ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124 and 270

[FRL-3506-4]

Changes to Interim Status Facilities for Hazardous Waste Management; Modifications of Hazardous Waste Management Permits; Procedures for Post-Closure Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating amendments to the hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) governing changes at interim status and permitted facilities, including redesignation of certain permit modifications as Class 1. Today's rule also amends the hazardous waste permitting regulations to clarify the Agency's authority to deny permits for the active life of a facility while a permit decision with respect to the post-closure period remains pending.

EFFECTIVE DATE: March 7, 1989.

ADDRESS: The public docket for this rulemaking is available for public inspection in Room S-212, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The docket number is F-87-RIPP-FFFFF. The public must make an appointment to review docket materials by calling (202) 475-9327. The public may copy a maximum of 50 pages of material from any one regulatory docket at no cost; additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline at (800) 424-9346 (in Washington, DC call 382-3000) or Barbara Foster, Office of Solid Waste, (OS-341), U.S. Environmental Protection Agency, Washington, DC 20460, telephone (202) 382-4751.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Authority

These regulations are issued under the authority of sections 2002(a), 3004, 3005, and 3006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6924, 6925, and 6926.

II. Background

Subtitle C of the Resource Conservation and Recovery Act (RCRA) creates a "cradle-to-grave" management system intended to ensure that hazardous waste is identified and properly transported, stored, treated, and disposed. Subtitle C requires EPA to identify hazardous waste and to promulgate standards for generators and transporters of such wastes. Under section 3004 of RCRA, owners and operators of treatment, storage, and disposal facilities are required to comply with standards "necessary to protect human health and the environment." These standards are generally implemented initially through interim status standards and later through permits that are issued under authorized State programs or by EPA.

Under section 3005(a) of RCRA, all treatment, storage, and disposal of hazardous waste are prohibited, except in accordance with a permit that implements the section 3004 standards. However, recognizing that the issuance of permits can be time consuming, Congress created "interim status" for facilities in existance on the effective date of EPA's permitting regulations (November 19, 1980). Under section 3005(e), owners and operators of hazardous waste treatment, storage, and disposal facilities in existance on that date who submitted a Part A permit application and a section 3010 notification are treated as having been issued permits until an authorized State or EPA takes final administrative action on their permit applications.

On August 14, 1987, the Agency proposed amendments to its regulations regarding changes at interim status facilities, procedures on post-closing permitting, and permit modifications. On November 17, 1988 the Agency issued a **Federal Register** notice soliciting public comment on the need to further amend its regulations on permit modification procedures. Those proposed amendments are discussed below.

A. Changes at Interim Status Facilities

An interim status facility generally may change its waste management operations without notification or prior Agency approval, except for changes specifically identified at 40 CFR 270.72. Under previous regulations, these changes were: (1) The handling of wastes not previously identified in Part A of the permit application; (2) increase in design capacity of processes where there is a lack of available capacity at other waste management facilities; (3) changes in or addition of processes if necessary to protect human health and the environment or to comply with Federal regulations or State or local laws; and (4) changes in ownership or operational control of a facility. Section 270.72 specifies procedures and criteria for each of these changes. Prior approval by the Director is required before facilities can increase design capacity, add or make changes in processes, or change ownership under § 270.72. Prior to today's rule, the reconstruction limit (the former § 270.72(c)) prohibited any of the above changes to an interim status facility that required a capital expenditure equaling or exceeding 50 percent of the cost of constructing a

comparable new hazardous waste management facility, except for changes necessary to comply with the recently promulgated tank standards (51 FR 25422, July 14, 1986) and certain changes to treat or store in tanks or containers hazardous wastes subject to land disposal restrictions (52 FR 25760, July 8, 1987).

EPA believes that these regulations may in some cases unnecessarily restrict interim status facilities' flexibility, particularly in complying with new regulatory requirements. The consequences include a potential delay for some facilities in complying with new requirements and, in some cases, increased risk to human health and the environment. In fact, some interim status facilities may have no means to operate in compliance with the RCRA regulations while EPA or an authorized State reviewed their application for a RCRA permit. To avoid these undesirable results, the Agency proposed several regulatory changes on August 14, 1987 (52 FR 30570) to increase flexibility for owners and operators of interim status facilities to make changes necessary to comply with Federal, State, or local regulatory requirements. Today's notice promulgates this proposal as a final rule.

B. Post-Closure Permitting

The permitting regulations specify that RCRA permits cover both the active life (including the closure period) of a facility and, where applicable, the post-closure care period.

A permit applicant required to obtain an operating permit must include all necessary post-closure information in its Part B permit application for the application to be "complete" and thus initiate the review process. When the application is complete, EPA's decision to issue a permit applies to the whole permit, including the portion of the permit concerning post-closure care. In practice, however, EPA has found it necessary to separate the decision to deny a permit to operate a unit from the decision to issue a permit covering post-closure conditions. As the August 14, 1987 proposal stated, this practice has been necessary to ensure prompt closure of facilities that fail to meet the regulatory standards. The former regulations, however, did not specifically provide for a separation of the permit decision for the active life of the facility from post-closure permit decision.

In the August 14, 1987 **Federal Register** notice, the Agency proposed to amend its permitting regulations to clarify its authority to deny permits for the active life (including the closure period) of a facility while a permit decision with respect to the post-closure period remains pending.

C. Permit Modifications

1. Newly Listed or Identified Wastes

Whenever EPA lists a new hazardous waste or identifies a new hazardous characteristic, facilities handling that waste must come into compliance with Subtitle C requirements. Unpermitted facilities may continue to handle the waste without Agency approval if they comply with interim status requirements in Part 265 and they submit to EPA a Part A application and a section 3010 notice. Permitted facilities, however, were required to secure a permit modification incorporating the newly listed or identified waste before the effective date of the new listing or identification. Under previous regulations, such a change required a "major" permit modification. The major modification procedures of the former § 270.41 included the full administrative procedures that apply to issuance of a permit; the only significant difference was that, for a major modification, only those conditions of the permit to be modified were reopened.

Because of concerns over inequitable treatment of permitted versus interim status facilities, EPA proposed in the August 14 **Federal Register** notice to allow newly listed or identified wastes, and the units handling such wastes, to be added to permits as minor permit modifications if the facility owner or operator requested a major modification within 180 days.

Today's rule, however, does not finalize this proposal because the Agency has already addressed this problem as part of the recent amendments to the permit modification regulations (53 FR 37912, September 28, 1988). Comments received on the August 14 proposal for today's rule were addressed in the September 28 final permit modification rule. As a result of the permit modification rule, permitted facilities can now more easily modify permits to allow for handling of newly listed or identified wastes in a manner more consistent with interim status facilities.

2. Land Disposal Restrictions

The permit modification regulations that EPA published on September 28, 1988 (53 FR 37912) established a new three-tiered system of permit modifications. In that rule, specific facility changes were classified as either Class 1, 2, or 3 modifications. This rule did not specifically address changes necessary to comply with the land disposal restrictions. However, in the course of developing land disposal restrictions for the First Third scheduled wastes (53 FR 31138, August 17, 1988) and the California list wastes (52 FR 25760, July 8, 1987), EPA received several comments on the need to provide increased flexibility for permitted facilities that need to make changes to comply with these requirements. Therefore, on November 17, 1988 (53 FR 46474), the Agency reopened the comment period on the facility changes rulemaking to solicit comment on whether certain facility changes stemming from the land disposal restrictions program should be Class 1 permit modifications.

The permit modifications addressed in the November 17 **Federal Register** notice are similar to two previous minor modifications that were superseded by the new permit modification procedures adopted on September 28, 1988. Former § 270.42(o) allowed facilities to add new waste codes to their permits if the wastes were restricted under Part 268, met the applicable treatment standards, and were not substantially different from currently handled wastes. Similarly, § 270.42(p) allowed the addition of new treatment processes used to treat restricted wastes to Best Demonstrated Available Technology (BDAT) levels as long as those processes took place in tanks and containers and the facility requested a major permit modification. (*See* 52 FR 25760, July 8, 1987).

