

US EPA ARCHIVE DOCUMENT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 265, 270, 271

[FRL-3143-1]

Changes to Interim Status and Permitted Facilities for Hazardous Waste Management; Procedures for Post-Closure Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) today proposes to amend its hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) governing changes at interim status and permitted hazardous waste management facilities. This proposed rule is intended to simplify changes that are necessary to comply with new regulatory requirements. EPA also proposes to amend its 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.

DATES: Comments must be received on or before October 13, 1987.

ADDRESSES: The public must submit an original and two copies of its comments to: EPA RCRA Docket (S-212) (WH-562), 401 M Street SW., Washington, DC 20460.

Place "Docket number F-87-RIPP-FFFFF" on your comments. The OSW docket for this proposed rulemaking is located in the sub-basement at the above address, and is open from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The public must make an appointment by calling (202) 475-9327 to review docket materials. 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 (WH-563), U.S. Environmental Protection Agency, Washington, DC 20460, telephone (202) 382-7729.

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I. Authority

These regulations are proposed 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. Purpose of Rulemaking

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 of. 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 existence 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 existence 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.

A facility with a permit or interim status may change its waste management operations only under certain conditions, specified in EPA's

regulations on permit modifications (40 CFR 270.41 and 270.42) and changes in interim status (40 CFR 270.72). On occasion, however, new regulations issued under RCRA may necessitate changes at permitted or interim status facilities that cannot readily be made under the regulations, resulting in unnecessary delay and in some cases increased risk to human health and the environment. For example, section 3015 of the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA imposed minimum technological requirements on certain interim status landfills, surface impoundments, and waste piles. On July 15, 1985, the Agency codified section 3015 (50 FR 28702). To comply with these new requirements and continue handling hazardous waste, many interim status facilities may have to make changes that are not allowed during interim status by the current regulations. The combined effect of these provisions may be to leave some facilities with no means of complying with the RCRA regulations, except to cease their operations while they apply for a RCRA permit.

To avoid this undesirable result, the Agency is today proposing regulatory changes to increase permitted and interim status facilities' flexibility to make changes necessary to comply with new requirements. Specifically, the proposal would allow a permitted facility to add a newly listed or identified waste to its permit as a "minor" permit modification, pending the review of a major modification request, provided that the facility was handling the waste prior to the time EPA defined it as hazardous. In addition, the proposed rule would allow owners and operators of interim status facilities to increase design capacity if necessary to comply with Federal, State, or local requirements. The rule would also amend § 270.72 to specify that owners and operators of interim status facilities may make changes in accordance with corrective action orders. It would also remove the "reconstruction" limit of the current § 270.72(e) for certain changes at interim status facilities necessary to comply with Federal, State, or local requirements, for changes made during closure of a facility or of a unit within a facility, and for changes necessary to continue handling newly listed or identified hazardous wastes. The proposed rule would further amend the current regulations to specify that the reconstruction limit does not apply to corrective action orders. However, the proposal conditions changes to an interim status facility that involve the addition of a land disposal unit on the

submission of certifications of compliance with all applicable groundwater monitoring and financial responsibility requirements within 12 months.

EPA is also proposing to amend its permitting regulations to clarify the Agency's 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. 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 to delay denial (and closure) until all post-closure conditions have been reviewed and approved.

The following sections of this preamble discuss the current regulations and proposed amendments in more detail.

III. Changes in Permitted Facilities—Newly Listed or Identified Wastes

Sections 270.41 and 270.42 of the RCRA regulations specify procedures for "major" and "minor" permit modifications. EPA or an authorized State may make minor permit modifications, which are enumerated in § 270.42, with the consent of the permit holder. Major modifications, which include any changes not specifically listed as minor, however, can be made only in accordance with the permit modification requirements of 40 CFR Part 124. The major modification procedures are essentially the same as those that apply to initial issuance of a permit. The only significant difference is that for a major modification, only those conditions of the permit to be modified are reopened. The major permit modification procedures include submission of an updated application, if requested by the permitting agency; preparation and public notice of a draft permit; and opportunity for a public hearing. As a result, major modifications may involve a lengthy administrative process requiring the expenditure of substantial time and resources.

Under the current regulations, the handling of hazardous wastes not listed in a facility permit constitutes a major permit modification. This requirement applies not only to the handling of wastes currently defined as hazardous, but also to newly listed or identified wastes. Therefore, if a permitted facility is handling a solid waste that EPA lists as hazardous under section 3001(b) of RCRA or that possesses characteristics that EPA identifies as hazardous under sections 3001 (g) and (h), the facility's permit must undergo a major

modification to allow it to continue to handle the waste.

As EPA identifies new hazardous wastes, either through new listings or by defining new hazardous characteristics, the burdens associated with the major permit modification procedures will increase substantially. For example, EPA's proposed organic toxicity characteristic, which is based on a Toxicity Characteristic Leaching Procedure (TCLP) (51 FR 21648, June 13, 1986), when final, may significantly expand the universe of hazardous wastes and may designate as hazardous many solid wastes now handled at permitted facilities—either in permitted storage, treatment, or disposal units or in units elsewhere on the facility that are unrelated to the permitted unit. These facilities will have to obtain approved permit modifications by the effective date of that rule in order to continue to store, treat, or dispose of the waste.

