Temporary Authorizations at Permitted Facilities

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Permit Modifications for Hazardous Waste Management Facilities; Final Rule

identified in Appendix I to 40 CFR Part 270 and discussed more fully in Section IV.C of this preamble.

Since Class 3 modifications involve substantial changes to facility operating conditions or waste management practices, they should be subject to the same review and public participation procedures as permit applications. The specific procedures for Class 3 modifications are at 40 CFR 270.42(c).

The first steps in the application procedures for Class 3 modifications are similar to the procedures for Class 2. Under § 270.42(c)(1), the permittee must submit a modification request to the Agency indicating the change to be made to the permit; identifying the change as a Class 3 modification; explaining why the modification is needed; and providing applicable information required by 40 CFR 270.13 through 270.21, 270.62, and 270.63. As with Class 2 modifications, the permittee is encouraged to consult with the Agency before submitting the modification request.

Section 270.42(c)(2) requires the permittee to notify persons on the facility mailing list and local and State agencies about the modification request. This notice must occur not more than 7 days before the date of submission nor more than 7 days after the date of submission. The notice must contain the same information as the Class 2 notification, including an announcement of a public informational meeting. The meeting would be held no fewer than 15 days after the notice and no fewer than 15 days before the end of the comment period.

Finally, after the conclusion of the 60-day comment period, the permitting Agency then initiates the permit issuance procedures of 40 CFR Part 124 for the Class 3 modification. Thus, the Agency will prepare a draft permit modification, publish a notice allow a 45-day public comment period on the draft permit modification, hold a public hearing on the modification if requested and issue or deny the permit modification. In addition, the Agency will consider and respond to all written comments received by the Agency during the 60-day public comment period as it conducts the activities required by Part 124.

In the September 23 notice, EPA proposed procedures for a second public meeting, which would be held at the owner or operator's discretion. EPA received several comments objecting to the requirements prescribing how the second meeting would be conducted (e.g., use of a neutral facilitator), particularly since the meeting was voluntary (i.e., the permittee could decide not to hold the meeting at all). In consideration of these comments, the Agency has dropped the reference to a second meeting in the Class 3 process. The purpose of today's rule is to specify the minimum requirements that must be followed for a Class 3 modification. Additional activities beyond those contained in today's rule (e.g., additional public meetings) may take place. In fact, EPA encourages frequent and early communications between the permittee and interested local citizens to informally address and resolve issues these parties may have. However, it is inappropriate to prescribe how such voluntary activities must be conducted.

EPA received very few additional comments on the proposed Class 3 procedures. One commenter wanted a provision for automatic authorization in the absence of Agency decisions on Class 3 modifications. EPA declines to do this because Class 3 modifications may have a significant effect on human health and the environment if the appropriate permit conditions based on Part 264 standards are not developed prior to actual implementation. This situation is unlike that for Class 2 modifications, which are more limited in their potential to adversely impact human health and the environment.

4. Other Permit Modifications

Although EPA has sought to provide a complete list of possible permit modifications and their classifications in Appendix I, there will undoubtedly be permit modification requests that are not included in Appendix I. Therefore, EPA today is establishing procedures that permittees can use under § 270.42(d) where a permittee wishing to make a permit modification not included in Appendix I can submit a Class 3 modification request, or alternatively ask the Agency for a determination that Class 1 or 2 modification procedures should apply. In making this determination, the Agency will consider the similarity of the requested modification to modifications listed in Appendix I, and will also apply the general definitions of Class 1, 2, and 3 modifications. It should be noted that EPA intends to monitor decisions by permitting authorities (both EPA Regional offices and authorized States) on modification request classifications and will periodically amend Appendix I of this regulation to include new classifications.

Several commenters supported this proposed approach. Others stated that there should be a specified time limit on the Agency's classification determination. EPA disagrees because the determinations may be varied in nature and complexity. Also, since the decisions may sometimes be precedential, consultations among authorized States, EPA Regional offices, or EPA headquarters may be necessary. The Agency is committed to making a speedy decision for these classifications, but believes that a deadline will not be beneficial in these circumstances. Therefore, EPA has decided not to set a time limit for decisions of modifications classifications.