III. Section by Section Analysis

A. Summary

Today's rule generally adopts the provisions of the proposed rule of August 14, 1987 related to changes at interim status and permitted facilities and post-closure permitting. It provides greater flexibility to interim status facilities to: (1) Increase design capacity, if approved by the Director as necessary to comply with Federal, State, or local requirements, and (2) make changes specified in section 3008(h) corrective action orders or similar orders issued by State or local authorities or by a court. It also lifts the "reconstruction" limit for: (1) Changes to certain units so long as they are necessary to comply with Federal, State, or local requirements; (2) changes necessary to allow continued handling of newly listed or identified hazardous wastes; (3) changes made in accordance with an approved closure plan; and (4) changes made pursuant to a corrective action order. In addition, it promulgates the proposed clarification that EPA can deny permits for the active

life of a facility while a decision on post-closure permitting is pending.

As part of today's changes to § 270.72, the Agency also reorganized that entire section. Under the new organization, paragraph (a) lists the changes that are regulated under § 270.72 and paragraph (b) contains all provisions related to the reconstruction limit. Note that a requirement that new land disposal units at interim status facilities certify compliance with groundwater and financial responsibility requirements within a year was proposed in § 270.72(c) but is promulgated today at § 270.73(e) in this final rule. The following chart cross references the former § 270.72 with today's rule.

RELATIONSHIP OF TODAY'S RULE TO THE FORMER SECTION 270.72

Previous citation	Today's rule
(a)	(a)(1)
(b)	(a)(2)
(c)	(a)(3)
(d)	(a)(4)
(e)	(b)

It should also be noted that the Agency made a minor clarification to the section now designated as § 270.72(a)(1). That section provides that an interim status facility may continue to handle a newly listed or identified waste not previously identified in the Part A permit application if the owner or operator submits a revised Part A. The Agency has added language in today's rule to remove any possible ambiguity that the unit currently handling the newly listed or identified waste may be added under that provision as well. Thus, when EPA lists or identifies a new waste, the facility may continue to handle the waste in the same unit without obtaining prior Director approval. This situation for interim status facilities is analogous to that of unpermitted and permitted facilities handling newly identified wastes, both of which can make this change without prior Director approval.

Because today's rule has no substantive effect on former § 270.72(a) (now § 270.72(a)(1)) and § 270.72(d) (now § 270.72(a)(4)) the Agency did not address public comments related to those sections in this notice. Although only portions of § 270.72 are being amended by today's rule, it is printed in its entirety for the convenience of the reader.

Today's publication of § 270.72(b) also serves to correct a technical error created by a final rule published on July 8, 1987 (52 FR 25760). In another final rule published on July 14, 1986, the Agency amended the former § 270.72(e) to eliminate the reconstruction limit for changes made solely to comply with the requirements of § 265.193 for tanks and ancillary equipment. In the July 8, 1987 rule, the Agency again amended the former § 270.72(e) to lift the reconstruction limit for certain changes at interim status facilities made to implement the land disposal restrictions and, at the same time, inadvertently omitted the July 14, 1986 amendment. Today's publication of § 270.72(b) incorporates all amendments to the reconstruction limit to date; the amendment related to tanks and ancillary equipment is found in § 270.72(b)(1) and the land disposal restriction amendment is found in § 270.72(b)(6).

In addition to adopting the interim status and post-closure permitting provisions of the proposed rule, today's rule also modifies the regulations at § 270.42 to reclassify as Class 1 certain permit modifications necessary to enable facilities to comply with the land disposal restrictions. Specifically, it allows owners and operators of permitted facilities to add new waste codes, or a narrative description, to a permit as Class 1 modifications where the added wastes are: (1) Restricted wastes that have been treated to meet the applicable Part 268 treatment standard, or (2) residues from treating so called "soft hammer" wastes, and (3) certain wastewater treatment residues and incinerator ash. The rule also allows as a Class 1 modification, without prior approval, the addition of new wastes for treatment in tanks or containers under certain limited conditions. Finally the rule allows as a Class 1 modification, with prior Director approval, the addition of new treatment processes, as long as those processes are necessary to treat restricted wastes to meet treatment standards and the treatment processes are to take place in tanks or containers.

B. Changes at Interim Status Facilities

1. Increases in Design Capacity

Today's rule (§ 270.72(a)(2)) allows owners and operators to increase design capacity of processes at a facility when the Director approves the change as necessary to comply with Federal, State, or local requirements. This new provision expands the reasons for allowing capacity increases; the former § 270.72(b) allowed owners and operators to increase design capacity only if the Director approved the change because of a demonstrated lack of available capacity at other waste management facilities.

This change will allow interim status facilities to comply with new requirements, including those imposed by HSWA, and will, therefore, provide increased public and environmental protection. In the preamble to the proposal of this rule, the Agency set forth several examples to demonstrate this point. (*See* 52 FR 30570 at 30573). No comments were submitted in opposition to this amendment. For these reasons, the Agency is adopting the proposed § 270.72(a)(2)(i) to allow increases in design capacity necessary to comply with new requirements.

Several commenters, however, requested that the Agency clarify whether "increases in design capacity of processes" could include the addition of new units at a facility. Section 270.72(a)(2) does allow the Director to approve addition of new units at a facility to increase the capacity of a process already in operation at the facility. It should be noted, however, that addition of a unit of a type not already present at the facility would be considered a change in process rather than an increase in design capacity, and therefore would fall under § 270.72(a)(3). (*See* section III.B.2 of this preamble).

Another commenter argued that § 270.72(a)(2)(i), which allows the Director to approve an increase in design capacity because there is a lack of available capacity elsewhere, frustrates implementation of the minimum technology requirements of section 3004(o) by requiring a finding of lack of available capacity before increases in design capacity can be made. EPA believes that the new § 270.72(a)(2)(ii) addresses this commenter's concern. As explained above, EPA or a State Director may approve an increase in design capacity under this section if the change is necessary to comply with Federal, State, or local requirements, regardless of whether or not other capacity is available. The preamble to the proposal specifically references the facility changes necessary to comply with section 3004(o) as being the type of Federally mandated requirement that would qualify as an appropriate reason for EPA or a State to approve an interim status change.

2. Changes in or Addition of Processes

Under the former § 270.72(c), owners and operators could make changes in or add processes at a facility if the Director approved the change as necessary either to protect human health and the environment in an emergency or to

comply with Federal regulations or State or local laws. The corresponding provision in today's rule, § 270.72(a)(3), has been amended to clarify that "Federal regulations or State or local laws" encompasses all Federal, State, and local requirements. This includes regulations, orders, statutes, and permit-related requirements such as approved closure plans. EPA received no comments opposing this clarifying amendment.

3. Corrective Action

Section 3008(h) authorizes the Agency to order a facility owner or operator to conduct corrective action during interim status when the Agency determines that there is or has been a release of hazardous waste into the environment. Section 270.72(a)(5) promulgated today allows interim status facilities to make changes in accordance with corrective action orders issued by the Agency under section 3008(h) or other Federal authority (or orders issued by a Director under an equivalent State authority). In today's rule, the Agency has modified the language proposed in § 270.72(a)(5) to clarify that when the Agency or a State seeks corrective action through judicial proceedings and a court, rather than the Agency or State, issues an order requiring corrective action, changes made in accordance with such an order would also be permissible changes under § 270.72(a)(5).

In addition to the new § 270.72(a)(5), today's rule also promulgates § 270.72(b)(5), which removes the reconstruction limit for changes made in accordance with such corrective action orders.

Under the new § 270.72(a)(5), facility changes introduced in accordance with corrective action orders restricted to activities involving wastes associated with the facility. This limitation does not prevent treatment, storage, or disposal of wastes released from within the facility that migrated beyond the facility's boundaries. Rather the limitation prevents the owner or operator from making changes under this authority to manage wastes and materials that have no relationship to the facility. The limitation for unrelated materials is necessary to prevent the owner or operator seeking to manage such materials from evading the permit requirement for new facilities and change in interim status requirements for facility modifications.