The Agency expects that as more permits are issued, the number of permit modifications will increase (e.g., many routine changes in the facility's operation require permit modifications). At the same time, the Agency will also be giving priority to the initial issuance of permits to new and interim status facilities. The Agency must establish priorities within the permit program, since its permitting resources are limited. These priorities should be set based on protection of human health and the environment. Without the amendment being proposed today, the Agency would be forced to process permit modifications for newly designated waste as a very high priority. Otherwise, after the effective date for the newly listed or identified waste, facilities would be forced to cease handling the wastes entirely, pending final action on a major permit modification request. In many cases, this could lead to serious disruption of the facility's operations with few, if any, benefits to the public or the environment.

EPA does not believe that Congress intended such a result, particularly in view of the language in the Hazardous and Solid Waste Amendments (HSWA) addressing interim status. In these amendments, Congress recognized that facilities without RCRA permits required some flexibility when new EPA regulations rendered them subject to permit requirements. Section 3005(e) of RCRA previously restricted interim status to owners or operators of "existing hazardous waste management facilities," defined by regulation as facilities in operation or for which

construction commenced on or before November 19, 1980 (40 CFR 260.10). In HSWA, Congress added section 3005(e)(1)(A)(ii), providing that facilities in existence on the effective date of statutory or regulatory changes that rendered them subject to permitting requirements could obtain interim status if their owners or operators applied for a permit and complied with the section 3010 notification requirements. In the legislative history accompanying this provision, Congress indicated that the amendment to section 3005(e) would apply to facilities in existence that treat, store, or dispose of newly listed wastes.

Although section 3005(e)(1)(A)(ii) is oriented to facilities not already in the RCRA Subtitle C universe—that is, facilities without permits or interim status—EPA believes that permitted and interim status facilities should have comparable ability to handle newly listed wastes. There is no indication that Congress intended for regulatory changes such as new hazardous waste listings to fall more harshly on permitted facilities than unpermitted facilities, or that permitted facilities should be required to cease handling newly listed or identified hazardous wastes until they had been through a procedure essentially equivalent to permit issuance. Such a requirement, in fact, would create the anomalous situation of punishing facilities that had successfully undergone the RCRA permitting process, while unpermitted facilities and facilities still in interim status would generally be able to make changes to handle newly designated wastes. In fact, the end result could be to force facilities that had received permits—and therefore presumably facilities that operated under higher standards—to ship hazardous wastes off-site to interim status or unpermitted facilities, leading in many cases to a decrease in health and environmental protection.

EPA believes that it is sound policy and consistent with Congressional intent, as expressed in section 3005(e), to provide a mechanism for permitted facilities to continue to handle newly listed or identified wastes, while at the same time imposing certain operating standards. The Agency is therefore proposing to amend § 270.42 to allow newly listed or identified wastes, and units handling such wastes, to be added to permits as minor modifications, on the condition that the units comply with the applicable standards of Part 265. The facility owner or operator, however, would be required to request a major permit modification to handle the newly listed or identified wastes within 180 days of the effective date of the new

designation. Authorization to continue in operation under the minor modification would end upon final disposition of the permit modification request or termination of the facility's operating permit.

Section 3005(e) provides for termination of a land disposal facility's authorization to operate pending full permitting upon failure to certify compliance with groundwater monitoring and financial responsibility requirements by a date certain. (See section 3005(e)(2) and (e)(3)). EPA, therefore, is similarly conditioning the proposed minor modification on a submission of such certifications for land disposal units within 12 months of the effective date of the waste listing or identification triggering RCRA requirements for the unit. Failure to submit such certifications would terminate authorization to manage hazardous wastes in the affected unit pending final disposition of the major modification, and the owner or operator would then be required to initiate closure activities for the unit.

A minor modification would not be available under this proposal unless the facility had been managing a newly listed or identified waste prior to the date of the Federal Register notice announcing the new listing or identification. This limitation would prevent permitted facilities from treating, storing, or disposing of previously unregulated wastes for the first time upon receiving notification of the listing or identification. In developing today's proposal, the Agency was primarily concerned that owners and operators who have already been managing wastes that subsequently become subject to RCRA regulation be allowed to continue to do so pending EPA and public review.

In proposing this amendment to § 270.42, EPA recognizes that the Part 124 public participation requirements will be deferred until a permittee's major modification request is processed. However, the Agency believes that this approach represents a reasonable balance between its policy in favor of public participation and the need to accord fair treatment to facility owners and operators who have been managing wastes newly subject to RCRA regulation and to impose controls on those wastes as quickly and efficiently as possible.

