure cost estimates under §265.144.

(8) Records of the quantities (and date of placement) for each shipment of hazardous waste placed in land disposal units under an extension to the effective date of any land disposal restriction granted pursuant to §268.5, or monitoring data required pursuant to a petition under §268.6, or a certification under §268.8 and the applicable notice required by a generator under §268.7.

(9) For an off-site treatment facility, a copy of the notice, and the certification and demonstration if applicable, required by the generator or the owner or operator under §268.7 or §268.8;

(10) For an on-site treatment facility, the information contained in the notice (except the manifest number), and the certification and demonstration if applicable, required by the generator or the owner or operator under §268.7 or §268.8.

(11) For an off-site land disposal facility, a copy of the notice; and the certification and demonstration if applicable, required by the generator or the owner or operator of a treatment facility under §268.7 or applicable §268.8;

(12) For an on-site land disposal facility, the information contained in the notice (except the manifest number), and the certification and demonstration if applicable, required by the generator or the owner or operator of a treatment facility under §268.7 or §268.8.

(13) For an off-site storage facility, a copy of the notice, and the certification and demonstration if applicable, required by the generator or the owner or operator under §268.7 or 268.8; and

## §265.76

(14) For an on-site storage facility, the information contained in the notice (except the manifest number), and the certification and demonstration if applicable, required by the generator or the owner or operator of a treatment facility under §§268.7 or 268.8.

(Amended June 19, 1992, August 1, 1995, July 23, 1996, January 1, 1999, August 23, 1999)

### **Section 265.74 Availability, Retention, and Disposition of Records.**

(a) All records, including plans, required under this part must be furnished upon request, and made available at all reasonable times or inspection, by any officer, employee, or representative of DNREC who is duly designated by the Secretary.

(b) The retention period for all records required under this part is extended automatically during the course of any unresolved enforcement action regarding the facility or as requested by the Secretary.

(c) A copy of records of waste disposal locations and quantities under §265.73(b)(2) must be submitted to the Secretary and local land authority upon closure of the facility (See §265.119).

(Amended January 1, 1999)

### **Section 265.75 Annual Report.**

The owner or operator must prepare and submit a single copy of an Annual Hazardous Waste Report to the State of Delaware Department of Natural Resources and Environmental Control by no later than March 1st. The Annual Hazardous Waste Report must be submitted on forms designated by the Department and must be used for this report. The annual report must cover facility activities during the previous calendar year and must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The calendar year covered by the report;

(c) For off-site facilities, the EPA identification number of each hazardous waste generator from which the facility received a hazardous waste during the year; for imported shipments, the report must give the name and address of the foreign generator;

(d) A description and the quantity of each hazardous waste the facility received during the year. For off-site facilities, this information must be listed by EPA identification number of each generator;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) Monitoring data under §265.94(a)(2)(ii) and (iii), and (b)(2), where required;

(g) The most recent closure cost estimate under §265.142, and, for disposal facilities, the most recent post-closure cost estimate under §265.144; and

(h) For generators who treat, store, or dispose of hazardous waste on-site, a description of the efforts undertaken during the year to reduce the volume and toxicity of waste generated.

(i) For generators who treat, store, or dispose of hazardous waste on-site, a description of the changes in volume and toxicity of waste actually achieved during the year in comparison to previous years to the extent such information is available for the years prior to 1984.

(j) The certification signed by the owner or operator of the facility or his authorized representative.

(Amended August 29, 1988)

### **Section 265.76 Unmanifested Waste Report.**

If a facility accepts for treatment storage, or disposal any hazardous waste from an off-site source without an accompanying manifest, or without an accompanying shipping paper as described in §263.20(e)(2) of these regulations, and if the waste is not excluded from the manifest requirement by §261.5 of these regulations, then the owner or operator must prepare and submit a single copy of a report to the Secretary within 15 days after receiving the waste. The report form and instructions in Appendix II must be used for this report. The report must include the following information:

(a) The EPA identification number, name, and address of the facility;

- (b) The date the facility received the waste;
- (c) The EPA identification number, name, and address of the generator and the transporter, if available;
- (d) A description and the quantity of each unmanifested hazardous waste the facility received;
- (e) The method of treatment, storage, or disposal for each hazardous waste;
- (f) The certification signed by the owner or operator of the facility or his authorized representative; and
- (g) A brief explanation of why the waste was unmanifested, if known.

[Comment: Small quantities of hazardous waste are excluded from regulation under this part and do not require a manifest. Where a facility receives unmanifested hazardous wastes, DNREC suggests that the owner or operator obtain from each generator a certification that the waste qualifies for exclusion. Otherwise, DNREC suggests that the owner or operator file an unmanifested waste report for the hazardous waste movement.]

### **Section 265.77 Additional Reports.**

In addition to submitting the annual report and unmanifested waste reports described in §275.75 and §265.76, the owner or operator must also report to the Secretary:

- (a) Releases, fires, and explosions as specified in §265.56(j);
- (b) Ground-water contamination and monitoring data as specified in §265.93 and §265.94;
- (c) Facility closure as specified in §265.115; and
- (d) As otherwise required by Subparts AA, BB and CC of this part.

(Amended August 1, 1995, January 1, 1999)

## **Subpart F - Ground-water Monitoring**

### **Section 265.90 Applicability.**

(a) The owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of ground water in at least the uppermost aquifer underlying the facility, except as §265.1 and paragraph (d) of this section provide otherwise.

(b) Except as paragraphs (d) and (e) of this section provide otherwise, the owner or operator must install, operate, and maintain a groundwater monitoring system which meets the requirements of §265.91, and must comply with §§ 265.92-265.94. This groundwater monitoring program must be carried out during the active life of the facility, and for disposal facilities, during the post-closure care period as well. In case of a surface impoundment used for storage/treatment of hazardous waste, groundwater monitoring after the active life of the facility, may be required if deemed necessary by the Secretary.

(c) By June 30, 1983, the owner or operator of a surface impoundment, landfill or land treatment facility which is used to manage hazardous waste must submit to the Department a hydrogeologic report, except as paragraph (d) of this section provides otherwise. The report must be certified by a "qualified engineer" or "qualified geologist". (See §260.10 for definitions of "qualified engineer" and "qualified geologist"). This report shall include at a minimum the following:

- (1) A definition of the geology of the site and surrounding area. This shall include:
  - (i) A description of the various lithologic units including grain size distribution, shape and color to a depth which includes at least the uppermost confined aquifer underlying the site; and
  - (ii) Isopach and structure contour maps and cross-sections showing these various lithostratigraphic units.
- (2) A description of the groundwater movement in at least the water table and uppermost confined aquifers underlying the site and the surrounding area including:

- (i) The rate and direction of flow, both horizontally and vertically; and
- (ii) A potentiometric surface map and cross-section of each aquifer.
- (iii) A map showing the difference in hydraulic head between the water table and uppermost confined aquifers.

(3) A description of the hydrologic characteristics of the lithostratigraphic units to a depth which includes at least the uppermost confined aquifers underlying the site and the surrounding area such as, but not limited to, hydraulic conductivity, porosity, aquifer thickness, transmissivity, and storage coefficient;

(4) A description of the chemical quality of the groundwater of at least the water table and uppermost confined aquifers underlying the site and surrounding area to include the parameters specified in §265.92(b)(1), (b)(2), (b)(3) and any other parameters specified by the Department depending on the composition of the waste; a description of the chemical quality of nearby surface water may be required if deemed necessary by the Department;

(5) A prediction of the potential movement of any contaminants that may enter the groundwater underlying the site and the surrounding area including the rate, extent and direction, both horizontal and vertical migration and the potential impact on groundwater and if applicable on surface water.

(6) An estimate of the amount of leachate which may be generated at the site. This shall be done by using methods described in the following publications: "Hydrologic Simulation on Solid Waste Disposal Sites", U.S. Environmental Protection Agency, Office of Water and Waste Management, SW-868, September 1980; or the "Use of the Water Balance Method for Predicting Leachate Generation from Solid Waste Disposal Sites", U.S. Environmental Protection Agency, Office of Solid Waste Management Program, SW-168, October, 1975; or an equivalent method approved by the EPA.

(7) A description of the existing groundwater and, if applicable, surface water monitoring program used to detect and determine and contaminant migration at the site and surrounding area.

(8) A proposal for further monitoring including additional monitoring wells and if applicable surface water monitoring stations, parameters for analysis and monitoring schedule.

(d) All or part of the groundwater monitoring requirements of this section may be waived if the owner or operator can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells (domestic, industrial or agricultural) or to surface water. This demonstration must be in writing, and must be kept at the facility by the effective date of these amendments and also must be submitted to the Department for approval within fifteen days of the effective date of these amendments. This demonstration must be certified by a "qualified engineer" or "qualified geologist" except in defining the geology and geologic materials in (d)(1)(ii) and (d)(2)(i) which must be certified by a "qualified geologist". Where a demonstration under this section was prepared prior to the effective date of these amendments and was not certified in accordance with the above revised requirements, the owner or operator shall submit a demonstration which complies with these additional certification requirements within ninety (90) days of the effective date of these amendments. This demonstration must establish the following:

(1) The potential for migration of hazardous waste or hazardous waste constituents from the facility to the uppermost aquifer, by an evaluation of:

- (i) A water balance of precipitation, evapotranspiration, run-off, and infiltration; and
- (ii) Unsaturated zone characteristics (i.e., geology and geologic materials, physical properties, and depth to ground water); and

(2) The potential for hazardous waste or hazardous waste constituents which enter the uppermost aquifer to migrate to a water supply well or surface water, by an evaluation of:

- (i) Saturated zone characteristics (i.e., geology and geologic materials, physical properties, and rate of ground water flow); and
- (ii) The proximity of the facility to water supply wells or surface water.

## §265.91

(e) If an owner or operator assumes (or knows) that groundwater monitoring of indicator parameters in accordance with §265.91 and §265.92 would show statistically significant increases (or decreases in the case of pH) when evaluated under §265.93(b), he may, install, operate, and maintain an alternate groundwater monitoring system (other than the one described in §265.91 and §265.92). If the owner or operator decides to use an alternate groundwater monitoring system he must:

(1) By the effective date of these amendments, submit to the Secretary a specific plan, certified by a "qualified engineer" or "qualified geologist" which satisfies the requirements of §264.93(d)(3) for an alternate groundwater monitoring system;

(2) No later than the effective date of these amendments, initiate the determinations specified in §265.93(d)(4).

(3) Prepare and submit a written report in accordance with §265.93 (d)(5);

(4) Continue to make the determination specified in §265.93(d)(4) on a quarterly basis until final closure of the facility; and

(5) Comply with the recordkeeping and reporting requirements in §265.94(b).

(f) The Secretary may replace all or part of the requirements of this subpart applying to a regulated unit (as defined in §122.90), with alternative requirements developed for groundwater monitoring set out in an approved closure or post-closure plan or in an enforceable document (as defined in §122.1(c)(7)), where the Secretary determines that:

(1) A regulated unit is situated among solid waste management units (or areas of concern), a release has occurred, and both the regulated unit and one or more solid waste management unit(s) (or areas of concern) are likely to have contributed to the release; and

(2) It is not necessary to apply the requirements of this subpart because the alternative requirements will protect human health and the environment. The alternative standards for the regulated unit must meet the requirements of §264.101(a).

(Amended August 23, 1999)

### **Section 265.91 Ground-water Monitoring System.**

(a) A ground-water monitoring system must be capable of yielding ground-water samples for analysis and must consist of:

(1) Monitoring wells (at least one) installed hydraulically upgradient (i.e., in the direction of increasing static head) from the limit of the waste management area. Their number, locations, and depths must be sufficient to yield ground-water samples that are:

(i) Representative of background ground-water quality in at least the uppermost aquifer near the facility; and

(ii) Not affected by the facility; and

(2) Monitoring wells (at least three) installed hydraulically downgradient (i.e., in the direction of decreasing static head) at the limit of the waste management area. Their number, locations, and depths must ensure that they immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to at least the uppermost aquifer.

(3) The facility owner or operator may demonstrate that an alternate hydraulically downgradient monitoring well location will meet the criteria outlined below. The demonstration must be in writing and kept at the facility. The demonstration must be certified by a qualified ground-water scientist and establish that:

(i) An existing physical obstacle prevents monitoring well installation at the hydraulically downgradient limit of the waste management area; and

(ii) The selected alternate downgradient location is as close to the limit of the waste management area as practical; and

(iii) The location ensures detection that, given the alternate location, is as early as possible of any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer.

(iv) Lateral expansion, new, or replacement units are not eligible for an alternate downgradient location under this paragraph.

(b) Separate monitoring systems for each waste management component of a facility are not required provided that the provisions for sampling upgradient and downgradient water quality will detect any discharge from the waste management area.

(1) In the case of a facility consisting of only one surface impoundment, landfill, or land treatment area, the waste management area is by the waste boundary (perimeter).

(2) In the case of a facility consisting of more than one surface impoundment, landfill, or land treatment area, the waste management area is described by an imaginary boundary zone which circumscribes the several waste management components.

(c) All 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 sample collection at depths where appropriate aquifer flow zones exist. The annular space (i.e., the space between the bore hole and well casing) above the sampling depth must be sealed with a suitable material (e.g., cement grout or bentonite slurry) to prevent contamination of samples and the groundwater.

(d) Prior to installation of a monitoring well, the owner or operator of a facility must obtain a permit from the Department in accordance with 7 Del. C., §6003(a)(3). Also installation of monitoring well should be conducted by a licensed driller in accordance with 7 Del. C., §6023(a)(1).

(Amended July 26, 1994)

### **Section 265.92 Sampling and Analysis.**

(a) The owner or operator must obtain and analyze samples from the installed ground-water monitoring system. The owner or operator must develop and follow a ground-water sampling and analysis plan. He must keep this plan at the facility. The plan must include procedures and techniques for:

- (1) Sample collection;
- (2) Sample preservation and shipment;
- (3) Analytical procedures; and
- (4) Chain of custody control.

[Comment: See "Procedures Manual for Ground-water Monitoring at Solid Waste Disposal facilities," EPA-530/SW-611, August 1977 and "Methods for Chemical Analysis of Water and Wastes," EPA-600/4-79-020, March 1979 for discussion of sampling and analysis procedures.]

(b) The owner or operator must determine the concentration or value of the following parameters in ground-water samples in accordance with paragraphs (c) and (d) of this section:

(1) Parameters characterizing the suitability of the groundwater as a drinking water supply, as specified in Appendix III.

(2) Parameters establishing ground-water quality:

- (i) Chloride
- (ii) Iron
- (iii) Manganese
- (iv) Phenols
- (v) Sodium
- (vi) Sulfate

[Comment: These parameters are to be used as a basis for comparison in the event a ground-water quality assessment is required under §265.93(d).]

(3) Parameters used as indicators of ground-water contamination:

- (i) pH
- (ii) Specific Conductance
- (iii) Total Organic Carbon
- (iv) Total Organic Halogen

(c)(1) For all monitoring wells, the owner or operator must establish initial background concentrations or values of all parameters specified in paragraph (b) of this section. He must do this quarterly for one year.

(2) For each of the indicator parameters specified in paragraph (b)(3) of this section, at least four replicate measurements must be obtained for each sample and the initial background arithmetic mean and variance must be determined by pooling the replicate measurements for the respective parameter concentrations or values in samples obtained from upgradient wells during the first year.

(d) After the first year, all monitoring wells must be sampled and the samples analyzed with the following frequencies:

(1) Samples collected to establish ground-water quality must be obtained and analyzed for the parameters specified in paragraph (b)(2) of this section at least semi-annually.

(2) Samples collected to indicate ground-water contamination must be obtained and analyzed for the parameters specified in paragraph (b)(3) of this section at least semi-annually.

(3) Samples collected for any specific parameters, designated by the Department other than those provided in (b)(1), (b)(2) and (b)(3) of this section must be obtained and analyzed at least semi-annually.

(4) Samples collected to characterize the suitability of the groundwater as a drinking water supply, must be obtained as analyzed for the parameters specified in Appendix III of the regulations, at least annually.

(e) Prior to taking sample, elevation of the ground-water surface at each monitoring well must be determined each time a sample is obtained.

**Section 265.93 Preparation, Evaluation and Response.**

(a) By the effective date of these amendments, the owner or operator must prepare an outline of a ground-water quality assessment program. The outline must describe a more comprehensive ground-water monitoring program (than that described in §265.91 and §265.92) capable of determining:

(1) Whether hazardous waste or hazardous waste constituents have entered the groundwater;

(2) The rate and extent of migration of hazardous waste or hazardous waste constituents in the groundwater; and

(3) The concentrations of hazardous waste or hazardous waste constituents in the groundwater.

(b) For each indicator parameter specified in §265.92(b)(3), and other specific parameters designated by the Department, as addressed in §265.92(d)(3), the owner or operator must calculate the arithmetic mean and variance, based on at least four replicate measurements on each sample, for each well monitored in accordance with §265.92(d)(2) and (d)(3), and compare these results with its initial background arithmetic mean. The comparison must consider individually each of the wells in the monitoring system, and must use the Student's t-test at the 0.01 level of significance (see Appendix IV) to determine statistically significant increases (and decreases, in the case of pH) over initial background.

(c)(1) If the comparisons for the upgradient wells made under paragraph (b) of this section show a significant increase (or pH decrease) the owner or operator must submit this information in accordance with §265.94(a)(2)(ii).

## §265.93

(2) If the comparisons for downgradient wells made under paragraph (b) of this section show a significant increase (or pH decrease), the owner or operator must then immediately obtain additional ground-water samples from those downgradient wells where a significant difference was detected, split the samples in two, or obtain analyses of all additional samples to determine whether the significant difference was a result of laboratory error.

(d)(1) If the analyses performed under paragraph (c)(2) of this section confirm the significant increases (or pH decrease), the owner or operator must provide written notice to the Secretary - within seven days of the date of such confirmation - that the facility may be affecting ground-water quality.

(2) Within 15 days after the notification under paragraph (d)(1) of this section, the owner or operator must develop and submit to the Secretary a specific plan, based on the outline required under paragraph (a) of this section and certified by a "qualified engineer" or "qualified geologist" for a ground-water quality assessment program at the facility.

(3) The plan to be submitted under §265.90(e)(1) or paragraph (d)(2) of this section must specify:

- (i) The number, location, and depth of wells;
- (ii) Sampling and analytical methods for those hazardous wastes or hazardous waste constituents in the facility;
- (iii) Evaluation procedures, including any use of previously gathered ground-water quality information; and
- (iv) A schedule of implementation.

(4) The owner or operator must implement the ground-water quality assessment plan which satisfies the requirements of paragraph (d)(3) of this section, and, at a minimum, determine:

- (i) The rate and extent of migration of the hazardous waste or hazardous waste constituents in the groundwater; and
- (ii) The concentrations of the hazardous waste or hazardous waste constituents in the groundwater.

(5) The owner or operator must make his first determination under paragraph (d)(4) of this section as soon as technically feasible, and, within 15 days after that determination, submit to the Secretary a written report containing an assessment of the ground-water quality.

(6) If the owner or operator determines, based on the results of the first determination under paragraph (d)(4) of this section, that no hazardous waste or hazardous waste constituents from the facility have entered the groundwater, then he may reinstate the indicator evaluation program described in §265.92 and paragraph (b) of this section. If the owner or operator reinstates the indicator evaluation program, he must so notify the Secretary in the report submitted under paragraph (d)(5) of this section.

(7) If the owner or operator determines, based on the first determination under paragraph (d)(4) of this section, that hazardous waste or hazardous waste constituents from the facility have entered the groundwater, then he:

- (i) Must, within 180 days of this determination, submit to the Department a plan including measures to mitigate and prevent and if necessary further monitor the spread of hazardous waste or hazardous waste constituents off site. Subsequent to written approval of the plan or portions thereof by the Department, the plan must be implemented by the owner or operator of the facility in accordance with the timetable specified by the Department. Depending on the contents of the mitigation plan, including the nature of the mitigation measures, the plan must be prepared and implemented by a "qualified engineer" and/or "qualified geologist", as appropriate. The mitigation plan must include the following as a minimum:

## §265.94

(1) Analysis of the concentration and extent of migration of the hazardous waste or hazardous waste constituents and potential problems associated with this condition. This must include an isopach map and cross-section showing the extent of migration of hazardous waste or hazardous waste constituents, if any.

(2) A detailed technical plan including the proposed procedure for containing and removing the condition of contamination.

(3) A schedule for implementation of the plan.

(4) An assessment of the potential impact of the mitigation program on the quality and quantity of groundwater and surface water.

(5) A proposed monitoring program to detect and determine the impact of the mitigation plan on groundwater and surface water at the site.

(ii) Must continue to make the determinations required under paragraph (d)(4) of this section on a quarterly basis until final closure of the facility, if the ground-water quality assessment plan was implemented prior to final closure of the facility; or

(iii) May cease to make the determinations required under paragraph (d)(4) of this section, if the ground-water quality assessment plan was implemented during the post-closure care period.

