ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124 and 270

[SW-FRL 2536-8]

Hazardous Waste Management System—The Hazardous Waste Permit Program; Procedures for Decisionmaking

AGENCY: Environmental Protection Agency.
ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is today amending its hazardous waste permit regulations. These regulations were promulgated pursuant to Subtitle C of the Resource Conservation and Recovery Act (RCRA) and were included in the Consolidated Permit Regulations (which have since been deconsolidated). These amendments will allow an owner or operator of an existing hazardous waste management facility who submits an incomplete Part A of the RCRA permit application to receive a notice of the deficiency and an opportunity to cure it before being subject to EPA enforcement for operating without a permit. The Agency is also amending the regulations to require that if the Administrator denies a request for a panel hearing on an initial permit for an existing hazardous waste management facility, he must give his reasons for the denial.

Today's actions are prompted by a settlement stipulation concerning these issues in the *NRDC v. EPA* lawsuit on the Consolidated Permit Regulations. These amendments will not have any economic impact on the regulated community, nor will they have any impact on public health or the environment.

DATE: These amendments are effective October 24, 1984.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll-free at (800) 424-9346 or in Washington, D.C. at 382-3000. For specific information on these amendments, contact Deborah Wolpe, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 382-2222.

SUPPLEMENTARY INFORMATION:

I. Background

On February 26, 1980 and May 19, 1980, EPA promulgated regulations implementing Subtitle C of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. 6901 *et seq.* These regulations established the first phase of a comprehensive program for the handling and management of hazardous waste (40 CFR Parts 260-265, 45 FR 33066-33289). In addition, on May 19, 1980, EPA promulgated the Consolidated Permit Regulations governing five permit programs. On April 1, 1983, the Consolidated Permit Regulations were deconsolidated. Each permit program now appears in a separate part of the Code of Federal Regulations. The changes proposed today concern only the RCRA portion of the Consolidated Permit Regulations, now codified at 40 CFR Part 270.

On May 10, 1983, EPA proposed amendments to the hazardous waste permit regulations, 40 CFR Parts 270 and 124 (48 FR 21098). These proposed amendments: (1) Ensure that owners and operators of hazardous waste management facilities are notified of defects in Part A of their permit applications and given an opportunity to correct these defects; and (2) set forth conditions when a permit applicant may request a hearing under Subpart F and ensure that if the Administrator denies a request for a panel hearing on an initial permit, he must give his reasons for the denial.

EPA has received a number of comments on these amendments. Almost all of the commenters strongly support the amendments as they were proposed. Therefore, today we are promulgating these amendments in final form and responding to questions and comments raised on these issues during the public comment period.

II. Failure To Qualify for Interim Status Because of an Incomplete Part A

An owner or operator of a hazardous waste management (HWM) facility may fail to qualify for interim status for any of the following reasons which are listed in RCRA as prerequisites to qualifying for interim status:

(a) The facility was not in existence on or before November 19, 1980;

(b) The owner or operator failed to comply with Section 3010 of RCRA (*i.e.*, failed to notify, if required); or

(c) The owner or operator failed to submit Part A of his permit application on time.[1]

In addition, an owner or operator may fail to qualify for interim status if he fails to submit a complete part A permit application. Section 270.70 of the regulations states that if, upon examination or reexamination of a Part A application, EPA determines that it failed to meet the standards of the regulations, EPA may notify the owner or operator that the application is deficient. Section 270.70 provides that the result of such a determination is that the owner or operator is not entitled to interim status, and is subject to EPA enforcement for operating without a permit.

On May 10, 1983, the Agency proposed amending 40 CFR 270.70 to provide that before EPA determines that Part A of a permit application is deficient, it will notify the owner or operator in writing of the apparent deficiency. The notice will specify the grounds for EPA's belief that the application is deficient and will give the owner or operator 30 days from the date of receipt to respond to the notification and to explain or cure the deficiency. If, after such notice and opportunity for response, EPA still finds that the application is deficient, it may then take appropriate enforcement action.