EPA recently addressed the general question of permit modifications in a regulatory negotiation with representatives of industry, public interest groups, and States. The result of this negotiation will be a separate proposed rulemaking in the near future

that will seek to make significant changes in the current permit modification system of §§ 270.41 and 270.42. However, the Agency believes that it should proceed with the amendments to § 270.42 in today's proposal because of the immediate need to provide permitted facilities an alternative to ceasing to handle newly listed waste. Therefore, it is not delaying this proposal in anticipation of the permit modification rule. Furthermore, today's proposed approach to new listing modifications is consistent with the negotiated agreement, which supports a regulation that would allow permitted facilities to continue to handle these new wastes.

IV. Changes in Interim Status Facilities

A. Background and Summary of EPA Proposal

Section 270.72 of the current RCRA regulations specifies three types of changes that owners and operators may make at interim status facilities without triggering permit requirements: (a) The handling of new hazardous wastes not previously identified in Part A of the permit application, (b) increases in the design capacity of processes, and (c) changes in or addition of storage, treatment, or disposal processes. The regulations also specify the procedures and criteria for each of these changes.

To handle hazardous wastes not listed in their Part A applications, owners or operators of interim status facilities must, under the current § 270.72(a), submit a revised Part A permit application to either EPA or an authorized State. Prior EPA or State approval is not required. Owners or operators seeking to increase the design capacity of processes at interim status facilities are subject to more stringent requirements. Under § 270.72(b) of the current regulations, owners or operators must submit a justification explaining the need for the change as well as a revised Part A permit application. Moreover, prior approval of the change must be obtained from the Regional Administrator (or the director of the State agency of an authorized State). Approval may only be given when there is a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities.

Under the current § 270.72(c), owners or operators wishing to make any changes in or additions to the processes of treatment, storage, or disposal at an interim status facility are also required to submit a revised Part A and a justification for the change of the regulating agency for approval. EPA or an authorized State may approve these

changes only when they are necessary to prevent a threat to human health and the environment due to an emergency situation, or when they were necessary to comply with Federal regulations (including the interim status standards of 40 CFR Part 265) or State or local laws.

The current § 270.72(e), however, limits the scope of any changes that take place at interim status facilities by prohibiting changes that require a capital expenditure equaling or exceeding 50% of the cost of constructing a new hazardous waste management facility. This provision, which is known as the "reconstruction" limit, applies equally to addition of new wastes, expansions in capacity, and process changes.

EPA generally believes that these regulations provide reasonable flexibility to interim status facilities without creating a loophole in the requirement that permits be obtained for new facilities. (See 45 FR 33324 (May 19, 1980)). In particular, these regulations provide important flexibility in allowing changes in or additions to processes necessary to comply with Federal or other requirements, such as the ban on liquids in landfills under section 3004(c) of RCRA, the imposition of minimum technological requirements under sections 3004(o) and 3005(j), and land disposal restrictions under section 3004(d)-(g).

Under some circumstances, however, an owner or operator of an interim status facility responding to new requirements may be unable to satisfy the substantive criteria of § 270.72 for making changes, or a specific change might exceed the reconstruction limit. If the owner or operator could not meet these standards but still wished to continue managing hazardous waste, he or she would have to discontinue at least some operations until the changes could be approved in connection with the issuance of a final Subtitle C permit. EPA believes that, in light of the growing nationwide shortage of hazardous waste management facilities, the time-consuming process necessary for final permitting, and the clear evidence of Congressional intent to require interim status facilities to make the specific changes necessary to achieve compliance with new requirements, this result would be unacceptable.

To address this problem, EPA is proposing to amend § 270.72 to allow owners or operators more flexibility to make certain changes to interim status facilities that are necessitated by new regulations. EPA proposes to allow owners and operators to increase design

capacity whenever necessary to comply with Federal, State, or local requirements. The proposed rule would also amend § 270.72 to specify that owners and operators of interim status facilities may make changes in accordance with corrective action orders. Further, the Agency is proposing to eliminate the reconstruction limit for changes in interim status that are determined to be necessary: (i) To comply with Federal, State, or local requirements, if the changes take place solely in existing units; in tanks or containers; or in replacement units that meet the minimum technology requirements of section 3004(o) or (ii) to allow the owner or operator to continue to handle newly listed or identified hazardous wastes. The proposal would also amend the reconstruction limit to specify that it does not apply to corrective actions required by EPA under RCRA or by States under similar laws. In addition, EPA is proposing to amend the reconstruction limit so that it would not apply during closure of a facility or of a unit within a facility. Finally, EPA is proposing a new condition on changes at interim status facilities involving the addition of land disposal units. EPA is proposing to require owners or operators of such units to demonstrate compliance with groundwater monitoring and financial responsibility requirements within 12 months. Without such a demonstration, the change would not be allowed.

The Agency is proposing to restructure § 270.72 in order to incorporate today's proposed amendments. For the convenience of the reader, the revised section in its entirety is set forth in this proposed rule. The following chart cross-references the current paragraphs of § 270.72 and their counterparts under the proposed format. Note that today's proposal would have no substantive effect on current requirements in § 270.72(a) and (d); only the section numbers are changed.