When the permittee chooses to request a classification determination instead of following the Class 3 process, then he or she should not initiate the formal modification review procedures until the Agency has decided on the appropriate classification. Otherwise, there may be confusion among the public concerning which process is being followed. Furthermore, the deadlines for Agency decisions in the Class 2 process will not begin until after the Agency has decided that the Class 2 procedures are appropriate for the modification and the permittee then proceeds in accordance with § 270.42(b). In any case, it should not take long for the permitting Agency to assign a classification to the modification request.

The proposal provided that the Agency would notify persons on the facility mailing list after making a determination on an unclassified change, and that the public and the permittee would have the right to appeal the decision. EPA is not adopting these provisions in today's rule, as discussed in section IV.B.6 of the preamble.

5. Temporary Authorizations

Today's rule provides the Agency with the authority to grant a permittee temporary authorization, without prior public notice and comment, to conduct activities necessary to respond promptly to changing conditions. (*See* § 270.42(e).) It is expected that temporary authorizations will be useful in the following two situations: (1) To address a one-time or short-term activity at a facility for which the full permit modification process is inappropriate; or (2) to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process.

An Agency-issued temporary authorization may be obtained for activities that are necessary to: (i) Facilitate timely implementation of closure or corrective action activities; (ii) allow treatment or storage in tanks or containers of restricted wastes in accordance with Part 268; (iii) avoid disrupting ongoing waste management

activities at the permittee's facility; (iv) enable the permittee to respond to changes in the types or quantities of wastes being managed under the facility permit; or (v) carry out other changes to protect human health and the environment. Temporary authorizations can be granted for any Class 2 modification that meets these criteria, or for a Class 3 modification that is necessary to: (i) Implement corrective action or closure activities; (ii) allow treatment or storage in tanks or containers of restricted waste; or (iii) provide improved management or treatment of a waste already listed in the permit, where necessary to avoid disruption of ongoing waste management, allow the permittee to respond to changes in waste quantities, or carry out other changes to protect human health and the environment. A temporary authorization will be valid for a period of up to 180 days. The term of the temporary authorization will begin at the time of its approval by the Agency, or at some specified effective date shortly after the time of approval. The authorized activities must be completed at the end of the authorization.

Several commenters responded on the subject of temporary authorizations. Several supported the approach contained in the proposal, citing the beneficial flexibility to change certain facility operations with no adverse effect to human health or the environment.

Two other commenters supported the use of temporary authorizations, but for more restricted uses (e.g., for on-site wastes only or for unexpected situations only). One commenter was generally opposed because of a lack of public comment and hearings. EPA disagrees because the use of temporary authorizations is allowed only for specified purposes, which are intended to improve the management of hazardous wastes or respond to a critical situation. The Agency will have the authority to deny any requests which are not protective of human health and the environment or do not meet the criteria for a temporary authorization. Also, as discussed below, the permittee must notify persons on the facility mailing list about the temporary authorization and must comply with Part 264 standards for its duration.

The proposal would not have allowed temporary authorizations for periods of less than 90 days. In today's final rule, however, EPA has eliminated this minimum length to provide that the term of a temporary authorization may be for any period up to 180 days. Although two commenters supported the proposed minimum length, EPA is making today's change for two reasons.

First, the minimum specified period of 90 days seemed arbitrary and would likely result in restricting the Agency's flexibility to allow facilities to respond to temporary situations. For example, if the Agency believed that there was good cause to authorize a facility to conduct a particular activity without a permit modification but that the task should be completed within 30 days under the proposal, the Agency would be limited to approving the activity for 90 days or denying the request. Given that temporary authorizations were developed to allow a rapid response without the limitations of a formal permit modification, to set an arbitrary minimum duration would be needlessly restrictive and likely counterproductive.

Second, the duration of a temporary authorization under proposed § 270.42(e) (i.e., 90 to 180 days) was inconsistent with the temporary authorization which may be granted by the Agency at day 90 or 120 in the Class 2 process which can be granted for 1 to 180 days (see § 270.42(b)(6)(i)(D)). The different treatment of these temporary authorizations could lead to confusion.