Some commenters expressed concern that the new § 270.72(a)(5) limits changes permissible for purposes of corrective action to those made in accordance with a corrective action order. The commenters argued that the provision should be expanded to allow changes necessary for voluntary corrective action to be made as well and that the reconstruction limit should not apply to voluntary corrective action measures. The commenters noted that corrective action done early can decrease the cost of clean-up and provide increased protection of human health and the environment. The Agency, however, limited the changes permissible under new § 270.72(a)(5) to those made in compliance with a corrective action order because voluntary corrective action would not typically involve EPA or State oversight or public notice. By requiring that the changes made under paragraph (a)(5) be made in accordance with a corrective action order, the Agency has assured that those changes will be subject to Agency review and, additionally, to public comment. Therefore, the Agency has not made the modification to § 270.72(a)(5) that the commenter suggested.

The Agency, nevertheless, believes that the regulations already provide significant flexibility for voluntary corrective action at interim status facilities. Section 270.72(a) (2) and (3) allow the Director to approve increases in design capacity or the addition of new processes, if necessary to comply with Federal, State, or local requirements. This would include changes made as part of voluntary corrective action taken in anticipation of a section 3008(h) order or section 3004(u) permit conditions. These changes, however, would be subject to Director approval and would be limited by the reconstruction cap of § 270.72(b).[1]

Sections 270.72(a) (2) and (3) and 270.72(a)(5), therefore, impose somewhat different requirements on different types of corrective action. Where EPA or a State has required specific corrective action as part of a section 3008(h) or similar order, or a court has ordered correction action, approval of that action as a change in interim status is not necessary, and the reconstruction limit does not apply (§ 270.72 (a)(5) and (b)(5)). On the other hand, where the action is not explicitly required in an order, or it is taken merely in anticipation of an order, Director approval is required and the reconstruction limit potentially applies (§ 270.72(a) (2) and (3)).

4. Loss of Interim Status

In some cases, new land disposal units may be added to a facility as a change in interim status. For example, a surface impoundment handling nonhazardous waste at an interim status facility might be brought into the system if EPA subsequently listed the waste as hazardous. In this case, § 270.73(e) of today's rule (proposed as § 270.72(c) but moved in the final rule to § 270.73 for purposes of clarity) would require the facility to certify, 12 months after the effective date of the listing, that the unit was in compliance with all applicable ground-water monitoring and financial responsibility requirements. EPA added this requirement to ensure comparable treatment of land disposal units containing newly identified hazardous wastes at permitted, unpermitted, and interim status facilities.

5. Other Issues

One commenter argued that the Agency should have the authority to approve any change in interim status that would improve environmental quality, decrease costs, or improve safety or efficiency. Another commenter argued that the Agency should allow changes made to: (1) Protect human health and the environment, (2) avoid disrupting ongoing waste management, and (3) enable the permittee to respond to sudden changes in the types or quantities of wastes being managed at the facility. The agency believes that the criteria suggested by these commenters are too broad. In adopting its regulation for interim status facilities, the Agency chose an approach it believed would allow reasonable modification to existing facilities without nullifying the requirements for obtaining a RCRA permit. (See 45 FR 33290 at 33324, May 19, 1980). As part of its approach, the Agency allowed increases in design capacity and addition of or changes in existing processes at interim status facilities only for specified reasons, and made those changes subject to Agency approval and to the reconstruction limit. The Agency continues to follow this approach in its regulations at § 270.72. EPA believes that the criteria suggested by the commenter might result in expansions at interim status facilities that require full public participation and other protections of the permitting process.

[1] The Agency addressed this general issue in the preamble to the proposed Mobile Treatment Unit (MTU) regulation (52 FR 20914 to 20930, June 3, 1987). In that preamble, the Agency explained that MTU's may be allowed to operate at interim status facilities as a change necessary to comply with Federal, State, or local requirements. The Agency then went further to say that the use of an MTU for studies at an interim status facility to determine whether a specific treatment could meet BDAT in accordance with the land disposal restrictions, or to select a remedial measure in anticipation of Agency action under sections 3008(h) or 3004(u) would likely qualify as an acceptable change in interim status.

C. Reconstruction Limit

1. General

The former § 270.72(e) prohibited changes to an interim status facility that required a capital expenditure equalling or exceeding 50 percent of the cost of constructing a comparable new hazardous waste management facility. This "reconstruction limit" was designed to prevent facilities from circumventing permitting requirements by expanding significantly during interim status. This limitation was amended in EPA's new tank standards, issued on July 14, 1986 (51 FR 25422), which eliminated the reconstruction limit for changes made solely for the purposes of complying with the tank standards on § 265.193. It was further amended in a final rule issued on July 8, 1987 (52 FR 25760), which eliminated the reconstruction limit for changes made to treat or store, in tanks or containers, wastes subject to land disposal restrictions when the changes were made solely to comply with land disposal restrictions. The Agency believes, however, that there are additional changes that should be allowed at interim status facilities even when they amount to a reconstruction. The need for these changes is more compelling than the need to limit interim status facility expansion.

To allow those changes, today's rule eliminates the reconstruction limit for changes in interim status that EPA or the State Director determines to be necessary: (1) To comply with Federal, State, or local requirements, if the changes take place solely in existing units; in new tanks or containers; or in replacement surface impoundments that meet the minimum technology requirements of section 3004(o); or (2) to allow the owner or operator to continue to handle newly listed or identified hazardous wastes. It also amends the reconstruction limit to specify that it does not apply to corrective actions required by EPA or by States under authorized RCRA programs, or ordered by a court. Finally, it amends the reconstruction limit so that it does not apply during closure of a facility or of a unit within a facility that is done pursuant to an approved closure plan.

2. Federal, State, and Local Requirements

Section 270.72(b)(2) of today's rule lifts the reconstruction limit for changes to existing units, changes solely involving tanks or containers, and changes involving the addition of replacement surface impoundments meeting minimum technology requirements, if those changes are necessary to comply with Federal, State, or local requirements. As explained in the preamble to the August 14 proposal, this amendment will allow more expeditious compliance with new requirements, therefore improving protection of human health and the environment.

Several commenters argued that the scope of § 270.72(b)(2) was too narrow. For example, some commenters suggested that the reconstruction limit be lifted for any new or replacement landfill or surface impoundment, and for any lateral expansions to these units, as long as the units were in compliance with minimum technology requirements. Commenters also argued that limitations to the reconstruction cap will prevent facilities from making all changes necessary to comply with Federal, State, or local requirements. Commenters argued that some rules, such as the land disposal restrictions, mandate incineration as the treatment standard for some wastes and that the reconstruction limit stands in the way of incinerators being added to a facility to allow the facility to comply with these requirements. Another argued that a facility should be able to follow the requirements for interim status landfills and surface impoundments in RCRA section 3015(b) and not be blocked by the reconstruction limit.

EPA disagrees with these comments and has finalized the rule as proposed. As the Agency stated in the preamble to the proposal, major new landfills and incinerators (i.e., those that would exceed the 50% reconstruction limit) require the close Agency oversight and approval afforded by the permit process. In addition, the permit process provides an opportunity for public participation, including an opportunity for comment and a hearing. Public comments on other rulemakings—such as the recent amendments to the permit modification procedures—and the intent of Congress as illustrated by HSWA, which stressed, for example, concerns about land disposal, make it clear that major new land disposal units and incinerators are inappropriate at interim status facilities, without the protections provided by the permitting process.

3. Newly Listed or Identified Wastes

Section 270.72(b)(3) of today's rule lifts the reconstruction limit for changes that are necessary to allow owners or operators to continue handling newly listed or identified wastes that had been treated, stored, or disposed of at the facility prior to the effective date of the rule establishing the new listing or identification.

This provision has been slightly modified from the proposal. The proposal restricted acceptable changes to those taking place at facilities that had handled the newly listed or identified waste prior to the date of the **Federal Register** notice establishing the new listing or identification. Today's rule allows the changes if the facility had handled the waste before the effective date of the rule.

EPA made this change in response to commenters, who pointed out an inconsistency between the proposal's treatment of interim status facilities and the statute's treatment of unpermitted facilities. Under section 3005(e)(A)(ii) of RCRA, facilities handling newly listed or identified wastes may obtain interim status if they were in existence on the effective date of the regulation listing or identifying the waste. EPA does not believe there is any reason to treat interim status facilities and facilities outside the permitting universe differently in this case. Therefore, it has modified the proposed language, so that the trigger date for defining whether a facility is eligible is the effective date of the new listing or identification, not the date of the rule's publication. Note that EPA made a similar change with respect to management of newly listed and identified wastes at permitted facilities in its recent amendments to the permit modification procedures. (*See* 53 FR 37912, September 28, 1988).