(e) Notwithstanding any other provision of this subpart, any ground-water quality assessment to satisfy the requirements of §265.93(d)(4) which is initiated prior to final closure of the facility must be completed and reported in accordance with §265.93(d)(5).

(f) Unless the groundwater is monitored to satisfy the requirements of §265.93(d)(4), at least annually the owner or operator must evaluate the data on ground-water surface elevations obtained under §265.92(e) to determine whether the requirements under §265.91(a) for locating the monitoring wells continues to be satisfied. If the evaluation shows that §265.91(a) is no longer satisfied, the owner or operator must immediately modify the number, location, or depth of the monitoring wells to bring the ground-water monitoring system into compliance with this requirement.

### **Section 265.94 Recordkeeping and Reporting.**

(a) Unless the groundwater is monitored to satisfy the requirements of §265.92(d)(4), the owner or operator must:

(1) Keep records of the analyses required in §265.92(c) and (d), the associated ground-water surface elevations required in §265.92(e), and the evaluations required in §265.93(b) throughout the active life of the facility, and, for disposal facilities, throughout the post-closure care period as well; and

(2) Report the following ground-water monitoring information to the Secretary:

(i) During the first year when initial background concentrations are being established for the facility: Concentrations or values of the parameters listed in §265.92(b) for each ground-water monitoring well within 15 days after completing each quarterly analysis. The owner or operator must separately identify for each monitoring well any parameters whose concentration or value has been found to exceed the maximum contaminant levels listed in Appendix III.

(ii) Semi-annually: concentrations or values of the parameters listed in §265.92(b)(3) and other specific parameters designated by the Department as addressed in §265.93(d)(3), for each ground-water monitoring well, along with the required evaluations for these parameters under §265.93(b). The owner or operator must separately identify any significant differences from initial background found in the upgradient wells, in accordance with §265.93(c)(1). The data shall be submitted to the Department within fifteen (15) days of completing the analysis.

(iii) Semi-annually: the concentrations or values of the parameters listed in §265.92(b)(2) and annually the concentrations or values of the parameters listed in §265.92(b)(1). The data shall be submitted to the Department within fifteen (15) days of completing the analysis.

(iv) The ground-water surface elevations as measured under §265.92(e) shall be included along with the corresponding data, submitted under §265.940 (a)(2)(i), (ii) and (iii).

## §265.111

(v) As part of the annual report required under §265.75: results of the evaluation of ground-water surface elevations under §265.93(f), and a description of the response to that evaluation, where applicable.

(b) If the groundwater is monitored to satisfy the requirements of §265.93(d)(4), the owner or operator must:

(1) Keep records of the analyses and evaluations specified in the plan, which satisfies the requirements of §265.93(d)(3), throughout the active life of the facility, and, for disposal facilities, throughout the post-closure care period as well; and

(2) Annually, until final closure of the facility, submit to the Secretary a report containing the results of his ground-water quality assessment program which includes, but is not limited to, the calculated (or measured) rate of migration of hazardous waste or hazardous waste constituents in the groundwater during the reporting period. This report must be submitted as part of the annual report required in §265.75.

### **Subpart G - Closure and Post-closure**

#### **Section 265.110 Applicability.**

Except as §265.1 provides otherwise:

(a) Sections 265.111 - 265.115 (which concern closure) apply to the owners and operators of all hazardous waste management facilities; and

(b) Sections 265.116-265.120 (which concern post-closure care) apply to the owners and operators of:

(1) All hazardous waste disposal facilities;

(2) Waste piles and surface impoundments for which the owner or operator intends to remove the wastes at closure to the extent that these sections are made applicable to such facilities in §§265.228 or 265.258;

(3) Tank systems that are required under §265.197 to meet requirements for landfills; and

(4) Containment buildings that are required under §265.1102 to meet the requirements for landfills.

(c) Section 265.121 applies to owners and operators of units that are subject to the requirements of §122.1(c)(7) and are regulated under an enforceable document (as defined in §122.1(c)(7)).

(d) The Secretary may replace all or part of the requirements of this subpart (and the unit-specific standards in §265.111(c)) applying to a regulated unit (as defined in §264.90), with alternative requirements for closure set out in an approved closure or post-closure plan, or in an enforceable document (as defined in §122.1(c)(7)), where the Secretary determines that:

(1) A regulated unit is situated among solid waste management units (or areas of concern), a release has occurred, and both the regulated unit and one or more solid waste management unit(s) (or areas of concern) are likely to have contributed to the release, and

(2) It is not necessary to apply the closure requirements of this subpart (and/or those referenced herein) because the alternative requirements will protect human health and the environment, and will satisfy the closure performance standard of §265.111(a) and (b).

(Amended August 29, 1988; August 10, 1990, August 1, 1995, August 23, 1999)

#### **Section 265.111 Closure Performance Standard.**

The owner or operator must close the facility in a manner that:

(a) Minimizes the need for further maintenance, and

## §265.112

(b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and

(c) Complies with the closure requirements of this subpart, including, but not limited to, the requirements of §§ 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381 and 265.404, and 265.1102.  
(Amended August 29, 1988, August 1, 1995)

### **Section 265.112 Closure Plan; Amendment of Plan.**

(a) Written plan. By May 19, 1981, or by six months after the effective date of the rule that first subjects a facility to provisions of this section, the owner or operator of a hazardous waste management facility must have a written closure plan. Until final closure is completed and certified in accordance with §265.115, a copy of the most current plan must be furnished to the Secretary upon request, including request by mail. In addition, for facilities without approved plans, it must also be provided during site inspections, on the day of inspection, to any officer, employee, or representative of the DNREC who is duly designated by the Secretary.

(b) Content of plan. The plan must identify steps necessary to perform partial and/or final closure of the facility at any point during its active life. The closure plan must include, at least:

(1) A description of how each hazardous waste management unit at the facility will be closed in accordance with §265.111; and

(2) A description of how final closure of the facility will be conducted in accordance with §265.111. The description must identify the maximum extent of the operation which will be unclosed during the active life of the facility; and

(3) An estimate of the maximum inventory of hazardous wastes ever on-site over the active life of the facility and a detailed description of the methods to be used during partial and final closure, including, but not limited to methods for removing, transporting, treating, storing or disposing of all hazardous waste, identification of and the type(s) of off-site hazardous waste management unit(s) to be used, if applicable; and

(4) A detailed description of the steps needed to remove or decontaminate all hazardous waste residues and contaminated containment system components, equipment, structures, and soils during partial and final closure including, but not limited to, procedures for cleaning equipment and removing contaminated soils, methods for sampling and testing surrounding soils, and criteria for determining the extent of decontamination necessary to satisfy the closure performance standard; and

(5) A detailed description of other activities necessary during the partial and final closure period to ensure that all partial closures and final closure satisfy the closure performance standards, including, but not limited to, ground-water monitoring, leachate collection, and run-on and run-off control; and

(6) A schedule for closure of each hazardous waste management unit and for final closure of the facility. The schedule must include, at a minimum the total time required to close each hazardous waste management unit and the time required for intervening closure activities which will allow tracking of the progress of partial and final closure. (For example, in the case of a landfill unit, estimates of the time required to treat or dispose of all hazardous waste inventory and of the time required to place a final cover must be included.); and

(7) An estimate of the expected year of final closure for facilities that use trust funds to demonstrate financial assurance under §265.143 or §265.145 and whose remaining operating life is less than twenty years, and for facilities without approved closure plans.

(8) For facilities where the Secretary has applied alternative requirements at a regulated unit under §§ 265.90(f), 265.110(d), and/or 265.140(d), either the alternative requirements applying to the regulated unit, or a reference to the enforceable document containing those alternative requirements.

## §265.112

(c) Amendment of plan. The owner or operator may amend the closure plan at any time prior to the notification of partial or final closure of the facility. An owner or operator with an approved closure plan must submit a written request to the Secretary to authorize a change to the approved closure plan. The written request must include a copy of the amended closure plan for approval by the Secretary.

(1) The owner or operator must amend the closure plan whenever:

(i) Changes in operating plans or facility design affect the closure plan, or

(ii) There is a change in the expected year of closure, if applicable, or

(iii) In conducting partial or final closure activities, unexpected events require a modification of the closure plan.

(iv) The owner or operator requests the Secretary to apply alternative requirements to a regulated unit under §§ 265.90(f), 265.110(d), and/or 265.140(d).

(2) The owner or operator must amend the closure plan at least 60 days prior to the proposed change in facility design or operation, or no later than 60 days after an unexpected event has occurred which has affected the closure plan. If an unexpected event occurs during the partial or final closure period, the owner or operator must amend the closure plan no later than 30 days after the unexpected event. These provisions also apply to owners and operators of surface impoundments and waste piles who intended to remove all hazardous wastes at closure, but are required to close as landfills in accordance with §265.310.

(3) An owner or operator with an approved closure plan must submit the modified plan to the Secretary at least 60 days prior to the proposed change in facility design or operation, or no more than 60 days after an unexpected event has occurred which has affected the closure plan. If an unexpected event has occurred during the partial or final closure period, the owner or operator must submit the modified plan no more than 30 days after the unexpected event. These provisions also apply to owners or operators of surface impoundments and waste piles who intended to remove all hazardous wastes at closure but are required to close as landfills in accordance with §265.310. If the amendment to the plan is a Class 2 or 3 modification according to the criteria in §122.42, the modification to the plan will be approved according to the procedures in §265.112(d)(4).

(4) The Secretary may request modifications to the plan under the conditions described in paragraph (c)(1) of this section. An owner or operator with an approved closure plan must submit the modified plan within 60 days of the request from the Secretary, or within 30 days if the unexpected event occurs during partial or final closure. If the amendment is considered a Class 2 or 3 modification according to the criteria in §122.42, the modification to the plan will be approved in accordance with the procedures in §265.112(d)(4).

(d) Notification of partial closure and final closure.

(1) The owner or operator must submit the closure plan to the Secretary at least 180 days prior to the date on which he expects to begin closure of the first surface impoundment, waste pile, land treatment, or landfill unit, or final closure if it involves such a unit, whichever is earlier. The owner or operator must submit the closure plan to the Secretary at least 45 days prior to the date on which he expects to begin partial or final closure of a boiler or industrial furnace. The owner or operator must submit the closure plan to the Secretary at least 45 days prior to the date on which he expects to begin final closure of a facility with only tanks, container storage, or incinerator units. Owners or operators with approved closure plans must notify the Secretary in writing at least 60 days prior to the date on which he expects to begin closure of a surface impoundment, waste pile, landfill, or land treatment unit, or final closure of a facility involving such a unit. Owners or operators with approved closure plans must notify the Secretary in writing at least 45 days prior to the date on which he expects to begin partial or final closure of a boiler or industrial furnace. Owners or operators with approved closure plans must notify the Secretary in writing at least 45 days prior to the date on which he expects to begin final closure of a facility with only tanks, container storage, or incinerator units.

(2) The date when he "expects to begin closure" must be either:

(i) Within 30 days after the date on which any hazardous waste management unit receives the known final volume of hazardous wastes, or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous waste. If the owner or operator of a hazardous waste management unit can demonstrate to the Secretary that the hazardous waste management unit or facility has the capacity to receive additional hazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all interim status requirements, the Secretary may approve an extension to this one-year limit; or

(ii) For units meeting the requirements of §265.113(d), no later than 30 days after the date on which the hazardous waste management unit receives the known final volume of nonhazardous wastes, or if there is a reasonable possibility that the hazardous waste management unit will receive additional nonhazardous wastes, no later than one year after the date on which the unit received the most recent volume of nonhazardous wastes. If the owner or operator can demonstrate to the Secretary that the hazardous waste management unit has the capacity to receive additional nonhazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements, the Secretary may approve an extension to this one-year limit.

(3) The owner or operator must submit his closure plan to the Secretary no later than 15 days after:

(i) Termination of interim status except when a permit is issued simultaneously with termination of interim status; or

(ii) Issuance of a judicial decree or final order under 7 Del. C., §6309 to cease receiving hazardous wastes or close.

(4) The Secretary will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the plan and request modifications to the plan no later than 30 days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a closure plan. The Secretary will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined). The Secretary will approve, modify, or disapprove the plan within 90 days of its receipt. If the Secretary does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Secretary will approve or modify this plan in writing within 60 days. If the Secretary modifies the plan, this modified plan becomes the approved closure plan. The Secretary must assure that the approved plan is consistent with §§ 265.111 through 265.115 and the applicable requirements of Subpart F of this part, §§ 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381, 265.404, and 265.1102. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(e) Removal of wastes and decontamination or dismantling of equipment. Nothing in this section shall preclude the owner or operator from removing hazardous wastes and decontaminating or dismantling equipment in accordance with the approved partial or final closure plan at any time before or after notification of partial or final closure.

(Amended August 29, 1988; August 10, 1990; July 26, 1994, August 1, 1995, August 23, 1999)

**Section 265.113 Closure; Time Allowed for Closure.**

(a) Within 90 days after receiving the final volume of hazardous wastes, or the final volume of nonhazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at a hazardous waste management unit or facility, or within 90 days after approval of the closure plan, whichever is later, the owner or operator must treat, remove from the unit or facility, or dispose of on-site, all hazardous wastes in accordance with the approved closure plan. The Secretary may approve a longer period if the owner or operator demonstrates that:

(1)(i) The activities required to comply with this paragraph will, of necessity, take longer than 90 days to complete; or

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes; and

(B) There is a reasonable likelihood that he or another person will recommence operation of the hazardous waste management unit or the facility within one year; and

(C) Closure of the hazardous waste management unit or facility would be incompatible with continued operation of the site; and

(2) He has taken and will continue to take all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements.

(b) The owner or operator must complete partial and final closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of hazardous wastes, or the final volume of nonhazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at the hazardous waste management unit or facility, or 180 days after approval of the closure plan, if that is later. The Secretary may approve an extension to the closure period if the owner or operator demonstrates that:

(1)(i) The partial or final closure activities will, of necessity, take longer than 180 days to complete; or

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes; and

(B) There is reasonable likelihood that he or another person will recommence operation of the hazardous waste management unit or the facility within one year; and

(C) Closure of the hazardous waste management unit or facility would be incompatible with continued operation of the site; and

(2) He has taken and will continue to take all steps to prevent threats to human health and the environment from the unclosed but not operating hazardous waste management unit or facility, including compliance with all applicable interim status requirements.

(c) The demonstrations referred to in §265.113(a) and (b) must be made as follows:

(1) The demonstrations in paragraph (a) must be made at least 30 days prior to the expiration of the 90-day period in paragraph (a); and

(2) The demonstrations in paragraph (b) must be made at least 30 days prior to the expiration of the 180-day period in paragraph (b).

(Amended August 29, 1988; July 26, 1994)

**Section 265.114 Disposal or decontamination of equipment, structures and soils.**

During the partial and final closure periods, all contaminated equipment, structures and soil must be properly disposed of, or decontaminated unless specified otherwise in §§265.197, 265.228, 265.258, 265.280, or 265.310. By removing all hazardous wastes or hazardous constituents during partial and final closure, the owner or operator may become a generator of hazardous waste and must handle that hazardous waste in accordance with all applicable requirements of Part 262 of these regulations.

(Amended August 29, 1988; August 10, 1990)

**Section 265.115 Certification of closure.**

Within 60 days of completion of closure of each hazardous waste surface impoundment, waste pile, land treatment, and landfill unit, and within 60 days of completion of final closure, the owner or operator must submit to the Secretary, by registered mail, a certification that the hazardous waste management unit or facility, as applicable, has been closed in accordance with the specifications in the approved closure plan. The certification must be signed by the owner or operator and by an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification must be furnished to the Secretary upon request until he releases the owner or operator from the financial assurance requirements for closure under §265.143(h).

(Amended August 29, 1988)

**Section 265.116 Survey plat.**

No later than the submission of the certification of closure of each hazardous waste disposal unit, an owner or operator must submit to the local zoning authority, or the authority with jurisdiction over local land use, and to the Secretary, a survey plat indicating the location and dimensions of landfill cells or other hazardous waste disposal units with respect to permanently surveyed benchmarks. This plat must be prepared and certified by a professional land surveyor. The plat filed with the local zoning authority, or the authority with jurisdiction over local land use must contain a note, prominently displayed, which states the owner's or operator's obligation to restrict disturbance of the hazardous waste disposal unit in accordance with the applicable Subpart G regulations.

(Amended August 29, 1988)

**Section 265.117 Post-closure care and use of property.**

(a)(1) Post-closure care for each hazardous waste management unit subject to the requirements of §§ 265.117 - 265.120 must begin after completion of closure of the unit and continue for 30 years after that date. It must consist of at least the following:

(i) Monitoring and reporting in accordance with the requirements of Subparts F, K, L, M, and N of this part; and

(ii) Maintenance and monitoring of waste containment systems in accordance with the requirements of Subparts F, K, L, M, and N of this part.

(2) Any time preceding closure of a hazardous waste management unit subject to post-closure care requirements or final closure, or any time during the post-closure period for a particular hazardous waste disposal unit, the Secretary may:

(i) Shorten the post-closure care period applicable to the hazardous waste management unit, or facility, if all disposal units have been closed, if he finds that the reduced period is sufficient to protect human health and the environment (e.g., leachate or ground-water monitoring results, characteristics of the hazardous waste, application of advanced technology, or alternative disposal, treatment, or re-use techniques indicate that the hazardous waste management unit or facility is secure); or

(ii) Extend the post-closure care period applicable to the hazardous waste management unit or facility, if he finds that the extended period is necessary to protect human health and the environment, (e.g., leachate or ground-water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).

(b) The Secretary may require, at partial and final closure, continuation of any of the security requirements of §265.14 during part or all of the post-closure period when:

(1) Hazardous wastes may remain exposed after completion of partial or final closure; or

(2) Access by the public or domestic livestock may pose a hazard to human health.

## §265.118

(c) Post-closure use of property on or in which hazardous wastes remain after partial or final closure must never be allowed to disturb the integrity of the final cover, liner(s), or any other components of the containment system, or the function of the facility's monitoring systems, unless the Secretary finds that the disturbance:

(1) Is necessary to the proposed use of the property, and will not increase the potential hazard to human health or the environment; or

(2) Is necessary to reduce a threat to human health or the environment.

(d) All post-closure care activities must be in accordance with the provisions of the approved post-closure plan as specified in §265.118.

(Amended August 29, 1988)

### **Section 265.118 Post-closure plan; Amendment of plan.**

(a) Written plan. By May 19, 1981, the owner or operator of a hazardous waste disposal unit must have a written post-closure plan. An owner or operator of a surface impoundment or waste pile that intends to remove all hazardous wastes at closure must prepare a post-closure plan and submit it to the Secretary within 90 days of the date that the owner or operator or Secretary determines that the hazardous waste management unit or facility must be closed as a landfill, subject to the requirements of §§ 265.117 - 265.120.

(b) Until final closure of the facility, a copy of the most current post-closure plan must be furnished to the Secretary upon request, including request by mail. In addition, for facilities without approved post-closure plans, it must also be provided during site inspections, on the day of inspection, to any officer, employee or representative of the Department who is duly designated by the Secretary. After final closure has been certified, the person or office specified in §265.118(c)(3) must keep the approved post-closure plan during the post-closure period.

(c) For each hazardous waste management unit subject to the requirements of this section, the post-closure plan must identify the activities that will be carried on after closure of each disposal unit and the frequency of these activities, and include at least:

(1) A description of the planned monitoring activities and frequencies at which they will be performed to comply with Subparts F, K, L, M, and N of this part during the post-closure care period; and

(2) A description of the planned maintenance activities, and frequencies at which they will be performed, to ensure:

(i) The integrity of the cap and final cover or other containment systems in accordance with the requirements of Subparts K, L, M, and N of this part; and

(ii) The function of the monitoring equipment in accordance with the requirements of Subparts F, K, L, M, and N of this part; and

(3) The name, address, and phone number of the person or office to contact about the hazardous waste disposal unit or facility during the post-closure care period.

(4) For facilities subject to §265.121, provisions that satisfy the requirements of §265.121(a)(1) and (3).

(5) For facilities where the Secretary has applied alternative requirements at a regulated unit under §§ 265.90(f), 265.110(d), and/or 265.140(d), either the alternative requirements that apply to the regulated unit, or a reference to the enforceable document containing those requirements.

(d) Amendment of plan. The owner or operator may amend the post-closure plan any time during the active life of the facility or during the post-closure care period. An owner or operator with an approved post-closure plan must submit a written request to the Secretary to authorize a change to the approved plan. The written request must include a copy of the amended post-closure plan for approval by the Secretary.

(1) The owner or operator must amend the post-closure plan whenever:

(i) Changes in operating plans or facility design affect the post-closure plan.

## §265.118

(ii) Events which occur during the active life of the facility, including partial and final closures, affect the post-closure plan.

(iii) The owner or operator requests the Secretary to apply alternative requirements to a regulated unit under §§ 265.90(f), 265.110(d), and/or 265.140(d).

(2) The owner or operator must amend the post-closure plan at least 60 days prior to the proposed change in facility design or operation, or no later than 60 days after an unexpected event has occurred which has affected the post-closure plan.