Relationship of today's proposal to the current section 270.72	
Current	Proposed
(a)	(a)(1)
(b)	(a)(2)
(c)	(a)(3)
(d)	(a)(4)
(e)	(b) (c)

B. Facility Changes

1. Federal, State, or Local Requirements

As described above, the current § 270.72(c) allows an interim status facility to make changes in or add processes if EPA or an authorized State

approves the change as necessary to comply with Federal regulations or State, or local laws. Today's proposal would amend that provision to clarify that it encompasses all Federal, State, and local requirements including regulations, orders, and statutes. Today's proposal would also expand the current § 270.72(b) to allow for increases in design capacity when necessary to comply with Federal, State, or local requirements. EPA believes that this proposal will allow interim status facilities to comply more promptly with new requirements, including those imposed by HSWA, and, therefore, will provide increased public and environmental protection. The following examples illustrate this point.

First, EPA has codified the HSWA amendment to section 3004 of RCRA, which imposed an absolute ban on the placement of bulk or noncontainerized liquid hazardous wastes or hazardous wastes containing free liquids in any interim status landfill after May 8, 1985. (See 50 FR 28750 (July 15, 1985)). EPA is aware that owners or operators of landfills who previously disposed of liquid hazardous wastes may now be required to modify their facilities so that they may continue to receive such wastes. In some cases, these changes may involve increases in the design capacity at the facility, as well as changes in or additions to processes. Under the current § 270.72(b), such increases could be made only if other facilities were unavailable. Therefore, the current requirements would force such facilities to send their wastes off-site or discontinue their operation until they could receive RCRA permits. Such a result would be counterproductive because it would limit available disposal capacity, and would make the liquids in landfills restriction significantly more difficult to implement.

Second, section 3008(h) of RCRA authorizes EPA to issue administrative orders or bring civil suits to compel owners and operators of interim status facilities to take corrective action where EPA determines that there is, or has been, a release of hazardous waste into the environment from the facility. Correcting the release may require the owner or operator to treat, store, or dispose of wastes or contaminated soils and water. These activities could require the owner or operator to expand capacity at existing storage or treatment units. The current interim status regulations were not intended to prohibit increases in design capacity for corrective action. If owners and operators were required to obtain approval for these modifications under

interim status, they might encounter delays or might have to obtain permits before corrective action could proceed. Such a requirement conflicts directly with the legislative history of section 3008(h) which explains that Congress created this new authority to "overcome the slowness of the permit process." (See the Conference Report to HSWA, H. Rep. No. 98-1133, 98th Cong., 2d Sess. at 111 (1984)).

Finally, interim status facilities may at times have to increase the design capacity specified in their Part A applications when EPA lists or identifies a new hazardous waste. For example, the design capacity in a facility's Part A may reflect only the capacity of units handling hazardous waste at the time interim status was granted. If a newly designated waste were handled in treatment, storage, or disposal units not previously accounted for in the Part A submission, the facility's hazardous waste design capacity would increase by virtue of the new waste designation.

The above examples illustrate how the current limitation to interim status facility capacity increases is not consistent with other substantive program requirements. The rationale for this limitation, to prevent existing facilities from evading permit requirements through capacity expansion during interim status, is less compelling when modifications to an interim status facility are necessitated by new statutory or regulatory requirements. Thus, EPA proposes to amend § 270.72 to allow increases in design capacity necessary to comply with new statutory or regulatory requirements, even if other facilities are available. (See proposed § 270.72(a)(2)).

2. Corrective Action Orders

Proposed § 270.72(a)(5) would specifically provide that interim status facilities may make changes in accordance with a RCRA section 3008(h) corrective action order or similar State order. An owner or operator making changes under the proposed § 270.72(a)(5) would not have to modify the Part A permit application. These changes would have to be specifically identified in the order, and the changes would have to be implemented in accordance with the order. If the changes were not specifically contemplated by the order, they could still be made under the provisions of § 270.72(a)(2)(ii) and (a)(3)(ii) for changes necessary to comply with a Federal requirement, and would be limited by the restrictions of those provisions. In those cases, the owner or operator would have to submit a

modified Part A permit application and obtain prior Director approval of the change as necessary to comply with the order.

The Agency believes that the proposed clarification for corrective action orders is necessary to respond to contamination at interim status facilities in a timely fashion. EPA emphasizes that all activities taken under the corrective action authority will comply with the substantive requirements of RCRA Subtitle C, including public participation requirements. EPA believes that public participation is important throughout the corrective action program, whether it affects interim status or permitted facilities. Therefore, the Agency intends to involve the public in decisions on remedies under section 3008(h) corrective action orders. Generally, this is expected to include soliciting public comment on the RCRA Facility Investigation (RFI) (which identifies the nature and extent of contamination at a facility), the corrective measures study (which specifies possible remedies), and the remedy that EPA proposes to require. As a result, any remedies introduced as part of a corrective action order will be developed with public participation comparable to that of permit issuance.