One commenter argued that the reconstruction limit should be lifted for changes necessary to handle newly listed or identified wastes, whether or not previously handled at the facility, when the process necessary to handle the newly listed or identified waste was similar to processes already at the facility. The commenter argued that the restriction to wastes previously handled at the facility is unfounded, particularly if the treatment required for handling the new waste is similar to treatment already used at the facility.

EPA disagrees with this comment. The purpose of § 270.72(b)(3) in the August 14 proposal was to prevent disruptions in existing operations at interim status facilities, not to allow facilities to expand their activities significantly without meeting permitting requirements. In doing so, it put interim status facilities on an equal footing with unpermitted facilities. Therefore, EPA has not adopted the commenter's suggestion in today's rule.

The Agency, however, believes that in most cases the flexibility requested by the commenter is already provided in other parts of § 270.72. In particular, facility changes to handle newly

identified wastes, where the unit process is similar to processes already at the facility, are unlikely to exceed the reconstruction limit. If such a change does not exceed the reconstruction limit, it can be made as a change in interim status, as long as it was approved as necessary to comply with Federal, State, or local requirements. Furthermore, such a change that involves storage or treatment solely in tanks or containers might be allowed as a change in interim status, even if the change exceeded the reconstruction limit. (See § 270.72(b)(2)).

4. Changes During Closure

Under § 270.72(b)(4) of today's rule, changes made at an interim status facility during closure in accordance with an approved closure plan are not subject to the reconstruction limit. For example, if an approved closure plan calls for the use of a new tank unit at a facility to treat waste before final disposal, that unit could be brought on to the facility, with Director approval, as a change in interim status. Similarly, if an approved closure plan required on-site incineration, an incinerator may be brought on to the facility as a change in interim status. However, in both cases, the unit could be used to handle only the wastes associated with closure.

EPA stresses that the closure plan approval process provides for Agency review and an opportunity for public comment analogous to that provided by the permit process. For example, in approving a closure plan, EPA or an authorized State would ensure that any new units brought on to the facility under a change in interim status met all applicable Part 265 operating and closure standards. Additional conditions might be required where necessary to ensure that the overall closure activity meets the closure performance standard at § 265.111. In the case of an incinerator, this would mean compliance with the trial burn requirements, the operating standards, and other requirements found in Part 264, depending on the site-specific circumstances. In addition, the closure regulations require public notice and an opportunity for comment, just as do the permitting regulations.

5. Corrective Action

As explained in section III.B.3 of this preamble, § 270.72(b)(5) removes the reconstruction limit for changes necessary to comply with corrective action orders, provided that such changes will be limited to treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility. This amendment will ensure prompter implementation of corrective action orders, while the section 3008(h) procedures will ensure public participation equivalent to permitting. For more discussion, see section III.B.3 of the preamble.

6. Other Issues

One commenter stated that the reconstruction limit is unsound and unwarranted. The commenter pointed out that EPA controls when to call in Part B permit applications and that new units are subject to new technology requirements. Citing the Agency's justification for the reconstruction limit in the preamble to the proposed rule, the commenter argued that if, as the Agency alleged, the purpose of the reconstruction limit is to prevent facilities from expanding during interim status, thereby evading the permitting process, the Agency should explicitly identify the means by which facilities do this and only those methods should be limited by the reconstruction limit. The commenter noted that there is no statutory reference to the reconstruction limit.

The Agency disagrees with this comment. Congress' purpose in establishing "interim status" was to ensure that facilities already in the business of managing hazardous waste were not unduly disrupted by RCRA's new permitting requirements. Interim status provides a mechanism to allow these facilities to continue in operation pending permit review and issuance.

In developing regulations to implement this requirement, EPA recognized that interim status facilities would require some flexibility to maintain operations. Section 270.72 provides that flexibility. However, EPA placed a cap on changes in interim status in the "reconstruction limit," to ensure that interim status facilities could not avoid permitting requirements for major new expansions of activities. Thus, the Agency struck the balance between undue disruption of current facility operations (the goal of interim status in the first instance) and the direction of Congress to move facilities into the permitting universe. This provision is described more fully in the preamble to EPA's interim status regulations (45 FR 33290 at 33324, May 19, 1980).

The August 14 proposal and today's rule do not change the basic requirements of the reconstruction limit. Instead, the purpose of the proposal was to identify specific areas where the reconstruction limit was not necessary or approrpriate. The commenter suggested that, instead of establishing the reconstruction limit as an across-the-board requirement and identifying exceptions, EPA should merely identify those activities where the limit applies. The Agency disagrees. Given the wide range of changes that might take place at an interim status facility, it would be impossible to identify all those that were "permit-like" or that required permit-level public participation. Therefore, the Agency has not adopted this approach, and continues to believe that the reconstruction limit should be lifted only in specific, clearly identified circumstances such as those identified in today's rule.

Another commenter suggested that EPA remove the reconstruction limit for any improvements to a facility that would provide increased protection of human health and the environment. EPA has rejected this standard as overly broad and vague. While the Agency does not wish to delay such changes unduly, it believes that, read broadly, this standard could allow almost any change at a facility, including the construction of a major new landfill or an incinerator. These are the kinds of changes that should undergo permitting and full public participation, regardless of whether they arguably increased health and environmental protection.

Another commenter suggested that the reconstruction limit (and more broadly § 270.72) prohibited a wide range of necessary or beneficial changes not identified in today's regulation. The commenter specifically referred to a storage facility that it claimed was unable to curb and pave an unpaved surface on which palletized drums were stored because the cost of this activity would exceed the reconstruction limit. The commenter in this case, however, has misunderstood the reconstruction limit. This limit applies only to facility changes that are regulated under § 270.72. If a change (for example, a new roof over a container storage area or the paving of a storage area) is not identified under § 270.72(a), and does not otherwise require a RCRA permit, it does not need Director approval before it can be made.

In general, if a facility requests an expansion during interim status, the Agency calculates the cumulative cost of all expansions made under § 270.72 since the time the facility gained interim status to determine if the proposed change constitutes a reconstruction. (Note that changes made to the facility that are not regulated under § 270.72 are not included in the cumulative cost). Today's rule raises the question of whether changes for which the reconstruction limit has been lifted should be included in this calculation of

cumulative cost. The Agency believes that inclusion of such changes could effectively block any subsequent change to the facility under § 270.72. Such an effect would inappropriately limit facility changes in interim status. Therefore, when calculating the cumulative cost of changes to a facility to determine whether a proposed change would constitute a reconstruction, the Agency will exclude the cost of any changes listed under § 270.72(b).

D. Post-Closure Permitting

Today's rule clarifies that the Agency has the authority to deny a permit for the active life of a facility or unit while a decision with respect to the post-closure permit remains pending. This practice allows EPA to close interim status facilities promptly through the permit denial process if they are unable to meet permitting standards, rather than delay denial (and closure) until all post-closure permit conditions have been reviewed and approved. The Agency believes that it has always had the authority to separate these two permit decisions under the permitting regulations, although those regulations did not specifically outline such an approach. In the August 14 **Federal Register** notice, the Agency proposed modifications to its permitting regulations under 40 CFR Part 270 that would make clear this authority. Those amendments, promulgated today, make the following changes: A new § 270.29 is added to specify that the permitting authority may deny a permit under 40 CFR Part 124 either in its entirety or as to the operating portion only; amended § 270.1(c) clarifies that any such partial denial does not affect a facility's responsibility to obtain the post-closure permit; and, amended § 270.10(c) specifies that the permitting authority may deny the operating portion of a permit without awaiting an application that is complete as to post-closure responsibilities. Finally, to assure fairness in this process, today's rule amends §§ 124.1(a), 124.15 (a) and (b), and 124.19 to clarify that a decision under § 270.29 to deny the operating portion of a permit is subject generally to Part 124 procedures and, in particular, to the appeals procedures of § 124.19.