(3) An owner or operator with an approved post-closure plan must submit the modified plan to the Secretary at least 60 days prior to the proposed change in facility design or operation, or no more than 60 days after an unexpected event has occurred which has affected the post-closure plan. If an owner or operator of a surface impoundment or a waste pile who intended to remove all hazardous wastes at closure in accordance with §265.228(b) or 265.258(a) is required to close as a landfill in accordance with §265.310, the owner or operator must submit a post-closure plan within 90 days of the determination by the owner or operator or Secretary that the unit must be closed as a landfill. If the amendment to the post-closure plan is a Class 2 or 3 modification according to the criteria in §122.42, the modification to the plan will be approved according to the procedures in §265.118(f).

(4) The Secretary may request modifications to the plan under the conditions described in above paragraph (d)(1). An owner or operator with an approved post-closure plan must submit the modified plan no later than 60 days of the request from the Secretary. If the amendment to the plan is considered a Class 2 or 3 modification according to the criteria in §122.42, the modifications to the post-closure plan will be approved in accordance with the procedures in §265.118(f). If the Secretary determines that an owner or operator of a surface impoundment or waste pile who intended to remove all hazardous wastes at closure must close the facility as a landfill, the owner or operator must submit a post-closure plan for approval to the Secretary within 90 days of the determination.

(e) The owner or operator of a facility with hazardous waste management units subject to these requirements must submit his post-closure plan to the Secretary at least 180 days before the date he expects to begin partial or final closure of the first hazardous waste disposal unit. The date he "expects to begin closure" of the first hazardous waste disposal unit must be either within 30 days after the date on which the hazardous waste management unit receives the known final volume of hazardous waste or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. The owner or operator must submit the post-closure plan to the Secretary no later than 15 days after:

(1) Termination of interim status (except when a permit is issued to the facility simultaneously with termination of interim status); or

(2) Issuance of a judicial decree or final orders under 7 Del. C., §6309 to cease receiving wastes or close.

(f) The Secretary will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the post-closure plan and request modifications to the plan no later than 30 days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a post-closure plan. The Secretary will give public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The Secretary will approve, modify, or disapprove the plan within 90 days of its receipt. If the Secretary does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within 30 days after receiving such written statement. The Secretary will approve or modify this plan in writing within 60 days. If the Secretary modifies the plan, this modified plan becomes the

approved post-closure plan. The Secretary must ensure that the approved post-closure plan is consistent with §§ 265.117 through 265.120. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(g) The post-closure plan and length of the post-closure care period may be modified any time prior to the end of the post-closure care period in either of the following two ways:

(1) The owner or operator or any member of the public may petition the Secretary to extend or reduce the post-closure care period applicable to a hazardous waste management unit or facility based on cause, or alter the requirements of the post-closure care period based on cause.

(i) The petition must include evidence demonstrating that:

(A) The secure nature of the hazardous waste management unit or facility makes the post-closure care requirement(s) unnecessary or supports reduction of the post-closure care period specified in the current post-closure plan (e.g., leachate or ground-water monitoring results, characteristics of the wastes, application of advanced technology, or alternative disposal, treatment, or re-use techniques indicate that the facility is secure), or

(B) The requested extension in the post-closure care period or alteration of post-closure care requirements is necessary to prevent threats to human health and the environment. (e.g., leachate or ground-water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).

(ii) These petitions will be considered by the Secretary only when they present new and relevant information not previously considered by the Secretary. Whenever the Secretary is considering a petition, he will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments within 30 days of the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever a hearing might clarify one or more issues concerning the post-closure plan. The Secretary will give the public notice of the hearing at least 30 days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for written public comments, and the two notices may be combined.) After considering the comments, he will issue a final determination, based upon the criteria set forth in paragraph (g)(1) of this section.

(iii) If the Secretary denies the petition, he will send the petitioner a brief written response giving a reason for the denial.

(2) The Secretary may tentatively decide to modify the post-closure plan if he deems it necessary to prevent threats to human health and the environment. He may propose to extend or reduce the post-closure care period applicable to a hazardous waste management unit or facility based on cause or alter the requirements of the post-closure care period based on cause.

(i) The Secretary will provide the owner or operator and the affected public, through a newspaper notice, the opportunity to submit written comments within 30 days of the date of the notice and the opportunity for a public hearing as in subparagraph (g)(1)(ii) of this section. After considering the comments, he will issue a final determination.

(ii) The Secretary will base his final determination upon the same criteria as required for petitions under paragraph (g)(1)(i) of this section. A modification of the post-closure plan may include, where appropriate, the temporary suspension rather than permanent deletion of one or more post-closure care requirements. At the end of the specified period of suspension, the Secretary would then determine whether the requirement(s) should be permanently discontinued or reinstated to prevent threats to human health and the environment.

(Amended August 29, 1988; August 10, 1990, August 23, 1999)

**Section 265.119 Post-closure notices.**

(a) No later than 60 days after certification of closure of each hazardous waste disposal unit, the owner or operator must submit to the local zoning authority, or the authority with jurisdiction over local land use, and to the Secretary, a record of the type, location, and quantity of hazardous wastes disposed of within each cell or other disposal unit of the facility. For hazardous wastes disposed of before January 12, 1981, the owner or operator must identify the type, location and quantity of the hazardous wastes to the best of his knowledge and in accordance with any records he has kept.

(b) Within 60 days of certification of closure of the first hazardous waste disposal unit and within 60 days of certification of closure of the last hazardous waste disposal unit, the owner or operator must:

(1) Record, in accordance with State law, a notation on the deed to the facility property - or on some other instrument which is normally examined during title search - that will in perpetuity notify any potential purchaser of the property that:

- (i) The land has been used to manage hazardous wastes; and
- (ii) Its use is restricted under Subpart G of these regulations; and
- (iii) The survey plat and record of the type, location, and quantity of hazardous wastes disposed of within each cell or other hazardous waste disposal unit of the facility required by §265.116 and §265.119(a) have been filed with the local zoning authority or the authority with jurisdiction over local land use and with the Secretary, and

(2) Submit a certification signed by the owner or operator that he has recorded the notation specified in paragraph (b)(1) of this section and a copy of the document in which the notation has been placed to the Secretary.

(c) If the owner or operator or any subsequent owner of the land upon which a hazardous waste disposal unit was located wishes to remove hazardous wastes and hazardous waste residues, the liner, if any, and all contaminated structures, equipment, and soils, he must request a modification to the approved post-closure plan in accordance with the requirements of §265.118(g). The owner or operator must demonstrate that the removal of hazardous wastes will satisfy the criteria of §265.117(c). By removing hazardous waste, the owner or operator may become a generator of hazardous waste and must manage it in accordance with all applicable requirements of these regulations. If the owner or operator is granted approval to conduct the removal activities, the owner or operator may request that the Secretary approve either:

(1) The removal of the notation on the deed to the facility property or other instrument normally examined during title search, or

(2) The addition of a notation to the deed or instrument indicating the removal of the hazardous waste.

(Amended August 29, 1988)

**Section 265.120 Certification of Completion of Post-Closure Care.**

No later than 60 days after the completion of the established post-closure care period for each hazardous waste disposal unit, the owner or operator must submit to the Secretary, by registered mail, a certification that the post-closure care period for the hazardous waste disposal unit was performed in accordance with the specifications in the approved post-closure plan. The certification must be signed by the owner or operator and an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification must be furnished to the Secretary upon request until he releases the owner or operator from the financial assurance requirements for post-closure care under §265.145(h).

(Amended August 29, 1988)

**Section 265.121 Post-closure requirements for facilities that obtain enforceable documents in lieu of post-closure permits.**

(a) Owners and operators who are subject to the requirement to obtain a post-closure permit under §122.1(c), but who obtain enforceable documents in lieu of post-closure permits, as provided under §122.1(c)(7), must comply with the following requirements:

- (1) The requirements to submit information about the facility in §122.28;
- (2) The requirements for facility-wide corrective action in §264.101 of these regulations;
- (3) The requirements of §§ 264.91 through 264.100.

(b)(1) The Secretary, in issuing enforceable documents under §265.121 in lieu of permits, will assure a meaningful opportunity for public involvement which, at a minimum, includes public notice and opportunity for public comment:

(i) When DNREC becomes involved in a remediation at the facility as a regulatory or enforcement matter;

(ii) On the proposed preferred remedy and the assumptions upon which the remedy is based, in particular those related to land use and site characterization; and

(iii) At the time of a proposed decision that remedial action is complete at the facility. These requirements must be met before the Secretary may consider that the facility has met the requirements of §122.1(c)(7), unless the facility qualifies for a modification to these public involvement procedures under paragraph (b)(2) or (3) of this section.

(2) If the Secretary determines that even a short delay in the implementation of a remedy would adversely affect human health or the environment, the Secretary may delay compliance with the requirements of paragraph (b)(1) of this section and implement the remedy immediately. However, the Secretary must assure involvement of the public at the earliest opportunity, and, in all cases, upon making the decision that additional remedial action is not needed at the facility.

(3) The Secretary may allow a remediation initiated prior to October 22, 1998 to substitute for corrective action required under a post-closure permit even if the public involvement requirements of paragraph (b)(1) of this section have not been met so long as the Secretary assures that notice and comment on the decision that no further remediation is necessary to protect human health and the environment takes place at the earliest reasonable opportunity after October 22, 1998.

**Subpart H - Financial Requirements**

**Section 265.140 Applicability.**

(a) The requirements of §§ 265.142, 265.143 and 265.147 through 265.150 apply to owners or operators of all hazardous waste facilities, except as provided otherwise in this section or in §265.1.

(b) The requirements of §§ 265.144 and 265.146 apply only to owners and operators of:

(1) Disposal facilities;

(2) Tank systems that are required under §265.197 of these regulations to meet the requirements for landfills; and

(3) Containment buildings that are required under §265.1102 to meet the requirements for landfills.

(c) States and the Federal government are exempt from the requirements of this subpart.

(d) The Secretary may replace all or part of the requirements of this subpart applying to a regulated unit with alternative requirements for financial assurance set out in the permit or in an enforceable document (as defined in §122.1(c)(7)), where the Secretary:

(1) Prescribes alternative requirements for the regulated unit under §§ 265.90(f) and/or 265.110(d), and

(2) Determines that it is not necessary to apply the requirements of this subpart because the alternative financial assurance requirements will protect human health and the environment.  
(Amended August 29, 1988, August 1, 1995, August 23, 1999)

**Section 265.141 Definitions of terms as used in this subpart.**

(a) "**Closure plan**" means the plan for closure prepared in accordance with the requirements of §265.112.  
(b) "**Current closure cost estimate**" means the most recent of the estimates prepared in accordance with §265.142(a), (b), and (c).

(c) "**Current post-closure cost estimate**" means the most recent of the estimates prepared in accordance with §265.144(a), (b), (c).

(d) "**Parent corporation**" means a corporation which directly owns at least 50 percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a "**subsidiary**" of the parent corporation.

(e) "**Post-closure plan**" means the plan for post-closure care prepared in accordance with the requirements of §§ 265.117 through 265.120.

(f) The following terms are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these regulations and are not intended to limit the meanings of terms in a way that conflicts with generally accepted accounting practices.

"**Assets**" means all existing and all probable future economic benefits obtained or controlled by a particular entity.

"**Current assets**" means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

"**Current liabilities**" means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

"**Independently audited**" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

"**Liabilities**" means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

"**Net worth**" means total assets minus total liabilities and is equivalent to owner's equity.

"**Net working capital**" means current assets minus current liabilities.

"**Tangible net worth**" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as good will and rights to patents or royalties.

(g) In the liability insurance requirements the terms "**bodily injury**" and "**property damage**" shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practice, are excluded from coverage in liability policies for bodily injury and property damage. The agency intends the meaning of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

"**Accidental occurrence**" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the stand point of the insured.

"**Legal defense costs**" means any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

**"Nonsudden accidental occurrence"** means an occurrence which takes place over time and involves continuous or repeated exposure.

**"Sudden accidental occurrence"** means an occurrence which is not continuous or repeated in nature.

(h) **"Substantial business relationship"** means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A "substantial business relationship" must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the Secretary.

(Amended August 1, 1995, January 1, 1999)

### **Section 265.142 Cost Estimate for Closure.**

(a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in §§ 265.111 through 265.115 and applicable closure requirements of §§ 265.178, 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381, 265.404, and 265.1102.

(1) The estimate must equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see §265.112(b)); and

(2) The closure cost estimate must be based on the costs to the owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of parent corporation in §265.141(d).) The owner or operator may use costs for on-site disposal if he can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

(3) The closure cost estimate may not incorporate any salvage value that may be realized by the sale of hazardous wastes, facility structures or equipment land or other facility assets at the time of partial or final closures.

(4) The owner or operator may not incorporate a zero cost for hazardous waste that might have economic value.

(5) Owners or operators using the trust fund for closure must include any costs or fees associated with administering the fund into the cost estimate for closure.

(b) During the active life of the facility, the owner or operator must adjust the closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with §265.143. For owners and operators using the financial test or corporate guarantee, the closure cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the Secretary as specified in §265.143(e)(3). The adjustment may be made by recalculating the closure cost estimate in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified in paragraphs (b)(1) and (b)(2) of this section. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted closure cost estimate by the latest inflation factor.

**§265.143**

(c) During the active life of the facility, the owner or operator must revise the closure cost estimate no later than 30 days after a revision has been made to the closure plan which increases the cost of closure. If the owner or operator has an approved closure plan, the closure cost estimate must be revised no later than 30 days after the Secretary has approved the request to modify the closure plan, if the change in the closure plan increases the cost of closure. The revised closure cost estimate must be adjusted for inflation as specified in §265.142(b).

(d) The owner or operator must keep the following at the facility during the operating life of the facility: The latest closure cost estimate prepared in accordance with §265.142(a) and (c) and, when this estimate has been adjusted in accordance with §265.142(b), the latest adjusted closure cost estimate.

(Amended August 29, 1988, August 1, 1995)

**Section 265.143 Financial Assurance for Closure.**

By the effective date of these regulations, an owner or operator of each facility must establish financial assurance for closure of the facility. He must choose from the options as specified in paragraphs (a) through (e) of this section.

(a) Closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a closure trust fund which conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Secretary. 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 State agency.

(2) The wording of the trust agreement must be identical to the wording specified in §264.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see §264.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current closure cost estimate covered by the agreement.

(3) Payments into the trust fund must be made annually by the owner or operator over the 20 years beginning with the effective date of these regulations or over the remaining operation life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund must be made as follows:

(i) The first payment must be made by the effective date of these regulations, except as provided in paragraph (a)(5) of this section. The first payment must be at least equal to the current closure cost estimate, except as provided in §265.143(f), divided by the number of years in the pay-in period.

(ii) Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

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

Where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (a)(3) of this section.

## §265.143

(5) If the owner or operator establishes a closure trust fund after having used one or more alternate mechanisms specified in the section, his first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annually payments made as specified in paragraph (a)(3) of this section.

(6) After the pay-in period is completed, whenever the current closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the Secretary for release of the amount in excess of the current closure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the Secretary for release of the amount in excess of the current closure cost estimate covered by the trust fund.

(9) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a)(7) or (8) of this section, the Secretary will instruct the trustee to release to the owner or operator such funds as the Secretary specifies in writing.

(10) After beginning partial or final closure, an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the Secretary. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. No later than 60 days after receiving bills for partial or final closure activities, the Secretary will instruct the trustee to make reimbursements in those amounts as the Secretary specifies in writing, if the Secretary determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the Secretary has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he may withhold reimbursements of such amounts as he deems prudent until he determines, in accordance with §265.143(h) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the Secretary does not instruct the trustee to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(11) The Secretary will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this Section; or  
(ii) The Secretary releases the owner or operator from the requirements of this Section in accordance with §265.143(h).

(b) Surety bond guaranteeing payment into a closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this paragraph and submitting the bond to the Secretary. 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 wording of the surety bond must be identical to the wording specified in §264.151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Secretary. This standby trust fund must meet the requirements specified in §265.143(a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Secretary with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in §265.143(a);

(B) Updating of Schedule A of the trust agreement (see §264.151(a)) to show current closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the Secretary becomes final, or within 15 days after an order to begin final closure is issued by a U.S. district court or other court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the Secretary's written approval of the assurance provided, within 90 days after receipt by both other owner or operator and the Secretary of the notice of cancellation of the bond from the surety.

(5) 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.

(6) The penal sum of the bond must be in an amount at least equal to the current closure cost estimate, except as provided in §265.143(f).

(7) Whenever the current closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the Secretary, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure cost estimate following written approval by the Secretary.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Secretary. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Secretary, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the Secretary has given prior written consent based on his receipt of evidence of alternate financial assurance as specified in this section.

(c) Closure 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 and submitting the letter to the Secretary. 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 State agency.

(2) The wording of the letter of credit must be identical to the wording specified in §264.151(d).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Secretary will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Secretary. This standby trust fund must meet the requirements of the trust fund specified in §265.143(a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Secretary with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in §265.143(a);

(B) Updating of Schedule A of the trust agreement (see §264.151(a)) to show current closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: The EPA identification number, name, and address of the facility, and the amount of funds assured for closure of the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Secretary by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Secretary have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current closure cost estimate except as provided in §265.143(f).

(7) Whenever the current closure cost estimate increases to an amount greater than the amount of the credit the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current closure cost estimate and submit evidence of such increase to the Secretary, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the amount of the credit may be reduced to the amount of the current closure cost estimate following written approval by the Secretary.

(8) Following a final administrative determination pursuant to 7 Del. C., Chapter 63 that the owner or operator has failed to perform final closure in accordance with the approved closure plan when required to do so, the Secretary may draw on the letter of credit.

(9) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Secretary within 90 days after receipt by both the owner or operator and the Secretary of the notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Secretary will draw on the letter of credit. The Secretary may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Secretary will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Secretary.

(10) The Secretary will return the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.143(h).

(d) Closure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining closure insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the Secretary. By the effective date of these regulations the owner or operator must submit to the Secretary a letter from an insurer stating that the insurer is considering issuance of closure insurance conforming to the requirements of this paragraph to the owner or operator. Within 90 days after the effective date of these regulations, the owner or operator must submit the certificate of insurance to the Secretary or establish other financial assurance as specified in this section. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more States.

(2) The wording of the certificate of insurance must be identical to the wording specified in §264.151(e).

(3) The closure insurance policy must be issued for a face amount at least equal to the current closure cost estimate, except as provided in §265.143(f). 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) The closure insurance policy must guarantee that funds will be available to close the facility whenever final closure occurs. The policy must also guarantee that once final closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Secretary, to such party or parties as the Secretary specifies.

(5) After beginning partial or final closure, an owner or operator or any other person authorized to conduct closure may request reimbursements for closure expenditures by submitting itemized bills to the Secretary. The owner or operator may request reimbursements for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within 60 days after receiving bills for closure activities, the Secretary will instruct the insurer to make reimbursements in such amounts as the Secretary specifies in writing if the Secretary determines that the partial or final closure expenditures are in accordance with the approved closure plan or otherwise justified. If the Secretary has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, he may withhold reimbursement of such amounts as he deems prudent until he determines in accordance with §265.143(h), that the owner or operator is no longer required to maintain financial assurance for final closure of the particular facility. If the Secretary does not instruct the insurer to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the Secretary consents to termination of the policy by the owner or operator as specified in paragraph (d)(10) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in this section will constitute a significant violation of these regulations, warranting such remedy as the Secretary deems necessary. Such violation will be deemed to begin upon receipt by the Secretary of a notice of further cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) 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 such consent is not unreasonably refused.

(8) The 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 elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Secretary. Cancellation, termination, or failure to renew may not occur, however, during the 120 days beginning with the date of receipt of the notice by both the Secretary and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

- (i) The Secretary deems the facility abandoned; or
- (ii) Interim status is terminated or revoked; or
- (iii) Closure is ordered by the Secretary or a U.S. District Court or other court of competent jurisdiction; or
- (iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 USC, (Bankruptcy); or
- (v) The premium due is paid.

(9) Whenever the current closure cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the Secretary, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the face amount of the current closure cost estimate following written approval by the Secretary.

(10) The Secretary will give written consent to the owner or operator that he may terminate the insurance policy when:

- (i) An owner or operator substitutes alternate financial assurance as specified in this section; or
- (ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.143(h).

(e) Financial test and corporate guarantee for closure.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph (e)(1)(i) or (e)(1)(ii) of this section:

- (i) The owner or operator must have:
  - (A) Two of the following three ratios: A ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
  - (B) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates; and
  - (C) Tangible net worth of at least \$10 million; and
  - (D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current closure and post-closure cost.

(ii) the owner or operator must have:

- (A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and
- (B) Tangible net worth at least six times the sum of the current closure and post-closure cost estimates; and
- (C) Tangible net worth of at least \$10 million; and
- (D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current closure and post-closure cost estimates.

(2) The phrase "**current closure and post-closure cost estimates**" as used in paragraph (e)(1) of this section refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer (§264.151(f)).