Under the proposed § 270.72(a)(5), facility changes introduced in accordance with corrective action orders would be restricted to activities involving wastes associated with the facility. This limitation would not prevent treatment, storage, or disposal of wastes released from within the facility that migrated beyond the facility's boundaries. Rather, the limitation would prevent 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 and operator from evading the permit requirement for new facilities and change-in-interim status requirements for facility modifications.

C. Reconstruction Limit

The current § 270.72(e) limits changes sought by an owner or operator during the interim status period. Even if a facility were allowed to add new processes under the current § 270.72(c) or increase capacity in accordance with today's proposed amendments, there may be instances in which the capital expenditures involved in making these changes might come into conflict with the reconstruction limit. In such cases, the facility would be unable to make the changes until it had received a RCRA permit.

EPA believes that the rationale for the reconstruction limit is less compelling where modifications are made at interim status facilities for the purpose of responding to new program requirements. Such modifications are not a means of evading the permit requirement, but rather are made to bring the facility's newly regulated units into compliance with RCRA. Therefore, the Agency is proposing to amend § 270.72 to eliminate the reconstruction limit for certain changes necessary to comply with Federal, State, or local requirements, including new hazardous waste designations and closure plans. In addition, the Agency is proposing to amend current regulations to specify that the reconstruction limit does not apply to changes made in accordance with corrective action orders. These situations are described in more detail below.

1. Federal, State, or Local Requirements

The Agency recognized the need for exceptions to the reconstruction limit in the recently promulgated tank rule, which requires secondary containment for interim status tank facilities. (See 51 FR 25422 *et seq.* (July 14, 1986)). Many interim status facilities will need to retrofit their tank systems to enable owners or operators to comply with these new requirements. Recognizing that this retrofit during interim status might exceed the reconstruction limit, the Agency amended the current § 270.72(e) so that changes made solely for the purpose of complying with the secondary containment requirements of the tank rule are specifically excluded from the reconstruction ban prohibition. (See 51 FR 25486 (July 14, 1986)). This special provision for tank facilities remains unchanged in today's proposed § 270.72(b)(1).

The same arguments for removing the reconstruction limit for tank facilities apply to other new requirements affecting interim status facilities. For example, the costs of complying with the HSWA minimum technology requirements for land-based units may, in some instances, exceed the reconstruction limit, particularly when changes at small hazardous waste management facilities are involved, or where a facility has already made other changes in interim status. Similar concerns apply to facility changes made to comply with the liquids in landfills prohibition and the land disposal restrictions.

The Agency anticipates that in order to meet the minimum technology requirements of section 3004(o), it will be preferable for many interim status facilities to replace certain surface

impoundments instead of retrofitting existing units. EPA will strive to review any such replacement surface impoundments through the RCRA permitting process. However, there will likely be situations where a permit cannot be issued prior to the statutory deadline for existing facilities to comply with the section 3004(o) standards. In such cases, EPA believes that the reconstruction limit should not prevent these facilities from establishing replacement surface impoundments that meet the more protective minimum technology standards.

To resolve these problems, EPA proposes to amend § 270.72 to eliminate the reconstruction limit in those cases where the changes in or additions to the processes employed at an interim status facility are made for the purpose of complying with a Federal, State, or local requirement. However, EPA is proposing to restrict this provision to changes in existing units; changes solely involving tanks or containers; or addition of minimum technology replacement surface impoundments. EPA believes that the introduction of new processes other than these—such as the introduction of incinerators—that exceed the reconstruction limit is likely to raise significant issues best addressed through the permitting process.

Under today's proposal, the owner or operator wishing to make a change still has a duty to comply with proposed § 270.72(a) and, where required by that section, must file an amended Part A permit application along with a justification for making the change. Section 270.72(a) may also require approval of the change from EPA or the authorized State before facility modification. Furthermore, EPA emphasizes that any process proposed to be added or changed must conform with the Part 265 interim status requirements.

Note that on December 11, 1986, the Agency proposed to lift the reconstruction limit for treatment or storage of restricted wastes in tanks or containers. (See 51 FR 44714). Today's proposed § 270.72(b)(2) is somewhat broader than the December proposal in that a facility change involving tanks or containers could occur without being subject to the reconstruction limit whether or not it involved a restricted waste. The Agency will proceed with the final rulemaking on the special interim status provision for restricted wastes along with the associated provisions of that rule since it is an integral part of the restricted wastes program. However, if today's proposal is

adopted, it will replace the restricted waste amendment to the extent that the two provisions would be redundant.

2. Newly Listed or Identified Wastes

The proposed § 270.72(b)(3) would eliminate the reconstruction limit for changes necessary to allow an owner or operator to continue handling newly listed or identified wastes. The Agency believes that interim status facilities should have the same opportunity to continue handling newly listed or identified wastes as newly regulated facilities now have, and as the Agency is proposing for permitted facilities.

3. Corrective Action Orders

Today's proposal would amend the current § 270.72(e) to specify that interim status facilities may make changes in accordance with interim status corrective action orders, even if they would otherwise constitute a reconstruction under the regulation. In general, EPA believes that corrective actions will occur within the reconstruction limit. However, in the case of smaller facilities or extensive corrective action, the limit might be exceeded. This is particularly likely to be the case where on-site treatment is introduced as part of the remedy. As explained in section IV.B of this preamble, EPA does not believe that such corrective actions should be delayed until a full permit to the facility can be issued.