The amendments allow EPA to deal expeditiously with facilities or units clearly unable to meet standards for operation under Part 264. They clarify the Agency's authority, in such cases, to move more expeditiously to permit denial and initiation of the closure process. At the same time, the amendments make it clear that such permit denial does not relieve the facility of its post-closure care responsibilities under the Part 264 standards once the post-closure permit is issued. Prior to issuance of the post-closure permit, the facility or unit remains subject to Part 265 standards. (*See* § 265.1(b)).

If the Agency did not have the authority to bifurcate the permit decision and instead were limited to only one permit decision, then it would have to issue the permit for the post-closure care period at the same time that it denied the portion of the permit concerning operational life. Development of the post-closure information necessary for a complete application and for issuance of the post-closure portion of the permit can be very time-consuming. Thus, the Agency's permitting decision to close a facility could be greatly delayed due to the need to develop post-closure information, even after it became clear that the facility would not be permitted for continued operation.

For instance, under § 124.3(d), failure to submit sufficient information for permitting is a basis for permit denial. However, if the Agency could not deny a permit without simultaneously issuing the post-closure portion of the permit, the permit decision for the facility would be delayed, allowing the facility to continue operation while the Agency gathered information necessary to develop a post-closure permit. In fact, the permit denial might be delayed longer for facilities that have greater deficiencies in their applications, thus rewarding facilities that are in greater noncompliance.

The Agency pointed out in the preamble of the proposed rule that it cannot under these amendments bifurcate the *issuance* of an operating permit and a post-closure permit. No permit may be issued without conditions covering the post-closure period applicable to the facility. One commenter questioned whether EPA in fact adhered to that requirement. The commenter cited a permit that contained no post-closure permit but only incorporated a reference to the post-closure plan. In fact, the permit described by the commenter appears to be consistent with EPA policy, because it contains post-closure conditions (albeit by reference). At the time of "closure," a separate "post-closure permit" would not be issued; instead, the facility owner/operator would be required to follow the terms of the post-closure plan incorporated into the permit.

One commenter objected that a bifurcated permit issuance process would violate due process rights of owners and operators of interim status facilities. First, the commenter argued that, rather than deny a permit for the active life and issue a post-closure permit, the Agency should use its enforcement authority to force closure. The Agency agrees that enforcement may in many cases be the appropriate authority for forcing closure at interim status facilities unable to comply with the regulations. However, the Agency also has the responsibility and in fact is required to deny applications for an operating permit at such facilities, as well as at facilities that prove unwilling to or incapable of preparing a complete application.

Second, the commenter argued that the proposed amendment would provide the Agency with unfettered discretion to deny a permit application at any stage of the process and that possible abuse could occur if the Agency were to use proposed § 270.10(c) rather than the notice of deficiency/response procedures specified in § 124.3 as a means of addressing incomplete applications. The Agency does not agree. To deny a permit, the Agency must follow the applicable procedures of 40 CFR Part 124; today's rule does not change that. The new § 270.29 provides that "[t]he Director may, pursuant to the procedures in Part 124, deny the permit application either in its entirety or as to the active life of a facility or unit only." Permit denial under section 124 presupposes that the completeness review process of § 124.3 has been satisfied. In addition, § 124.6(b) requires that, if the Agency decides to deny a permit application, it must first issue a notice of intent to deny. This, of course, includes a notice of intent to deny a permit for the operating life of a facility and, this notice must follow the same procedures as any draft permit under that section, that is, it must be accompanied by a statement of basis and a fact sheet, based on the administrative record, publicly noticed, and made available for public comment. (*See* § 124.6(e)). In addition, to assure clarity, the Agency has amended §§ 124.1, 124.15 (a) and (b), and 124.19 in today's rule to indicate specifically that the decision to deny the operating life portion of a permit is subject to appeal under the procedures of § 124.19. Thus, today's amendments do not change the applicability of Part 124 procedures for permit denial, which the Agency believes provide owners and operators of interim status facilities full due process protection.

The commenter also pointed out that the Agency amended § 270.10(c) on December 1, 1987 (52 FR 45788) in a rule

that codified certain HSWA provisions. The Agency recognizes this fact and further amends that section in this rule.

One commenter pointed out that while the preamble language discussed bifurcation of permit decisions in terms of "facilities", the regulatory language in proposed §§ 270.1(c) and 270.10(c) referred to "units". The Agency agrees with the commenter that this discrepancy requires clarification. Generally, it is the Agency's practice to issue or deny permits for entire facilities, addressing all units in operation or closing at the site. However, the Agency has authority, under § 270.1(c)(4), to issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all units at the facility. To make it clear that the Agency can either bifurcate its permit denial and post-closure permit decisions with respect to the entire facility or for selected units at the facility, the Agency has modified the language in today's revisions to §§ 270.1 and 270.10(c) to refer to "facility or unit."

E. Permit Modifications to Comply With the Land Disposal Restrictions and to Facilitate Treatment

On September 28, 1988 (53 FR 37912), EPA established a new three-tiered system of procedures for permittee-initiated permit modifications. In that rule, specific facility changes were classified as either Class 1, 2, or 3 modifications. On November 17, 1988 (53 FR 46474), EPA requested further comment in this rulemaking on whether it would be appropriate to allow, as Class 1 modifications, certain facility changes that are necessary to comply with the land disposal restrictions and to otherwise facilitate treatment of hazardous wastes. After reviewing comments on this notice, EPA is today amending the permit modification requirements to add the following types of modifications:

Class 1 modifications without prior approval

1. Addition of new waste codes (or a narrative description) for *disposal* of restricted wastes if:

—Treated to BDAT standards, or
—Treated in compliance with "soft-hammer" standards.
—In addition, the waste must be disposed of in landfills or surface impoundments meeting minimum technology requirements.

2. Addition of new waste codes (or a narrative description) for *disposal* of treated wastewater, waste-water treatment residues, and incinerator ash containing non-restricted waste codes, if:

—Disposed of in a landfill or surface impoundment meeting minimum technology requirements, and
—The receiving landfill or surface impoundment previously handled that type of waste

3. Addition of new waste codes (or a narrative description) for *treatment* if:

—Receiving unit is a tank or container, and
—No new tanks or containers and no new management or treatment processes are added, and
—The receiving unit previously handled that type of waste

Class 1 modification with prior approval

1. Addition of new tanks or containers or new treatment processes in tanks or containers (with or without addition of new waste codes), if:

—Used for treatment of restricted wastes to BDAT or "soft hammer" standards

Each of these new permit modifications are discussed in greater detail below.

1. Disposal of Restricted Wastes that Meet Treatment Standards. In the November 17 notice, the Agency requested comment on establishing a new Class 1 modification for the addition of new waste codes, or a narrative description of wastes, to a permit when the addition covers restricted wastes that meet the applicable treatment standards (i.e., the treatment standard promulgated in Subpart D of Part 268, which standard is based on performance of the Best Demonstrated Available Technology). This change would apply to treatment residues from restricted wastes (including wastes derived therefrom) treated to BDAT levels, or that meet the treatment standards as generated. In addition, the Agency requested comment on whether these modifications should be limited to situations where the receiving unit met the minimum technological requirements.

All of the commenters who responded to this request for further comment supported the general concept of establishing this new Class 1 modification. A few commenters expressed a preference for Agency approval prior to such a facility change. However, most commenters argued that prior Agency approval should not be required. Since the wastes would already meet BDAT treatment standards, the requirement for prior Agency approval would have little environmental benefit and would only delay the implementation of the changes. In addition, many commenters also argued that the minimum technological requirements should not be required for landfills or surface impoundments receiving these wastes because the wastes would meet BDAT standards, and so may legally be disposed in non-MTR landfills and, in limited circumstances, non-MTR impoundments.

EPA agrees with the commenters who urged that this modification be Class 1 without prior Agency approval. However, the Agency disagrees with the commenters who argued that minimum technological requirements should not apply to receiving landfills and surface impoundments. The rationale for establishing a Class 1 modification without prior Agency approval for these types of permit changes is based on the fact that the wastes will be treated in accordance with the applicable treatment standards and that they will be placed in receiving units that meet the most stringent unit design standards (i.e., minimum technology requirements). These prerequisites will assure that the permit modification will be relatively minor and, therefore, appropriate for Class 1. Under the Class 1 process, facilities implementing the change must notify the Agency within 7 days of implementation, and the Agency retains the right to reject a Class 1 modification for cause (e.g., not meeting the Class 1 modification preconditions).