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the Secretary:

- (i) A letter signed by the owner's or operator's chief financial officer and worded as specified in §264.151(f); and
- (ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and
- (iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:
  - (A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and
  - (B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) The owner or operator may obtain an extension of the time allowed for submission of the documents specified in paragraph (e)(3) of this section if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the Secretary and to the EPA Regional Administrator of each Region in which the owner's or operator's facilities to be covered by the financial test are located. This letter from the chief financial officer must:

- (i) Request the extension;
- (ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;
- (iii) Specify for each facility to be covered by the test the EPA identification number, name, address, and current closure and post-closure cost estimates to be covered by the test;
- (iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these regulations;
- (v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (e)(3) of this section; and
- (vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (e)(3) of this section, the owner or operator must send updated information to the Secretary within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (e)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, he must send notice to the Secretary of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Secretary may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (e)(3) of this section. If the Secretary finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) The Secretary may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (e)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Secretary will evaluate other qualifications on an individual. The owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) The owner or operator is no longer required to submit the items specified in paragraph (e)(3) of this section when:

- (i) An owner or operator substitutes alternate financial assurance as specified in this section; or
- (ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.143(h).

(10) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (e)(1) through (8) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in §264.151(h). A certified copy of the guarantee must accompany the items sent to the DNREC Secretary as specified in paragraph (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform final closure of a facility covered by the corporate guarantee in accordance with the closure plan and other interim status requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in §265.143(a) in the name of the owner or operator.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Secretary. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Secretary, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Secretary within 90 days after receipt by both the owner or operator and the Secretary of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(f) 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. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in paragraphs (a) through (d), respectively, 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 closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The Secretary may use any or all of the mechanisms to provide for closure of the facility.

(g) Use of a financial mechanism for multiple facilities. An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Secretary must include a list showing, for each facility, the EPA identification number, name, address, and the amount of funds for closure assured by the mechanism. If the facilities covered by the mechanism are outside the State, identical evidence of financial assurance must be submitted to and maintained with the Secretary and Regional Administrators of all appropriate EPA Regions. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure of any of the facilities covered by the mechanism, the Secretary may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Release of the owner or operator from the requirements of this section. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Secretary will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Secretary has reason to believe that final closure has not been in accordance with the approved closure plan. The Secretary shall provide the owner or operator a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.

(Amended August 29, 1988, August 1, 1995, January 1, 1999)

#### **Section 265.144 Cost Estimate for Post-closure Care.**

(a) The owner or operator of a hazardous waste disposal unit must have a detailed written estimate, in current dollars, of the annual cost of post-closure monitoring and maintenance of the facility in accordance with the applicable post-closure regulations in §§ 265.117 through 265.120, 265.228, 265.258, 265.280, and 265.310.

(1) The post-closure cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct post-closure care activities. A third party is a party who is neither a parent nor subsidiary of the owner or operator. (See definition of parent corporation in §265.141(d).)

(2) The post-closure cost estimate is calculated by multiplying the annual post-closure cost estimate by the number of years of post-closure care required under §265.117.

(3) Owners or operators using the trust fund for post-closure care must include any costs or fees associated with administering the fund into the cost estimate for post-closure care.

(b) During the active life of the facility, the owner or operator must adjust the post-closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with §265.145. For owners or operators using the financial test or corporate guarantee, the post-closure care cost estimate must be updated for inflation no later than 30 days after the close of the firm's fiscal year and before submission of updated information to the Secretary as specified in §265.145(d)(5). The adjustment may be made by recalculating the post-closure cost estimate in current dollars or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business as specified in §265.145(b)(1) and (b)(2). The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the post-closure cost estimate by the inflation factor. The result is the adjusted post-closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted post-closure cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator must revise the post-closure cost estimate no later than 30 days after a revision to the post-closure plan which increases the cost of post-closure care. If the owner or operator has an approved post-closure plan, the post-closure cost estimate must be revised no later than 30 days after the Secretary has approved the request to modify the plan, if the change in the post-closure plan increases the cost of post-closure care. The revised post closure cost estimate must be adjusted for inflation as specified in §265.114(b).

(d) The owner or operator must keep the following at the facility during the operating life of the facility: the latest post-closure cost estimate prepared in accordance with §265.144 (a) and (c) and, when this estimate has been adjusted in accordance with §265.144(b), the latest adjusted post-closure cost estimate.

(Amended August 29, 1988)

**Section 265.145 Financial assurance for post-closure care.**

By the effective date of these regulations, an owner or operator of a facility with a hazardous waste disposal unit must establish financial assurance for post-closure care of the disposal unit(s).

(a) Post-closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a post-closure trust fund which conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Secretary. 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 State agency.

(2) The wording of the trust agreement must be identical to the wording specified in §264.151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see §264.151(a)(2)). Schedule A of the trust agreement must be updated within 60 days after a change in the amount of the current post-closure cost estimate covered by the agreement.

(3) Payments into the trust fund must be made annually by the owner or operator over the 20 years beginning with the effective date of these regulations or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the post-closure trust fund must be made as follows:

(i) The first payment must be made by the effective date of these regulations, except as provided in paragraph (a)(5) of this section. The first payment must be at least equal to the current post-closure cost estimate, except as provided in §265.145(f), divided by the number of years in the pay-in period.

(ii) Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

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

Where CE is the current post-closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current post-closure cost estimate at the time the fund is established. However, he must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (a)(3) of this section.

(5) If the owner or operator established post-closure trust fund after having used one or more alternate mechanisms specified in this section, his first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in paragraph (a)(3) of this section.

(6) After the pay-in period is completed, whenever the current post-closure-cost estimate changes during the operating life of the facility, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current post-closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) During the operating life of the facility, if the value of the trust fund is greater than the total amount of the current post-closure cost estimate, the owner or operator may submit a written request to the Secretary for release of the amount in excess of the current post-closure cost estimate.

## §265.145

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the Secretary for release of the amount in excess of the current post-closure cost estimate covered by the trust fund.

(9) Within 60 days after receiving a request from the owner or operator for release of funds as specified in paragraph (a)(7) or (8) of this section, the Secretary will instruct the trustee to release to the owner or operator such funds as the Secretary specifies in writing.

(10) During the period of post-closure care, the Secretary may approve a release of funds if the owner or operator demonstrates to the Secretary that the value of the trust fund exceeds the remaining cost of post-closure care.

(11) An owner or operator or any other person authorized to conduct post-closure care may request reimbursements for post-closure expenditures by submitting itemized bills to the Secretary. Within 60 days after receiving bills for post-closure care activities, the Secretary will instruct the trustee to make reimbursements in those amounts as the Secretary specifies in writing, if the Secretary determines that the post-closure expenditures are in accordance with the approved post-closure plan or otherwise justified. If the Secretary does not instruct the trustee to make such reimbursements, he will provide the owner or operator with a detailed written statement of reasons.

(12) The Secretary will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or  
(ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.145(h).

(b) Surety bond guaranteeing payment into a post-closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to requirements of this paragraph and submitting the bond to the Secretary. 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 wording of the surety bond must be identical to the wording specified in §264.151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this Section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the Secretary. This standby trust fund must meet the requirements specified in §265.145(a), except that;

(i) An originally signed duplicate of the trust agreement must be submitted to the Secretary with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in §265.145(a);

(B) Updating of Schedule A of the trust agreement (see §264.151(a)) to show current post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(ii) Fund the standby trust fund in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the Secretary becomes final, or within 15 days after an order to begin final closure is issued by a U.S. district court or other court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the Secretary's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the Secretary of a notice of cancellation of the bond from the surety.

## §265.145

(5) 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.

(6) The penal sum of the bond must be in an amount at least equal to the current post-closure cost estimate, except as provided in §265.145(f).

(7) Whenever the current post-closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within 60 days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current post-closure cost estimate and submit evidence of such increase to the Secretary, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current post-closure cost estimate decreases, the penal sum may be reduced to the amount of the current post-closure cost estimate following written approval by the Secretary.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the Secretary. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Secretary as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the Secretary has given prior written consent based on his receipt of evidence of alternate financial assurance as specified in this section.

### (c) Post-closure 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 and submitting the letter to the Secretary. 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 State agency.

(2) The wording of the letter of credit must be identical to the wording specified in §264.151(d).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the Secretary will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the Secretary. This standby trust fund must meet the requirements of the trust fund specified in §265.145(a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the Secretary with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these regulations:

(A) Payments into the trust fund as specified in §265.145(a);

(B) Updating of Schedule A of the trust agreement (see §264.151(a)) to show current post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: the EPA identification number, name, and address of the facility, and the amount of funds assured for post-closure care of the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least 1 year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least 1 year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the Secretary by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the 120 days will begin on the date when both the owner or operator and the Secretary have received the notice as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current post-closure cost estimate, except as provided in §265.145(f).

(7) Whenever the current post-closure cost estimate increases to an amount greater than the amount of the credit during the operating life of the facility, the owner or operator, within 60 days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current post-closure cost estimate and submit evidence of such increase to the Secretary, or obtain financial assurance as specified in this Section to cover the increase. Whenever the current post-closure cost estimate decreases during the operating life of the facility, the amount of the credit may be reduced to the amount of the current post-closure cost estimate following written approval by the Secretary.

(8) During the period of post-closure care, the Secretary may approve a decrease in the amount of the letter of credit if the owner or operator demonstrates to the Secretary that the amount exceeds the remaining cost of post-closure care.

(9) Following a final administrative determination pursuant to 7 Del. C., Chapter 63 that the owner or operator has failed to perform post-closure care in accordance with the approved post-closure plan and other permit requirements, the Secretary may draw on the letter of credit.

(10) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the Secretary within 90 days after receipt by both the owner or operator and the Secretary of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the Secretary will draw on the letter of credit. The Secretary may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension the Secretary will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the Secretary.

(11) The Secretary returns the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.145(h).

(d) Post-closure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining post-closure insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the Secretary. By the effective date of these regulations the owner or operator must submit to the Secretary a letter from an insurer stating that the insurer is considering issuance of post-closure insurance conforming to the requirements of this paragraph to the owner or operator. Within 90 days after the effective date of these regulations, the owner or operator must submit the certificate of insurance to the Secretary or establish other financial assurance as specified in this section. 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 States.

(2) The wording of the certificate of insurance must be identical to the wording specified in §264.151(e).

(3) The post-closure insurance policy must be issued for a face amount at least equal to the current post-closure cost estimate, except as provided in §265.145(f). 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) The post-closure insurance policy must guarantee that funds will be available to provide post-closure care of the facility whenever the post-closure period begins. The policy must also guarantee that once post-closure care begins the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the Secretary, to such party or parties as the Secretary specifies.

(5) An owner or operator or any other person authorized to perform post-closure care may request reimbursement for post-closure care expenditures by submitting itemized bills to the Secretary. Within 60 days after receiving bills for post-closure care activities, the Secretary will instruct the insurer to make reimbursements in those amounts as the Secretary specifies in writing, if the Secretary determines that the post-closure expenditures are in accordance with the approved post-closure plan or otherwise justified. If the Secretary does not instruct the insurer to make such reimbursements, he will provide a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the Secretary consents to termination of the policy by the owner or operator as specified in paragraph (d)(11) of this section. Failure to pay the premium, without substitution of alternate financial assurance as specified in the section, will constitute a significant violation of these regulations, warranting such remedy as the Secretary deems necessary. Such violation will be deemed to begin upon receipt by the Secretary of a notice of future to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) 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 such consent is not unreasonably refused.

(8) The 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 elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the Secretary. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

- (i) The Secretary deems the facility abandoned; or
- (ii) Interim status is terminated or revoked; or
- (iii) Closure is ordered by the Secretary or a U.S. district court or other court of competent jurisdiction; or
- (iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 USC (Bankruptcy); or
- (v) The premium due is paid.

(9) Whenever the current post-closure cost estimate increases to an amount greater than the face amount of the policy during the operating life of the facility, the owner or operator, within 60 days after the increase, must either cause the face amount to be increased to an amount at least equal to the current post-closure cost estimate and submit evidence of such increase to the Secretary, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current post-closure cost estimate decreases during the operating life of the facility, the face amount may be reduced to the amount of the current post-closure cost estimate following written approval by the Secretary.

(10) 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 amounts 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.

(11) The Secretary will give written consent to the owner or operator that he may terminate the insurance policy when:

- (i) an owner or operator substitutes alternate financial assurance as specified in this section; or
- (ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.145(h).

(e) Financial test and corporate guarantee for post-closure care.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria either of paragraph (e)(1)(i) or (e)(1)(ii) of this section:

(i) The owner or operator must have:

(A) Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates; and

(C) Tangible net worth of at least \$10 million; and

(D) Assets in the United States amounting to a least 90 percent of his total assets or at least six times the sum of the current closure and post-closure cost estimates.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth at least six times the sum of the current closure and post-closure cost; and

(C) Tangible net worth of at least \$10 million; and

(D) Assets located in the United States amounting to at least 90 percent of his total assets or at least six times the sum of the current closure and post-closure cost estimates.

(2) **[Reserved]**

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the Secretary:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in §264.151(f); and

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

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

(4) The owner or operator may obtain an extension of the time allowed for submission of the documents specified in paragraph (e)(3) if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the DNREC Secretary and the EPA Regional Administrator of each Region in which the owner's or operator's facilities to be covered by the financial test are located. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA identification number, name, address, and the current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's latest complete fiscal year before the effective date of these regulations;

(v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (e)(3) of this section; and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (e)(3) of this section, the owner or operator must send updated information to the Secretary within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (e)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, he must send notice to the Secretary of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within 120 days after the end of such fiscal year.

(7) The Secretary may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (e)(3) of this section. If the Secretary finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (e)(1) of this section, the owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of such a finding.

(8) The Secretary may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (e)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Secretary will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

(9) During the period of post-closure care, the Secretary may approve a decrease in the current post-closure cost estimate for which this test demonstrates financial assurance if the owner or operator demonstrates to the Secretary that the amount of the cost estimate exceeds the remaining cost of post-closure care.

(10) The owner or operator is no longer required to submit the items specified in paragraph (e)(3) of this section when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The Secretary releases the owner or operator from the requirements of this section in accordance with §265.145(h).

(11) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (e)(1) through (9) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in §264.151(h). A certified copy of the guarantee must accompany the items sent to the DNREC Secretary as specified in paragraph (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee must provide that:

## §265.145

(i) If the owner or operator fails to perform post-closure care of a facility covered by the corporate guarantee in accordance with the post-closure plan and other interim status requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in §265.145(a) in the name of the owner or operator.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the Secretary. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the Secretary, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the Secretary within 90 days after receipt by both the owner or operator and the Secretary of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(f) 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. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in paragraphs (a) through (d), respectively, 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 post-closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The Secretary may use any or all of the mechanisms to provide for post-closure care of the facility.

(g) Use of a financial mechanism for multiple facilities. An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the Secretary must include a list showing, for each facility, the EPA identification number, name, address, and the amount of funds for post-closure care assured by the mechanism. If the facilities covered by the mechanism are in more than one Region, identical evidence of financial assurance must be submitted to and maintained with the Regional Administrators of all such Regions. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for post-closure care of any of the facilities covered by the mechanism, the Secretary may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Release of the owner or operator from the requirements of this section. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that the post-closure care period has been completed in accordance with the approved post-closure plan, the Secretary will notify the owner or operator in writing that he is no longer required by this Section to maintain financial assurance for post-closure care of that unit, unless the Secretary has reason to believe that post-closure care has not been in accordance with the approved post-closure plan. The Secretary will provide the owner or operator a detailed written statement of any such reason to believe that post-closure care has not been in accordance with the approved post-closure plan.

(Amended August 29, 1988, August 1, 1995, January 1, 1999, August 23, 1999)

**Section 265.146 Use of a Mechanism for Financial Assurance of Both Closure and Post-closure Care.**

An owner or operator may satisfy the requirements for financial assurance for both closure and post-closure care for one or more facilities by using a trust fund, surety bond, letter of credit, insurance, financial test, or corporate guarantee that meets the specifications for the mechanism in both §§ 265.143 and 265.145. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for financial assurance of closure and of post-closure care.

(Amended August 29, 1988)

**Section 265.147 Liability Requirements.**

(a) Coverage for sudden accidental occurrences. An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraphs (a)(1), (2), (3), (4), (5), or (6) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in §264.151(i). The wording of the certificate of insurance must be identical to the wording specified in §264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Secretary. If requested by a Secretary, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Secretary in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (a)(1) through (a)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (a)(1) through (a)(6) of this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (a)(1) through (a)(6) of this section.

(b) Coverage for nonsudden accidental occurrences. An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least \$3 million per occurrence per site with an annual aggregate of at least \$6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least \$4 million per occurrence per site and \$8 million annual aggregate. This liability coverage may be demonstrated as specified in paragraph (b)(1), (2), (3), (4), (5), or (6) of this section:

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this paragraph.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in §264.151(i). The wording of the certificate of insurance must be identical to the wording specified in §264.151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the Secretary. If requested by a Secretary, the owner or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in paragraphs (f) and (g) of this section.

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in paragraph (h) of this section.

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in paragraph (i) of this section.

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in paragraph (j) of this section.

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated

must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this paragraph, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess" coverage.

(7) An owner or operator shall notify the Secretary in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (b)(1) through (b)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (b)(1) through (b)(6) of this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (b)(1) through (b)(6) of this section.

(c) **[Reserved]**

(d) Adjustments by the Secretary. If the Secretary determines that the levels of financial responsibility required by paragraphs (a) or (b) of this section are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the Secretary may adjust the level of financial responsibility required under paragraphs (a) or (b) of this section as may be necessary to protect human health and the environment. This adjusted level will be based on the Secretary's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the Secretary determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill, or land treatment facility, he may require that an owner or operator of the facility comply with paragraph (b) of this section. An owner or operator must furnish to the Secretary, within a reasonable time, any information which the Secretary requests to determine whether cause exists for such adjustments of level or type of coverage. The Secretary will process an adjustment of the level of required coverage as if it were a permit modification under §122.15(a)(7)(iii) of these regulations and subject to the procedures of §124.5 of these regulations. Notwithstanding any other provision, the Secretary may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to adjust the level or type of required coverage.

(e) Period of coverage. Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Secretary will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the Secretary has reason to believe that closure has not been in accordance with the approved closure plan.

(f) Financial test for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this paragraph. To pass this test the owner or operator must meet the criteria of paragraph (f)(1)(i) or (f)(1)(ii).

(i) The owner or operator must have:

(A) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) Tangible net worth of at least \$10 million; and

(C) Assets in the United States amounting to either: (1) At least 90 percent of his total assets; or (2) at least six times the amount of liability coverage to be demonstrated by this test:

(ii) The owner or operator must have:

## §265.147

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB, as issued by Standard and Poor's, or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth of at least \$10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting in either: (1) at least 90 percent of his total assets; or (2) at least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase "amount of liability coverage" as used in paragraph (e)(1) of this section refers to the annual aggregate amounts for which coverage is required under paragraphs (a) and (b) of this section.

(3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the Secretary.

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in §265.151(g). If an owner or operator is using the financial test to demonstrate both assurance for closure or post-closure care, as specified by §§ 264.143(f), 264.145(f), 265.143(e), and 265.145(e), and liability coverage, he must submit the letter specified in §264.151(g) to cover both forms of financial responsibility; a separate letter as specified in §264.151(f) is not required.

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

(iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

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

(4) The owner or operator may obtain a one-time extension of the time allowed for submission of the documents specified in paragraph (f)(3) of this section if the fiscal year of the owner or operator ends during the 90 days prior to the effective date of these regulations and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than 90 days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these regulations, a letter to the Secretary. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA identification number, name, address, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these regulations;

(v) Specify the date, no later than 90 days after the end of such fiscal year, when he will submit the documents specified in paragraph (f)(3) of this section; and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (f)(3) of this section, the owner or operator must send updated information to the Secretary within 90 days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3) of this section.

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must obtain insurance, a letter of credit, a surety bond, a trust fund, or a guarantee for the entire amount of required liability coverage as specified in this section. Evidence of liability coverage must be submitted to the Secretary within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(7) The Secretary may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see paragraph (f)(3)(ii) of this section). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The Secretary will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this section within 30 days after notification of disallowance.

(g) Guarantee for liability coverage. (1) Subject to paragraph (g)(2) of this section, an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as "guarantee." The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (f)(6) of this section. The wording of the guarantee must be identical to the wording specified in §264.151(h)(2) of these regulations. A certified copy of the guarantee must accompany the items sent to the Secretary as specified in paragraph (f)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee.

(i) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(ii) **[Reserved]**

(2)(i) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (A) the State in which the guarantor is incorporated, and (B) each State in which a facility covered by the guarantee is located have submitted a written statement to DNREC that a guarantee executed as described in this section and §264.151(h)(2) is a legally valid and enforceable obligation in that State.