The proposed amendments were prompted by a settlement stipulation concerning this issue in the litigation on the Consolidated Permit Regulations, *NRDC v. EPA*, No. 80-1607, and Consolidated Cases (D.C. Cir., filed June 2, 1980).[2]

This proposal, however, merely put in regulatory form what the Agency believes is already standard operating procedure with respect to deficient Part A applications. EPA believes it is reasonable to give permit applicants an opportunity to cure deficient applications before interim status is denied; and, in practice, does allow an applicant to correct, explain or resubmit a Part A, if it is found deficient. This amendment merely includes these procedures in the regulations. All but two of the comments EPA received on this amendment strongly supported adopting it.

One commenter suggested that the time limit of 30 days to correct deficiencies in Part A applications be extended to 45 days. This, the commenter claimed, would allow complex facilities adequate opportunity for further contact with the Agency to resolve uncertainties and submit a complete application. We do not agree that the additional 15 days is necessary. Thirty days should be a more than adequate time period to contact the agency and correct or cure a Part A. Part

[1] Failure to file a Part A on time may not always result in a failure to qualify for interim status. The agency may, by compliance order issued under Section 3008 of RCRA, extend the date by which the owner or operator of an existing HWM facility may submit Part A of its permit application, as there is no statutory deadline for submitting the permit application (see 40 CFR 270.10(e)(3)).

[2] For further discussion of the *NRDC v. EPA* suit and the settlement agreement filed on the RCRA-related issues, see the preamble to the proposed amendments on owner signature and certification, 47 FR 32038 (July 23, 1982).

A's consist of straight-forward requests for information which the applicant should already have on hand, such as a description of the processes to be used for treating, storing, or disposing of waste at the facility; the design capacity of these processes; the location of the facility, etc. An extra fifteen days is not necessary for such information needs.

One commenter opposed any change to 40 CFR § 270.70(b). The commenter stated that such a change raises the question of whether there are still owners and/or operators who have not filled out a proper Part A application. The commenter was concerned that the Agency is still looking through delinquent Part A's to determine deficiencies, rather than calling in Part B's.

The Agency will always be receiving Part A applications when we change the regulations to regulate facilities that may have originally been exempted (e.g., small quantity generators, new wastes). Under these circumstances a facility may still submit a Part A application and may then qualify for interim status if it was in existence on November 19, 1980.

The promulgation of this amendment does not affect the Agency's current priority in permitting hazardous waste facilities. Our priorities are still focused on calling Part B's and issuing permits to facilities as quickly as possible rather than reviewing delinquent Part A applications. However, since we may always receive new or revised Part A's, we believe today's change to § 270.70 is reasonable both to put in regulatory form what is already standard procedure and to assuage the litigants' concerns in this area.

III. Opportunity for a Hearing Prior to Denial of an Initial Permit

On May 10, 1983, EPA also proposed amending 40 CFR 124.12 to provide that during the 45 day public comment period a permit applicant may request a panel hearing pursuant to § 124.114 for initial RCRA permits. The applicant must explain in his request why he believes that the issues for which he requests a hearing are genuine issues of material fact. He must also explain why these are determinative issues, *i.e.*, which are likely to influence the outcome of one or more contested permit conditions, and which would require extensive changes to the facility. If the regional Administrator denies the request, he would have to send a brief written statement to the applicant explaining his reasons for concluding that no determinative issues have been presented for resolution in a panel hearing. The basic reason for this amendment is to provide some assurance that a panel hearing will not be arbitrarily denied.

The petitioners in the NRDC lawsuit raised several issues concerning a hearing on the issuance or denial of an initial RCRA permit. They argued that due process requires the opportunity for a hearing in all cases before a permit is denied for a facility operating under interim status. In addition, they argued that the imposition of extensive, expensive conditions in a permit might be tantamount to denial of a permit, therefore, a hearing should be available in such situations as well. They believed that the existing regulations did not provide for a hearing in all instances.[3]

It is EPA's position that formal adjudicatory hearings are not required for the issuance or denial of RCRA permits; that an informal public hearing plus the notice requirements currently in the regulations are sufficient to satisfy due process requirements.[4] The current regulations provide for notice of what the Agency proposes to do, an opportunity to challenge that proposal both through written comments and informal public hearing, a response to comments, and a decision based on administrative record. Section 7004(b) of RCRA provides for an informal public hearing upon receipt by the Director of a written notice of opposition to the Agency's intent to issue a RCRA permit and of a request for such a hearing.