Several commenters pointed out that the minimum technological standards are not imposed on landfills and surface impoundments that would otherwise be subject to those standards as long as they qualify for the exemption in section 3004(o) (2) and (3) (e.g., the unit has alternative design and operating practices or is a monofill). EPA agrees with these commenters that restricted wastes destined for a unit that qualifies for the section 3004(o) (2) or (3) exemption may also be added to the permit as a Class 1 change. This could include impoundments that meet certain of the section 3005(j) exceptions to retrofitting. (See 50 FR 28710, July 15, 1985, and 53 FR 31185–186, August 17, 1988). The Agency believes that this is equitable and protective since these two exemptions are allowed only in situations where environmental protection equivalent to the minimum technological requirements will be achieved.

In summary, today's rule allows the addition of new waste codes, or a narrative waste description, to a permit as a Class 1 modification where the addition involves a restricted waste that

meets the applicable treatment standards, provided that the waste is disposed in a landfill or surface impoundment unit that meets the minimum technology requirements set forth at section 3004(o) (including the exemptions in section 3004(o) (2) and (3)). The modification appears in items (H)(5)(c) (surface impoundments) and J(6)(C) (landfills) of Appendix I to § 270.42.

This amendment will provide permittees the ability to respond quickly to the requirements of the land disposal restrictions. This will facilitate implementation of the land disposal restrictions program by helping to ensure that there is an ultimate disposal outlet for properly treated hazardous wastes (and for wastes that already meet treatment standards). Without a means a disposal, treatment facilities will not accept restricted wastes for treatment, thus undermining the whole purpose of the land disposal restrictions effort. Today's rule will also expedite final disposition of restricted wastes and will encourage the use of units that meet the minimum technological standards. It should be noted that those permittees who have landfill or surface impoundment units that do not meet the minimum technological requirements may generally use the Class 2 procedures to add waste codes for restricted waste treated to (or that meet) BDAT standards.

2. Soft Hammer Waste Treatment Residues. In the November 17 notice, EPA solicited comment on whether the addition of waste codes, or a narrative description, for the receipt of residues from the treatment of "soft hammer" wastes should also be a Class 1 modification. Further, the Agency requested comment on whether such Class 1 modifications should be available only when a certification has been submitted pursuant to § 268.8. This certification would ensure that these wastes would have to be treated by the practically available technologies that yield the greatest environmental benefit (§ 268.8(a)(2)(ii)). Under the approach described in the November 17 notice, therefore, Class 1 modifications would not be available for adding waste codes, or a narrative description, for: (1) *Untreated* "soft hammer" wastes, or (2) any treated "soft hammer wastes" that will not be disposed in a minimum technology landfill or surface impoundment (e.g., if the waste is destined for a land treatment unit).

Most commenters argued that the addition of waste codes to a permit for the receipt of residuals from the treatment of "soft hammer" wastes should be defined as Class 1 without prior Agency approval. Furthermore, several commenters believed that this modification should include the receipt of untreated "soft hammer" wastes.

EPA agrees with the commenters in general regarding the need for greater flexibility for permittees to be able to accept treated "soft hammer" wastes and, therefore, is today promulgating such permit changes as a Class 1 modification. (*See* Appendix I to § 270.42, items H(5)(c) (surface impoundments) and J(6)(c) (landfills)). However, the Agency has determined that only the "soft hammer" treatment residues for which there is a § 268.8 certification should qualify for Class 1 modifications. EPA believes that this limitation is necessary since today's rule is designed in large part to further the legitimate treatment of restricted wastes and to advance the ultimate goal of the land disposal restrictions statutory provisions. Allowing disposal of untreated soft hammer wastes (i.e., soft hammer wastes for which a generator certifies that there is no practically available treatment) does not further these objectives. Furthermore, since no § 268.8 certification is to be filed for soft hammer wastes not destined for disposal in a landfill or impoundment, there is no ready benchmark to evaluate the extent of treatment of such wastes, making the Class 1 modification inappropriate. Other permit changes involving "soft hammer" wastes or residues can generally be allowable under the Class 2 procedures.

3. Other Treatment Residues. EPA, in response to comment, is also allowing as a Class 1 modification without prior approval the addition of new waste codes (or a new narrative description of particular wastes) by a disposal facility to receive residues from wastewater treatment or incineration, or to receive treated wastewater, provided that the disposal unit meets minimum technology requirements, and provided that the surface impoundment or landfill has previously handled this type of waste. For example, if the facility already receives wastewater treatment sludge from treating multi-waste code leachate, it could add waste codes (or a narrative description) to allow it to continue to receive this same type of waste. In addition, today's rule would allow disposal facilities to modify their permits to receive multi-waste code incinerator ash as a Class 1 modification, without prior approval, where the facility already is permitted to accept incinerator ash and the waste is placed in an MTR unit. These modifications are described in items H(5)(d) (surface impoundments) and J(6)(d) (landfills) of Appendix I.

EPA is adopting this provision in response to comment, and also is acting to assure that there are means of disposing of properly treated residues from wastewater treatment and from incineration. As the Agency indicated in the November 17 notice, there are many forms of wastewater treatment and incineration that approximate BDAT that should be facilitated. (*See* 53 FR 46477). Treatment will not occur, however, if there is no means of disposing of the residues from such treatment. The Agency also is assuring that only land disposal units with the most safeguards are eligible for receipt of these treatment residues by limiting eligibility for this Class 1 modification to disposal in minimum technology landfills and surface impoundments.

4. Addition of Wastes at Treatment Facilities. The Agency also solicited comment on whether greater flexibility should be provided for treatment facilities receiving hazardous wastewaters and wastewater treatment residues carrying multiple waste codes not yet subject to land disposal restrictions. EPA specifically cited the problems potentially faced by treatment facilities handling leachate derived from the disposal of waste in the second or third of the schedule. Although the facility's level of treatment might approximate eventual BDAT, if the leachate or leachate treatment residue carries too many waste codes, the treatment facility's permit could preclude immediate receipt. (It should be noted that although many wastewater treatment tank facilities do not require RCRA permits, some do. (*See generally*, 53 FR 34080–81, September 2, 1988). Permits also are required for tanks treating wastewater treatment residues that are non-wastewaters).

Commenters on this question generally recommended that EPA provide broad flexibility for facilities receiving such wastes. In reviewing these comments as well as the principle underlying the current permit modification rules, however, the Agency concluded that a broad approach, setting no limits on the types of wastes received or the treatment conducted would be inappropriate—particularly where a Class 1 modification without prior approval was contemplated. As a result, the Agency has decided on a narrower approach, focusing on the specific examples cited in the November 17 notice.

Today's rulemaking, consequently, establishes a Class 1 modification

without prior approval to allow tank and container treatment facilities to add waste codes (or a narrative description) provided that the treatment occurs in tanks or containers, the facility does not add any new treatment units or types of treatment processes (i.e., methods), the waste does not require any new management standards, and the facility previously handled that type of waste. (*See* F(4)(b) (containers) and G(5)(d) (tanks)).

The Agency notes that in response to comment, it has determined that this Class 1 modification should be available without prior approval. The Agency believes that the limitations placed on eligibility assure minimal changes in existing treatment facility operation, and that the further limitation to treatment in tanks and containers will result in this modification being available only in situations with minimum potential for adverse environmental impact. The Agency also notes that this amendment will in many cases encompass restricted wastes, and thus addresses changes that were covered by the former § 270.42(p), which was superseded on September 28, 1988. In addition, as already noted, the Agency is attempting to avoid regulatory impediments to proper treatment, and believes that this amendment furthers that objective. Moreover, to the extent restricted wastes are involved (and by May, 1990, most wastes will be restricted), this modification furthers the ultimate goals of the land disposal restrictions program as well by increasing availability of treatment and thus allowing the land disposal prohibitions to go into effect without the need of national or case-by-case variances based on lack of existing treatment capacity.