(ii) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this section only if:

(A) the non-U.S. corporation has identified a registered agent for service of process in each State in which a facility covered by the guarantee is located and in the State which it has its principal place of business, and if

(B) the Attorney General or Insurance Commissioner of each State in which a facility covered by the guarantee is located and the State in which the guarantor corporation has its principal place of business, has submitted a written statement to DNREC that a guarantee executed as described in this section and §264.151(h)(2) is a legally valid and enforceable obligation in that State.

(h) Letter of credit for liability coverage. (1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit that conforms to the requirements of this paragraph and submitting a copy of the letter of credit to the Secretary.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State agency.

(3) The wording of the letter of credit must be identical to the wording specified in § 264.151(k) of these regulations.

(4) An owner or operator who uses a letter of credit to satisfy the requirements of this section may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund 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 State agency.

(5) The wording of the standby trust fund must be identical to the wording specified in §264.151(n).

(i) Surety bond for liability coverage. (1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond that conforms to the requirements of this paragraph and submitting a copy of the bond to the Secretary.

(2) The surety company issuing the bond must be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the surety bond must be identical to the wording specified in §264.151(l) of these regulations.

(4) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of (i) the State in which the surety is incorporated, and (ii) each State in which a facility covered by the surety bond is located have submitted a written statement to DNREC that a surety bond executed as described in this section and §264.151(l) of these regulations is a legally valid and enforceable obligation in Delaware.

(j) Trust fund for liability coverage. (1) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this paragraph and submitting an originally signed duplicate of the trust agreement to the Secretary.

(2) 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 State agency.

(3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the Fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this paragraph, "the full amount of the liability coverage to be provided" means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust fund must be identical to the wording specified in §264.151(m) of this part.

(k) Notwithstanding any other provision of this part, an owner or operator using liability insurance to satisfy the requirements of this section may use, until October 16, 1982, a Hazardous Waste Facility Liability Endorsement or Certificate of Liability Insurance that does not certify that the insurer is licensed to transact the business of insurance, or eligible as an excess or surplus lines insurer, in one or more States.

(Amended August 29, 1988, August 1, 1995, January 1, 1999)

**Section 265.148 Incapacity of Owners or Operators, Guarantors, or Financial Institutions.**

(a) An owner or operator must notify the Secretary by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), USC, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. A guarantor of a corporate guarantee as specified in §§ 265.143(e) and 265.145(e) must make such a notification if he is named as debtor, as required under the terms of the corporate guarantee (§264.151(h)).

(b) An owner or operator who fulfills the requirements of §§ 265.143, 265.145, or 265.147 by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution to act as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must establish other financial assurance or liability coverage within 60 days after such an event.

**Sections 265.149 - 265.150 [Reserved]**

**Subpart I - Use and Management of Containers**

**Section 265.170 Applicability.**

The regulations in this subpart apply to owners and operators of all hazardous waste facilities that store containers of hazardous waste, except as §265.1 provides otherwise.

**Section 265.171 Condition of containers.**

If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with the requirements of this part.

**Section 265.172 Compatibility of waste with container.**

The owner or operator must use a container made of or lined with materials which will not react with, and are otherwise compatible with, the hazardous waste to be stored, so that the ability of the container to contain the waste is not impaired.

**Section 265.173 Management of containers.**

(a) A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

(b) A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

[Comment: Re-use of containers in transportation is governed by U.S. Department of Transportation regulations, including those set forth in 49 CFR §173.28.]

**Section 265.174 Inspections.**

The owner or operator must inspect areas where containers are stored at least weekly, looking for leaks and for deterioration caused by corrosion or other factors. A written record of the inspections must be maintained onsite for a minimum of 3 years.

[Comment: See §265.171 for remedial action required if deterioration or leaks are detected.]  
(Amended July 23, 1996)

**Section 265.175 [Reserved]**

**Section 265.176 Special requirements for ignitable or reactive waste.**

Containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) from the facility's property line.

[Comment: See §265.17(a) for additional requirements]

**Section 265.177 Special requirements for incompatible wastes.**

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for Examples) must not be placed in the same container, unless §265.17(b) is complied with.

(b) Hazardous waste must not be placed in an unwashed container that previously held an incompatible waste or material (see Appendix V for examples), unless §265.17(b) is complied with.

(c) A storage container holding a hazardous waste that is incompatible with any waste or other materials stored nearby in other containers, piles, open tanks, or surface impoundments must be separated from the other materials or protected from them by means of a dike, berm, wall, or other device.

[Comment: The purpose of this is to prevent fires, explosions, gaseous emission, leaching, or other discharge of hazardous or hazardous waste constituents which could result from the mixing of incompatible wastes or materials if containers break or leak.]

**Section 265.178 Air emission standards.**

The owner or operator shall manage all hazardous waste placed in a container in accordance with the applicable requirements of Subparts AA, BB, and CC of this part.

(Amended January 1, 1999)

**Subpart J - Tanks**

**Section 265.190 Applicability.**

The requirements of this subpart apply to owners and operators of facilities that use tank systems for storing or treating hazardous waste except as otherwise provided in paragraphs (a),(b), and (c) of this section or in §265.1 of this part.

(a) Tank systems that are used to store or treat hazardous waste containing no free liquids and that are situated inside a building with an impermeable floor are exempted from the requirements of §265.193 of this subpart. To demonstrate the absence or presence of free liquids in the stored/treated waste, the following test must be used: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in §260.11 of these regulations.

(b) Tank systems, including sumps, as defined in §260.10, that serve as part of a secondary containment system to collect or contain releases of hazardous wastes are exempted from the requirements in §265.193(a).

(c) Tanks, sumps, and other collection devices used in conjunction with drip pads, as defined in §260.10 of these regulations and regulated under Part 265 Subpart W, must meet the requirements of this subpart.

(Amended August 29, 1988; August 10, 1990; November 19, 1993, July 23, 1996)

**Section 265.191 Assessment of existing tank system's integrity.**

(a) For each existing tank system that does not have secondary containment meeting the requirements of §265.193, the owner or operator must determine that the tank system is not leaking or is unfit for use. Except as provided in paragraph (c) of this section, the owner or operator must obtain and keep on file at the facility a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with §122.11(d), that attests to the tank system's integrity by January 12, 1988.

(b) This assessment must determine that the tank system is adequately designed and has sufficient structural strength and compatibility with the waste(s) to be stored or treated to ensure that it will not collapse, rupture, or fail. At a minimum, this assessment must consider the following:

- (1) Design standard(s), if available, according to which the tank and ancillary equipment were constructed;
- (2) Hazardous characteristics of the waste(s) that have been or will be handled;
- (3) Existing corrosion protection measures;
- (4) Documented age of the tank system, if available, (otherwise, an estimate of the age); and
- (5) Results of a leak test, internal inspection, or other tank integrity examination such that:

(i) For non-enterable underground tanks, this assessment must consist of a leak test that is capable of taking into account the effects of temperature variations, tank end deflection, vapor pockets, and high water table effects,

(ii) For other than non-enterable underground tanks and for ancillary equipment, this assessment must be either a leak test, as described above, or an internal inspection and/or other tank integrity examination certified by an independent, qualified, registered professional engineer in accordance with §122.11(d) that addresses cracks, leaks, corrosion, and erosion.

[Note: The practices described in the American Petroleum Institute (API) Publication, Guide for Inspection of Refinery Equipment, Chapter XIII, "Atmospheric and Low-Pressure Storage Tanks," 4th edition, 1981, may be used, where applicable, as guidelines in conducting the integrity examination of an other than non-enterable underground tank system.]

(c) Tank systems that store or treat materials that become hazardous wastes subsequent to July 14, 1986 must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste.

(d) If, as a result of the assessment conducted in accordance with paragraph (a) of this section, a tank system is found to be leaking or unfit for use, the owner or operator must comply with the requirements of §265.196.

(Amended August 29, 1988)

**Section 265.192 Design and installation of new tank systems or components.**

(a) Owners or operators of new tank systems or components must ensure that the foundation, structural support, seams, connections, and pressure controls (if applicable) are adequately designed and that the tank system has sufficient structural strength, compatibility with the waste(s) to be stored or treated, and corrosion protection so that it will not collapse, rupture, or fail. The owner or operator must obtain a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with §122.11(d) attesting that the system has sufficient structural integrity and is acceptable for the storing and treating of hazardous waste. This assessment must include, at a minimum, the following information:

- (1) Design standard(s) according to which the tank(s) and ancillary equipment is or will be constructed.
- (2) Hazardous characteristics of the wastes to be handled.

(3) For new tank systems or components in which the external shell of a metal tank or any external metal component of the tank system is or will be in contact with the soil or with water, a determination by a corrosion expert of:

(i) Factors affecting the potential for corrosion, including but not limited to:

- (A) Soil moisture content;
- (B) Soil pH;
- (C) Soil sulfides level;
- (D) Soil resistivity;
- (E) Structure to soil potential;
- (F) Influence of nearby underground metal structures (e.g., piping);
- (G) Stray electric current; and
- (H) Existing corrosion-protection measures (e.g., coating, cathodic protection).

(ii) The type and degree of external corrosion protection that are needed to ensure the integrity of the tank system during the use of the tank system or component, consisting of one or more of the following:

- (A) Corrosion-resistant materials of construction such as special alloys, fiberglass-reinforced plastic;
- (B) Corrosion-resistant coating (such as epoxy, fiberglass) with cathodic protection (e.g., impressed current or sacrificial anodes); and
- (C) Electrical isolation devices such as insulating joints and flanges.

[Note: The practices described in the National Association of Corrosion Engineers (NACE) standard, "Recommended Practice (RP-02-85) - Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," and the American Petroleum Institute (API) Publication 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems," may be used, where applicable, as guidelines in providing corrosion protection for tank systems.]

(4) For underground tank system components that are likely to be affected by vehicular traffic, a determination of design or operational measures that will protect the tank system against potential damage; and

(5) Design considerations to ensure that:

- (i) Tank foundations will maintain the load of a full tank;
- (ii) Tank systems will be anchored to prevent flotation or dislodgment where the tank system is placed in a saturated zone, or is located within a seismic fault zone; and
- (iii) Tank systems will withstand the effects of frost heave.

(b) The owner or operator of a new tank system must ensure that proper handling procedures are adhered to in order to prevent damage to the system during installation. Prior to covering, enclosing, or placing a new tank system or component in use, an independent, qualified installation inspector or an independent, qualified, registered professional engineer, either of whom is trained and experienced in the proper installation of tank systems must inspect the system or component for the presence of any of the following items:

- (1) Weld breaks;
- (2) Punctures;
- (3) Scrapes of protective coatings;
- (4) Cracks;
- (5) Corrosion;
- (6) Other structural damage or inadequate construction or installation.

All discrepancies must be remedied before the tank system is covered, enclosed, or placed in use.

(c) New tank systems or components and piping that are placed underground and that are backfilled must be provided with a backfill material that is a noncorrosive, porous, homogeneous substance and that is carefully installed so that the backfill is placed completely around the tank and compacted to ensure that the tank and piping are fully and uniformly supported.

(d) All new tanks and ancillary equipment must be tested for tightness prior to being covered, enclosed or placed in use. If a tank system is found not to be tight, all repairs necessary to remedy the leak(s) in the system must be performed prior to the tank system being covered, enclosed, or placed in use.

(e) Ancillary equipment must be supported and protected against physical damage and excessive stress due to settlement, vibration, expansion or contraction.

[Note: The piping system installation procedures described in the American Petroleum Institute (API) Publication 1615 (November 1979), "Installation of Underground Petroleum Storage Systems," or ANSI Standard B31.3, "Petroleum Refinery System," may be used, where applicable, as guidelines for proper piping systems.]

(f) The owner or operator must provide the type and degree of corrosion protection necessary, based on the information provided under paragraph (a)(3) of this section, to ensure the integrity of the tank system during use of the tank system. The installation of a corrosion protection system that is field fabricated must be supervised by an independent corrosion expert to ensure proper installation.

(g) The owner or operator must obtain and keep on file at the facility written statements by those persons required to certify the design of the tank system and supervise the installation of the tank system in accordance with the requirements of paragraphs (b) through (f) of this section to attest that the tank system was properly designed and installed and that repairs, pursuant to paragraphs (b) and (d) of this section were performed. These written statements must also include the certification statement as required in §122.11 of these regulations.

#### **Section 265.193 Containment and detection of releases.**

(a) In order to prevent the release of hazardous waste or hazardous constituents to the environment, secondary containment that meets the requirements of this section must be provided (except as provided in paragraphs (f) and (g) of this section):

(1) For all new tank systems or components, prior to their being put into service;

(2) For all existing tanks used to store or treat EPA Hazardous Waste Nos. F020, F021, F022, F023, F026, and F027, within two years after January 12, 1987;

(3) For those existing tank systems of known and documentable age, within two years after January 12, 1987, or when the tank systems have reached 15 years of age, whichever comes later;

(4) For those existing tank systems for which the age cannot be documented, within eight years of January 12, 1987; but if the age of the facility is greater than seven years, secondary containment must be provided by the time the facility reaches 15 years of age, or within two years of January 12, 1987, whichever comes later, and

(5) For tank systems that store or treat materials that become hazardous wastes subsequent to January 12, 1987, within the time intervals required in paragraphs (a)(1) through (a)(4) of this section, except that the date that a material becomes a hazardous waste must be used in place of January 12, 1987.

(b) Secondary containment systems must be:

(1) Designed, installed, and operated to prevent any migration of wastes or accumulated liquid out of the system to the soil, groundwater, or surface water at any time during the use of the tank system; and

(2) Capable of detecting and collecting releases and accumulated liquids until the collected material is removed.

(c) To meet the requirements of paragraph (b) of this section, secondary containment systems must be at a minimum:

(1) Constructed of or lined with materials that are compatible with the waste(s) to be placed in the tank system and must have sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydrological forces), physical contact with the waste to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operation (including stresses from nearby vehicular traffic):

(2) Placed on a foundation or base capable of providing support to the secondary containment system and resistance to pressure gradients above and below the system and capable of preventing failure due to settlement, compression or uplift;

(3) Provided with a leak detection system that is designed and operated so that it will detect the failure of either the primary and secondary containment structure or any release of hazardous waste or accumulated liquid in the secondary containment system within 24 hours, or at the earliest practicable time if the existing detection technology or site conditions will not allow detection of a release within 24 hours;

(4) Sloped or otherwise designed or operated to drain and remove liquids resulting from leaks, spills, or precipitation. Spilled or leaked waste and accumulated precipitation must be removed from the secondary containment system within 24 hours, or in as timely a manner as is possible to prevent harm to human health or the environment, if removal of the released waste or accumulated precipitation cannot be accomplished within 24 hours.

[Note - If the collected material is a hazardous waste under Part 261, it is subject to management as a hazardous waste in accordance with all applicable requirements of Parts 262 through 265. If the collected material is discharged through a point source to waters of the United States, it is subject to the requirements of §§ 301, 304 and 402 of the Clean Water Act, as amended. If discharged to Publicly Owned Treatment Works (POTWs), it is subject to the requirements of §307 of the Clean Water Act, as amended. If the collected material is released to the environment, it is subject to the reporting requirements of 7 Del. C., Chapter 60, also, it may be subject to the reporting requirements of 40 CFR Part 302].

(d) Secondary containment for tanks must include one or more of the following devices:

- (1) A liner (external to the tank);
- (2) A vault;
- (3) A double-walled tank; or
- (4) An equivalent device as approved by the Secretary.

(e) In addition to the requirements of paragraphs (b), (c), and (d) of this section, secondary containment systems must satisfy the following requirements:

(1) External liner systems must be:

- (i) Designed or operated to contain 100 percent of the capacity of the largest tank within its boundary;
- (ii) Designed or operated to prevent run-on or infiltration of precipitation into the secondary containment system unless the collection system has sufficient excess capacity to contain run-on or infiltration. Such additional capacity must be sufficient to contain precipitation from a 25- year, 24 hour rainfall event;
- (iii) Free of cracks or gaps; and
- (iv) Designed and installed to completely surround the tank and to cover all surrounding earth likely to come into contact with the waste if released from the tank(s) (i.e., capable of preventing lateral as well as vertical migration of the waste).

(2) Vault systems must be:

- (i) Designed or operated to contain 100 percent of the capacity of the largest tank within its boundary;
- (ii) Designed or operated to prevent run-on or infiltration of precipitation into the secondary containment system unless the collection system has sufficient excess capacity to contain run-on or infiltration. Such additional capacity must be sufficient to contain precipitation from a 25- year, 24-hour rainfall event;

- (iii) Constructed with chemical-resistant water stops in place at all joints (if any);
- (iv) Provided with an impermeable interior coating or lining that is compatible with the stored waste and that will prevent migration of wastes into the concrete;
- (v) Provided with a means to protect against the formation of and ignition of vapors within the vault, if the waste being stored or treated:
  - (A) Meets the definition of ignitable waste under §262.21 of these regulations; or
  - (B) Meets the definition of reactive waste under §262.21 and may form an ignitable or explosive vapor; and
- (vi) Provided with an exterior moisture barrier or be otherwise designed or operated to prevent migration of moisture into the vault if the vault is subject to hydraulic pressure.

(3) Double-walled tanks must be:

- (i) Designed as an integral structure (i.e., an inner tank within an outer shell) so that any release from the inner tank is contained by the outer shell;
- (ii) Protected, if constructed of metal, from both corrosion of the primary tank interior and the external surface of the outer shell; and
- (iii) Provided with a built-in, continuous leak detection system capable of detecting a release within 24 hours or at the earliest practicable time, if the owner or operator can demonstrate to the Secretary and the Secretary concurs, that the existing leak detection technology or site conditions will not allow detection of a release within 24 hours.

[Note: The provisions outlined in the Steel Tank Institute's (STI) "Standard for Dual Wall Underground Steel Storage Tank" may be used as guidelines for aspects of the design of underground steel double-walled tanks.]

(f) Ancillary equipment must be provided with full secondary containment (e.g., trench, jacketing, double-walled piping) that meets the requirements of paragraphs (b) and (c) of this section except for:

- (1) Aboveground piping (exclusive of flanges, joints, valves, and connections) that are visually inspected for leaks on a daily basis;
- (2) Welded flanges, welded joints, and welded connections that are visually inspected for leaks on a daily basis;
- (3) Sealless or magnetic coupling pumps and sealless valves, that are visually inspected for leaks on a daily basis; and
- (4) Pressurized aboveground piping systems with automatic shut-off devices (e.g., excess flow check valves, flow metering shutdown devices, loss of pressure actuated shut-off devices) that are visually inspected for leaks on a daily basis.

(g) The owner or operator may obtain a variance from the requirements of this section if the Secretary finds, as a result of a demonstration by the owner or operator, either: that alternative design and operating practices, together with location characteristics, will prevent the migration of hazardous waste or hazardous constituents into the groundwater or surface water at least as effectively as secondary containment during the active life of the tank system, or that in the event of a release that does migrate to groundwater or surface water, no substantial present or potential hazard will be posed to human health or the environment. New underground tank systems may not, per a demonstration in accordance with paragraph (g)(2) of this section, be exempted from the secondary containment requirements of this section. Application for a variance as allowed in paragraph (g) of this section does not waive compliance with the requirements of this subpart for new tank systems.

(1) In deciding whether to grant a variance based on a demonstration of equivalent protection of groundwater and surface water, the Secretary will consider:

- (i) The nature and quantity of the waste;
- (ii) The proposed alternate design and operation;
- (iii) The hydrogeologic setting of the facility, including the thickness of soils between the tank system and groundwater; and
- (iv) All other factors that would influence the quality and mobility of the hazardous constituents and the potential for them to migrate to groundwater or surface water.

(2) In deciding whether to grant a variance, based on a demonstration of no substantial present or potential hazard, the Secretary will consider:

- (i) The potential adverse effects on groundwater, surface water, and land quality taking into account:
  - (A) The physical and chemical characteristics of the waste in the tank system, including its potential for migration,
  - (B) The hydrogeological characteristics of the facility and surrounding land,
  - (C) The potential for health risks caused by human exposure to waste constituents,
  - (D) The potential for damage to wildlife, crops, vegetation, and physical structures caused by exposure to waste constituents, and
  - (E) Persistence and permanence of the potential adverse effects;
- (ii) The potential adverse effects of a release on groundwater quality, taking into account:
  - (A) The quantity and quality of groundwater and the direction of groundwater flow,
  - (B) The proximity and withdrawal rates of water in the area,
  - (C) The current and future uses of groundwater in the area, and
  - (D) The existing quality of groundwater, including other sources of contamination and their cumulative impact on the groundwater quality;
- (iii) The potential adverse effects of a release on surface water quality, taking into account:
  - (A) The quantity and quality of groundwater and the direction of groundwater flow,
  - (B) The patterns of rainfall in the region,
  - (C) The proximity of the tank system to surface waters,
  - (D) The current and future uses of surface waters in the area and any water quality standards established for those surface waters, and
  - (E) The existing quality of surface water, including other sources of contamination and the cumulative impact on surface water quality; and
- (iv) The potential adverse effects of a release on the land surrounding the tank system, taking into account:
  - (A) The patterns of rainfall in the region, and
  - (B) The current and future uses of the surrounding land.