Petitioners also believed that the May 19, 1980 regulations only gave a right to a public hearing in situations where EPA proposed to issue a permit. This was not EPA's intent. As clarified in amendments promulgated on July 15, 1981 (46 FR 36704), the Agency intends that the requirement to hold an informal hearing (when one is requested) apply to cases where the Agency has tentatively decided to issue a permit. The term "draft permit" applies to both.

[3] There are three types of hearings available under Part 124. These are: (1) *Public Hearings.* Public hearings must be held whenever the Director receives written notice of opposition to a RCRA draft permit and a request for a hearing within 45 days of public notice of the draft permit. The Director may also hold such a hearing at his discretion. [See 40 CFR 124.121]; (2) *Evidentiary hearings.* Evidentiary hearings under Subpart E of Part 124 are formal adversarial hearings conducted by a judicial officer pursuant to formal rules of practice; and (3) *Panel hearings.* Panel hearings under Subpart F of Part 124 are nonadversial hearings before a presiding officer and a panel consisting of three or more EPA employees having special expertise or responsibility in areas related to the issues being decided. Evidentiary hearings and panel hearings are both considered formal adjudicatory hearings, as they conform to the formal hearing requirements of the Administrative Procedure Act. Public hearings are considered informal hearings.

[4] See 45 FR 33409–33411 (May 19, 1980).

Finally, the petitioners were also concerned that in some instances, there would be complicated factual issues that could be addressed better through a formal, rather than an informal hearing. As the regulations are currently written, the Regional Administrator always has the discretion to hold a formal panel hearing. However, the petitioners objected to a lack of assurance in the regulations that they would receive a written response to a request for such a hearing, should the Regional Administrator deny the request. They were concerned that there would be situations where EPA and the permit applicant would disagree about changes necessary to bring the facility into compliance with the regulations. In situations where the Regional Administrator proposes to issue a permit, but the applicant disagrees as to major permit conditions, the petitioners want the opportunity for a panel hearing.

As a matter of policy, EPA has determined that permit applicants should have an opportunity for a panel hearing where there is a tentative decision to deny the initial permit for an existing facility, and where the applicant and EPA disagree on major conditions in the initial draft permit for an existing facility. Today's final amendment to § 124.12(e)(2) provides the assurance that a panel hearing will not be arbitrarily denied.

All of the comments the Agency received on this amendment urged that the amendment be adopted as proposed. One commenter requested clarification on an apparent contradiction as to whether a panel hearing is considered a formal or an informal hearing. The commenter claimed that footnote 5 of the preamble in the proposed rule (45 FR 21099) states that panel hearings are considered formal adjudicatory hearings as they conform to the formal hearing requirements of the Administrative Procedure Act, while the preamble seems to indicate that the panel hearing is considered an informal hearing. They quote the following passages of the preamble:

> * * * the Agency intends that the requirement to hold an *informal hearing* (when one is requested) apply to cases where the Agency has tentatively decided to deny a permit as well as when the Agency has tentatively decided to issue a permit (48 FR at 21099, emphasis added).

and later:

> As a matter of policy, EPA has determined that permit applicants should have the opportunity for a *panel hearing* when there is tentative decision to deny the initial permit * * * (48 FR 21099, emphasis added).

This is not a contradiction. In the first quote, we are simply explaining that an informal hearing, *i.e.*, a public hearing, is all that is required to satisfy due process requirements. In the second quote, we are stating that over and above due process requirements, EPA's policy will be to allow permit applicants an opportunity for a panel hearing when there are factual issues which may be addressed better through a formal, *i.e.*, a panel hearing.

Another commenter has requested that the Agency state clearly what the proper procedure would be if a hearing was requested and then denied. They suggest that there should be administrative recourse to the Regional Administrator's decision.

If a hearing has been properly requested under § 124.114, and the Regional Administrator denies the request, the applicant will receive a brief written statement of the Regional Administrator's reasons for concluding that no determinative issues have been presented for resolution in a panel hearing (see today's amendment to § 124.12). The Regional Administrator shall then prepare a recommended decision under § 124.124. Any person whose hearing request has been denied may then appeal that recommended decision to the Administrator as provided in § 124.91.