5. New Tanks and Containers to Perform Treatment. In the November 17 **Federal Register** notice, EPA requested comment on the establishment of a Class 1 modification with prior Agency approval for the addition of new waste codes (or a narrative description) where additional tanks and containers, or new treatment processes that take place in tanks and containers, are necessary to treat restricted wastes to meet treatment standards. (The amendment would also cover addition of new tanks or containers, or new treatment processes, without addition of new waste codes). This would include partial treatment that meets treatment standards for some of the hazardous constituents in a waste mixture. Treatment would include treatment according to BDAT standards, or for "soft hammer" wastes, treatment for which a certification will be filed pursuant to § 268.8. This modification would be similar to the previous minor modifications in § 270.42 (o) and (p) that were superseded by the permit modification rule published on September 28, 1988. Most commenters supported this modification and its classification, and the Agency is today promulgating this provision as proposed. (*See* Appendix I of § 270.42, items F(1)(c) and G(1)(e)).

It should be noted that this modification would require Class 1 procedures, *with* prior Director approval. The Agency previously determined, in promulgating the former § 270.42 (o) and (p), that flexibility in adding treatment processes, treatment capacity, and waste codes of restricted wastes, would encourage availability of treatment to meet the BDAT standards and thus would further the objectives of the land disposal restrictions program. (*See* 52 FR 25781, July 8, 1987). At the same time, the Agency still believes that if new tanks or containers, or new treatment processes in tanks or containers, are to be added by the facility, prior Director approval should be required before the modification goes into effect. (In this regard, EPA disagrees with the commenter who stated that the former § 270.42(p) did not require prior Director approval; it in fact did require such approval.)

Another commenter stated that this modification should also include treatment in devices "similar to" tanks and containers. The commenter specifically cited distillation units as an example of such units. The Agency disagrees with this comment. In the first place, most distillation units will probably fall within the definition of tank, and therefore this amendment is unnecessary. (*See* 52 FR 3762–63, February 5, 1987). More importantly, it would be very difficult, if not impossible, to define by regulation which units were "similar to" tanks and which were not. The Agency, therefore, is not adopting this suggestion.

6. Other Issues. In commenting on the November 17 notice, several commenters raised a number of issues directly related to the "derived from" rule as discussed in the August 17, 1988 First Thirds Land Disposal Restrictions rule (53 FR 31138). Today's rule only addresses procedural concerns arising from the Agency's long-standing interpretation of the "derived from" rule. The more substantive aspects regarding the application of the "derived from" provisions are not part of this rulemaking.

Today's Class 1 modifications also do not apply to the listed dioxin-containing hazardous wastes (F020, 021, 022, 023, 026, 027, and 028). Such an amendment raises complicated issues beyond the scope of the Agency's notice and not discussed in any detail in the public comments.

The Agency also adds one further note respecting waste codes. Federal RCRA regulations do not require that waste codes be listed in permits. Although such permits must contain some language authorizing receipt of particular hazardous wastes, that language might for example take the form of a narrative description (for example "residues from incineration" or "residues from treating leachate"). Thus, facilities wishing to modify their permits pursuant to today's amendments could do so by establishing a narrative description of allowable wastes instead of by adding particular waste codes.

IV. State Authority

A. Applicability of Rule in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (*See* 40 CFR, Part 271 for the standards and requirements for authorization). Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments (HSWA) of 1984, a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal Program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to implement those requirements and prohibitions in an authorized State, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related

provisions as State law to retain final authorization, HSWA applies in authorized States in the interim.

However, it should be noted that section 3009 of RCRA and § 271.1(i) provide that States can impose requirements that are more stringent than the Federal requirements. Federal program changes that are less stringent or reduce the scope of the Federal program do not have to be adopted by authorized States. Furthermore, any authorized State requirement that is more stringent than a newly enacted less-stringent Federal provision remains in effect as authorized State law. This is true even if the less stringent Federal requirements are imposed by HSWA. For less stringent Federal program changes (or changes that reduce the scope of the program), the combined effect of RCRA sections 3006 and 3009 will result in one of the two following situations. In the first case, if the new Federal requirements are promulgated pursuant to pre-HSWA authority, such requirements will not take effect in an authorized State unless and until the State chooses to adopt them as part of the State program. In contrast, less stringent Federal requirements that are imposed by HSWA authority become part of the Federal program that is in effect in all States, including authorized States; however, as discussed above, any more stringent State requirement remains in effect as authorized State law. Therefore, as a practical matter, the regulated community may not be able to benefit from the less stringent Federal HSWA provisions until the State chooses to amend its more stringent authorized RCRA regulations or enabling authority.

B. Effect on State Authorizations

Today's rule is considered to be less stringent than, or to reduce the scope of, existing Federal requirements. Therefore, authorized States are not required to modify their programs to adopt requirements equivalent to these provisions.

Today's rule is not a rule that imposes a requirement or prohibition pursuant to HSWA. However, portions of today's rule may be necessary in appropriate situations to effectively implement HSWA. For example, use of a Class 1 modification to add waste codes and/or narrative descriptions of treatment residues to RCRA permits may be necessary in appropriate situations to effectively implement the treatment requirements and prohibitions of the HSWA land disposal restrictions program. Other examples would involve a change in interim status needed to comply with an EPA-issued section 3008(h) corrective action order or to comply with the minimum technology requirements of HSWA section 3004(o). Hence, the portions of today's rule necessary to implement HSWA in appropriate situations will be immediately effective and administered by EPA in all States pursuant to RCRA section 3006(g). The Agency notes that a permit modification that specifies waste codes and/or narrative descriptions for a permit that previously did not specify waste codes and/or provided a less specific description may create a more stringent permit. Furthermore, during EPA's administration of today's rule, depending on State law, a State may not need to take any action to recognize the effectiveness of a Class 1 modification.

V. Effective Date

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

Today's rule establishes requirements that are less stringent than requirements currently in place. Since the rule relaxes regulations with which the regulated community is required to comply, the Agency finds that the regulated community does not need six months to come into compliance. In addition, the Agency believes that it is important for these amendments to become effective as soon as possible, because of the need for flexibility on the part of interim status facilities to comply with new requirements coming into effect, such as the land disposal restrictions and corrective action. These reasons also provide good cause for making today's rule immediately effective under section 553(d) of the Administrative Procedure Act.

VI. Regulatory Analysis

A. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "major" and thus whether it must prepare and consider a Regulatory Impact Analysis in connection with the rule. Today's rule is not major because it will not result in an annual effect on the economy of $100 million or more, nor will it result in an increase in costs or prices to industry. 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. Therefore, the Agency has not prepared a Regulatory Impact Analysis for today's rule. This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12291.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, at the time an Agency publishes a proposed or final rule, it must prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities, unless the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. Today's rule provides more flexibility for treatment, storage, or disposal facilities to respond to new requirements and does not affect the compliance burdens of the regulated community. Therefore, pursuant to 5 U.S.C 601b, I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

List of Subjects

40 CFR Part 124

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements.

40 CFR Part 270

Administrative practice and procedure, Hazardous waste, Reporting and recordkeeping requirements, Permit application requirements, Permit modification procedures, Waste treatment and disposal.

Date: February 26, 1989.

William K. Reilly,

Administrator.

Therefore, Subchapter I of Title 40 is amended as follows:

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for Part 124 continues to read as follows:

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

2. In § 124.1, paragraph (a) is amended by adding a sentence to the end to read as follows:

§ 124.1 Purpose and scope.

(a) * * * The procedures of this part also apply to denial of a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29.

* * * * *

3. In § 124.15, the first sentences in paragraphs (a) and (b) introductory text, are revised to read as follows:

§ 124.15 Issuance and effective date of permit.

(a) After the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator shall issue a final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29).

* * * * *

(b) A final permit decision (or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under § 270.29) shall become effective 30 days after the service of notice of the decision unless:

* * * * *

4. In § 124.19, the first sentence of paragraph (a) introductory text, is revised to read as follows:

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(a) Within 30 days after a RCRA, UIC, or PSD final permit decision (or a decision under § 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. * * *

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PART 270—EPA-ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. The authority citation for Part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

2. In § 270.1, paragraph (c) introductory text, is amended by adding a sentence to the end to read as follows:

§ 270.1 Purpose and scope of these regulations.