(3) The owner or operator of a tank system, for which a variance from secondary containment had been granted in accordance with the requirements of paragraph (g)(1) of this section, at which a release of hazardous waste has occurred from the primary tank system but has not migrated beyond the zone of engineering control (as established in the variance), must:

- (i) Comply with the requirements of §265.196, except paragraph (d); and
- (ii) Decontaminate or remove contaminated soil to the extent necessary to:
  - (A) Enable the tank system, for which the variance was granted, to resume operation with the capability for the detection of and response to releases at least equivalent to the capability it had prior to the release, and
  - (B) Prevent the migration of hazardous waste or hazardous constituents to groundwater or surface water; and
- (iii) If contaminated soil cannot be removed or decontaminated in accordance with paragraph (g)(3)(ii) of this section, comply with the requirements of §265.197(b);

(4) The owner or operator of a tank system, for which a variance from secondary containment had been granted in accordance with the requirements of paragraph (g)(1) of this section, at which a release of hazardous waste has occurred from the primary tank system and has migrated beyond the zone of engineering control (as established in the variance), must:

- (i) Comply with the requirements of §265.196(a), (b), (c), and (d); and
- (ii) Prevent the migration of hazardous waste or hazardous constituents to groundwater or surface water, if possible, and decontaminate or remove contaminated soil. If contaminated soil cannot be decontaminated or removed, or if groundwater has been contaminated, the owner or operator must comply with the requirements of §265.197(b);

(iii) If repairing, replacing, or reinstalling the tank system, provide secondary containment in accordance with the requirements of paragraphs (a) through (f) of this section or reapply for a variance from secondary containment and meet the requirements for new tank systems in §265.192 if the tank system is replaced. The owner or operator must comply with these requirements even if contaminated soil can be decontaminated or removed, and groundwater or surface water has not been contaminated.

(h) The following procedures must be followed in order to request a variance from secondary containment:

(1) The Secretary must be notified in writing by the owner or operator that he intends to conduct and submit a demonstration for a variance from secondary containment as allowed in paragraph (g) of this section according to the following schedule:

(i) For existing tank systems, at least 24 months prior to the date that secondary containment must be provided in accordance with paragraph (a) of this section; and

(ii) For new tank systems, at least 30 days prior to entering into a contract for installation of the tank system.

(2) As part of the notification, the owner or operator must also submit to the Secretary a description of the steps necessary to conduct the demonstration and a timetable for completing each of the steps. The demonstration must address each of the factors listed in paragraph (g)(1) or paragraph (g)(2) of this section.

(3) The demonstration for a variance must be completed and submitted to the Secretary within 180 days after notifying the Secretary of intent to conduct the demonstration.

(4) The Secretary will inform the public, through a newspaper notice, of the availability of the demonstration for a variance. The notice shall be placed in a daily or weekly major local newspaper of general circulation and shall provide at least 30 days from the date of the notice for the public to review and comment on the demonstration for a variance. The Secretary also will hold a public hearing, in response to a request or at his own discretion, whenever such a hearing might clarify one or more issues concerning the demonstration for a variance. Public notice of the hearing will be given at least 30 days prior to the date of the hearing and may be given at the same time as notice of the opportunity for the public to review and comment on the demonstration. These two notices may be combined.

(5) The Secretary will approve or disapprove the request for a variance within 90 days of receipt of the demonstration from the owner or operator and will notify in writing the owner or operator and each person who submitted written comments or requested notice of variance decision. If the demonstration for a variance is incomplete or does not include sufficient information, the 90-day time period will begin when the Secretary receives a complete demonstration, including all information necessary to make a final determination. If the public comment period in paragraph (h)(4) of this section is extended, the 90-day time period will be similarly extended.

(i) All tank systems, until such time as secondary containment meeting the requirements of this section is provided, must comply with the following:

(1) For non-enterable underground tanks, a leak test that meets the requirements of §265.191(b)(5) must be conducted at least annually;

(2) For other than non-enterable underground tanks, and for all ancillary equipment, an annual leak test, as described in paragraph (i)(1) of this section, or an internal inspection or other tank integrity examination by an independent, qualified, registered professional engineer that addresses cracks, leaks, corrosion, and erosion must be conducted at least annually. The owner or operator must remove the stored waste from the tank, if necessary, to allow the condition of all internal tank surfaces to be assessed.

## §265.195

[Note - The practices described in the American Petroleum Institute (API) Publication Guide for Inspection of Refining Equipment, Chapter XIII, "Atmospheric and Low Pressure Storage Tanks," 4th edition, 1981, may be used, when applicable, as guidelines for assessing the overall condition of the tank system.]

(3) The owner or operator must maintain on file at the facility a record of the results of the assessments conducted in accordance with paragraphs (i)(1) through (i)(3) of this section.

(4) If a tank system or component is found to be leaking or unfit-for-use as a result of the leak test or assessment in paragraphs (i)(1) through (i)(3) of this section, the owner or operator must comply with the requirements of §265.196.

(Amended August 29, 1988; August 10, 1990)

### Section 265.194 General operating requirements.

(a) Hazardous wastes or treatment reagents must not be placed in a tank system if they could cause the tank, its ancillary equipment, or the secondary containment system to rupture, leak, corrode, or otherwise fail.

(b) The owner or operator must use appropriate controls and practices to prevent spills and overflows from tank or secondary containment systems. These include at a minimum:

(1) Spill prevention controls (e.g., check valves, dry disconnect couplings);

(2) Overfill prevention controls (e.g., level sensing devices, high level alarms, automatic feed cut-off, or bypass to a standby tank); and

(3) Maintenance of sufficient freeboard in uncovered tanks to prevent overtopping by wave or wind action or by precipitation.

(c) The owner or operator must comply with the requirements of §265.196 if a leak or spill occurs in the tank system.

(Amended August 29, 1988)

### Section 265.195 Inspections.

(a) The owner or operator must inspect, where present, at least once each operating day:

(1) Overfill/spill control equipment (e.g., waste-feed cut-off systems, bypass systems, and drainage systems) to ensure that it is in good working order;

(2) The aboveground portions of the tank system, if any, to detect corrosion or releases of waste;

(3) Data gathered from monitoring equipment and leak-detection equipment, (e.g., pressure and temperature gauges, monitoring wells) to ensure that the tank system is being operated according to its design; and

(4) The construction materials and the area immediately surrounding the externally accessible portion of the tank system including secondary containment structures (e.g., dikes) to detect erosion or signs of releases of hazardous waste (e.g., wet spots, dead vegetation);

[Note: §265.15(c) requires the owner or operator to remedy any deterioration or malfunction he finds. Section 265.196 requires the owner or operator to notify the Secretary upon confirming a release. Also, 40 CFR Part 302 may require the owner or operator to notify the National Response Center of a release.]

(b) The owner or operator must inspect cathodic protection systems, if present, according to, at a minimum, the following schedule to ensure that they are functioning properly:

(1) The proper operation of the cathodic protection system must be confirmed within six months after initial installation, and annually thereafter, and

(2) All sources of impressed current must be inspected and/or tested, as appropriate, at least bimonthly (i.e., every other month).

[Note: The practices described in the National Association of Corrosion Engineers (NACE) standard, "Recommended Practice (RP-02-85) - Control of External Corrosion on Metallic Buried, Partially Buried or Submerged Liquid Storage Systems," and the American Petroleum Institute (API) Publication 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems," may be used, where applicable, as guidelines in maintaining and inspecting cathodic protection systems.]

(c) The owner or operator must document in the operating record of the facility an inspection of those items in paragraphs (a) and (b) of this section.

(Amended August 29, 1988)

**Section 265.196 Response to leaks or spills and disposition of leaking or unfit-for-use tank systems.**

A tank system or secondary containment system from which there has been a leak or spill, or which is unfit for use, must be removed from service immediately, and the owner or operator must satisfy the following requirements:

(a) Cessation of use; prevent flow or addition of wastes. The owner or operator must immediately stop the flow of hazardous waste into the tank system or secondary containment system and inspect the system to determine the cause of the release.

(b) Removal of waste from tank system or secondary containment system.

(1) If the release was from the tank system, the owner or operator must, within 24 hours after detection of the leak, or, if the owner or operator demonstrates that is not possible, at the earliest practicable time remove as much of the waste as is necessary to prevent further release of hazardous waste to the environment and to allow inspection and repair of the tank system to be performed.

(2) If the release was to a secondary containment system, all released materials must be removed within 24 hours or in as timely a manner as is possible to prevent harm to human health and the environment.

(c) Containment of visible releases to the environment. The owner or operator must immediately conduct a visual inspection of the release and, based upon that inspection:

(1) Prevent further migration of the leak or spill to soils or surface water; and

(2) Remove, and properly dispose of, any visible contamination of the soil or surface water.

(d) Notifications, reports.

(1) Any release to the environment, except as provided in paragraph (d)(2) of this section, must be reported to the Secretary within 24 hours of detection. If the release has been reported pursuant to 40 CFR Part 302, that report will satisfy this requirement.

(2) A leak or spill of hazardous waste that is:

(i) Less than or equal to a quantity of one (1) pound, and

(ii) Immediately contained and cleaned-up is exempted from the requirements of this paragraph.

(3) Within 30 days of detection of a release to the environment, a report containing the following information must be submitted to the Secretary:

(i) Likely route of migration of the release;

(ii) Characteristics of the surrounding soil (soil composition, geology, hydrogeology, climate);

(iii) Results of any monitoring or sampling conducted in connection with the release (if available). If sampling or monitoring data relating to the release are not available within 30 days, these data must be submitted to the Secretary as soon as they become available;

(iv) Proximity to downgradient drinking water, surface water, and population areas; and

(v) Description of response actions taken or planned.

(e) Provision of secondary containment, repair, or closure.

(1) Unless the owner or operator satisfies the requirements of paragraphs (e)(2) through (4) of this section, the tank system must be closed in accordance with §265.197.

(2) If the cause of the release was a spill that has not damaged the integrity of the system, the owner/operator may return the system to service as soon as the released waste is removed and repairs, if necessary, are made.

## §265.197

(3) If the cause of the release was a leak from the primary tank system into the secondary containment system, the system must be repaired prior to returning the tank system to service.

(4) If the source of the release as a leak to the environment from a component of a tank system without secondary containment, the owner/operator must provide the component of the system from which the leak occurred with secondary containment that satisfies the requirements of §265.193 before it can be returned to service, unless the source of the leak is an aboveground portion of a tank system. If the source is an aboveground component that can be inspected visually, the component must be repaired and may be returned to service without secondary containment as long as the requirements of paragraph (f) of this section are satisfied. If a component is replaced to comply with the requirements of this subparagraph, that component must satisfy the requirements for new tank systems or components in §§ 265.192 and 265.193. Additionally, if a leak has occurred in any portion of a tank system component that is not readily accessible for visual inspection (e.g., the bottom of an inground or onground tank), the entire component must be provided with secondary containment in accordance with §265.193 prior to being returned to use.

(f) Certification of major repairs. If the owner or operator has repaired a tank system in accordance with paragraph (e) of this section, and the repair has been extensive (e.g., installation of an internal liner, repair of a ruptured primary containment or secondary containment vessel), the tank system must not be returned to service unless the owner/operator has obtained a certification by an independent, qualified, registered professional engineer in accordance with §122.11(d) that the repaired system is capable of handling hazardous wastes without release for the intended life of the system. This certification must be submitted to the Secretary within seven days after returning the tank system to use.

[Note: See §265.15(c) for the requirements necessary to remedy a failure. The owner or operator is subject to the reporting requirements of 7 Del. C. Chapter 60, also, 40 CFR Part 302 requires the owner or operator to notify the National Response Center of a release of any "reportable quantity".]

[Note: The Secretary may, on the basis of any information received that there is or has been a release of hazardous waste or hazardous constituents into the environment, issue an order under 7 Del. C., Chapter 63 requiring corrective action or such other response as deemed necessary to protect human health and the environment.]

(Amended August 29, 1988)

### **Section 265.197 Closure and post-closure care.**

(a) At closure of a tank system, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated soils, and structures and equipment contaminated with waste, and manage them as hazardous waste, unless §261.3(d) of these regulations applies. The closure plan, closure activities, cost estimates for closure, and financial responsibility for tank systems must meet all of the requirements specified in Subparts G and H of this part.

(b) If the owner or operator demonstrates that not all contaminated soils can be practicably removed or decontaminated as required in paragraph (a) of this section, then the owner or operator must close the tank system and perform post-closure care in accordance with the closure and post-closure care requirements that apply to landfills (§265.310). In addition, for the purposes of closure, post-closure, and financial responsibility, such a tank system is then considered to be a landfill, and the owner or operator must meet all of the requirements for landfills specified in Subparts G and H of this part.

(c) If an owner or operator has a tank system which does not have secondary containment that meets the requirements of §265.193(b) through (f) and which is not exempt from the secondary containment requirements in accordance with §265.193(g), then,

## §265.200

(1) The closure plan for the tank system must include both a plan for complying with paragraph (a) of this section and a contingent plan for complying with paragraph (b) of this section.

(2) A contingent post-closure plan for complying with paragraph (b) of this section must be prepared and submitted as part of the permit application.

(3) The cost estimates calculated for closure and post-closure care must reflect the costs of complying with the contingent closure plan and the contingent post-closure plan, if these costs are greater than the costs of complying with the closure plan prepared for the expected closure under paragraph (a) of this section.

(4) Financial assurance must be based on the cost estimates in paragraph (c)(3) of this section.

(5) For the purposes of the contingent closure and post-closure plans, such a tank system is considered to be a landfill, and the contingent plans must meet all of the closure, post-closure, and financial responsibility requirements for landfills under Subparts G and H of this part.

(Amended August 29, 1988)

### **Section 265.198 Special Requirements for Ignitable or Reactive Wastes.**

(a) Ignitable or reactive waste must not be placed in a tank system, unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the tank system so that:

(i) The resulting waste, mixture, or dissolved material no longer meets the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of these regulations; and

(ii) Section 265.17(b) is complied with; or

(2) The waste is stored or treated in such a way that it is protected from any material or conditions that may cause the waste to ignite or react; or

(3) The tank system is used solely for emergencies.

(b) The owner or operator of a facility where ignitable or reactive waste is stored or treated in tanks must comply with the requirements for the maintenance of protective distances between the waste management area and any public ways, streets, alleys, or an adjoining property line that can be built upon as required in Tables 2-1 through 2-6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code," (1977 or 1981), (incorporated by reference, see §260.11).

(Amended August 29, 1988)

### **Section 265.199 Special Requirements for incompatible wastes.**

(a) Incompatible wastes, or incompatible waste and materials, must not be placed in the same tank system, unless §265.17(b) is complied with.

(b) Hazardous waste must not be placed in a tank system that has not been decontaminated and that previously held an incompatible waste or material, unless §265.17(b) is complied with.

(Amended August 29, 1988; August 10, 1990)

### **Section 265.200 Waste analysis and trial tests.**

In addition to performing the waste analyses required by §265.13, the owner or operator must, whenever a tank system is to be used to treat chemically or to store a hazardous waste that is substantially different from waste previously treated or stored in that tank system; or treat chemically a hazardous waste with a substantially different process than any previously used in that tank system:

(a) Conduct waste analysis and trial treatment or storage tests (e.g., bench-scale or pilot-plant scale tests); or

(b) Obtain written, documented information on similar waste under similar operating conditions to show that the proposed treatment or storage will meet the requirements of §265.194(a).

## §265.201

[Note: Section 265.13 requires the waste analysis plan to include analyses needed to comply with §§ 265.198 and 265.199. Section 265.73 requires the owner or operator to place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]  
(Amended August 29, 1988; August 10, 1990)

### **Section 265.201 Special requirements for generators of between 100 and 1,000 kg/mo. that accumulate hazardous waste in tanks.**

(a) The requirements of this section apply to small quantity generators of more than 100 kg but less than 1,000 kg of hazardous waste in a calendar month, that accumulate hazardous waste in tanks for less than 180 days (or 270 days if the generator must ship the waste greater than 200 miles), and do not accumulate over 6,000 kg on-site at any time.

(b) Generators of between 100 and 1,000 kg/mo. hazardous waste must comply with the following general operating requirements:

(1) Treatment or storage of hazardous waste in tanks must comply with §265.17(b).

(2) Hazardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life.

(3) Uncovered tanks must be operated to ensure at least 60 centimeters (2 feet) of freeboard, unless the tank is equipped with a containment structure (e.g., dike or trench), a drainage control system, or a diversion structure (e.g., standby tank) with a capacity that equals or exceeds the volume of the top 60 centimeters (2 feet) of the tank.

(4) Where hazardous waste is continuously fed into a tank, the tank must be equipped with a means to stop this inflow (e.g., waste feed cut-off system or by-pass system to stand-by tank).

[Note: These systems are intended to be used in the event of a leak or overflow from the tank due to a system failure (e.g., a malfunction in the treatment process, a crack in the tank, etc.).]

(c) Generators of between 100 and 1,000 kg/mo. accumulating hazardous waste in tanks, must inspect and maintain for a minimum of 3 years written documentation of the inspection, the following, where present:

(1) Discharge control equipment (e.g., waste feed cut-off systems, by-pass systems, and drainage systems) at least once each operating day, to ensure that it is in good working order;

(2) Data gathered from monitoring equipment (e.g., pressure and temperature gauges) at least once each operating day to ensure that the tank is being operated according to its design;

(3) The level of waste in the tank at least once each operating day to ensure compliance with §265.201(b)(3);

(4) The construction materials of the tank at least weekly to detect corrosion or leaking of fixtures or seams; and

(5) The construction materials of, and the area immediately surrounding discharge confinement structures (e.g., dikes) at least weekly to detect erosion or obvious signs of leakage (e.g., wet spots or dead vegetation).  
[As required by §265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

(d) Generators of between 100 and 1,000 kg/mo. accumulating hazardous waste in tanks must, upon closure of the facility, remove all hazardous waste from tanks, discharge control equipment, and discharge confinement structures.

[Note: At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with §261.3(c) or (d), that any solid waste removed from his tank is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265.]

## §265.221

(e) Generators of between 100 and 1,000 kg/mo. must comply with the following special requirements for ignitable or reactive waste:

(1) Ignitable or reactive waste must not be placed in a tank, unless:

(i) The waste is treated, rendered, or mixed before or immediately after placement in a tank so that:

(A) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §261.21 or §261.23 of these regulations; and

(B) Section 265.17(b) is complied with; or

(ii) The waste is stored or treated in such a way that it is protected from any material or conditions that may cause the waste to ignite or react; or

(iii) The tank is used solely for emergencies.

(2) The owner or operator of a facility which treats or stores ignitable or reactive waste in covered tanks must comply with the buffer zone requirements for tanks contained in Tables 2-1 through 2-6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code," (1977 or 1981) (incorporated by reference, see §260.11).

(f) Generators of between 100 and 1,000 kg/mo. must comply with the following special requirements for incompatible wastes:

(1) Incompatible wastes, or incompatible wastes and materials (see Appendix V for examples) must not be placed in the same tank, unless §265.17(b) is complied with.

(2) Hazardous waste must not be placed in an unwashed tank which previously held an incompatible waste or material, unless §265.17(b) is complied with.

(Amended August 29, 1988; August 10, 1990, July 23, 1996)

### **Section 265.202 Air emission standards.**

The owner or operator shall manage all hazardous waste placed in a tank in accordance with the applicable requirements of Subparts AA, BB, and CC of this part.

(Amended January 1, 1999)

## **Subpart K - Surface Impoundments**

### **Section 265.220 Applicability.**

The regulations in this subpart apply to owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste, except as §265.1 provides otherwise.

### **Section 265.221 Design and operating requirements.**

(a) The owner or operator of each new surface impoundment unit on which construction commences after January 29, 1992, each lateral expansion of a surface impoundment unit on which construction commences after July 29, 1992, and each replacement of an existing surface impoundment unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system between such liners, and operate the leachate collection and removal system, in accordance with §264.221(c), unless exempted under §264.221(d), (e), or (f), of these regulations. "Construction commences" is as defined in §260.10 of these regulations under "existing facility".

(b) The owner or operator of each unit referred to in paragraph (a) of this section must notify the Secretary at least sixty days prior to receiving waste. The owner or operator of each facility submitting notice must file a Part B application within six months of the receipt of such notice.

(c) The owner or operator of any replacement surface impoundment unit is exempt from paragraph (a) of this section if:

**§265.221**

(1) The existing unit was constructed in compliance with the design standards of §3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

(d) The double liner requirement set forth in paragraph (a) of this section may be waived by the Secretary for any monofill, if:

(1) The monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not contain constituents which would render the wastes hazardous for reasons other than the Toxicity Characteristic in §261.24 of these regulations, with EPA Hazardous Waste Numbers D004 through D017; and

(2)(i)(A) The monofill has at least one liner for which there is no evidence that such liner is leaking. For the purposes of this paragraph the term "liner" means a liner designed, constructed, installed, and operated to prevent hazardous waste from passing beyond the liner at any time during the active life of the facility, or a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, ground water, or surface water at any time during the active life of the facility. In the case of any surface impoundment which has been exempted from the requirements of paragraph (a) of this section on the basis of a liner designed, constructed, installed, and operated to prevent hazardous waste from passing beyond the liner, at the closure of such impoundment the owner or operator must remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or operator of such impoundment must comply with appropriate post-closure requirements, including but not limited to groundwater monitoring and corrective action;

(B) The monofill is located more than one-quarter mile from an underground source of drinking water (as that term is defined in §122.3 of the Regulations Governing Underground Injection Control); and

(C) The monofill is in compliance with generally applicable ground-water monitoring requirements for facilities with permits under 7 Del. C., Chapter 63.