The criteria in the final rule for approval of temporary authorizations under § 270.42(e)(3) are the same as proposed on September 23, 1987 except for two changes. First, in response to several requests by commenters, EPA is adding a specific provision for the storage and treatment of wastes subject to the land disposal restrictions of Part 268. This will give the regulated industry the flexibility to treat and store restricted wastes in tanks and containers, while the permit modification process is conducted. The Agency believes that there was sufficient flexibility to approve these changes as a temporary authorization under the proposed criteria; however, commenters wanted an assurance that the activities allowed under the recently promulgated minor modification provision in § 270.42(p)—which will be eliminated with today's new modification process—will be eligible for a temporary authorization under the new system. Therefore, these activities involving restricted wastes are specifically endorsed for temporary authorizations in new § 270.42(e)(3)(ii)(B).

In a second change, EPA decided not to retain the proposed temporary authorization provision for management of newly regulated waste. Instead, management of such waste is addressed solely under § 270.42(g). Although some commenters suggested keeping both alternatives, other commenters believed that the special procedure for new wastes in § 270.42(g) is generally more appropriate. EPA believes that it is preferable to have a single procedure for addressing newly regulated wastes, and agrees that § 270.42(g) is more appropriate since it is designed specifically for that situation. (See preamble discussion in Section IV.B.7.)

Section 270.42(e) (2) through (4) details the procedures for granting temporary authorizations. Under these procedures, the permittee must submit to the Agency a request for a temporary authorization describing the activities to be conducted; explain why the temporary authorization was necessary; and provide sufficient information to ensure compliance with Part 264 standards. In addition, the permittee would be required to notify all persons on the facility mailing list and local and State agencies about the temporary authorization request within seven days of the request.

Section 270.42(e)(3) requires the Agency to approve or deny the temporary authorization as quickly as practical. To approve the authorization, the Agency must find that the request meets the criteria for a temporary authorization. It should be noted that today's rule, like the proposal, require compliance with Part 264 for Agency-initiated temporary authorizations. This is because the procedures for obtaining such an authorization provides for Agency review of the permittee's request and an affirmative Agency action to approve the conditions of the authorization. Therefore, an Agency permit writer will be involved in establishing the appropriate operating conditions based on the Part 264 standards. This is in contrast to the automatic temporary authorizations (discussed in Section IV.B.2.ii above) where Part 265 standards are more appropriate since there are no Agency-prescribed site specific conditions developed.

A denial of a temporary authorization request would not prejudice action on any concurrent modification request. The denial only means that the activities contemplated by the permittee were not eligible for a temporary authorization. The request could still be acceptable as a permit modification.

In today's final rule, EPA has modified the language in § 270.42(e)(4) from the proposal. As proposed, § 270.42(e)(4)(i) required the owner or operator to submit a "complete modification request" within 60 days of obtaining a temporary authorization. This provision assumed

there would be circumstances where the permittee might not have time to provide all the material required under Part 270 (e.g., changes to closure plans or training plans) prior to issuance of the temporary authorization.

Several commenters disagreed with this proposal, pointing out that in many cases a temporary authorization could address a short-term or one-time situation, and would not require a permanent modification to the permit and submission of all the Part 270 information. EPA agrees with these commenters, and finds the 60-day deadline unnecessary, particularly since § 270.42(e)(3)(i) requires the permittee to demonstrate in his or her request that the Part 264 standards will be achieved. Thus, the Director should have all information necessary prior to a temporary authorization decision. In cases where some additional minor information is needed, the Director could make the authorization conditional on the submission of this information on an appropriate schedule.

The proposal allowed the renewal of a temporary authorization (§ 270.42 (e)(1) and (e)(4)(iii)), if the permittee initiated the Class 2 or 3 process for a permit modification. Today's rule modifies and clarifies these provisions. As required in § 270.42(e)(4) today, a temporary authorization cannot be reissued except through the following procedures. First, the permittee must initiate the appropriate Class 2 or 3 modification process for the activity covered in the temporary authorization. In addition, for a Class 2 modification, any extension of the activity approved in the temporary authorization must take place under Class 2 procedures. Finally, for a Class 3 modification, the Director may extend the temporary authorization if warranted to allow the authorized activity to continue while Class 3 procedures are completed.