* * * * *

(c) * * * The denial of a permit for the active life of a hazardous waste management facility or unit does not affect the requirement to obtain a post-closure permit under this section.* * *

3. In § 270.10, paragraph (c) is amended by adding a sentence to the end to read as follows:

§ 270.10 General application requirements.

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(c) * * * The Director may deny a permit for the active life of a hazardous waste management facility or unit before receiving a complete application for a permit.

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4. In Part 270, a new § 270.29 is added to Subpart B to read as follows:

§ 270.29 Permit denial.

The Director may, pursuant to the procedures in Part 124, deny the permit application either in its entirety or as to the active life of a hazardous waste management facility or unit only.

5. Section 270.42, Appendix I is amended by revising items F(1)(a), F(1)(b), F(3), G(1)(a), G(1)(b), (G)(5)(a), and G(5)(b) and adding items F(1)(c), F(4)(a), F(4)(b), G(1)(e), G(5)(c), G(5)(d), H(5)(c), H(5)(d), J(6)(c), and J(6)(d) as follows:

§ 270.42 Permit modification at the request of the permittee.

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Appendix I to § 270.42—Classification of Permit Modifications

Modification	Class
* * * * *	
F. *Containers*	
1. Modification or addition of container units:	
a. Resulting in greater than 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) below	3
b. Resulting in up to 25% increase in the facility's container storage capacity, except as provided in F(1)(c) and F(4)(a) below	2
c. Or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), with prior approval of the Director. This modification may also involve addition of new waste codes or narrative descriptions of wastes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1 1
* * * * *	
3. Storage of different wastes in containers, except as provided in (F)(4) below:	
* * * * *	
4. Storage of treatment of different wastes in containers:	
a. That require addition of units or change in treatment process or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards, or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
b. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
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G. *Tanks*	
1. * * *	
a. Modification or addition of tank units resulting in greater than 25% increase in the facility's tank capacity, except as provided in G(1)(c), G(1)(d), and G(1)(e) below	3
b. Modification or addition of tank units resulting in up to 25% increase in the facility's tank capacity, except as provided in G(1)(d) and G(1)(e) below	2
* * * * *	
e. Modification or addition of tank units or treatment processes necessary to treat wastes that are restricted from land disposal to meet some or all of the applicable treatment standards or to treat wastes to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), with prior approval of the Director. This modification may also involve addition of new waste codes. It is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1 1
* * * * *	
5. * * *	
a. That require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process from that authorized in the permit, except as provided in (G)(5)(c) below	3
b. That do not require additional or different management practices, tank design, different fire protection specifications, or significantly different tank treatment process than authorized in the permit, except as provided in (G)(5)(d)	2

Modification	Class
c. That require addition of units or change in treatment processes or management standards, provided that the wastes are restricted from land disposal and are to be treated to meet some or all of the applicable treatment standards or that are to be treated to satisfy (in whole or in part) the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii). The modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	[1] 1
d. That do not require the addition of units or a change in the treatment process or management standards, and provided that the units have previously received wastes of the same type (e.g., incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	
H. * * *	
5. * * *	
c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 269.8(a)(2)(ii), and provided that the unit meets the minimum technological requirements stated in § 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a unit that meets the minimum technological requirements stated in §268.5(h)(2), and provided further that the surface impoundment has previously received wastes of the same type (for example, incinerator scrubber water). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
* * * * *	
J. * * *	
6. * * *	
* * * * *	
c. That are wastes restricted from land disposal that meet the applicable treatment standards or that are treated to satisfy the standard of "use of practically available technology that yields the greatest environmental benefit" contained in § 268.8(a)(2)(ii), and provided that the landfill unit meets the minimum technological requirements stated in § 268.5(h)(2). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
d. That are residues from wastewater treatment or incineration, provided that disposal occurs in a landfill unit that meets the minimum technological requirements stated in §268.5(h)(2), and provided further that the landfill has previously received wastes of the same type (for example, incinerator ash). This modification is not applicable to dioxin-containing wastes (F020, 021, 022, 023, 026, 027, and 028)	1
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[1] Class 1 modifications requiring prior Agency approval.

6. Section 270.72 is revised to read as follows:

§ 270.72 Changes during interim status.

(a) Except as provided in paragraph (b), the owner or operator of an interim status facility may make the following changes at the facility:

(1) Treatment, storage, or disposal of new hazardous wastes not previously identified in Part A of the permit application (and, in the case of newly listed or identified wastes, addition of the units being used to treat, store, or dispose of the hazardous wastes on the effective date of the listing or identification) if the owner or operator submits a revised Part A permit application prior to such treatment, storage, or disposal;

(2) Increases in the design capacity of processes used at the facility if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the changes because:

(i) There is a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities, or

(ii) The change is necessary to comply with a Federal, State, or local requirement.

(3) Changes in the processes for the treatment, storage, or disposal of hazardous waste or addition of processes if the owner or operator submits a revised Part A permit application prior to such change (along with a justification explaining the need for the change) and the Director approves the change because:

(i) The change is necessary to prevent a threat to human health and the environment because of an emergency situation, or

(ii) The change is necessary to comply with a Federal, State, or local requirement.

(4) Changes in the ownership or operational control of a facility if the new owner or operator submits a revised Part A permit application no later than 90 days prior to the scheduled change. When a transfer of operational control of a facility occurs, the old owner or operator shall comply with the requirements of 40 CFR Part 265, Subpart H (Financial Requirements), until the new owner or operator has demonstrated to the Director that he is complying with the requirements of that subpart. The new owner or operator must demonstrate compliance with Subpart H requirements within six months of the date of the change in ownership or operational control of the facility. Upon demonstration to the Director by the new owner or operator of compliance with Subpart H, the Director shall notify the old owner or operator in writing that he no longer needs to comply with Subpart H as of the date of demonstration. All other interim status duties are transferred effective immediately upon the date of the change in ownership or operational control of the facility.

(5) Changes made in accordance with an interim status corrective action order issued by EPA under section 3008(h) or other Federal authority, by an authorized State under comparable State authority, or by a court in a judicial action brought by EPA or by an authorized State. Changes under this paragraph are limited to the treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility.

(b) Except as specifically allowed under this paragraph, changes listed under paragraph (a) of this section may not be made if they amount to reconstruction of the hazardous waste management facility. Reconstruction occurs when the capital investment in the changes to the facility exceeds 50 percent of the capital cost of a comparable entirely new hazardous waste management facility. If all other requirements are met, the following changes may be made even if they amount to a reconstruction:

(1) Changes made solely for the purposes of complying with the requirements of 40 CFR 265.193 for tanks and ancillary equipment.

(2) If necessary to comply with Federal, State, or local requirements, changes to an existing unit, changes solely involving tanks or containers, or addition of replacement surface inpoundments that satisfy the standards of section 3004(o).

(3) Changes that are necessary to allow owners or operators to continue

handling newly listed or identified hazardous wastes that have been treated, stored, or disposed of at the facility prior to the effective date of the rule establishing the new listing or identification.

(4) Changes during closure of a facility or of a unit within a facility made in accordance with an approved closure plan.

(5) Changes necessary to comply with an interim status corrective action order issued by EPA under section 3008(h) or other Federal authority, by an authorized State under comparable State authority, or by a court in a judicial proceeding brought by EPA or an authorized State, provided that such changes are limited to the treatment, storage, or disposal of solid waste from releases that originate within the boundary of the facility.

(6) Changes to treat or store, in tanks or containers, hazardous wastes subject to land disposal restrictions imposed by Part 268 or RCRA section 3004, provided that such changes are made solely for the purpose of complying with Part 268 or RCRA section 3004.

7. In § 270.73, paragraphs (e) and (f) are redesignated as paragraphs (f) and (g) and a new paragraph (e) is added to read as follows:

§ 270.73 Termination of interim status.

* * * * *

(e) For owners or operators of any land disposal unit that is granted authority to operate under § 270.72(a)(1), (2) or (3), on the date 12 months after the effective date of such requirement, unless the owner or operator certifies that such unit is in compliance with all applicable ground-water monitoring and financial responsibility requirements.

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