(ii) The owner or operator demonstrates that the monofill is located, designed and operated so as to assure that there will be no migration of any hazardous constituent into groundwater or surface water at any future time.

(e) In the case of any unit in which the liner and leachate collection system has been installed pursuant to the requirements of paragraph (a) of this section and in good faith compliance with paragraph (a) of this section and with guidance documents governing liners and leachate collection systems under paragraph (a) of this section, no liner or leachate collection system which is different from that which was so installed pursuant to paragraph (a) of this section will be required for such unit by the Secretary when issuing the first permit to such facility, except that the Secretary will not be precluded from requiring installation of a new liner when the Secretary has reason to believe that any liner installed pursuant to the requirements of paragraph (a) of this section is leaking.

(f) A surface impoundment must maintain enough freeboard to prevent any overtopping of the dike by overfilling, wave action, or a storm. Except as provided in paragraph (b) of this section, there must be at least 60 centimeters (two feet) of freeboard.

(g) A freeboard level less than 60 centimeters (two feet) may be maintained if the owner or operator obtains certification by a qualified engineer that alternate design features or operating plans will, to the best of his knowledge and opinion, prevent overtopping of the dike. The certification, along with a written identification of alternate design features or operating plans preventing overtopping, must be maintained at the facility.

## §265.223

(h) Surface impoundments that are newly subject to RCRA §3005(j)(1) due to the promulgation of additional listings or characteristics for the identification of hazardous waste must be in compliance with paragraphs (a), (c) and (d) of this section not later than 48 months after the promulgation of the additional listing or characteristic. This compliance period shall not be cut short as the result of the promulgation of land disposal prohibitions under Part 268 of these regulations or the granting of an extension to the effective date of a prohibition pursuant to §268.5 of these regulations, within this 48-month period.

(i) Existing surface impoundments subject to RCRA Subtitle C prior to November 8, 1984, must comply with new unit requirements by November 8, 1988 or stop hazardous waste activity.

(Amended November 21, 1985, May 8, 1986, August 1, 1995, January 1, 1999)

### **Section 265.222 Action leakage rate.**

(a) The owner or operator of surface impoundment units subject to §265.221(a) must submit a proposed action leakage rate to the Secretary when submitting the notice required under §265.221(b). Within 60 days of receipt of the notification, the Secretary will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Secretary before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Secretary shall approve an action leakage rate for surface impoundment units subject to §265.221(a). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under §265.226(b), to an average daily flow rate (gallons per acre per day) for each sump. Unless the Secretary approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and if the unit closes in accordance with §265.228(a)(2), monthly during the post-closure care period when monthly monitoring is required under §265.226(b).

(Amended August 1, 1995)

### **Section 265.223 Containment system.**

All earthen dikes must have a protective cover, such as grass, shale, or rock, to minimize wind and water erosion and to preserve their structural integrity.

[Note: The July 29, 1992 Federal Register added a new section 265.223 without redesignating the already existing section 265.223. As a result of this error, both sections will appear in the DRGHW. EPA will publish a correction to this error in the Federal Register at a later date.]

(Amended January 1, 1999)

**Section 265.223 Response actions.**

(a) The owner or operator of surface impoundment units subject to §265.221(a) must submit a response action plan to the Secretary when submitting the proposed action leakage rate under §265.222. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

(1) Notify the Secretary in writing of the exceedence within 7 days of the determination;

(2) Submit a preliminary written assessment to the Secretary within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;

(3) Determine to the extent practicable the location, size, and cause of any leak;

(4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;

(5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Secretary the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Secretary a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

(1)(i) Assess the source of liquids and amounts of liquids by source,

(ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and

(iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or

(2) Document why such assessments are not needed.

(Amended August 1, 1995, January 1, 1999)

**Section 265.224 [Reserved]**

**Section 265.225 Waste analysis and trial tests.**

(a) In addition to the waste analyses required by §265.13, whenever a surface impoundment is to be used to:

(1) Chemically treat a hazardous waste which is substantially different from waste previously treated in that impoundment; or

(2) Chemically treat hazardous waste with a substantially different process than any previously used in that impoundment; the owner or operator must, before treating the different waste or using the different process:

(i) Conduct waste analyses and trial treatment tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar treatment of similar waste under similar operating conditions; to show that this treatment will comply with §265.17(b).

[Comment: As required by §265.13, the waste analysis plan must include analyses needed to comply with §§ 265.229 and 265.230. As required by §265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

**Section 265.226 Monitoring and inspection.**

(a) The owner or operator must inspect:

(1) The freeboard level at least once each operating day to ensure compliance with §265.222, and

(2) The surface impoundment, including dikes and vegetation surrounding the dike, at least once a week to detect any leaks, deterioration, or failures in the impoundment.

[Comment: As required by §265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

(b)(1) An owner or operator required to have a leak detection system under §265.221(a) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(2) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(3) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Secretary based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump. The timing for submission and approval of the proposed "pump operating level" will be in accordance with §265.222(a).

(Amended August 1, 1995)

**Section 265.227 [Reserved]**

**Section 265.228 Closure and post-closure care.**

(a) At closure, the owner or operator must:

(1) Remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste unless §261.3(d) of these regulations applies; or

(2) Close the impoundment and provide post-closure care for a landfill under Subpart G and §265.310, including the following:

(i) Eliminate free liquids by removing liquid wastes or solidifying the remaining wastes and waste residues;

(ii) Stabilize remaining wastes to a bearing capacity sufficient to support final cover, and

(iii) Cover the surface impoundment with a final cover designed and constructed to:

(A) Provide long-term minimization of the migration of liquids through the closed impoundment;

(B) Function with minimum maintenance;

(C) Promote drainage and minimize erosion or abrasion of the cover;

(D) Accommodate settling and subsidence so that the cover's integrity is maintained; and

## §265.250

(E) Have a permeability less than or equal to the permeability of any bottom liner system or natural subsoils present.

(b) In addition to the requirements of Subpart G, and §265.310, during the post-closure care period, the owner or operator of a surface impoundment in which wastes, waste residues, or contaminated materials remain after closure in accordance with the provisions of paragraph (a)(2) of this section must:

(1) Maintain the integrity and effectiveness of the final cover, including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events;

(2) Maintain and monitor the leak detection system in accordance with §§ 264.221(c)(2)(iv) and (3) of these regulations and 265.226(b) and comply with all other applicable leak detection system requirements of this part;

(3) Maintain and monitor the groundwater monitoring system and comply with all other applicable requirements of Subpart F of this part; and

(4) Prevent run-on and run-off from eroding or otherwise damaging the final cover.

(Amended August 29, 1988; August 10, 1990, August 1, 1995)

### **Section 265.229 Special requirements for ignitable or reactive wastes.**

Ignitable or reactive waste must not be placed in a surface impoundment unless the waste and impoundment satisfy all applicable requirements of Part 268 of these regulations, and:

(a) The waste is treated, rendered, or mixed before or immediately after placement in the impoundment so that:

(1) The resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of these regulations; and

(2) Section 265.17(b) is complied with; or

(b)(1) The waste is managed in such a way that it is protected from any material or conditions which may cause it to ignite or react; and

(2) The owner or operator obtains a certification from a qualified chemist or engineer that, to the best of his knowledge and opinion, the design features or operating plans of the facility will prevent ignition or reaction; and

(3) The certification and the basis for it are maintained at the facility; or

(c) The surface impoundment is used solely for emergencies.

(Amended November 21, 1985; June 19, 1992)

### **Section 265.230 Special requirements for incompatible wastes.**

Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same surface impoundment, unless §265.17(b) is complied with.

### **Section 265.231 Air emission standards.**

The owner or operator shall manage all hazardous waste placed in a surface impoundment in accordance with the applicable requirements of Subparts BB and CC of this part.

(Amended January 1, 1999)

## **Subpart L - Waste Piles**

### **Section 265.250 Applicability.**

The regulations in this subpart apply to owners and operators of facilities that treat or store hazardous waste in piles, except as §265.1 provides otherwise. Alternatively, a pile of hazardous waste may be managed as a landfill under Subpart N.

**Section 265.251 Protection from wind.**

The owner or operator of a pile containing hazardous waste which could be subject to dispersal by wind must cover or otherwise manage the pile so that wind dispersal is controlled.

**Section 265.252 Waste analysis.**

In addition to the waste analysis required by §265.13, the owner or operator must analyze a representative sample of waste from each incoming movement before adding the waste to any existing pile, unless (1) the only wastes the facility receives which are amendable to piling are compatible with each other, or (2) the waste received is compatible with the waste in the pile to which it is to be added. The analysis conducted must be capable of differentiating between the types of hazardous waste the owner or operator places in piles, so that mixing of incompatible waste does not inadvertently occur. The analysis must include a visual comparison of color and texture.

[Comment: As required by §265.13, the waste analysis plan must include analyses needed to comply with §§ 265.256 and 265.257. As required by §265.73, the owner or operator must place the results of this analysis in the operating record of the facility.]

**Section 265.253 Containment.**

If leachate or run-off from a pile is a hazardous waste, then either:

(a)(1) The pile must be placed on an impermeable base that is compatible with the waste under the conditions of treatment or storage;

(2) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portion of the pile during peak discharge from at least a 25-year storm;

(3) The owner or operator must design, construct, operate, and maintain a run-off management system to collect and control at least the water volume resulting from a 24-hour, 25-year storm; and

(4) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously to maintain design capacity of the system; or

(b)(1) The pile must be protected from precipitation and run-on by some other means; and

(2) No liquids or wastes containing free liquids may be placed in the pile.

[Comment: If collected leachate or run-off is discharged through a point source to waters of the United States, it is subject to requirements of §402 of the Clean Water Act, as amended.]

**Section 265.254 Design and operating requirements.**

The owner or operator of each new waste pile on which construction commences after January 29, 1992, each lateral expansion of a waste pile unit on which construction commences after July 29, 1992, and each such replacement of an existing waste pile unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners, and operate the leachate collection and removal systems, in accordance with §264.251(c), unless exempted under §264.251(d), (e), or (f), of these regulations; and must comply with the procedures of §265.221(b). "Construction commences" is as defined in §260.10 of these regulations under "existing facility".

(Amended May 8, 1986; August 10, 1990, August 1, 1995)

**Section 265.255 Action leakage rates.**

(a) The owner or operator of waste pile units subject to §265.254 must submit a proposed action leakage rate to the Secretary when submitting the notice required under §265.254. Within 60 days of receipt of the notification, the Secretary will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Secretary before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Secretary shall approve an action leakage rate for waste pile units subject to §265.254. The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly flow rate from the monitoring data obtained under §265.260, to an average daily flow rate (gallons per acre per day) for each sump. Unless the Secretary approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period.

(Amended August 1, 1995)

**Section 265.256 Special requirements for ignitable or reactive waste.**

(a) Ignitable or reactive waste must not be placed in a pile unless: the waste and pile satisfy all applicable requirements of Part 268 of these regulations, and:

(1) Addition of the waste to an existing pile (i) results in the waste or mixture no longer meeting the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of these regulations, and (ii) complies with §265.17(b); or

(2) The waste is managed in such a way that it is protected from any material or conditions which may cause it to ignite or react.

(Amended June 19, 1992)

**Section 265.257 Special requirements for incompatible wastes.**

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same pile, unless §265.17(b) is complied with.

(b) A pile of hazardous waste that is incompatible with any waste or other material stored near by in other containers, piles, open tanks, or surface impoundments must be separated from the other materials, or protected from them by means of a dike, berm, wall, or other device.

[Comment: The purpose of this is to prevent fires, explosions, gaseous emissions, leaching, or other discharge of hazardous waste or hazardous waste constituents which could result from the contact or mixing of incompatible wastes or materials.]

(c) Hazardous waste must not be piled on the same area where incompatible wastes or materials were previously piled, unless that area has been decontaminated sufficiently to ensure compliance with §265.17(b).

**Section 265.258 Closure and post-closure care.**

(a) At closure, the owner or operator must remove or decontaminate all waste residues, contaminated and containment system components (liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and managed them as hazardous waste unless §261.3(d) of these regulations applies; or

(b) If, after removing or decontaminating all residues and making all reasonable efforts to effect removal or decontamination of contaminated components, subsoils, structures, and equipment as required in paragraph (a) of this section, the owner or operator finds that not all contaminated subsoils can be practicably removed or decontaminated, he must close the facility and perform post-closure care in accordance with the closure and post-closure requirements that apply to landfills (§265.310).

**Section 265.259 Response actions.**

(a) The owner or operator of waste pile units subject to §265.254 must submit a response action plan to the Secretary when submitting the proposed action leakage rate under §265.255. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak determination system exceeds the action leakage rate for any sump, the owner or operator must:

- (1) Notify the Secretary in writing of the exceedence within 7 days of the determination;
- (2) Submit a preliminary written assessment to the Secretary within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;
- (3) Determine to the extent practicable the location, size, and cause of any leak;
- (4) Determine whether waste receipts should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;
- (5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and
- (6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Secretary the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Secretary a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

- (1)(i) Assess the source of liquids and amounts of liquids by source,
- (ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and
- (iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or
- (2) Document why such assessments are not needed.

(Amended August 1, 1995)

**Section 265.260 Monitoring and inspection.**

An owner or operator required to have a leak detection system under §265.254 must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(Amended August 1, 1995)

**Subpart M - Land Treatment**

**Section 265.270 Applicability.**

The regulations in this subpart apply to owners and operators of hazardous waste land treatment facilities, except as §265.1 provides otherwise.

**Section 265.271 [Reserved]**

**Section 265.272 General operating requirements.**

(a) Hazardous waste must not be placed in or on a land treatment facility unless the waste can be made less hazardous or nonhazardous by degradation, transformation, or immobilization processes occurring in or on the soil.

(b) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portions of the facility during peak discharge from at least a 25- years term.

(c) The owner or operator must design, construct, operate, and maintain a run-off management system capable of collecting and controlling a water volume at least equivalent to a 24-hour, 25-year storm.

(d) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(e) If the treatment zone contains particulate matter which may be subject to wind dispersal, the owner or operator must manage the unit to control wind dispersal.

(Amended November 21, 1985)

**Section 265.273 Waste analysis**

In addition to the waste analysis required by §265.13, before placing a hazardous waste in or on a land treatment facility, the owner or operator must:

(a) Determine the concentrations in the waste of any substances which equal or exceed the maximum concentration contained in Table I §261.24 of these regulations that cause a waste to exhibit the Toxicity Characteristic;

(b) For any waste listed in Part 261, Subpart D, of these regulations determine the concentrations of any substances which caused the waste to be listed as a hazardous waste; and

(c) If food chain crops are grown, determine the concentrations in the waste of each of the following constituents: arsenic, cadmium, lead, and mercury, unless the owner or operator has written, documented data that show that the constituent is not present.

(Comment: Part 261 of these regulations specifies the substance for which a waste listed as a hazardous waste. As required by §265.13, the waste analysis plan must include analyses needed to comply with §§ 265.281 and 265.282. As required by §265.73, the owner or operator must place the results from each waste analysis, or the documented information, in the operating record of the facility.)

**Section 265.274 - 265.275 [Reserved]**

**Section 265.276 Food chain crops.**

(a) An owner or operator of a hazardous waste land treatment facility on which food chain crops are being grown, or have been grown and will be grown in the future, must notify the Secretary within 60 days after the effective date of this part.

[Comment: The growth of food chain crops at a facility which has never before been used for this purpose is a significant change in process under §122.23(c)(3) of these regulations. Owners or operators of such land treatment facilities who propose to grow food chain crops after the effective date of this Part must comply with §122.23(c)(3) of these regulations.]

(b)(1) Food chain crops must not be grown on the treated area of a hazardous waste land treatment facility unless the owner or operator can demonstrate, based on field testing, that any arsenic, lead, mercury, or other constituents identified under §265.273(b):

(i) Will not be transferred to the food portion of the crop by plant uptake or direct contact, and will not otherwise be ingested by food chain animals (e.g., by grazing); or

(ii) Will not occur in greater concentrations in the crops grown on the land treatment facility than in the same crops grown on untreated soils under similar conditions in the same region.

(2) The information necessary to make the demonstration required by paragraph (b)(1) of this Section must be kept at the facility and must, at a minimum:

(i) Be based on tests for the specific waste and application rates being used at the facility; and

(ii) Include descriptions of crop and soil characteristics, sample selection criteria, sample size determination, analytical methods, and statistical procedures.

(c) Food chain crops must not be grown on a land treatment facility receiving waste that contains cadmium unless all requirements of paragraphs (c)(1)(i) through (iii) of this section or all requirements of paragraphs (c)(2)(i) through (iv) of this section are met.

(1)(i) The pH of the waste and soil mixture is 6.5 or greater at the time of each waste application, except for waste containing cadmium at concentrations of 2 mg/kg (dry weight) or less;

(ii) The annual application of cadmium from waste does not exceed 0.5 kilograms per hectare (kg/ha) on land used for production of tobacco, leafy vegetables, or root crops grown for human consumption for other food chain crops, the annual cadmium application rate does not exceed:

Time period	Annual Cd application rate (kg/ha)
Present to June 30, 1984	2.00
July 1, 1984 to Dec. 31, 1986	1.25
Beginning Jan. 1, 1987	0.50

(iii) The cumulative application of cadmium from waste does not exceed the levels in either paragraph (c)(1)(iii)(A) of this section or paragraph (c)(1)(iii)(B) of this section.

(A)

**Maximum cumulative application (kg/ha)**

Soil cation exchange capacity (meq/100g)	Background soil pH less than 6.5	Background soil pH greater than 6.5
Less than 5	5	5
5 to 15	5	10
Greater than 15	5	20

(B) For soils with a background pH of less than 6.5, the cumulative cadmium application rate does not exceed the levels below: Provided, that the pH of the waste and soil mixture is adjusted to and maintained at 6.5 or greater whenever food chain crops are grown.

Soil cation exchange capacity (meq/100g)	Maximum cumulative application (kg/ha)
Less than 5	5
5 to 15	10
Greater than 15	20

(2)(i) The only food chain crop produced is animal feed.

(ii) The pH of the waste and soil mixture is 6.5 or greater at the time of waste application or at the time the crop is planted, whichever occurs later, and this pH level is maintained whenever food chain crops are grown.

(iii) There is a facility operating plan which demonstrates how the animal feed will be distributed to preclude ingestion by humans. The facility operating plan describes the measures to be taken to safeguard against possible health hazards from cadmium centering the food chain, which may result from alternative land uses.

(iv) Future property owners are notified by a stipulation in the land record or property deed which states that the property has received waste at high cadmium application rates and that food chain crops must not be grown except in compliance with paragraph (c)(2) of this section.

[Comment: As required by §265.73, if an owner or operator grows foods chain crops on his land treatment facility, he must place the information developed in this section in the operating record of the facility.]

**Section 265.277 [Reserved]**

**Section 265.278 Unsaturated zone (zone of aeration) monitoring.**

(a) The owner or operator must have in writing, and must implement, an unsaturated zone monitoring plan which is designed to:

(1) Detect the vertical migration of hazardous waste and hazardous waste constituents under the active portion of the land treatment facility, and

(2) Provide information on the background concentrations of the hazardous waste and hazardous waste constituents in similar but untreated soils nearby; this background monitoring must be conducted before or in conjunction with the monitoring required under paragraph (a)(1) of this section.

(b) The unsaturated zone monitoring plan must include, at a minimum:

(1) Soil monitoring using soil cores, and

(2) Soil pore water monitoring using devices such as lysimeters.

## §265.280

(c) To comply with paragraph (a)(1) of this section, the owner or operator must demonstrate in his unsaturated zone monitoring plan that:

(1) The depth at which soil and soil-pore water samples are to be taken is below the depth to which the waste is incorporated into the soil;

(2) The number of soil and soil-pore water samples to be taken is based on the variability of:

(i) The hazardous waste constituents (as identified in §265.273(a) and (b) in the waste and in the soil; and

(ii) The soil type(s); and

(3) The frequency and timing of soil and soil-pore water sampling is based on the frequency, time, and rate of waste application, proximity to groundwater, and soil permeability.

(d) The owner or operator must keep at the facility his unsaturated zone monitoring plan, and the rationale used in developing this plan.

(e) The owner or operator must analyze the soil and soil-pore water samples for the hazardous waste constituents that were found in the waste during the waste analysis under §265.273 (a) and (b).

[Comment: As required by §265.73, all data and information developed by the owner or operator under this section must be placed in the operating record of the facility.]