The result of today's change for a temporary authorization that is concurrently undergoing the Class 2 review is to set a limit, generally, of 300 days for operation under the temporary authorization. The proposal would have allowed, in extreme cases, up to 540 days of temporary authorization before a final Agency decision was required. (For example, a 280-day authorization, reissued for a second 180-day period, and then the Director's decision per § 270.42(e)(4)(ii) to issue an additional authorization of 180 days.) These changes were made in response to commenters, who requested a shorter and clearer schedule for Agency decisions on Class 2 changes subject to temporary authorizations. EPA agrees with these comments, and maintains that Class 2 changes should be reviewed rapidly and incorporated into the permit as a modification. It is not appropriate for these decisions to be postponed for up to a year and a half. For these reasons, today's rule does not allow extension of a temporary authorization for a Class 2 activity, except through the Class 2 procedures that are leading to an Agency decision on the modification request.

For Class 3 modifications, the renewal of the temporary authorization is at the discretion of the Director if he or she believes that it is appropriate for the activities to continue while the Class 3 modification process is completed. In most cases it will be difficult to complete the Class 3 process in the 180 days allowed for the temporary authorization, since there will be at least 105 days of public comment (60 days for comment on the applicant's modification request and 45 days for comment on the draft permit modification prepared by the Agency), as well as one or more public meetings and a public hearing, if requested. Therefore, today's rule allows the extension of a Class 3 temporary authorization for an additional 180 days, for a maximum of 360 days. However, this would be allowed only if the facility is proceeding toward a Class 3 modification.

In summary, the Agency-issued temporary authorization mechanism provides a reasonable balance between the public's right to be informed of and comment on activities at permitted hazardous waste facilities and the facility owner/operator's need to implement certain changes rapidly. More generally, the temporary authorization procedure will provide important flexibility to permitted hazardous waste facilities without sacrifice to public health or the environment. Because temporary authorizations are designed specifically for activities necessary to improve management of hazardous waste or to conduct timely closures and corrective actions, this authority should actually reduce risk and promote safe handling of wastes. For this reason, EPA believes that the temporary authorization procedure will be of benefit to the regulated industry, regulating agencies, and the public.

6. Notification Requirements and Permit Modification Appeals

Under today's rule, the Director will notify persons on the facility mailing list and appropriate state and local government agencies within 10 days of any decision to grant or deny a permit modification request (except for Class 1 modifications and temporary authorizations). (*See* § 270.42(f).) Such notification will also be given within 10 days after a Class 2 automatic authorization takes effect. The permit appeal procedures of 40 CFR 124.19 apply to the Director's decision to grant or deny a Class 2 or 3 permit modification request and to Class 2 automatic authorizations. For Class 1 modifications, temporary authorizations, and classification determinations, the appeal procedures of Part 124 do not apply, although in many cases there are opportunities to seek a change in the modification or authorization, as discussed in more detail below.

The proposal provided that the Agency would notify persons on the facility mailing list after making a determination on an unclassified change, after approving a Class 1 modification (when prior approval is needed), and after granting a temporary authorization. However, EPA received a number of comments from state agencies and industry arguing that there are too many required notices in the proposal, and that numerous notifications add complexity to the process and divert Agency resources to administrative tasks instead of to protection of the environment. EPA agrees with this comment for notifications of temporary authorizations, classification determinations, and Class 1 approvals.

In the case of Agency classification determinations, there will be subsequent public notification of the proposed changes as the facility proceeds with its modification request. The public will be able to raise concerns at that time if they believe that the modification request has been incorrectly classified. For these reasons, EPA believes that the notice regarding a classification determination would be redundant, and therefore is not adopting it in today's rule.

For Class 1 modifications, the permittee is required to provide notice of the change to persons on the facility mailing list within 90 days, including those cases where prior Director approval is required. (See § 270.42(a)(1)(ii).) The proposal would have also required that the Agency send a notice of its decision to the facility mailing list for a Class 1 modification that required prior Agency approval. EPA believes that there is no need for the Agency to mail such a notice since the permittee will be sending a similar notice. Two notifications regarding a single Class 1 modification would be a duplication of effort and could also be confusing to people on the mailing list.