Proposed § 270.72(b)(5) would not limit the kinds of changes that could be introduced without limit at a facility as a part of a corrective action order. In this respect, it differs from proposed § 270.72(b)(2), which restricts changes in compliance with other Federal, State, or local requirements to changes in existing units, changes solely involving tanks or containers, or addition of minimum technology replacement surface impoundments. EPA does not believe that this restriction is necessary for actions required by interim status corrective action orders because of the extensive Agency involvement in developing these orders and in specifying the appropriate process and design necessary to manage the waste releases at the facility. Since these corrective actions will be consistent with the Part 264 facility standards, we do not believe that it is necessary or desirable to restrict the types of corrective action remedies at interim status facilities.

4. Closure at Interim Status Facilities

Because a facility can remain in interim status during its closure period, changes made at such a facility to

enhance closure would constitute changes in interim status. For example, if an owner or operator is required as part of an approved closure plan to treat wastes on-site, that treatment could be approved as a change in interim status under the current § 270.72(c). However, under current regulations, any changes introduced during closure that constituted a reconstruction might be prohibited by the current § 270.72(e). As a result, closure in this case might be delayed until a permit had been issued to the facility. EPA believes that permit issuance in this case could lead to delays that increase risks to public health and the environment and might discourage the use of treatment in connection with closure. At the same time, the closure plan review process, detailed in § 265.112, is comparable to the permitting process, including a specific requirement for public notice and opportunity for a hearing. For these reasons, the Agency is proposing to amend § 270.72 to specify that the reconstruction limit does not apply to changes made during the closure period of an interim status facility or of a unit within a facility. This change to the regulations should significantly expedite closure at interim status facilities and encourage treatment as an alternative to disposal, without jeopardizing public health or the environment or reducing the role of the public.

It should be emphasized that any treatment or other processes introduced at a closing facility will generally be of relatively short duration and only used to handle wastes associated with the closure, as specified in an approved closure plan. It should also be emphasized that when a treatment unit or other process is introduced during closure, the owner or operator of the facility must submit a revised Part A permit application to reflect that change. If the interim status facility is seeking a permit, the closure activities during the interim status do not have to be added to Part B of the permit application if completion of closure will be certified by the time the permit is issued.

D. Conditional Changes

As is discussed above, the current regulations on changes during interim status limit the extent of changes allowed pending full permitting of the facility. With certain refinements, those limitations are retained in today's proposal. In addition, EPA is also proposing to limit the duration of the authorization to make certain changes at interim status facilities where the owner or operator cannot demonstrate compliance with groundwater monitoring

and financial responsibility requirements.

Today's proposal would add § 270.72(c), which has no counterpart in the existing regulations on changes during interim status. The proposed § 270.72(c) would provide that a change during interim status that involved the addition of a land disposal unit would only be allowed subject to the condition that the owner or operator certify compliance with all applicable groundwater monitoring and financial responsibility requirements within 12 months. Addition of any land disposal unit for which the certifications were not made would not be allowed as a change during interim status. The owner or operator of such a unit would have to discontinue receipt of hazardous waste in that unit until the facility was permitted. Pending final permitting, the owner or operator would have to begin closure activities.

The purpose of this provision is to place the burden on facility owners and operators to demonstrate compliance with groundwater monitoring and financial responsibility requirements within a specified period of time. This is analogous to the certification required of newly regulated land disposal facilities under section 3005(e)(3) of RCRA and of land disposal facilities operating under interim status on November 8, 1984 under section 3005(e)(2). EPA believes that the newly regulated land disposal units at interim status facilities should be subject to the same certification requirements as are newly regulated land disposal facilities under section 3005(e)(3). Although EPA does not have the authority to terminate interim status for failure to submit certifications, EPA may deny authorization to expand an interim status facility for failure to demonstrate compliance. As is discussed in section III of today's preamble, EPA is proposing an analogous condition for newly regulated land disposal units at permitted facilities under the proposed § 270.42(q).

V. Post-Closure Permits

Today the Agency is also proposing to amend its Part 270 permit regulations to clarify its authority to deny permits for the active life of a facility while a decision on post-closure permitting is pending.

The current 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 a permit covering the post-closure care period must include all necessary post-

closure information in its Part B application for the application to be "complete" and thus initiate the review process. When the application is complete, the decision to issue or deny a RCRA permit applies to the whole permit for which an applicant is required to apply, including the portion of the permit concerning post-closure care.

The existing regulations do not specifically provide for a separation of the permit decision for the active life of the facility from the post-closure permit decision. However, the Agency does not believe that it must always make both the active life and post-closure determinations as one permit decision, and further, it believes that in some cases it makes good sense to separate these determinations. EPA needs to have this flexibility to deal expeditiously with facilities clearly unable to meet standards for continued operation. It is important for such facilities to cease operation and begin closure as soon as possible. The Agency can often accomplish this objective best through permit denial and initiation of the closure process. At the same time, such permit denial does not relieve the facility of its post-closure care responsibilities under the Part 264 standards.