### **Section 265.279 Recordkeeping.**

The owner or operator must include hazardous waste application dates and rates in the operating record required under §265.73.

### **Section 265.280 Closure and post-closure.**

(a) In the closure plan under §265.112 and the post-closure plan under §265.118, the owner or operator must address the following objectives and indicate how they will be achieved:

(1) Control of the migration of hazardous waste and hazardous waste constituents from the treated area into the ground water;

(2) Control of the release of contaminated run-off from the facility into surface water;

(3) Control of the release of airborne particulate contaminants caused by wind erosion; and

(4) Compliance with §265.276 concerning the growth of food-chain crops.

(b) The owner or operator must consider at least the following factors in addressing the closure and post-closure care objectives of paragraph (a) of this section;

(1) Type and amount of hazardous waste and hazardous waste constituents applied to the land treatment facility;

(2) The mobility and the expected rate of migration of the hazardous waste and hazardous waste constituents;

(3) Site location, topography, and surrounding land use, with respect to the potential effects of pollutant migration (e.g., proximity to groundwater, surface water and drinking water sources);

(4) Climate, including amount, frequency, and pH of precipitation;

(5) Geological and soil profiles and surface and subsurface hydrology of the site, and soil characteristics, including cation exchange capacity, total organic carbon, and pH;

(6) Unsaturated zone monitoring information obtained under §265.278; and

(7) Type, concentration, and depth of migration of hazardous waste constituents in the soil as compared to their background concentrations.

(c) The owner or operator must consider at least the following methods in addressing the closure and post-closure care objectives of paragraph (a) of this section:

(1) Removal of contaminated soils;

(2) Placement of a final cover, considering:

(i) Functions of the cover (e.g., infiltration control, erosion and run-off control, and wind erosion control); and

## §265.300

(ii) Characteristics of the cover, including material, final surface contours, thickness, porosity and permeability, slope, length of run of slope, and type of vegetation on the cover; and

(3) Monitoring of groundwater.

(d) In addition to the requirements of Subpart G of this part, during the closure period the owner or operator of a land treatment facility must:

(1) Continue unsaturated zone monitoring in a manner and frequency specified in the closure plan, except that soil pore liquid monitoring may be terminated 90 days after the last application of waste to the treatment zone;

(2) Maintain the run-on control system required under §265.272(b);

(3) Maintain the run-off management system required under §265.272(c); and

(4) Control wind dispersal of particulate matter which may be subject to wind dispersal.

(e) For the purpose of complying with §265.115, when closure is completed the owner or operator may submit to the Secretary certification both by the owner or operator and by an independent qualified soil scientist, in lieu of an independent registered professional engineer, that the facility has been closed in accordance with the specifications in the approved closure plan.

(f) In addition to the requirements of §265.117, during the post-closure care period the owner or operator of a land treatment unit must:

(1) Continue soil-core monitoring by collecting and analyzing samples in a manner and frequency specified in the post-closure plan:

(2) Restrict access to the unit as appropriate for its post-closure use;

(3) Assure that growth of food chain crops complies with §265.276; and

(4) Control wind dispersal of hazardous waste.

### **Section 265.281 Special requirements for ignitable or reactive waste.**

The owner or operator must not apply ignitable or reactive waste to the treatment zone unless the waste and treatment zone meet all applicable requirements of Part 268 of these regulations, and:

(a) The waste is immediately incorporated into the soil so that:

(1) The resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §§ 265.21 or 262.23 of these regulations, and

(2) Section 264.17(b) is complied with; or

(b) The waste is managed in such a way that it is protected from any material or conditions which may cause it to ignite or react.

### **Section 265.282 Special requirements for incompatible wastes.**

Incompatible wastes or incompatible wastes and materials (see Appendix V for examples), must not be placed in the same land treatment area, unless §265.17(b) is complied with.

## **Subpart N - Landfills**

### **Section 265.300 Applicability.**

The regulations in this subpart apply to owners and operators of facilities that dispose of hazardous waste in landfills, except as §265.1 provides otherwise. A waste pile used as a disposal facility is a landfill and is governed by this subpart.

**Section 265.301 Design and operating requirements.**

(a) The owner or operator of each new landfill unit on which construction commences after January 29, 1992, each lateral expansion of a landfill unit on which construction commences after July 29, 1992, and each such replacement of an existing landfill unit that is to commence reuse after July 29, 1992 must install two or more liners and a leachate collection and removal system above and between such liners, and operate the leachate collection and removal systems, in accordance with §264.301(c) unless exempted under 264.301(d), (e), or (f), of these regulations. "Construction commences" is as defined in §260.10 of these regulations under "existing facility".

(b) The owner or operator of each unit referred to in paragraph (a) of this section must notify the Secretary at least sixty (60) days prior to receiving waste. The owner or operator of each facility submitting notice must file a Part B application within six months of the receipt of such notice.

(c) The owner or operator of any replacement landfill unit is exempt from paragraph (a) of this section if:

(1) The existing unit was constructed in compliance with the design standards of section 3004(o)(1)(A)(i) and (o)(5) of the Resource Conservation and Recovery Act; and

(2) There is no reason to believe that the liner is not functioning as designed.

(d) The double liner requirement set forth in paragraph (a) of this section may be waived by the Secretary for any monofill, if:

(1) The monofill contains only hazardous wastes from foundry furnace emission controls or metal casting molding sand, and such wastes do not contain constituents which would render the wastes hazardous for reasons other than the Toxicity Characteristic in §261.24 of these regulations, with EPA Hazardous Waste Numbers D004 through D017; and

(2)(i)(A) The monofill has at least one liner for which there is no evidence that such liner is leaking;

(B) The monofill is located more than one-quarter mile from an underground source of drinking water (as that term is defined in §122.3 of the Regulations Governing Underground Injection); and

(C) The monofill is in compliance with generally applicable groundwater monitoring requirements for facilities with permits under 7 Del. C., Chapter 63, or

(ii) The owner or operator demonstrates that the monofill is located, designed and operated so as to assure that there will be no migration of any hazardous constituent into groundwater or surface water at any future time.

(e) In the case of any unit in which the liner and leachate collection system has been installed pursuant to the requirements of paragraph (a) of this section and in good faith compliance with paragraph (a) of this section and with guidance documents governing liners and leachate collection systems under paragraph (a) of this section, no liner or leachate collection system which is different from that which was so installed pursuant to paragraph (a) of this section will be required for such unit by the Secretary when issuing the first permit to such facility, except that the Secretary will not be precluded from requiring installation of a new liner when the Secretary has reason to believe that any liner installed pursuant to the requirements of paragraph (a) of this Section is leaking.

(f) The owner or operator must design, construct, operate, and maintain a run-on control system capable of preventing flow into the active portion of the landfill during peak discharge from at least a 25-year storm.

(g) The owner or operator must design, construct, operate and maintain a run-off management system to collect and control at least the water volume resulting from a 24-hour, 25-year storm.

(h) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems must be emptied or otherwise managed expeditiously after storms to maintain design capacity of the system.

(i) The owner or operator of a landfill containing hazardous waste which is subject to dispersal by wind must cover or otherwise manage the landfill so that wind dispersal of the hazardous waste is controlled.

[Comment: As required by §265.13, the waste analysis plan must include analyses needed to comply with §§ 265.312, 265.313, and 265.314. As required by §265.73, the owner or operator must place the results of these analyses in the operating record of the facility].

(Amended May 8, 1986, August 1, 1995)

**Section 265.302 Action leakage rate.**

(a) The owner or operator of landfill units subject to §265.301(a) must submit a proposed action leakage rate to the Secretary when submitting the notice required under §265.301(b). Within 60 days of receipt of the notification, the Secretary will: Establish an action leakage rate, either as proposed by the owner or operator or modified using the criteria in this section; or extend the review period for up to 30 days. If no action is taken by the Secretary before the original 60 or extended 90 day review periods, the action leakage rate will be approved as proposed by the owner or operator.

(b) The Secretary shall approve an action leakage rate for landfill units subject to §265.301(a). The action leakage rate is the maximum design flow rate that the leak detection system (LDS) can remove without the fluid head on the bottom liner exceeding 1 foot. The action leakage rate must include an adequate safety margin to allow for uncertainties in the design (e.g., slope, hydraulic conductivity, thickness of drainage material), construction, operation, and location of the LDS, waste and leachate characteristics, likelihood and amounts of other sources of liquids in the LDS, and proposed response actions (e.g., the action leakage rate must consider decreases in the flow capacity of the system over time resulting from siltation and clogging, rib layover and creep of synthetic components of the system, overburden pressures, etc.).

(c) To determine if the action leakage rate has been exceeded, the owner or operator must convert the weekly or monthly flow rate from the monitoring data obtained under §265.304 to an average daily flow rate (gallons per acre per day) for each sump. Unless the Secretary approves a different calculation, the average daily flow rate for each sump must be calculated weekly during the active life and closure period, and monthly during the post-closure care period when monthly monitoring is required under §265.304(b).

(Amended August 1, 1995)

**Section 265.303 Response actions.**

(a) The owner or operator of landfill units subject to §265.301(a) must submit a response action plan to the Secretary when submitting the proposed action leakage rate under §265.302. The response action plan must set forth the actions to be taken if the action leakage rate has been exceeded. At a minimum, the response action plan must describe the actions specified in paragraph (b) of this section.

(b) If the flow rate into the leak detection system exceeds the action leakage rate for any sump, the owner or operator must:

- (1) Notify the Secretary in writing of the exceedence within 7 days of the determination;
- (2) Submit a preliminary written assessment to the Secretary within 14 days of the determination, as to the amount of liquids, likely sources of liquids, possible location, size, and cause of any leaks, and short-term actions taken and planned;
- (3) Determine to the extent practicable the location, size, and cause of any leak;
- (4) Determine whether waste receipt should cease or be curtailed, whether any waste should be removed from the unit for inspection, repairs, or controls, and whether or not the unit should be closed;
- (5) Determine any other short-term and longer-term actions to be taken to mitigate or stop any leaks; and

## §265.309

(6) Within 30 days after the notification that the action leakage rate has been exceeded, submit to the Secretary the results of the analyses specified in paragraphs (b)(3), (4), and (5) of this section, the results of actions taken, and actions planned. Monthly thereafter, as long as the flow rate in the leak detection system exceeds the action leakage rate, the owner or operator must submit to the Secretary a report summarizing the results of any remedial actions taken and actions planned.

(c) To make the leak and/or remediation determinations in paragraphs (b)(3), (4), and (5) of this section, the owner or operator must:

- (1)(i) Assess the source of liquids and amounts of liquids by source,
  - (ii) Conduct a fingerprint, hazardous constituent, or other analyses of the liquids in the leak detection system to identify the source of liquids and possible location of any leaks, and the hazard and mobility of the liquid; and
  - (iii) Assess the seriousness of any leaks in terms of potential for escaping into the environment; or
- (2) Document why such assessments are not needed.

(Amended August 1, 1995)

### **Section 265.304 Monitoring and inspection.**

(a) An owner or operator required to have a leak detection system under §265.301(a) must record the amount of liquids removed from each leak detection system sump at least once each week during the active life and closure period.

(b) After the final cover is installed, the amount of liquids removed from each leak detection system sump must be recorded at least monthly. If the liquid level in the sump stays below the pump operating level for two consecutive months, the amount of liquids in the sumps must be recorded at least quarterly. If the liquid level in the sump stays below the pump operating level for two consecutive quarters, the amount of liquids in the sumps must be recorded at least semi-annually. If at any time during the post-closure care period the pump operating level is exceeded at units on quarterly or semi-annual recording schedules, the owner or operator must return to monthly recording of amounts of liquids removed from each sump until the liquid level again stays below the pump operating level for two consecutive months.

(c) "Pump operating level" is a liquid level proposed by the owner or operator and approved by the Secretary based on pump activation level, sump dimensions, and level that avoids backup into the drainage layer and minimizes head in the sump. The timing for submission and approval of the proposed "pump operating level" will be in accordance with §265.302(a).

(d) Cover, under circumstances other than wind dispersal, may be required if deemed necessary by the Department.

(Amended May 8, 1986, August 1, 1995)

### **Sections 265.305 - 265.308 [Reserved]**

### **Section 265.309 Surveying and recordkeeping.**

The owner or operator of a landfill must maintain the following items in the operating record required in §265.73:

- (a) On a map, the exact location and dimensions, including depth, of each cell with respect to permanently surveyed bench marks; and
- (b) The contents of each cell and the approximate location of each hazardous waste type within each cell.

**Section 265.310 Closure and post-closure care.**

(a) At final closure of the landfill or upon closure of any cell, the owner or operator must cover the landfill or cell with a final cover designed and constructed to:

- (1) Provide long-term minimization of migration of liquids through the closed landfill;
- (2) Function with minimum maintenance;
- (3) Promote drainage and minimize erosion or abrasion of the cover;
- (4) Accommodate the settling and subsidence so that the cover's integrity is maintained; and
- (5) Have a permeability less than or equal to the permeability of any bottom liner system or natural subsoils present.

(b) After final closure, the owner or operator must comply with all post-closure requirements contained in §§ 265.117 - 265.120 including maintenance and monitoring throughout the post-closure care period. The owner or operator must:

- (1) Maintain the integrity and effectiveness of the final cover, including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events;
- (2) Maintain and monitor the leak detection system in accordance with §§ 264.301(c)(3)(iv) and (4) of these regulations and 265.304(b), and comply with all other applicable leak detection system requirements of this part;
- (3) Maintain and Monitor the groundwater monitoring system and comply with all other applicable requirements of Subpart F of this part;
- (4) Prevent run-on and run-off from eroding or otherwise damaging the final cover; and
- (5) Protect and maintain surveyed benchmarks used in complying with §265.309.

(Amended November 21, 1985, August 1, 1995, January 1, 1999)

**Section 265.311 [Reserved]**

**Section 265.312 Special requirements for ignitable or reactive waste.**

(a) Except as provided in paragraph (b) of this section, and in §265.316, ignitable or reactive waste must not be placed in a landfill, unless the waste and landfill meets all applicable requirements of Part 268 of these regulations, and:

- (1) The resulting waste, mixture, or dissolution or material no longer meets the definition of ignitable or reactive waste under §261.21 or §281.23 of these regulations, and
- (2) Section 265.17(b) is complied with.

(b) Except for prohibited wastes which remain subject to treatment standards in Subpart D of Part 268, wastes in containers may be landfilled without meeting the requirements of paragraph (a) of this section, provided that the wastes are disposed of in such a way that they are protected from any material or conditions which may cause them to ignite. At a minimum, ignitable wastes must be disposed of in non-leaking containers which are carefully handled and placed so as to avoid heat, sparks, rupture, or any other condition that might cause ignition of the wastes; must be covered daily with soil or other non-combustible material to minimize the potential for ignition of the wastes; and must not be disposed of in cells that contain or will contain other wastes which may generate heat sufficient to cause ignition of the waste.

(Amended June 19, 1992)

**Section 265.313 Special requirements for incompatible wastes.**

Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same landfill cell, unless §265.17(b) is complied with.

**Section 265.314 Special requirements for liquid bulk and containerized liquids.**

(a) Bulk or non-containerized liquid waste or waste containing free liquids may be placed in a landfill prior to May 8, 1985 only if:

(1) The landfill has a liner and leachate collection and removal system that meets the requirements of §264.301(a) of these regulations; or

(2) Before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g., by mixing with a sorbent solid), so that free liquids are no longer present.

(b) Effective May 8, 1985, the placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids (whether or not sorbents have been added) in any landfill is prohibited.

(c) Containers holding free liquids must not be placed in a landfill unless:

(1) All free-standing liquid;

(i) has been removed by decanting, or other methods;

(ii) has been mixed with sorbent or solidified so that free-standing liquid is no longer observed; or

(iii) had been otherwise eliminated; or

(2) The container is very small, such as an ampule; or

(3) The container is designed to hold free liquids for use other than storage such as a battery or capacitor; or

(4) The container is a lab pack as defined in §265.316 and is disposed of in accordance with §265.316.

(d) To demonstrate the absence or presence of free liquids in either a containerized or a bulk waste, the following test must be used: Method 9095 (Paint Filter Liquids Test) as described in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in §260.11 of these regulations.

(e) The date for compliance with paragraph (a) of this section is November 19, 1981. The date for compliance with paragraph (c) of this section is March 22, 1982.

(f) Sorbents used to treat free liquids to be disposed of in landfills must be nonbiodegradable. Nonbiodegradable sorbents are: materials listed or described in paragraph (f)(1) of this section; materials that pass one of the tests in paragraph (f)(2) of this section; or materials that are determined by EPA to be nonbiodegradable through the Part 260 petition process.

(1) Nonbiodegradable sorbents. (i) Inorganic minerals, other inorganic materials, and elemental carbon (e.g., aluminosilicates, clays, smectites, Fuller's earth, bentonite, calcium bentonite, montmorillonite, calcined montmorillonite, kaolinite, micas (illite), vermiculites, zeolites; calcium carbonate (organic free limestone); oxides/hydroxides, alumina, lime, silica (sand), diatomaceous earth; perlite (volcanic glass); expanded volcanic rock; volcanic ash; cement kiln dust; fly ash; rice hull ash; activated charcoal/activated carbon); or

(ii) High molecular weight synthetic polymers (e.g., polyethylene, high density polyethylene (HDPE), polypropylene, polystyrene, polyurethane, polyacrylate, polynorborene, polyisobutylene, ground synthetic rubber, cross-linked allylstyrene and tertiary butyl copolymers). This does not include polymers derived from biological material or polymers specifically designed to be degradable; or

(iii) Mixtures of these nonbiodegradable materials.

(2) Tests for nonbiodegradable sorbents. (i) The sorbent material is determined to be nonbiodegradable under ASTM Method G21-70 (1984a)-Standard Practice for Determining Resistance of Synthetic Polymer Materials to Fungi; or

(ii) The sorbent material is determined to be nonbiodegradable under ASTM Method G22-76 (1984b)-Standard Practice for Determining Resistance of Plastics to Bacteria; or

(iii) The sorbent material is determined to be non-biodegradable under OECD test 301B: [CO<sub>2</sub> Evolution (Modified Sturm Test)].

## §265.316

(g) Effective November 8, 1985, the placement of any liquid which is not a hazardous waste in a landfill is prohibited unless the owner or operator of such landfill demonstrates to the Secretary, or the Secretary determines, that:

(1) The only reasonably available alternative to the placement in such landfill is placement in a landfill or unlined surface impoundment, whether or not permitted or operating under interim status, which contains, or may reasonably be anticipated to contain, hazardous waste; and

(2) Placement in such owner or operator's landfill will not present a risk of contamination of any underground source of drinking water (as that term is defined in §122.3 of the Delaware Regulations Governing Underground Injection Control).

(Amended May 8, 1986; August 29, 1988, August 1, 1995, July 23, 1996, January 1, 1999)

### **Section 265.315 Special requirements for containers.**

Unless they are very small, such as an ampule, containers must be either:

(a) At least 90 percent full when placed in the landfill; or

(b) Crushed, shredded, or similarly reduced in volume to the maximum practical extent before burial in the landfill.

(Amended November 21, 1985)

### **Section 265.316 Disposal of small containers of hazardous waste in overpacked drums (lab packs).**

Small containers of hazardous waste in overpacked drums (lab packs) may be placed in a landfill if the following requirements are met:

(a) Hazardous waste must be packaged in non-leaking inside containers. The inside containers must be of a design and constructed of a material that will not react dangerously with, be decomposed by, or be ignited by the waste held therein. Inside containers must be tightly and securely sealed. The inside containers must be of the size and type specified in the Department of Transportation (DOT) hazardous materials regulations (49 CFR Parts 173, 178, and 179), if those regulations specify a particular inside container for the waste.

(b) The inside containers must be overpacked in an open head DOT-specification metal shipping container (49 CFR Parts 178 and 179) of no more than 416-liter (110 gallon) capacity and surrounded by, at a minimum, a sufficient quantity of sorbent material, determined to be nonbiodegradable in accordance with §264.315(f), to completely sorb all of the liquid contents of the inside containers. The metal outer container must be full after it has been packed with inside containers and sorbent material.

(c) The sorbent material used must not be capable of reacting dangerously with, being decomposed by, or being ignited by the contents of the inside containers, in accordance with §265.17(b).

(d) Incompatible wastes, as defined in §260.10(a) of these regulations, must not be placed in the same outside container.

(e) Reactive waste, other than cyanide- or sulfide-bearing waste as defined in §261.23(a)(5) of these regulations, must be treated or rendered non-reactive prior to packaging in accordance with paragraphs (a) through (d) of this section without first being treated or rendered non-reactive.

(f) Such disposal is in compliance with the requirements of Part 268 of these regulations. Persons who incinerate lab packs according to the requirements in 40 CFR §268.42(c)(1) may use fiber drums in place of metal outer containers. Such fiber drums must meet the DOT specifications in 49 CFR §173.12 and be overpacked according to the requirements in paragraph (b) of this section.

(Amended June 19, 1992, August 1, 1995)