It should be noted, as it was in the proposal (see 48 FR 21200), that in circumstances where a permit has been appealed, and no formal hearing was held, the Administrator may remand the appeal to the Regional Administrator, and direct the Regional Administrator to hold a non-adversary panel hearing.

IV. Economic Impact

These amendments will not have any economical impact on the regulated community. As stated in the background information, it is standard operating procedure for the Agency to allow an applicant the opportunity to correct, explain or cure an imcomplete Part A of the RCRA permit. The amendment to § 270.70 therefore, does not change anything but the regulatory language.

The amendment to § 124.12(e) requires the Regional Administrator to provide a written reason for denying an applicant's request for a formal hearing. This change increases the paperwork of the Regional Administrator, but does not affect the regulated community.

V. Executive Order 12291

Under Executive Order 12291 (46 FR 12193, February 19, 1981), EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. A major rule is defined as a regulation which is likely to result in:

An annual effect on the economy of $100 million or more;

A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions; or

Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises in domestic or expert markets.

This regulation is not major because it will not result in an effect on the economy of $100 million or more. It merely provides some procedural safeguards upon the failure to qualify for interim status and the issuance or denial of a RCRA permit. There will be no adverse impact on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. These amendments are not major regulations. Therefore, no Regulatory Impact Analysis is being prepared.

These amendments were submitted to the Office of Management and Budget for review as required by Executive Order 12291.

VI. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.*, EPA must prepare a regulatory flexibility analysis for all final rules to assess their impact on small entities. No regulatory flexibility analysis is required, however, where the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This regulation will not have any economic impact on owners and operators of hazardous waste management facilities (including those which are small entities). Accordingly, I hereby certify, pursuant to 5 U.S.C. 601(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

Dated: April 18, 1984.

William D. Ruckelshaus,

Administrator.

List of Subjects

40 CFR Part 270

Administrative practice and procedure, Air-pollution control, Hazardous materials, Reporting and record-keeping requirements, Waste treatment and disposal, Water pollution control, Water supply, Confidential business information.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous materials, Waste treatment and disposal, Waste pollution control, Water supply, Indians-lands.

40 CFR Parts 270 and 124 are amended as follows:

PART 270—[AMENDED]

1. The authority citation for Part 270 reads as follows:

Authority: Sections 1008, 2002(a), 3005, 3007 and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (RCRA) (42 U.S.C. 6901, 6912(a), 6925, 6927 and 6974).

2. In Part 270, § 270.70 is amended by revising paragraph (b) to read as follows:

§ 270.70 Qualifying for interim status.

* * * * *

(b) Failure to qualify for interim status. If EPA has reason to believe upon examination of a Part A application that it fails to meet the requirements of § 270.13, it shall notify the owner or operator in writing of the apparent deficiency. Such notice shall specify the grounds for EPA's belief that the application is deficient. The owner or operator shall have 30 days from receipt to respond to such a notification and to explain or cure the alleged deficiency in his Part A application. If, after such notification and opportunity for response, EPA determines that the application is deficient it may take appropriate enforcement action.

PART 124—[AMENDED]

3. The authority citation for part 124 reads as follows:

Authority: The Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; the Safe Drinking Water Act, 42 U.S.C. 300(f) et seq.; the Clean Water Act, 33 U.S.C. 1251 et seq.; the Clean Air Act, 42 U.S.C. 1857 et seq.

4. In Part 124, § 124.12 is amended by revising paragraph (e) to read as follows:

§ 124.12 Public hearings.

* * * * *

(e)(1) At his or her discretion, the Regional Administrator may specify that RCRA or UIC permits be processed under the procedures in Subpart F.

(2) For initial RCRA permits for existing HWM facilities, the Regional Administrator shall have the discretion to provide a hearing under the procedures in Subpart F. The permit applicant may request such a hearing pursuant to § 124.114 no one or more

issues, if the applicant explains in his request why he or she believes those issues: (1) Are genuine issues to material fact; and (2) determine the outcome of one or more contested permit conditions identified as such in the applicant's request, that would require extensive changes to the facility ("contested major permit conditions"). If the Regional Administrator decides to deny the request, he or she shall send to the applicant a brief written statement of his or her reasons for concluding that no such determinative issues have been presented for resolution in such a hearing.

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