The Agency believes that it currently has the authority to separate these two permit decisions, although the permitting regulations do not specifically outline this approach. If the Agency were limited to only one permit decision, then the Agency 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 if it is clear that the facility will 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 gathers information necessary to develop a post-closure permit. In fact, the permit denial may be delayed longer for facilities that have greater

deficiencies in their applications, thus rewarding facilities that are in greater noncompliance.

The Agency is therefore proposing to amend its permitting regulations to specifically provide for a bifurcation of the permit process allowing separation of operating permit denial and post-closure permit issuance. By this amendment, the Agency is clarifying its ability under the permitting regulations to deny a facility's operational permit, requiring its closure under Part 265, while also continuing to develop a separate post-closure permit. Today's proposal amends the Agency's hazardous waste permitting regulations at 40 CFR Part 270 to add a new § 270.29, which specifies 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. In addition, § 270.10 is amended to specify that the permitting authority may deny the operating portion of a permit without awaiting an application that is complete as to post-closure responsibilities. The Agency 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.

It should be noted that the Agency proposed amendments to § 270.1(c) on March 28, 1986 (51 FR 10706) in a rule that would codify certain HSWA provisions. The Agency is proposing to further amend that section in this rule. The full text of § 270.1(c), including all proposed amendments, is set forth in this proposed § 270.1(c) for the convenience of the reader.

VI. State Authority

A. Applicability of Rules 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 carry out those requirements and prohibitions in authorized States, 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, the 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 State requirement that is more stringent than a new Federal provision remains in effect under State law. This is equally true for such Federal requirements that are imposed by HSWA or pre-HSWA authority.

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 has adopted 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 under State law. In this case, the more stringent provisions in both the State program and the Federal HSWA program define the applicable requirements in each State. Therefore, as a practical matter, the regulated community may not be able to benefit from the less stringent Federal HSWA

provisions until the State amends its more stringent regulations or enabling authority.

B. Effect on State Authorizations

The amendments proposed in today's rule are considered to be less stringent than, or reduce the scope of, the existing Federal requirements. Therefore, authorized States would not be required to modify their programs to adopt requirements equivalent or substantially equivalent to these provisions.

Certain portions of today's proposal would be imposed pursuant to pre-HSWA authority, while other portions would be promulgated pursuant to HSWA. Specifically, the proposed § 270.72(a)(2)(ii), (a)(3)(ii), and (b)(2) would be added to EPA's regulations to allow changes during interim status that are necessary to comply with new HSWA requirements (e.g., minimum technology standards of section 3004(o)). In addition, the amendments in § 270.72(a)(5) and (b)(5) that address corrective action orders stem from section 3008(h) authority. Therefore, the Agency is proposing to add these requirements to Table 1 in § 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA. As discussed in the section above, any State requirement that is more stringent than these HSWA provisions remains in effect. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1.

The remaining amendments in today's proposal would not be imposed pursuant to HSWA. Therefore, those standards would not be effective in authorized States, but would be applicable in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable unless the State revises its program to adopt equivalent requirements under State law.

VII. Effective Date

This rule, if promulgated, would be 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) provides for an immediate effective date if the Agency finds that the regulated community does not need six months to come into compliance with the new regulation.

This proposed rule would establish requirements that are less stringent than requirements currently in place. Since the rule would relax regulations with which the regulated community is

already required to comply, the Agency has found that the regulated community does not need six months to come into compliance. These reasons also provide an adequate basis for making this rule immediately effective under section 553(d) of the Administrative Procedure Act.

VIII. Regulatory Analysis

A. Regulatory Impact Analysis

Under Executive Order 12291, EPA must determine whether a regulation is "major" and thus whether EPA must compare and consider a Regulatory Impact Analysis in connection with the rule. Today's proposal 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 the U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. Therefore, the Agency does not believe a Regulatory Impact Analysis is required for today's rule. The proposed rule has been reviewed by the Office of Management and Budget (OMB) 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 any 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. The amendments proposed today provide additional flexibility for hazardous waste treatment, storage, and disposal facilities to respond to new requirements and do 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 265

Hazardous waste, Corrective action, Reporting and recordkeeping requirements, Waste treatment and disposal.

40 CFR Part 270

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

40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous waste, Intergovernmental relations, Reporting and recordkeeping requirements.

Lee M. Thomas,

Administrator.

Date: August 3, 1987.

Therefore, it is proposed that Subchapter I of Title 40 be amended as follows:

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

1. The authority citation for Part 265 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3004, 3005, and 3015, Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended [42 U.S.C. 6905, 6912(a), 6924, and 6935].

2. In § 265.1, paragraph (b) is revised to read as follows. (The comment following paragraph (b) remains unchanged.)

§ 265.1 Purpose, scope, and applicability.

* * * * *

(b) The standards of this part apply to owners and operators of facilities that treat, store, or dispose of hazardous waste who have fully complied with the requirements for interim status under section 3005(e) of RCRA and § 270.10 of this chapter until either a permit is issued under section 3005 of RCRA or until applicable Part 265 closure and post-closure responsibilities are fulfilled, and to those owners and operators of facilities in existence on November 19, 1980 who have failed to provide timely notification as required by section 3010(a) of RCRA and/or failed to file Part A of the permit application as required by 40 CFR 270.10 (e) and (g), and to owners and operators of RCRA permitted facilities for those units for which they have obtained a minor permit modification under § 270.42(q) until the permittee's major modification request under § 270.41 is granted or until Part 265 closure and post-closure responsibilities are fulfilled. These standards apply to all treatment, storage, and disposal of hazardous waste at these facilities after the effective date of these regulations, except as specifically provided otherwise in this part or Part 261 of this chapter.

* * * * *

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

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

Authority: Secs. 1006, 2002, 3004, 3005, 3007, 3019, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974).

4. In § 270.1, the introductory text of paragraph (c) is revised to read as follows:

§ 270.1 Purpose and scope of these regulations.

(c) Scope of the RCRA Permit Requirement. RCRA requires a permit for the "treatment," "storage," or "disposal" of any "hazardous waste" as defined in § 270.2. Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners and operators of surface impoundments, landfills, land treatment units, and waste pile units that close after January 26, 1983 or that received wastes after July 26, 1982, must have post-closure permits, as necessary to implement applicable Part 264—Groundwater Monitoring, Unsaturated Zone Monitoring, Corrective Action, and Post-closure Care Requirements of this chapter. The denial of a permit for the active life of a hazardous waste management unit does not affect the requirement to obtain a post-closure permit under this section.

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

§ 270.10 General application requirements.

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

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

§ 270.29 Permit denial.

The Director may deny the permit application under § 124.6(a) in its entirety or as to the active life of the facility only.

7. In § 270.42, a new paragraph (q) is added to read as follows:

§ 270.42 Minor modifications of permits.

(q) Allow units at a permitted facility that handle newly listed or identified hazardous wastes, to continue managing such wastes provided that (1) the permittee requests a major permit modification pursuant to §§ 124.5 and 270.41 within one hundred and eighty (180) days of the effective date of such new listing or identification, (2) the major permit modification request contains a demonstration that the newly listed or identified waste was treated, stored, or disposed of in such unit prior to the date of the Federal Register notice announcing the new listing or identification, (3) each affected unit complies with the applicable standards at 40 CFR Part 265 until the major permit modification request is granted or until Part 265 closure and post-closure responsibilities are fulfilled, and (4) where the permit modification involves the addition of a land disposal unit, the permittee certifies compliance with all applicable groundwater monitoring and financial responsibility requirements within 12 months of the effective date of the new listing or identification. The authorization to continue in operation conferred under this paragraph shall terminate upon final administrative disposition of the permittee's major modification request under § 270.41, termination of the permit under § 270.43, or upon failure of the owner or operator to certify compliance with groundwater or financial responsibility requirements.

8. Section § 270.72 is revised to read as follows:

§ 270.72 Changes during interim status.

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

(1) Treatment, storage, or disposal of new hazardous wastes not previously identified in Part A of the permit application 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 or 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 longer than 90 days prior the scheduled change. When a transfer of ownership or 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 the 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 of 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, or by an authorized State under a comparable State authority. Changes under this paragraph are limited to the treatment, storage, or disposal of solid waste from releases that originate at the facility.

(b) Changes to an interim status HWM facility that amount to reconstruction of the facility may only be made as provided in this paragraph. Reconstruction occurs when the capital investment in the changes to the facility exceeds fifty percent of the capital cost of a comparable entirely new HWM facility. The following changes may be made even if they amount to a reconstruction:

(1) Changes made solely for the purpose of complying with the

requirements of 40 CFR 265.193 for tanks and ancillary equipment.

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

(3) 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 date of the Federal Register notice announcing the new listing or identification.

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

(5) Changes necessary to comply with an interim status corrective action order issued by EPA under section 3008(h), or other Federal authority, or by an authorized State under a comparable

State authority 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.

(c) Any land disposal unit that becomes subject to RCRA requirements due to a statutory or regulatory change shall, on the date 12 months after the effective date of such statutory or regulatory change, lose any authority to operate that is conferred under this section unless the owner or operator certifies that such unit is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

9. The authority citation for Part 271 continues to read as follows:

Authority: Secs. 1006, 2002(a), and 3006 of the Solid Waste Disposal Act, as amended by

the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6926).

§ 271.1 [Amended]

10. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Date	Title of regulation	FR reference	Effective date
[Insert date of publication in FEDERAL REGISTER.]	Interim Status and Permitted Facilities § 270.72(a)(2)(ii), (a)(3)(ii), (a)(5), (b)(2) and (b)(5) only.	[insert FR reference].	[insert date of publication of final rule in FEDERAL REGISTER].

[FR Doc. 87-18094 Filed 8-13-87; 8:45 am]

BILLING CODE 6560-50-M